

Holding Corporations Accountable for Damaging the Climate

Environmental Law Alliance Worldwide
2014



This report aims to help lawyers and others evaluate possible avenues to pursue climate justice. ELAW completed the first edition of this report in July 2014. We anticipate that this report will be a working document and will be updated and improved over time as the legal and scientific landscapes related to the climate evolve. If you would like to propose corrections or additions to this report, please contact ELAW Staff Attorney Jennifer Gleason, by e-mail: jen@elaw.org.

This report does not constitute legal advice and ELAW does not intend to give legal advice. Any person or entity considering pursuing litigation should consult with an attorney licensed to practice law in that jurisdiction.

Acknowledgements

ELAW is grateful for generous support from the Wallace Global Fund, which made this report possible.

We thank the following authors and contributors to this report: Jennifer Gleason, Liz Mitchell, Pedro Leon Gutierrez, and Bern Johnson, Environmental Law Alliance Worldwide (ELAW); Chris Wold, International Environmental Law Project, Lewis & Clark Law School; Ritwick Dutta, Lawyers Initiative for Forest and Environment (India); Manolo Morales, Corporación ECOLEX (Ecuador); Mauro Figueiredo (Brazil); and Collins Odote Oloo, Benson Owuor Ochieng, and Benedette Mutuku, Institute for Law and Environmental Governance (Kenya).

Many thanks to the following law students and recent graduates from the Lewis and Clark Law School, University of Oregon School of Law, University of Washington School of Law, and Willamette University College of Law for their research: Maggie Boberg, Anthony Brown, Killian Doherty, Bryce Hinchman, Weston LeMay, Verónica Muriel, Marcus Pearson, Ashley White, and Victoria Wilder.

The Environmental Law Alliance Worldwide (ELAW) helps communities speak out for clean air, clean water, and a healthy planet. We are a global alliance of attorneys, scientists and other advocates collaborating across borders to promote grassroots efforts to build a sustainable, just future.

The idea for this project came from ELAW's partners around the world. We are awed and inspired by the work they do in their home countries every day and thank them for their collaboration.

Table of Contents

METHODOLOGY	1
SUMMARY RESULTS	2
RIGHTS-BASED APPROACH	5
HORIZONTAL APPLICATION	5
THE RIGHT TO DIGNITY	6
COUNTRY REPORTS	8
INDIA	9
CONSTITUTION	9
NATIONAL GREEN TRIBUNAL	11
TORTS – ADAPTING AN OLD DOCTRINE	13
ECUADOR	14
CONSTITUTION	14
JURISPRUDENCE	15
BRAZIL	18
CONSTITUTION	18
NATIONAL ENVIRONMENTAL POLICY ACT	18
PUBLIC CIVIL ACTION ACT	19
COLOMBIA	22
CONSTITUTION AND LAW 472	22
MEXICO	24
FEDERAL CODE OF CIVIL PROCEDURES	24
KENYA	27
CONSTITUTION	27
ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT	31
ENVIRONMENT AND LAND COURT	32
NIGERIA	33
CONSTITUTION	33
FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES	33
COMPLEMENTARY STRATEGIES	35
EUROPE – FILING UNDER THE BRUSSELS REGULATION	35
UNITED STATES – U.S. DISCOVERY IN FOREIGN PROCEEDINGS	38
APPORTIONING LIABILITY	39
CONCLUSION	41

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Courts in several countries – including Brazil, Colombia, Ecuador, India, Kenya, and Mexico – are poised to bring justice to victims of climate damages. ELAW has been working with partners around the world to identify jurisdictions where strong cases could be filed and we are pleased to report the results of this research.

Requiring corporations causing climate impacts to compensate damaged communities would help remedy the injustice of climate change, internalize costs of greenhouse gas emissions, make corporations tremble at the prospect of further damage awards, and thus help prevent further harm.

Law professor Shi-Ling Hsu writes that “seeking direct civil liability against those responsible for greenhouse gas emissions – is the only [type of litigation] that holds out any promise of being a magic bullet. By targeting deep-pocketed private entities that actually emit greenhouse gases[,] . . . a civil litigation strategy, if successful, skips over the potentially cumbersome, time-consuming, and politically perilous route of pursuing legislation and regulation.”¹

ELAW has worked on environmental and human rights issues with grassroots lawyers in 70 countries for more than 20 years. This collaboration has generated many conversations about strategies for successful litigation on behalf of communities in courts outside of the United States . The goal of this project was to follow promising leads and highlight a few potential legal paths that might spark new ideas and lead to a breakthrough in achieving climate justice.

Methodology

We focused our research exclusively on prospects for successful climate litigation outside the United States,² reviewing domestic laws, judicial decisions, and

¹ Shi-Ling Hsu, A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Judgment Lawsuit, 79 U. Colo. L. Rev. 701, 716-717 (2008).

² Many articles have explored possible litigation in the U.S. See David Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Env'tl. L. 1 (2003); David

procedural rules in several countries where we believed lawyers could file strong cases seeking compensation for damages caused by climate change. We did not need to conduct a global survey of laws and cases because we had developed a promising set of leads through our collaboration with partners around the world.

This report rests on several key assumptions. Seeking damages from corporations liable for climate change became infinitely more possible because of the good work of Rick Heede and his team to apportion responsibility for carbon emissions in the *Climate Majors* project.³ The group of emitters identified in the *Carbon Majors* study is one set of potential defendants. Heede's research removes a previously insurmountable hurdle for grassroots lawyers seeking to hold major carbon emitters accountable.

The potential success of climate litigation is also bolstered by high-quality scientific studies attributing climate impacts to anthropogenic climate change. Studies published by the Intergovernmental Panel on Climate Change (IPCC)⁴ and others will help lawyers around the world seeking to hold corporations accountable meet the burden of causation.

This report proceeds on the assumption that an individual or community has suffered harm due to anthropogenic climate change and that scientists can demonstrate that these climate impacts are due to emissions attributable to a group of entities that include the defendant or defendants in a particular case. This assumption is not insignificant, but we are convinced that there are impacts being suffered today that are so clearly tied to human-caused climate change that causation hurdles can be overcome. The task we assigned ourselves was to find jurisdictions that have substantive or procedural laws that make a case seeking compensation for climate damages more feasible. Discussion of climate science and how to attribute particular impacts to greenhouse gas emitters is outside the scope of this project.

Summary Results

This project began with some ideas and a handful of leads suggesting certain countries outside the United States where climate change litigation could be

Hunter and James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. Pa. L. Rev. 1741 (2007).

³ Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 *Climate Change* 229 (2014). “[T]he study aggregates historical emissions according to carbon producing entities themselves. Heede concludes that nearly two-thirds of carbon dioxide emitted since the 1750s can be traced to the 90 largest fossil fuel and cement producers, most of which still operate.” The *Carbon Majors* study, available at <http://carbonmajors.org/>.

⁴ Intergovernmental Panel on Climate Change (IPCC), *see*, <http://www.ipcc.ch/>.

successfully initiated. Through in-depth research and collaboration with legal practitioners and scholars around the world, we have gained a better understanding about possible paths forward.

We found that civil law jurisdictions are more likely to have a particular statute under which a case seeking compensation for climate damages could be filed. In particular, Brazil, Colombia, and Mexico all have laws under which a climate-related claim could be filed. One exception is the common law country of Kenya, which also has a relevant law that opens the door to climate litigation as well as a specialized environmental court. Filing a case that invokes one of these laws may offer the best approach.

Jurisprudence in India is very dynamic, and it could be that the most important ingredient to a successful climate case is a court ready to modify legal principles to address the unique and grave injustices arising from climate-related impacts. Judges in India have been willing to adapt the law to address violations of fundamental rights and have not been daunted by addressing widespread pollution problems caused by numerous wrongdoers. In addition, India has a specialized environmental tribunal that, in its short existence, has already issued a number of decisions that protect fundamental rights.

Constitutions in some countries contain provisions that would support a climate damages case filed against a private corporation. Our research found clear indications that courts in Brazil and Colombia will hold private corporations liable for violating fundamental rights; and very likely that courts in Ecuador, India, Kenya and Mexico would do so, too. Because constitutional provisions can be coupled with strong laws in Brazil, Colombia, Kenya and Mexico, filing a case in one of these four countries gains even more appeal.

Finally, we identified two procedural strategies worth noting because they could complement climate litigation arising out of the countries mentioned above. The first is that plaintiffs could file a case in a European Union Member State against a corporation domiciled in that country for climate damages that take place outside of Europe. Moreover, courts in at least the Netherlands have asserted jurisdiction over corporations affiliated with the EU-domiciled corporation. And finally, it appears that EU courts would apply the substantive law from the country in which the damages occurred. Therefore, one potentially strong case would be to file a claim on behalf of impacted Brazilians in a court in the Netherlands against Royal Dutch Shell, and any affiliated corporations, based on the substantive domestic laws of Brazil.

The second strategy would be to use a U.S. law that allows parties engaged in litigation in a tribunal outside the United States to conduct discovery from entities based within the United States. This procedural tactic would allow litigants to gain access to important evidence to support their cases.

We are optimistic about these findings and have appreciated the opportunity to work with our partners to evaluate prospects for pursuing climate change litigation in their home countries.

Rights-based Approach

In the absence of statutes creating a cause of action to hold entities financially responsible for climate change damages, enforcing fundamental constitutional rights is a promising strategy.

Some national constitutions guarantee citizens the right to live in a healthy environment and impose a duty on citizens to protect the environment. Other constitutions guarantee citizens the right to life and courts have interpreted this right to include the right to a healthy environment. Ecuador amended its constitution in 2008 to grant rights to nature. India's Supreme Court ruled in 2013 that India's constitution imposes an obligation on humans to protect the environment and prevent species from becoming extinct.⁵ There is a distinct and growing trend towards characterizing environmental rights as fundamental human rights.

The concept of enforcing fundamental constitutional rights to protect the environment is not new. However, court cases have typically been brought against government entities, not private parties, and petitioners have not sought money damages. The question we investigated is whether this rights-based approach can be expanded to achieve climate justice.

One benefit of this strategy is that cases enforcing fundamental rights may be expedited or subject to procedural rules that reduce hurdles that would be expected to arise in statutory causes of action (e.g., standing to sue). For example, the Supreme Court of Pakistan explained that it is “well-settled that in human rights cases/public interest litigation [to enforce a fundamental right], the procedural trappings and restrictions, precondition of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the Court.”⁶ The Court went further to say that in cases alleging a violation of a fundamental right, the Supreme Court “has vast power . . . to investigate into questions of fact . . . independently by recording evidence, appointing commission or any other reasonable and legal manner to ascertain the correct position.”⁷

Horizontal Application

A rights-based approach to climate change litigation is most promising in countries where private entities are subject to accountability for violating an individual's fundamental rights. Some courts, such as those in the United States, have

⁵ Centre for Envir. Law v. Union of India, Writ Petition (civil) No. 337 of 1995 (Supreme Court of India) (15 April 2013), available at <http://indiankanoon.org/doc/27900105/>.

⁶ General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v. Director, Industries and Mineral Development, Punjab, Lahore, 1994 SCMR 2061 (12 July 1994), at para. 5, available at <http://ceej.pk/cms/docs/sc/1994SCMR2061.pdf>.

⁷ *Id.*

broadened application to private entities when they are found to be acting as the state or meet a similar narrow exception.⁸

Courts in at least a few countries have gone further. Professor Danwood Mzikenge Chirwa asserts that the basic rights found in the constitutions of Ireland and South Africa are directly enforceable against private entities.⁹ ELAW looked for other countries where fundamental rights are directly enforceable against private entities. As described below, we found that courts in Brazil, Colombia, Ecuador, India, Kenya, and Mexico will hold or are likely to hold private entities liable for violations of fundamental rights.

The Right to Dignity

We explored the idea of enforcing constitutional rights that may not traditionally be considered part of a country's environmental law regime. ELAW partners raised the specific example of enforcing the right to live with human dignity as a way to ensure that everyone has the right to live in a clean, healthy and safe environment with access to resources to fulfill people's basic needs. Climate change is threatening these rights for people in many countries.

Enforcing dignity rights expands the range of climate litigation options. Most importantly, it opens the door to constitutional remedies for advocates in countries that do not recognize environmental rights in their constitutions. Where a country's constitution explicitly includes the right to live in a healthy environment along with the right to dignity, invoking the right to dignity may help frame the story about climate impacts more effectively. Alternatively, it might be better to bring a case solely under the constitutional right to human dignity for political reasons. Finally, environmental and dignity rights could be coupled and used to reinforce the other.

In order to understand how courts might interpret the right to dignity, we searched for court decisions interpreting this right on its own instead of in conjunction with the right to live in a healthy environment. We found that at least Pakistan has interpreted the right to live with human dignity, coupled with the right to life, must include the right to live in an unpolluted environment.

In *Shehla Zia v. WAPDA*,¹⁰ petitioners challenged the constitutionality of plans to build an electrical grid station in a residential neighborhood in part because they feared the electromagnetic fields associated with the station would threaten their

⁸ See *Evans v. Newton*, 382 U.S. 296, 299 (1966), available at <http://www.law.cornell.edu/supremecourt/text/382/296> ("[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.").

⁹ Danwood Mzikenge Chirwa, *The Horizontal Application of Constitutional Rights in a Comparative Perspective*, 10(2) *Law, Democracy & Development*, 21-48 (2006).

¹⁰ *Shehla Zia v. WAPDA*, 1994 S.C. 693 (12 February 1994), available at <http://www.elaw.org/node/1342>.

constitutional right to life.¹¹ The Supreme Court of Pakistan considered what the constitutional right to life entails and explained:

Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with the law. The word life is very significant as it covers all facts of human existence. The word life has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. For the purposes of present controversy suffice it to say that a person is entitled to protection of law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations.¹²

After reviewing what courts in other countries said about the right to life, including the right to live with human dignity, the Court concluded:

The word life in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Under our Constitution, Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world. The Constitution guarantees dignity of man and also right to life under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment.¹³

Later the same year, in *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v. Director, Industries and Mineral Development, Punjab, Lahore*,¹⁴ the Supreme Court of Pakistan again considered the meaning of the right to life and referred back to its explanation in *Shehla Zia* that the right to life should be read with the right to dignity and interpreted to include the right to clean water. These decisions strongly suggest that the right to dignity could encompass the right to live free of human-caused climate change impacts.

¹¹ *Id.* at para. 1.

¹² *Id.* at para. 12.

¹³ *Id.* at para. 14.

¹⁴ *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v. Director, Industries and Mineral Development, Punjab, Lahore*, 1994 SCMR 2061 (12 July 1994), available at <http://ceej.pk/cms/docs/sc/1994SCMR2061.pdf>.

Country Reports

In addition to constitutional law research, ELAW worked with partners to analyze domestic laws in several countries and identify the strongest legal theories and outline unique aspects of each country's laws that might support a climate case. The following sections provide brief overviews of research into the Constitution, laws, regulations, court rules, and jurisprudence in India, Ecuador, Brazil, Mexico, Colombia, Kenya and Nigeria to determine whether there are any unique features in these legal frameworks that would make a case seeking compensation for climate damages more feasible. We investigated these countries, and a few others, because we had the impression that something about the laws or judicial decisions in these countries would make it possible for an individual or community to seek compensation for climate damages. The reports below highlight the countries we identified as most promising.

INDIA

The Supreme Court of India has issued some of the world's most progressive rulings ensuring that fundamental rights are protected even if affected citizens do not themselves go to court. When considering countries whose courts may be ready to ensure that fundamental rights are not infringed by climate impacts, India rose to the top of the list.

In India, the strongest case seeking compensation for climate damages, would likely be one asserting violations of constitutional rights filed before the National Green Tribunal. However, it is worth noting that traditional courts have also been creative in implementing tort law in India, which could make it easier to bring a tort case in India compared to other common law jurisdictions.

Constitution

Indian courts have declared that the Constitution protects the right to live in a healthy environment, and that violators of this right may be ordered to pay compensation, even though the right itself is not expressly enumerated in the Constitution. Furthermore, courts seem to be poised to hold private entities responsible for violating this right.

The Constitution of India incorporates the right to life in Article 21, and the right to equality in Article 14, as well as imposing duties on the state and citizens to protect the environment in Articles 48A and 51A(g). Courts in India have interpreted this collection of rights and duties to confer the right to live in a healthy environment on all Indians. In *M.C. Mehta v. Kamal Nath*,¹⁵ the Supreme Court discussed the interplay of constitutional rights in India and confirmed that courts have authority to award financial damages against entities that violate the right to live in a healthy environment. The Court explained:

Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. One of the fundamental duties of every citizen as set out in Article 51A(g) is to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures. These two Articles have to be considered in the light of Article 21 of the Constitution which provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21 of the Constitution.

¹⁵ *M.C. Mehta v. Kamal Nath* [2000] 6 SCC 213, available at <http://www.elaw.org/node/6920>.

In the matter of enforcement of rights under Article 21 of the Constitution, this Court, besides enforcing the provisions of the Acts referred to above, has also given effect to Fundamental Rights under Articles 14 and 21 of the Constitution and has held that if those rights are violated by disturbing the environment, it can award damages not only for the restoration of the ecological balance, but also for the victims who have suffered due to that disturbance. In order to protect the “life”, in order to protect “environment” and in order to protect “air, water and soil” from pollution, this Court, through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21 of the Constitution

In the matter of enforcement of Fundamental Rights under Article 21 under Public Law domain, the Court, in exercise of its powers under Article 32 of the Constitution has awarded damages against those who have been responsible for disturbing the ecological balance either by running the industries or any other activity which has the effect of causing pollution in the environment. The Court while awarding damages also enforces the “POLLUTER PAYS PRINCIPLE” which is widely accepted as a means of paying for the cost of pollution and control. To put in other words, the wrongdoer, the polluter, is under an obligation to make good the damage caused to the environment.¹⁶

Cases alleging a violation of the right to live in a healthy environment have generally been filed pursuant to Articles 32 and 226, which grant the Supreme Court and High Courts jurisdiction over cases enforcing fundamental rights. In *M.C. Mehta v. Union of India*,¹⁷ the Supreme Court examined Article 32 and declared that it confers broad authority to Indian courts:

It may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights.¹⁸

The Supreme Court expanded on this principle several years later, stating:

The powers of this Court under Article 32 are not restricted and it can award damages in [public interest litigation] or a Writ Petition as has

¹⁶ *Id.* at paras. 12-14.

¹⁷ *M.C. Mehta v. Union of India* [1987] SCR (1) 819, available at <http://www.indiankanoon.org/doc/1486949/>.

¹⁸ *Id.* at 827 (citing *Bandhua Mukti Morcha v. Union of India* [1984] 2 SCR 67).

been held in series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner.¹⁹

Further, it is likely that the Supreme Court of India would hold a private corporation liable for violations of fundamental rights under the right circumstances. In *M.C. Mehta v. Union of India*, Chief Justice Bhagwati opined that a private corporation could be held accountable for violating fundamental rights and came close to finding that a manufacturer of caustic chlorine and other chemicals could be held accountable for harm arising out of releases of toxic gases that threatened the health and safety of workers and nearby residents. In the end, however, the Chief Justice explained that the Court did not need to decide that issue to effectively resolve the case.²⁰

In another case (not related to the environment), while reviewing the broad jurisdiction of the Supreme Court, Justice S. Saghir Ahmad noted, “Fundamental Rights can be enforced even against private bodies and individuals.”²¹

It seems clear that a case asserting a violation of the right to live in a healthy environment could be filed against a corporation in India.

National Green Tribunal

Another reason to consider filing climate damage cases in India is the recently created National Green Tribunal (“NGT”). In the three years since it was established, the NGT has quickly proven to be an active environmental court. The preamble of the National Green Tribunal Act refers to the Tribunal’s power to award compensation and damages:

An Act to provide for the establishment of the National Green Tribunal for the effective and expeditious disposal of cases relating to environment protection and conservation of forest and other natural resources including enforcement of any legal right related to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.²²

¹⁹ *M.C. Mehta v. Kamal Nath* [2000] 6 SCC 213, at para. 29, available at <http://www.elaw.org/node/6920>.

²⁰ *M.C. Mehta v. Union of India* [1987] SCR(1) 819, 839-842, available at <http://www.indiankanoon.org/doc/1486949/>.

²¹ *Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty* [1996] SCC (1) 490, available at <http://indiankanoon.org/doc/642436/>.

²² NATIONAL GREEN TRIBUNAL ACT, 2010, available at <http://www.moef.nic.in/downloads/public-information/NGT-fin.pdf>.

In fact, the NGT may be the only court or tribunal in India where a case seeking compensation for climate damages may be filed. In *Bhopal Gas Peedith Mahila Sanghathan v. Union of India*,²³ the Supreme Court directed that environmental cases should be filed before the NGT, and that all pending cases before the High Court be transferred to the NGT:

Keeping in view the provisions and scheme of the National Green Tribunal Act, 2010 . . . it can safely be concluded that the environmental issues and matters covered under the NGT Act, Schedule 1 should be instituted and litigated before the National Green Tribunal (for short NGT). Such approach may be necessary to avoid likelihood of conflict of orders between the High Courts and the NGT. Thus, in unambiguous terms, we direct that all the matters instituted after coming into force of the NGT Act and which are covered under the provisions of the NGT Act and/or in Schedule I to the NGT Act shall stand transferred and can be instituted only before the NGT. This will help in rendering expeditious and specialized justice in the field of environment to all concerned.²⁴

In *Kalpavriksh v. Union of India*,²⁵ the government of India questioned the NGT's jurisdiction to hear a case challenging the appointment of unqualified individuals to expert committees responsible for advising the government on environmental clearance decisions. The government argued that the case was untenable because of the subject matter and because the action under challenge took place before the creation of the NGT. The NGT flatly rejected the argument, stating:

We have to examine the jurisdiction of the Tribunal with reference to prevalent law of the land that right to clean and decent environment is a fundamental right. Dimensions of environmental jurisprudence and jurisdiction of this Tribunal, thus, should essentially be examined in the backdrop that the protection of environment and ecology has been raised to the pedestal of the Fundamental Rights

The jurisdiction of the Tribunal is thus, very wide. Once a case has nexus with the environment or the laws relatable thereto, the jurisdiction of the Tribunal can be invoked. Not only the cases of direct adverse impact on environment can be brought within the jurisdiction of the Tribunal, but even cases which have indirect adverse impacts can be considered by the Tribunal.²⁶

²³ *Bhopal Gas Peedith Mahila Sanghathan v. Union of India* [2012] 8 SCC 326, available at <http://indiankanoon.org/doc/178436640/>.

²⁴ *Id.* at para. 38.

²⁵ *Kalpavriksh v. Union of India*, Application No. 116 (THC) of 2013, available at <http://www.indiaenvironmentportal.org.in/files/environment%20clearance%20NGT%2017Jul2014.pdf>.

²⁶ *Id.* at paras. 25-26.

Indians suffering impacts from climate change have a high likelihood of having their case heard if they raise constitutional issues before the NGT, even if the acts that lead to the climate damages took place before the creation of the NGT.

Torts – Adapting an old doctrine

In common law countries such as India, the traditional route to seeking compensation when one individual injures another is by filing a tort claim. Although it could be more advantageous to frame climate litigation in India in a constitutional context, rather than as a tort, it is worth noting that the Supreme Court of India has been willing to reshape tort law and adapt long-standing common law doctrine to ensure victims of torts are not thwarted in their effort to obtain justice.

The Supreme Court of India has unequivocally declared that polluters must pay damages when they harm the environment. In *M.C. Mehta v. Kamal Nath*²⁷ the Court explained:

Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender.²⁸

In a case in which polluters may have escaped liability if the court had applied the traditional rules for evaluating strict liability claims, the Supreme Court of India instead adopted a variation of strict liability, which it named “absolute liability” under which the polluters were more likely to be held liable.²⁹

While a tort is probably not the strongest route forward in India, if a case is filed as a tort, the Supreme Court might be willing to adapt principles of negligence, public nuisance, or other common law principles to bring justice to the victims, just as it did with strict liability.

²⁷ *M.C. Mehta v. Kamal Nath* [2000] 6 SCC 213, available at <http://www.elaw.org/node/6920>

²⁸ *Id.* at para. 29.

²⁹ *M.C. Mehta v. Union of India* [1987] SCR(1) 819, 844, available at <http://www.indiankanon.org/doc/1486949/>.

ECUADOR

The Constitution of the Republic of Ecuador includes many provisions that would support a case to hold polluters liable for impacts to the environment, such as climate impacts. There is an open question about whether a case could be filed against a private corporation for violating constitutional rights, but there are currently no laws or court decisions that definitively stand in the way of proceeding.

Constitution

Like other constitutions around the world, Article 14 of the Ecuadorian Constitution recognizes a right to live in a clean and ecologically balanced environment that guarantees sustainability and good living (“sumak kawsay”).³⁰ Famously, however, Ecuador’s Constitution goes one step farther and grants rights to nature itself. It declares that the existence of nature, or “Pacha Mama,” must be respected and that nature has the right to maintain and regenerate its lifecycles, structure, functions, and evolutionary processes.³¹ Any person is allowed to petition public authorities to ensure these rights are fulfilled.³² Nature is also granted the right to its restoration, and this right is independent of other obligations requiring those responsible for damages to compensate individuals or communities that depend on the affected natural systems.³³

There are other important provisions as well. For example, the Constitution requires that whomever causes environmental damage must restore the damaged ecosystem to its original state, regardless of whether the party intended to cause the damage.³⁴

Article 396 declares that strict liability³⁵ will govern claims alleging environmental damage and, in addition to any sanctions, the responsible party has an obligation to restore the ecosystem and compensate affected people and communities.³⁶ The

³⁰ CONSTITUCION DE LA REPUBLICA DEL ECUADOR 2008, Art. 14, original text: “Se reconoce el derecho de la población a vivir en un ambiente sano y ecológicamente equilibrado, que garantice la sostenibilidad y el buen vivir, sumak kawsay.”

³¹ *Id.* at Art. 71, original text: “La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos.”

³² *Id.*, original text: “Toda persona, comunidad, pueblo o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza.”

³³ *Id.* at Art. 72, original text: “La naturaleza tiene derecho a la restauración. Esta restauración será independiente de la obligación que tienen el Estado y las personas naturales o jurídicas de indemnizar a los individuos y colectivos que dependan de los sistemas naturales afectados.”

³⁴ *Id.* at Art. 396(3).

³⁵ “Objective liability” is sometimes translated as “strict liability.” This form of strict liability is not burdened with the common law interpretations of strict liability, so we use objective liability here so as not to cause confusion between the two.

³⁶ CONSTITUCION DE LA REPUBLICA DEL ECUADOR 2008, Art. 396.

same article explains that no statute of limitations will apply to environmental cases.³⁷

In Article 397, the state pledges to permit any person, community, or legal entity, to bring legal actions without demonstrating a direct interest. In addition, the burden of proof as to whether real or threatened damage exists lies with the one carrying out the act or the defendant.³⁸

And finally, there are several other provisions that could help climate victims obtain compensation in Ecuador, including Article 395, which states that in case of doubt related to legal provisions on environmental matters, they will be interpreted in the light most favorable to protecting the environment.³⁹

Jurisprudence

Whether an Ecuadorian court would maintain a case filed against a private corporation for climate damages under these constitutional provisions remains an open question, but there are indications that it could be possible to bring a successful case.

In 2012, one judge hinted that the rights of nature could be enforced against a private entity. In issuing a preliminary injunction against the municipal government of Santa Cruz, the judge noted that the right of Nature is “a right of constitutional rank and that, due to its hierarchical superiority, directly binds everyone, whether they are public entities or private persons.”⁴⁰

There are also helpful decisions interpreting some of the important constitutional provisions identified above. For example, in *Wheeler y Huddle v. Gobierno Provincial de Loja*, the court relied on Article 397 to strike out a lower court decision that had dismissed a case challenging a road construction project, in part because the

³⁷ *Id.*

³⁸ *Id.* at 397(1), original text: “Para garantizar el derecho individual y colectivo a vivir en un ambiente sano y ecológicamente equilibrado, el Estado se compromete a: 1. Permitir a cualquier persona natural o jurídica, colectividad o grupo humano, ejercer las acciones legales y acudir a los órganos judiciales y administrativos, sin perjuicio de su interés directo, para obtener de ellos la tutela efectiva en materia ambiental, incluyendo la posibilidad de solicitar medidas cautelares que permitan cesar la amenaza o el daño ambiental materia de litigio. La carga de la prueba sobre la inexistencia de daño potencial o real recaerá sobre el gestor de la actividad o el demandado.”

³⁹ *Id.* at Art. 395(4), original text: “En caso de duda sobre el alcance de las disposiciones legales en materia ambiental, éstas se aplicarán en el sentido más favorable a la protección de la naturaleza.”

⁴⁰ Oscar Luis Aguirre Abad c/ Gobierno Autónomo Descentralizado Municipal de Santa Cruz, Juicio No. 269 - 2012 (28 June 2012), at pp.11-12, available at <http://www.mpambiental.org/arquivos/jurisprudencia/1343739009.pdf> (unofficial translation, original text: “[E]l derecho de la naturaleza, es básicamente un derecho de rango constitucional y que, por su superioridad jerárquica, vincula directamente a todos, sean estas entidades públicas o personas privadas.”).

petitioners did not satisfactorily prove the damages.⁴¹ The petitioners presented an *acción de protección* to protect the rights of nature – particularly the Vilcabamba River – against actions taken by the Provincial Government of Loja. In 2008, the Provincial Government deposited rock and other material in the Vilcabamba River as part of a highway construction project. The government did not produce an environmental impact assessment before undertaking the project or depositing the debris in the river. In 2009, when seasonal rains caused river levels to rise, the waters carried the rocks and debris downstream where they caused erosion and other damage, including destruction to trees.

On appeal, the Provincial Court of Loja vacated the trial court decision and ordered the Provincial Government of Loja to carry out a series of actions, including the development and implementation of a restoration plan. The Court reasoned that “until it is objectively shown that there exists no probable or certain danger that activities carried out in a specific zone are causing pollution or environmental harm, it is the duty of constitutional judges to tend immediately to safeguarding and enforcing the legal protection for the rights of nature, doing whatever may be necessary to avoid or remedy environmental harm.”⁴² The Court explained that in cases seeking to protect the rights of nature, the burden of proof falls upon the project proponent, as required by Article 397 of the Ecuadorian Constitution. “The dismissal of an *acción de protección* to protect the rights of Nature for failure to produce evidence would be unacceptable because in cases of probable, possible or presumably already produced environmental harm from pollution, the burden of proving the absence [of harm] falls not only upon the person who is in the best position to do so but who also maintains so ironically that such harm does not exist.”⁴³

The Court concluded that the Provincial Government of Loja failed to meet its legal obligation to protect the environment by making highway improvements without performing an environmental impact study or obtaining an environmental permit. The Court responded to the government’s argument that the inhabitants of the province need highways by explaining how a constitutional judge is to resolve conflicts of protected interests. Because the Court found it possible to make highway improvements without disrespecting the constitutional rights of Nature, no such conflict of rights had to be resolved in this case. Nonetheless, the Court

⁴¹ *Wheeler y Huddle c/ Gobierno Provincial de Loja*, juicio 11121-2011-0010 (30 March 2011), available at <http://www.elaw.org/node/8379>.

⁴² *Id.* at 3 (unofficial translation, original text: “[H]asta tanto se demuestre objetivamente que no existe la probabilidad o el peligro cierto de que las tareas que se realicen en una determinada zona produzcan contaminación o conlleven daño ambiental, es deber de los Jueces constitucionales propeder de inmediato al resguardo y hacer afectiva la tutela judicial de los derechos de la Naturaleza, efectuando lo que fuera necesario para evitar que sea contaminada, o remediar.”).

⁴³ *Id.* at 4 (unofficial translation, original text: “Sería inadmisibile el rechazo de una acción de protección a favor de la Naturaleza por no haberse arrimado prueba, pues en caso de probable, posibles o bien que puedan presumirse ya provocado un daño ambiental por contaminación, deberá acreditar su inexistencia no solo quien este en mejores condiciones de hacerlo sino quien precisamente sostiene tan irónicamente que tal daño no existe.”).

asserted: “the interest of these populations in a highway is minor compared to the interest in a healthy environment that affects a greater number of people, including those same populations with an interest in the highway. Although this is a conflict between two collective interests, the environment is of greater importance.”⁴⁴

In addition, there are judicial decisions predating the adoption of the 2008 Constitution that include language that could be helpful for holding corporations liable for climate damages. In *Guevara Batioja v. Petroecuador*, the former Ecuadorian Supreme Court recognized that the theory of strict liability (subjective liability)⁴⁵ has been increasingly accepted, especially in the jurisprudence of France, Argentina, and Colombia, and decided “[w]e completely agree with this position, and this is the reason that we adopt it as the basis of this decision, in light of the fact that the production, industry, transport, and use of hydrocarbons constitute, without a doubt, activities of high risk or danger.”⁴⁶ This finding that the production of hydrocarbons is a high-risk activity will bolster any climate damages case filed in Ecuador.

Ecuador’s constitution includes many important provisions that could help people or communities impacted by climate change seek compensation for those damages. Finally, there are several administrative regulations and local government laws that could bolster a constitutional petition.

⁴⁴ *Id.* at 5 (unofficial translation, original text: “[E]l interés de esas poblaciones en una carretera resulta minorado comparándolo con el interés a un medio ambiente sano que abarca un mayor número de personas, e incluso se puede afirmar que dentro de ese número de personas se incluye a los pobladores de esas parroquias. Aún tratándose de un conflicto entre dos intereses colectivos, es el medio ambiente el de mayor importancia.”).

⁴⁵ In this case, the court was interpreting a law that that included subjective responsibility, which is similar to common law strict liability doctrines.

⁴⁶ *Guevara Batioja, José Luis c/ Petroecuador*, Juicio ordinario No. 31-2002, Primera Sala de Corte Suprema de Justicia (29 October 2002), at para. 20, available at <http://www.derechoecuador.com/productos/producto/catalogo/registros-oficiales/2003/marzo/code/17765/registro-oficial-19-de-marzo-del-2003#anchor443352> (“Nosotros coincidimos plenamente con esta posición, y esta es la razón por la cual adoptamos como sustento del presente fallo, en vista de la producción, industria, transporte y operación de sustancias Hidrocarbúferas constituyen, a no dudarlo, actividades de alto riesgo o peligrosidad.”)

BRAZIL

In Brazil, a citizen or NGO could file a case enforcing the constitutional right to a healthy environment and alleging violations of the National Environmental Policy Act seeking damages against a corporation that has caused climate damages. There are several provisions of law and judicial decisions that make such a case possible.

Actions could be filed against entities responsible for climate damage under either the Constitution or under the Public Civil Action Act.

Constitution

Article 225 of the Brazilian Constitution grants Brazilians the right to live in a clean and healthy environment and subjects individuals or legal persons who conduct “activities considered as harmful to the environment” “to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused.”⁴⁷

Article 170 of the Constitution clearly states that economic activity may be limited to ensure social justice and to protect the environment. A 2005 decision from the Supreme Federal Court (Supremo Tribunal Federal) invoked this article to declare “the integrity of the environment cannot be compromised by business interests nor be dependent upon merely economic motivations, especially taking into account [...] that economic activity, in light of the constitutional framework that governs it, is subordinate, among other general principles, to that [principle] which privileges ‘environmental protection.’”⁴⁸

The Constitution grants any citizen the right to bring a legal action to nullify an act that causes harm to the environment. Such action will not incur judicial costs unless it has been brought in bad faith. A case invoking this provision may be filed as an *Ação Popular* under Lei nº 4.717/65.⁴⁹

National Environmental Policy Act

In addition, the National Environmental Policy Act of 1981, Lei 6.938/81,⁵⁰ imposes liability on polluters to restore the environment or compensate for its damage. The Act defines a polluter as a public or private person (physical or juridical) that is

⁴⁷ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL DE 1988, Art. 225, para. 3.

⁴⁸ Suprema Tribunal Federal. Ação direta de inconstitucionalidade 3.540-1/DF, Relator Min. Celso de Mello (01 September 2005), at p. 36, available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=387260> (unofficial translation, original text: “[A] incolumidade do meio ambiente não pode ser comprometida por interesses empresariais nem ficar dependente de motivações de índole meramente econômica, ainda mais se tiver presente [...] que a atividade econômica, considerada a disciplina constitucional que a rege, esta subordinada, dentre outros princípios gerais, aquele que privilegia a ‘defesa do meio ambiente’ (CF, art. 170, VI).”).

⁴⁹ LEI 4.717/65 (29 June 1965), available at http://www.planalto.gov.br/ccivil_03/leis/l4717.htm.

⁵⁰ LEI DA POLÍTICA NACIONAL DO MEIO AMBIENTE, LEI 6.938/81 (31 August 1981), available at http://www.planalto.gov.br/ccivil_03/Leis/L6938.htm.

responsible (directly or indirectly) for activity that causes environmental degradation.⁵¹ The Act defines degradation of the quality of the environment to be the adverse alteration of some characteristics of the environment; and pollution is the degradation of the environment by an activity that either directly or indirectly threatens the health, safety or well-being of the population; creates adverse conditions for social or economic activities; or adversely affects biota.⁵²

An objective of the National Environmental Policy Act is to impose on the polluter the obligation to restore the environment or pay economic damages for harm caused to the environment.⁵³ The Act declares “[w]ithout prejudice to the application of the sanctions foreseen herein, the polluter is obligated, independent of the existence of fault, to compensate or repair the harm caused to the environment and to third parties affected by the polluter’s activity.”⁵⁴

In one case, Minister Herman Benjamin addressed concerns about how damages were apportioned between parties. Benjamin declared that when more than one entity is responsible for damage, liability should be imputed to both entities. Arguing about which entity carries a greater responsibility will be a hurdle to facilitating access to justice for the victims.⁵⁵

Public Civil Action Act

The Public Civil Action Act⁵⁶ grants standing to NGOs to bring a case seeking compensation for environmental damages.⁵⁷ Litigants may seek monetary compensation for material or moral damages of either an individual or collective nature caused to the environment. Under the Act, a court will not award advance costs, fees, expert fees, or any other expenses or costs against the plaintiff association unless it is proven that the case was brought in bad faith, under which circumstances, the plaintiff will be ordered to pay attorney fees and court costs.⁵⁸

⁵¹ LEI 6.938/81, art. 3, § IV.

⁵² *Id.* at art. 3, §§ II and III.

⁵³ *Id.* at art. 4, § VII.

⁵⁴ *Id.* at art. 14, § 1 (unofficial translation, original text: “Sem obstar a aplicação das penalidades previstas neste artigo, é o poluidor obrigado, independentemente da existência de culpa, a indenizar ou reparar os danos causados ao meio ambiente e a terceiros, afetados por sua atividade.”).

⁵⁵ Recurso Especial No. 1.236.863 – ES (2011/0028375-0). The Minister explained: “A rigor, na apuração do nexo de causalidade no âmbito da responsabilidade civil solidária, não se discute percentagem, nem maior ou menor participação da conduta do agente na realização do dano, pois a ser diferente perderia o instituto exatamente a sua maior relevância prática na facilitação do acesso à Justiça para as vítimas.”

⁵⁶ LEI DE AÇÃO CIVIL PÚBLICA, LEI 7.347/85 (24 July 1985), available at http://www.planalto.gov.br/ccivil_03/Leis/L7347orig.htm

⁵⁷ The organization must meet criteria outlined in the law, including that it has been legally registered for one year and that it was established for one of the recognized purposes which includes protection of the environment. LEI 7.347/85, art. 3.

⁵⁸ *Id.* at art. 18.

It is possible that a Brazilian court would find a corporation liable for damages to the environment even if the activities that led to the damage were lawful. One commentator, Carolina Prado da Hora, has opined that recent judgments from the Supreme Federal Court confirm this point of view.⁵⁹

Courts, including the Supreme Federal Court, have shifted the burden of proof to the defendant in environmental cases.⁶⁰ Courts have required the defendant to demonstrate that it is not responsible for the damage caused rather than leaving the burden of affirmatively proving causation on the plaintiff. Courts have reasoned that the imposition of objective liability, the precautionary principle, the polluter pays principle, and the principle *indubio pro natura*, all call for the evidentiary burden to be shifted. For example, in REsp 883656 (2006/0145139-9 - 28/02/2012), Minister Herman Benjamin explained that a dynamic burden of proof facilitates access to justice and combats inequalities, which, in turn, fosters due process of law.⁶¹

In a 2013 decision, the Supreme Federal Court vacated and remanded a lower court decision that failed to adequately apply environmental legal principles in its adjudication of a lawsuit brought by fishermen who alleged damages caused by a hydroelectric dam project.⁶² The Court explained that Lei 6.938/81 “adopted the system of objective liability, which was wholly accepted by the legal system, such that it is irrelevant, herein, to discuss the conduct of the agent (guilt or fraud) for the attribution of the duty to repair the harm caused.”⁶³ The Court emphasized the appropriateness of objective liability where profits are gained by the potentially harmful activity at issue: “[I]f a given risky activity is performed and, above all, profits are gained from this [activity], the company must take responsibility for harms that it may eventually cause to others, independently of the evidence of fraud or guilt.”⁶⁴ In reaching its decision, the Court cited one of its earlier decisions explaining that the 1988 Constitution imposed objective liability for environmental harm.⁶⁵

⁵⁹ Carolina Prado da Hora, *Da Responsabilidade Civil Ambiental*, published on the website of *Âmbito Jurídico*, http://www.ambito-juridico.com.br/site/?n_link=revista_artigos_leitura&artigo_id=7995

⁶⁰ In addition, a draft code of civil procedure currently being considered by the National Congress would codify judicial authority to shift the burden of proof depending on the circumstances of the case. Draft law 8046/2010, art. 358.

⁶¹ Recurso Especial No. 883656 (2006/0145139-9 - 28/02/2012), available at https://ww2.stj.jus.br/revistaelectronica/ita.asp?registro=200601451399&dt_publicacao=28/02/2012.

⁶² Supremo Tribunal de Justiça. AgRg RE No. 206.748/SP, Relator Min. Villa Boas Cueva (21 February 2013) available at https://ww2.stj.jus.br/revistaelectronica/ita.asp?registro=201201507675&dt_publicacao=27/02/2013

⁶³ *Id.* at p. 11.

⁶⁴ *Id.* at p. 9.

⁶⁵ *Id.* at pp. 11-12 (citing Recurso Especial No. 578.797/RS, Relator Min. Luiz Fux (5 August 2004), at pp.10-11, available at <http://stj.jusbrasil.com.br/jurisprudencia/19374652/recurso-especial-resp-578797-rs-2003-0162662-0/inteiro-teor-19374653>).

The Court also discussed the burden of proof for environmental claims where objective liability applies, but highlighted the need to apply the precautionary principle, which “presupposes burden-shifting, falling upon whoever allegedly caused the environmental harm [the burden] to prove that they did not cause it or that the substance released into the environment is not potentially harmful.”⁶⁶ The Court clarified that “despite liability being strict, the harm being evident and the need for showing the causal nexus being the rule, the principles governing environmental law (precaution, prevention, and restoration) must be considered, especially, in this case, the precautionary principle, by which the environment must have the benefit of doubt in its favor in cases of uncertainty (due to lack of scientifically relevant evidence) about the causal nexus between a given activity and a negative environmental effect.”⁶⁷

The Court also explained that the statute of limitations does not start running until the damage becomes evident.

Brazilian laws, together with helpful judicial interpretation, could make Brazil a good place to file a climate case.

⁶⁶ *Id.* at p. 12 (unofficial translation, original text: “O princípio de precaução pressupõe a inversão do ônus probatório, competindo a quem supostamente promoveu o dano ambiental comprovar que não o causou ou que a substância lançada ao meio ambiente não lhe é potencialmente lesiva.”).

⁶⁷ *Id.* at p. 12 (unofficial translation, original text: “[N]ão obstante a responsabilidade ser objetiva, o dano ser evidente e a necessidade de comprovação do nexos de causalidade ser a regra, não se pode deixar de ter em conta os princípios que regem o direito ambiental (precaução, prevenção e reparação), principalmente, para a hipótese, o Princípio de Precaução, no qual o meio ambiente deve ter em seu favor o benefício da dúvida no caso de incerteza (por falta de provas cientificamente relevantes) sobre o nexos causal entre determinada atividade e um efeito ambiental negativo.”).

COLOMBIA

It is clear that courts in Colombia have authority to hear a case against a corporation that has violated the right to a healthy environment. In addition, Colombian law uniquely allows an injured community to seek relief even if the community cannot identify the party responsible for the injury. This provision would allow a community that has been harmed by climate change (or is threatened with harm from climate change) to file a case and petition the judge to determine the party responsible for the damage or threat.

Constitution and Law 472

According to Article 79 of the Colombian Constitution, every person has the right to enjoy a healthy environment.⁶⁸ Article 88 of the Constitution establishes that the right to a healthy environment is a collective right that may be protected through an *Acción Popular*.⁶⁹ The Colombian Constitutional Court has declared that the right to a healthy environment is a right owed to all humanity including unborn future generations.⁷⁰

The ability to enforce the fundamental right to a healthy environment through an *Acción Popular* has been codified in Law 472 of 1998.⁷¹ Under this law, plaintiffs may bring an *Acción Popular* to prevent harm; stop the danger, threat, or infringement of collective rights and interests; or achieve restoration of circumstances to their original state, when it is possible.⁷² The Constitutional Court has noted that one of the characteristics of the *Acción Popular* is its preventive nature.⁷³ Actual damage to a collective right is not needed because the *Acción*

⁶⁸ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COLOMBIA DE 1991, Art. 79, § 4 cl (1).

⁶⁹ *Id.* at Art. 88, § 5 cl (1). Fundamental rights may also be protected under a *Tutela* process. A *Tutela* is known as an ‘extraordinary action’ which would be filed in national courts that may be more effective in addressing climate damages, but there are more uncertain legal questions that make a *Tutela* a less promising avenue. A judge requires people bringing a *Tutela* to meet a high standard of proof and, to date, *Tutelas* have only been allowed against state actors or companies charged to carry out a public service.

⁷⁰ La Corte Constitucional de Colombia, Judgment C-632 of August 24, 2011, M.P. Gabriel Eduardo Mendoza Martelo, at sec.4.7 (citing Judgment C-401 de 1995.), available at: <http://www.corteconstitucional.gov.co/relatoria/2011/c-632-11.htm>. (“La ubicación del medio ambiente en esa categoría de derechos, lo ha dicho la Corte, resulta particularmente importante, ‘ya que los derechos colectivos y del ambiente no sólo se le deben a toda la humanidad, en cuanto son protegidos por el interés universal, y por ello están encuadrados dentro de los llamados derechos humanos de ‘tercera generación’, sino que se le deben incluso a las generaciones que están por nacer’, toda vez que ‘[l]a humanidad del futuro tiene derecho a que se le conserve, el planeta desde hoy, en un ambiente adecuado a la dignidad del hombre como sujeto universal del derecho.’”).

⁷¹ LEY 472 DE 1998, art. 2, available at:

<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=188>.

⁷² *Id.* at art. 2 cl (2).

⁷³ La Corte Constitucional de Colombia, Judgment T-466 of June 5, 2003. M.P. Alfredo Beltrán Sierra, (citing sentencia C-215 de 1999), available at:

<http://www.corteconstitucional.gov.co/relatoria/2003/T-466-03.htm>.

Popular was designed to prevent damage to public interests.⁷⁴

Any natural or legal person, a non-governmental organization, or the General Procurator of the Nation (*Procurador General de la Nación*), among others, may file an *Acción Popular*.⁷⁵ Any member of an impacted group may bring a claim to defend the group from the threat or damage to a collective right.⁷⁶

Importantly, the right to a healthy environment can be enforced against corporations. An *Acción Popular* may be brought against a natural or legal person, or against a public authority whose action or omission threatens, violates, or has violated the right or collective interest.⁷⁷ An *Acción Popular* may even be brought against an unknown party. In this case, when the person bringing the claim does not know the person or entity that threatened or violated the collective right, the judge will be responsible for determining the identity of the party.⁷⁸

Because the right to a healthy environment is a collective right, it is a substantive right that the courts will protect by issuing orders enjoining or requiring action.⁷⁹ According to the Constitutional Court, the *Acción Popular* is a mechanism that aims to reestablish the use and enjoyment of collective rights such as the right to a healthy environment.⁸⁰ Further, Law 472 of 1998 establishes that the courts may, when protecting collective rights, order the defendant to do or not to do something, or to pay damages for the harm it caused. Any monetary damages are paid to the government entity charged with protecting the affected collective rights, provided that entity is not responsible for causing the injury. According to the Constitutional Court, this payment is necessary to enable the government to repair the threat or violation of the collective right.⁸¹

⁷⁴ *Id.*

⁷⁵ LEY 472 at art. 12.

⁷⁶ La Corte Constitucional de Colombia, Judgment T-466 of June 5, 2003, M.P. Alfredo Beltrán Sierra.

⁷⁷ LEY 472 at art. 14.

⁷⁸ *Id.*

⁷⁹ *Id.* at art. 34.

⁸⁰ La Corte Constitucional de Colombia, Judgment T-466 of June 5, 2003, M.P. Alfredo Beltrán Sierra.

⁸¹ Colombian Constitutional Court, Judgment C-215 of April 14, 1999. M.P. María Victoria Sáchica de Moncaleano, available at: <http://www.corteconstitucional.gov.co/relatoria/1999/c-215-99.htm>. (“[D]el contenido de la norma en mención no puede deducirse que esté excluyendo la responsabilidad de los agentes de esa institución, toda vez que la disposición se refiere precisamente a la entidad “no culpable”, que además tiene a su cargo la defensa de los derechos e intereses colectivos cuya vulneración se busca reparar. De igual manera, el legislador pretende con esta medida, garantizar los recursos necesarios para que dicho organismo adelante las gestiones pertinentes destinadas a reparar los perjuicios causados a los intereses y derechos afectados, como quiera que esas entidades son las encargadas de propender por la defensa y protección de éstos.”).

MEXICO

In Mexico, the Federal Code of Civil Procedures creates two viable avenues for filing climate cases. Communities whose right to live in a healthy environment, guaranteed under Article 4 of the Constitution of Mexico,⁸² has been violated by climate change could strengthen their cases by asserting their constitutional rights. In addition, Mexican courts have recognized that there could be a situation where a court could find that fundamental rights impose obligations on private entities, but no court has yet held a private corporation accountable for violating the right to live in a healthy environment.⁸³

Federal Code of Civil Procedures

The 2011 reform of the Federal Code of Civil Procedures (el Código Federal de Procedimientos Civiles) (“CFPC”),⁸⁴ offers a promising path for holding corporations financially liable for harm suffered by climate-affected individuals, communities, or society-at-large in Mexico.⁸⁵

The CFPC creates several causes of action including an *acción colectiva en sentido estricto*, which can be brought to remedy violations of collective rights and interests that have been suffered by a definable group of people. Another cause of action is an *acción difusa* to repair damages to the collective environment.

An *acción colectiva en sentido estricto* can be brought on behalf of a group of at least 30 people similarly injured. The individuals in the class can be identified before or after the case. Injured individuals can be identified up to 18 months after the final judgment. Each member of the class then must prove their individual damages through an independent procedure. The ability to form a class after the final

⁸² CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, Art. 4, available at <http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm>

⁸³ Mexico's Supreme Court, Tesis: 1a.XX/2013 (10a.), Seminario Judicial de la Federación y su Gaceta, Décima Época, libro XVI, January 2013, t.1, p.627, Reg. 2002504. Derechos Fundamentales de Igualdad y de No Discriminación. Gozan de Eficacia en las Relaciones entre Particulares, available at http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=100000000000&Expresion=2002504&Dominio=Rubro&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&ID=2002504&Hit=1&IDs=2002504&tipoTesis=&Semanao=0&tabla=

⁸⁴ EL CÓDIGO FEDERAL DE PROCEDIMIENTOS CIVILES (“CFPC”), available at <http://www.diputados.gov.mx/LeyesBiblio/pdf/6.pdf>

⁸⁵ We originally identified Mexico as a promising jurisdiction because we expected the Federal Law on Environmental Liability (la Ley Federal de Responsabilidad Ambiental) (“LFRA”), adopted in 2013, might open the door to climate litigation. However, after studying the LFRA closely, we have determined that a class action as authorized under the 2011 reform of the Federal Code of Civil Procedures is a much better option. The LFRA includes many provisions that make it unlikely that a corporation would be required to pay for climate damages if sued under the Act. The LFRA focuses on remedying damage to the environment caused by illegal activities. While there are a few possible ways to use this law, there would be significant hurdles and our opinion is that the class action procedures create a much more straightforward path for holding corporations financially liable for climate change damages.

judgment would save the expense of gathering the class if the action were to unexpectedly fail.

Such a case could be filed by a single representative of the injured group of people or by an appropriate civil society organization.⁸⁶ The civil society organization does not need to allege harm to itself or be made up of injured individuals.

Any case brought under the CFPC must be filed within three years and six months of the action that caused the damage. However, for damages of a continuing nature, the time limit starts to toll from the last day that the damage is generated.⁸⁷ This could be very important for a case related to climate change; because of the ongoing nature of climate change damages, the statute of limitations never tolls.

Filing a case under the CFPC seems promising for many reasons. One is that the process for initiating an action under the CFPC is relatively simple. In addition, judges exercising jurisdiction under the code have broad authority to compel government officials or parties named in the case to produce evidence. Furthermore, a judge can bring in any person — *suo motu* or at the request of a party — to resolve the case.⁸⁸

Under the CFPC, the court has the authority to order reparation of the damages to the individuals or community, as well as reparation of damages to the environment. Under an *acción colectiva en sentido estricto*, the focus is on remedying harm suffered by the injured individuals.⁸⁹ The court has the authority to order payment of financial damages, as well as enjoining activities that would cause additional harm.⁹⁰ One drawback is that under an *acción colectiva en sentido estricto*, each member of the injured class must go through an individual process to prove specific damages to determine the amount that must be paid to that individual.⁹¹

Under the alternative process – an *acción difusa* – the goal is to restore things to the way they were before the injury occurred. When it is not possible to achieve restoration, the court may require a payment be deposited in a fund.⁹² If the judge determines the case addresses a social interest, the fund may be used to pay the costs associated with bringing the case, as well as paying an honorarium to a public interest organization that initiated the case.⁹³ Such an honorarium is limited to 10-20 percent of the total damages awarded to the plaintiffs.⁹⁴ The CFPC lists the types

⁸⁶ CFPC at art. 585.

⁸⁷ *Id.* at art. 584.

⁸⁸ *Id.* at art. 597.

⁸⁹ *Id.* at art. 605.

⁹⁰ *Id.* at art. 604.

⁹¹ *Id.* at art. 605.

⁹² *Id.* at arts. 604 and 625

⁹³ *Id.* at art. 625.

⁹⁴ *Id.* at art. 617.

of costs that may be covered by the fund, and clearly states the list is not exhaustive.⁹⁵

In addition to awarding damages, Mexican courts have the authority to issue injunctions to stop activities that cause or will cause imminent or irreparable damages to the class.⁹⁶ Importantly, a plaintiff may seek a preliminary injunction without any obligation to post a financial guarantee to cover the cost of any monetary harm suffered by the defendant should the plaintiff's case not succeed. Another helpful provision requires each side to bear their own costs in the case, which shields plaintiffs from the risk of having to pay the defendants' costs if the plaintiffs lose.⁹⁷ While the plaintiffs must bear their own costs, corporate defendants are likely to generate significant litigation costs that would make it prohibitive to bring a case if a losing plaintiff would have to bear those costs. In many jurisdictions, the risk of having to pay a defendant's costs is a major deterrent to bringing public interest litigation.

A few provisions may hinder successful application of the CFPC. An important factor to consider is that when restoration is impossible, the law allows for substitute compliance under an *acción difusa*.⁹⁸ This would allow a defendant found liable for environmental damage to undertake protection of another site or perform some other substitute compliance, which is not ideal.

The CFPC was reformed recently, bringing changes that make a climate case viable in Mexico. It is unclear how courts will interpret some sections of the law, but filing an *acción colectiva en sentido estricto* provides an avenue for an injured community to seek compensation for climate damages in Mexico.

⁹⁵ *Id.* at art. 625.

⁹⁶ *Id.* at art. 610.

⁹⁷ *Id.* at art. 617.

⁹⁸ *Id.* at art. 604.

KENYA

Kenyans suffering from climate impacts could file a strong case based on rights found in the Constitution of Kenya (2010)⁹⁹ coupled with relevant sections of the Environmental Management and Co-ordination Act (1999).¹⁰⁰ The opportunity to bring a case in Kenya became even more promising with the recent creation of the Environment and Land Court, which is authorized to hear cases related to climate issues.

Constitution

Article 42 of the Constitution of Kenya, part of the Bill of Rights, recognizes that every person has the right to a clean and healthy environment.¹⁰¹ This right is further elaborated in Articles 69 and 70. Article 69 declares “*Every person* has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.”¹⁰² Article 70 ensures that a person whose right to a healthy environment has been violated, or is likely to be violated, may go to court to protect that right. The Constitution specifically grants Kenyan courts the power to award compensation and reduces the evidentiary hurdles for petitions enforcing the right to a healthy environment by relieving petitioners of the burden to demonstrate particular harm. Article 70 states:

(1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment; . . .

or

(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

⁹⁹ THE CONSTITUTION OF KENYA, 2010, available at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>.

¹⁰⁰ ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999, No. 8 of 1999 (as amended), available at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20387>.

¹⁰¹ THE CONSTITUTION OF KENYA, 2010, Art. 42 (“Every person has the right to a clean and healthy environment, which includes the right—
(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
(b) to have obligations relating to the environment fulfilled under Article 70.”).

¹⁰² *Id.* at Art. 69 (emphasis added).

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

The constitutional right to a healthy environment is only helpful in this context if the right can be enforced against non-governmental entities that have endangered a person's environment. Recent court decisions from Kenya indicate that at least some courts are ready to hold private entities liable for violating fundamental rights.

In *Satrose Ayuma v. Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme*,¹⁰³ petitioners asked the High Court of Kenya to enforce the fundamental right to housing against several entities. Two of the respondent entities argued that they could not be bound by the constitution's obligation to protect fundamental human rights because they were private parties. The High Court ultimately determined that each of the respondents qualified as an agency of the state or a public body and that each violated the petitioners' rights to adequate housing.¹⁰⁴ However, the Court took great pains to explain that the 2010 Constitution granted the court jurisdiction to enforce fundamental rights against private entities. Judge Isaac Lenaola, delivering the opinion for the High Court, explained that the Constitution "binds all persons" and "Article 20(1) provides that 'the Bill of Rights applies to all law and binds all state organs and all persons.'"¹⁰⁵ Judge Lenaola continued:

I am . . . aware that [under the Constitution], this Court is obligated to develop the law to the extent that it gives effect to a right or fundamental freedom; and it must adopt an interpretation that favours the enforcement of a right or fundamental freedom, in order to promote the spirit and objects of the Bill of Rights It is thus clear to my mind that it would not have been the intention of the drafters of the Constitution and the Kenyan people who overwhelmingly passed the Constitution that the Bill of Rights would only bind State Organs. A purposive interpretation . . . would imply that the Bill of Rights binds all State Organs and all persons, whether they are public bodies or juristic persons.

It also seems clear to me therefore that from a wide definition of the term "person" as contained in Article 260, the intention of the framers of the Constitution was to have both a vertical and a horizontal application of the Bill of Rights.¹⁰⁶

¹⁰³ *Satrose Ayuma v. Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme*, Petition No. 65 of 2010 [2013] eKLR (High Court of Kenya at Nairobi), available at <http://kenyalaw.org/caselaw/cases/view/90359/>.

¹⁰⁴ *Id.* at paras. 52-53 & 92.

¹⁰⁵ *Id.* at para. 55 (emphasis in original).

¹⁰⁶ *Id.* at paras. 58-59.

In a more recent case brought against a private hospital, the High Court of Kenya again concluded that fundamental rights may be enforced against private persons. Referring to its decision in *Satrose Ayuma*, the Court explained, “[t]he issue whether the Bill of Rights applies horizontally or vertically is beyond [doubt].” The Court then explained further:

The real issue is whether and to what extent the Bill of Rights is to apply to private relationships. The question as to whether it is to be applied horizontally or just vertically against the State depends on the nature of the right and fundamental freedom and the circumstances of the case. In the case of *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi*, Petition Number 625 of 2009 [2011] eKLR[, Gacheche J., observed that, “. . . the rigid position that human rights apply vertically is being overtaken by the emerging trends in the development of human rights litigation We can no longer afford to bury our heads in the sand for we must appreciate the realities which is that private individuals and bodies such as clubs and companies wield great power over individual citizenry who should as of necessity, be protected from such non-state bodies who may for instance discriminate unfairly or cause other constitutional breaches The major challenge to horizontal application of human rights is the fact that it (is) a novel area and courts bear great responsibility of examining individual cases so as to decide each case on its own merits as a horizontal application does not and should not cut across the board I find that fundamental rights are applicable both vertically and horizontally save that horizontal application would not apply as a rule but it would only be an exception which would obviously demand that the court do treat (it) on a case by case basis by examining the circumstances of each case before it is legitimized.

For instance, the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the Constitution directly.

A number of jurisdictions around the world recognise the horizontality of the bill of rights while others have confined themselves to the vertical application. Some Constitutions expressly specify whether the human rights provisions are enforceable against private individuals and bodies or only against the State. All in all, the doctrine of horizontal application has been likened to ‘a gifted but neglected child with huge potential that is seeking to be released.’

Nyamu J., in the *Richard Nduati Kariuki v Leonard Nduati Kariuki and Another* [2006] Misc App. No. 7 of 2006 [2006] eKLR cites a quote by J. Balkan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York, Free Press, 2004) where it is stated, “The diffusion of political authority in the context of the global economy has led to concerns about the ability of constitutionalism to operate as a check on political power if it speaks only to the state. Moreover, there is growing awareness-perhaps fuelled by recent examples of corporate corruption and wrong doing-that private power as much as public power has the capacity to oppress.”

I take the positions that the from the history of [the] country and the events leading up to the promulgation of the Constitution leave no doubt that it was intended to be a transformative document. I would be hesitant to adopt a hard and fast position that would prevent the principles and values of the Constitution being infused into the lives of ordinary Kenyans through application of the Bill of Rights to private relationships where necessary.¹⁰⁷

It seems clear that at least the High Court of Kenya is poised to enforce the fundamental right to live in a healthy environment against private corporations.

Abdalla Rhova Hiribae v. Attorney General,¹⁰⁸ reinforces the interpretation of the 2010 Constitution as applying fundamental rights horizontally,¹⁰⁹ and includes another finding helpful to a climate damages case. This case clarifies that courts may enforce violations of the right to live in a healthy environment even if the activities complained of occurred before the adoption of the 2010 Constitution. In this case, petitioners challenged government approval of projects such as shrimp and prawn farming in the Tana Delta without required land use plans and environmental impact assessments.¹¹⁰ The petitioners based their claim in part on the violation of the constitutional right to a healthy environment and the right to live with human dignity.¹¹¹ In addressing the applicability of the new constitution to acts occurring before it was adopted, the Court found,

[t]he right to life and all that goes with it, including the right to a livelihood and a clean environment, were protected under the former

¹⁰⁷ Isaac Ngugi v. The Nairobi Hospital, Petition No. 407 of 2012 [2013] eKLR, at paras. 18-25 (High Court of Kenya at Nairobi), available at <http://kenyalaw.org/caselaw/cases/view/90941/>.

¹⁰⁸ *Abdalla Rhova Hiribae v. Attorney General*, Civil Case No. 14 of 2010 (High Court of Kenya at Nairobi), available at <http://www.naturekenya.org/sites/default/files/TANA%20DELTA%20JUDGEMENT%2004-02-2013.pdf>.

¹⁰⁹ *Id.* at para. 47 (“an individual or corporate person . . . can be held to have violated another person’s constitutional rights”).

¹¹⁰ *Id.* at para. 1.

¹¹¹ *Id.* at para. 13. (They also based their claim on violation of several international laws which they explained are imported into Kenyan law through Article 2(5) and (6) of the Constitution.)

constitution, albeit, the right to a clean environment and livelihood, indirectly as elements of the right to life. More importantly, petitioners are entitled to continued protection of these rights, so that if there is a threat of continued violation, it cannot be properly argued that because the events in question occurred prior to the new Constitution, the petitioners have no right of recourse before the Court.¹¹²

Finally, it should be noted that in *Abdalla Rhova Hiribae v. Attorney General*, even though the Court ultimately found for the respondents, the High Court ordered that both parties should bear their own costs “[g]iven the public interest nature of this petition and the importance of the subject matter.”¹¹³ In many jurisdictions, the losing party is required to pay the other party’s costs, which is a deterrent to public interest litigation.

Environmental Management and Co-ordination Act

The Environmental Management and Co-ordination Act, 1999 (“EMCA”)¹¹⁴ augments the High Court’s authority to enforce the right to a healthy environment and award compensation to victims. The Act states, “Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.”¹¹⁵ The Act also ensures that a person alleging a violation, or a likely violation, of this right “may apply to the High Court for redress[.]”¹¹⁶ The High Court has the power to require “the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and . . . provide compensation for any victims of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental[.]”¹¹⁷ In exercising its jurisdiction, the High Court must consider certain sustainable development principles, including the polluter pays principle.¹¹⁸

Finally, similar to the Constitution, the EMCA grants broad standing, ensuring that any person “shall have the capacity to bring an action [under the EMCA] notwithstanding that such a person cannot show that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury.”¹¹⁹ In *Mwaniki v. Gicheha*,¹²⁰ the plaintiffs filed a suit seeking a permanent injunction to

¹¹² *Id.* at para. 44.

¹¹³ *Id.* at para 72.

¹¹⁴ ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999, No. 8 of 1999 (as amended), available at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20387>.

¹¹⁵ *Id.* at § 3(1).

¹¹⁶ *Id.* at § 3(3).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at § 5(e).

¹¹⁹ *Id.* at § 4.

¹²⁰ *Mwaniki v. Gicheha*, Civil Case No 313 of 2000 [2006] eKLR (High Court of Nairobi), available at <http://kenyalaw.org/caselaw/cases/view/18776>.

restrain the defendants from constructing or continuing to construct a slaughterhouse on the parcel of land known as Plot No. Zone 6 within Limuru Township. The case was grounded on the fact that the construction was in contravention of the EMCA as the defendants had neither sought nor obtained a license to discharge effluent, nor had they undertaken an environmental impact assessment as required under the EMCA. The plaintiffs also complained that the defendants' failure to comply with these statutory provisions was likely to cause injury to them and was a violation of the plaintiffs' rights to a clean and healthy environment. Even though the plaintiffs did not own the land in dispute, the Court nevertheless determined that the plaintiffs had standing to sue under the EMCA.

Environment and Land Court

Perhaps the most encouraging recent development in Kenya is the newly established Environment and Land Court, which is vested with authority to hear cases related to climate change. The Environment and Land Court Act,¹²¹ enacted by lawmakers to implement Article 162(2)(b) of the Constitution,¹²² declares that the Environment and Land Court has the "power to hear and determine disputes relating to environment and land, including disputes . . . relating to . . . climate issues[.]"¹²³ The Court exercises appellate jurisdiction over the decisions of subordinate courts or local tribunals for issues falling within the Court's jurisdiction. The Court may issue any order and grant any relief it deems fit, including an award of damages, compensation, restitution, and costs (among others).¹²⁴

The Kenyan Parliament's decision to vest courts with jurisdiction over climate issues clearly signals that it expects such conflicts to arise. Given that no statute (as of yet) specifically addresses climate conflicts, the most likely path for cases to arrive before the Environment and Land Court would be as violations of fundamental constitutional rights and/or violations of EMCA. The Courts of Kenya appear likely to continue construing the new constitution liberally, thus protecting the fundamental rights of Kenyans to live in a healthy environment by addressing threats to those rights brought by private entities responsible for climate damages.

Filing a climate damages case in the Environment and Land Court as a violation of both fundamental rights and the EMCA has great potential.

¹²¹ ENVIRONMENT AND LAND COURT ACT, 2011 (Act No. 19 of 2011, Corr. No. 18/2012, Act No. 12 of 2012), available at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2012A>.

¹²² THE CONSTITUTION OF KENYA, 2010, Art. 162(2)(b) (requiring creation of a court with the status of the High Court, to hear cases related to the environment and land).

¹²³ ENVIRONMENT AND LAND COURT ACT, 2011, § 13(2)(a).

¹²⁴ *Id.* at § 13(7)).

NIGERIA

Given the presence of many oil companies in Nigeria, it is worthwhile to consider whether any aspects of the Nigerian legal system would open doors to bringing a climate impact case.

Constitution

In a promising case, the Benin Division of the High Court of Nigeria found that Shell Petroleum Development Company Nigeria Ltd. violated the Iwherekan community's constitutional right to live in a healthy environment. In *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria*,¹²⁵ the applicant, representing the community, complained that Shell and a Nigerian state oil company were violating the community's right to life and their right to live in dignity by flaring gas during oil production. The Court held that constitutionally guaranteed rights to life and dignity "inevitably includes the right to clean, poison-free, pollution-free healthy environment."¹²⁶ Without discussing whether it was appropriate to enforce a fundamental right against a private corporation, the Court found that both Shell and the state-owned corporation violated the applicant's "fundamental right to life (including healthy environment) and dignity of human person as enshrined in the Constitution" by flaring gas.¹²⁷ In this case, the two companies were acting together, which probably influenced the Court to find both companies violated the applicant's fundamental rights (applying the state actor test rather than applying fundamental rights horizontally).

Fundamental Rights (Enforcement Procedure) Rules

A case to enforce fundamental rights in Nigeria may be brought under the Fundamental Rights (Enforcement Procedure) Rules of 2009 (FREP Rules).¹²⁸ The FREP Rules grant "any person" the right to bring a case alleging a violation of fundamental rights.¹²⁹ The Preamble to the FREP Rules encourages broad standing and asserts that courts cannot dismiss human rights cases for lack of standing:

The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental

¹²⁵ *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria*, Federal High Court of Nigeria Benin Division, Suit No. FHC/B/CS/53/05 1, 29 (2005), available at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf>.

¹²⁶ *Id.* at 29.

¹²⁷ *Id.*

¹²⁸ FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES OF 2009 (2009 FREP Rules), available at <http://accesstojustice-ng.org/2009%20FREP%20RULES.pdf>.

¹²⁹ *Id.* at Order II, § 1.

organisations, may institute human rights application on behalf of any potential applicant.¹³⁰

In addition, the FREP Rules ensure that fundamental rights cases “shall not be affected by any limitation Statute whatsoever.”¹³¹

If a Nigerian court has jurisdiction to enforce fundamental rights against private corporations, the FREP Rules include provisions that could help applicants address the potential legal barriers of standing and statute of limitations. However, experience with the *Gbemre* case shows that it may be difficult to enforce a decision against an oil company in Nigeria.

¹³⁰ *Id.* at Preamble, § 3(e).

¹³¹ *Id.* at Order III, § 1.

Complementary Strategies

Two types of actions that would complement a case filed under some of the laws or constitutions identified above are worth noting – filing a case in a European Union Member State and using a U.S. discovery law applicable to foreign litigants to obtain evidence to support their foreign case.

Europe – Filing Under the Brussels Regulation

Communities impacted by greenhouse gas emissions traceable to a company domiciled in a European Union Member State could choose to file a case in a court of that EU country. Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“Brussels Regulation”) allows foreign nationals to bring such a claim to the court of an EU Member State regardless of where the events leading to the claim took place.¹³²

The Brussels Regulation declares that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”¹³³ A company or other legal person is domiciled where it has its “(a) statutory seat, or (b) central administration, or (c) principal place of business.”¹³⁴

A recent decision from the Netherlands demonstrates that cases filed under the Brussels Regulation could offer a path to climate justice. In *Oruma v. Royal Dutch Shell*,¹³⁵ Nigerians filed a case in the District Court of The Hague against Royal Dutch Shell (“Shell”) and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria, Ltd. (“Shell-Nigeria”) for damages arising from an oil spill in Nigeria. The plaintiffs asked the Court to find the two companies jointly and severally liable for tortious conduct.¹³⁶ The plaintiffs argued, “As ‘operator’ of the oil pipeline, [Shell-Nigeria] is liable to pay compensation to [the plaintiffs]. [Shell-Nigeria] breached its duty to exercise due care because it failed to prevent the oil spill, commenced the clean-up too late and conducted an incomplete clean-up. In addition to [Shell-Nigeria], [Shell] is jointly and severally liable to pay [the plaintiffs] compensation. As [Shell-Nigeria’s] parent company, [Shell] should have exercised its influence on and control over [Shell-Nigeria’s] (environmental) policy to prevent [Shell-Nigeria] from

¹³² COUNCIL REGULATION (EC) NO. 44/2001 OF 22 DECEMBER 2000 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (as amended), available at http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133054_en.htm.

¹³³ *Id.* at art. 4(1).

¹³⁴ *Id.* at art. 60(1).

¹³⁵ *Oruma v. Royal Dutch Shell*, 330891/HA ZA 09-579, judgment in motion contesting jurisdiction of 30 December 2009, unofficial English translation available at <https://milieudefensie.nl/publicaties/bezwaren-uitspraken/judgment-courtcase-shell-in-jurisdiction-motion-oruma>

¹³⁶ *Id.* at § 2.1(I).

inflicting the damage at issue on people and the environment to the extent possible. According to [the plaintiffs], [Shell] breached this duty to exercise due care.”¹³⁷

The Court accepted that it had jurisdiction over claims related to Shell under the Brussels Regulation because Shell is domiciled in the Netherlands.¹³⁸

Shell-Nigeria argued that the Court did not have jurisdiction over claims against it. Shell-Nigeria argued additionally that the plaintiffs abused “procedural law by initiating claims against [Shell] on a patently inadequate basis for the sole purpose of creating jurisdiction with regard to [Shell-Nigeria]”¹³⁹

Because Shell-Nigeria is not domiciled in an EU Member State, whether the Dutch court has jurisdiction over the company is governed by Dutch law, which states:

In the event that the Dutch court has jurisdiction over one of the defendants in matters that must be initiated by a writ of summons, the Dutch court also has jurisdiction over other defendants involved in the same proceedings, provided the claims against the various defendants are connected to such an extent that reasons of efficiency justify a joint hearing.¹⁴⁰

In considering whether the claims were connected to such an extent to justify a joint hearing, the Court noted, that the case alleged the two companies were

liable for the same damage, which also follows from the claim for a joint and several order for [Shell] and [Shell-Nigeria]. This means that the same complex of facts in Nigeria must be assessed in respect of the claims against both [Shell] and [Shell-Nigeria]. The court finds that this fact alone demonstrates a connection to such an extent that reasons of efficiency justify a joint hearing of the claims against [Shell] and [Shell-Nigeria]. That all or part of these facts and circumstances did not occur in the Netherlands is not exceptional in Dutch case law and does not lead to a different opinion on sufficient connection and efficiency¹⁴¹

In addressing the complaint that the plaintiffs filed a case against Shell only to gain jurisdiction over Shell-Nigeria, the Court explained that “abuse of procedural law can only be assumed very rarely, in particular if a claim is based on facts and circumstances which the plaintiffs knew or should have known were (obviously) incorrect or based on arguments which the plaintiffs should have realized

¹³⁷ *Id.* at § 2.2.

¹³⁸ *Id.* at § 3.1 (noting that jurisdiction over Shell was not disputed by the parties).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at § 3.4 (citing Dutch Code of Civil Procedure, § 7(1)).

¹⁴¹ *Id.* at § 3.6.

beforehand had no chance of success (whatsoever) and thus were completely unsound”¹⁴² The Court found there was no abuse of procedural law because the plaintiffs’ arguments were not unsound given that “the corporate veil in group relationships may be directly or indirectly pierced, albeit under exceptional circumstances.”¹⁴³

The Court found that it had jurisdiction over both Shell and Shell-Nigeria.¹⁴⁴

In a later proceeding, the Court consolidated the case with a related case and addressed the merits.¹⁴⁵ The Court applied Dutch conflict of laws rules and determined that Nigerian substantive law would apply to the allegations that the companies had committed torts injuring the plaintiffs.¹⁴⁶ Based on Nigerian law, the Court dismissed the plaintiffs’ claims.

In a related case, *Akpan v. Royal Dutch Shell*,¹⁴⁷ the District Court of The Hague found Shell-Nigeria had committed a tort and required Shell-Nigeria to compensate the injured Nigerians.¹⁴⁸ The Court found that “under Nigerian law, [Shell-Nigeria] committed a specific tort of negligence against Akpan by insufficiently securing the wellhead of the . . . well prior to the two oil spills in 2006 and 2007. . . and order[ed] [Shell-Nigeria] to compensate Akpan for the damage he suffered as a result”¹⁴⁹

The Brussels Regulation would conceivably allow climate victims to file cases against companies in courts of the EU country where the company is domiciled even if the climate damages occur in another country. In the Netherlands, at least the District Court of The Hague has allowed a case to also be filed against an affiliated corporation if the facts related to both claims are the same. In addition, it may be that the court would apply the substantive law of the country where the damage occurs, making it possible to bring a case in a European country against a company domiciled in Europe (and its affiliated corporations) for climate damages that would be based on strong substantive law from a country where the damages occurred.

¹⁴² *Id.* at § 3.2.

¹⁴³ *Id.* at § 3.3.

¹⁴⁴ *Id.* at § 3.8.

¹⁴⁵ *Oruma v. Royal Dutch Shell*, 330891/HA ZA 09-579, final judgment (30 January 2013), unofficial English translation available at <https://milieudedefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-oguru-vs-shell-oil-spill-goi>.

¹⁴⁶ *Id.* at § 4.9-4.11.

¹⁴⁷ *Akpan v. Royal Dutch Shell/Shell Nigeria*, C/09/337050/HA ZA 0—1580 (30 January 2013), unofficial English translation available at <https://milieudedefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/view>.

¹⁴⁸ *Id.* at § 5.1.

¹⁴⁹ *Id.*

United States – U.S. Discovery in Foreign Proceedings

If a case is filed in a court outside of the United States, U.S. law allows parties to conduct discovery in the United States to obtain testimony, documents or other evidence for use in the foreign proceeding.¹⁵⁰ This discovery law could prove to be an invaluable tool in climate cases. It could, for example, help gain access to documents held by corporations with a presence in the United States that might help support a plaintiff's claim in a developing country.

The law, 28 U.S.C. § 1782, states, in part:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . .¹⁵¹

In *Intel Corp. v. Advanced Micro Devices*,¹⁵² the U.S. Supreme Court held that district court judges have broad discretion in determining whether to grant a section 1782 request, subject to statutory requirements and prudential guidelines.¹⁵³ Information that may be obtained under a section 1782 discovery request must be non-privileged information that is relevant to a party's claim or defense, as required under Rule 26 of the Federal Rules of Civil Procedure.

Section 1782 discovery requests have proven powerful in other cases and are likely to be very helpful in any climate damages case filed against a multinational corporation in a court outside the U.S.

¹⁵⁰ 28 U.S.C. § 1782(a).

¹⁵¹ 28 U.S.C. § 1782(a).

¹⁵² *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), available at <http://www.law.cornell.edu/supct/html/02-572.ZO.html>.

¹⁵³ *Id.* at 264.

Apportioning Liability

Defendants in climate change cases are likely to argue that the challenge of apportioning liability should protect them from liability. In evaluating legal theories that would support a strong climate damages case, we looked for laws or cases that allow a court to hold an individual company responsible for climate damage, regardless of its level of contribution. A court might determine that the compensation owed is equivalent to a defendant's contribution to overall greenhouse gas emissions — which may be only a small fraction of overall contributions — but even that could be a good starting point for climate damages litigation.

Courts must be willing to determine they have the authority to hold an individual corporation responsible for at least its share of greenhouse gas emissions in order for communities to obtain climate justice. Laws that hold polluters responsible for their individual share of damage (regardless of whether a polluter's share is 1% or 90%) will be important. It may be difficult to find a court in any developing country with jurisdiction over significant numbers of greenhouse gas emitters. Requiring victims to file cases against large numbers of polluters could create a situation where those most severely affected, and arguably the least responsible, bear the burden and the cost of damages with no possibility of redress.

Some of the laws and judicial doctrines identified in our research raise a strong prospect that one entity may be held accountable even if it was not the sole contributor to the damages.

The evolution of tort law in the U.S. to hold responsible parties liable should encourage courts elsewhere to adapt existing jurisprudence to address injustices. Courts have demonstrated that they can be creative in finding ways to appropriately remedy a legal wrong. The federal court for the Southern District of New York recognized:

[F]rom time to time courts have fashioned new approaches in order to permit plaintiffs to pursue a recovery when the facts and circumstances of their actions raised unforeseen barriers to relief.¹⁵⁴

The court made that statement as it modified the principle of market share liability to address a new factual situation.¹⁵⁵ Market share liability is commonly applied in product liability cases, in instances where it is difficult to establish a causal link to a

¹⁵⁴ *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 377 (S.D.N.Y. 2005).

¹⁵⁵ In a market share approach to apportioning damages, each defendant is liable for the plaintiff's harm proportional to the defendant's economic share of the market. *W. PAGE KEETON ET AL, PROSSER AND KEETON ON TORTS* § 103 (5th ed. 1984).

single defendant, but “identification of the exact defendant whose product injured the plaintiff is . . . generally required.”¹⁵⁶

In *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*,¹⁵⁷ municipalities and water providers alleged that their water supplies were contaminated with a gasoline additive, MTBE. The *MTBE* court analyzed application of market share liability to the case. The court recognized, as noted above, that it needed to fashion a new approach to address MTBE contamination because several factors necessary to apply traditional market share liability were not present. The *MTBE* court then applied its own version of market share liability called the “commingled product theory:”

When a plaintiff can prove that certain gaseous or liquid products . . . of many suppliers were present in a completely commingled or blended state at the time and place that the risk of harm occurred, and the commingled product caused a single indivisible injury, then each of the products should be deemed to have caused the harm Thus, if a defendant’s indistinct product was present in the area of contamination and was commingled with the products of other suppliers, all of the suppliers can be held liable for any harm arising from an incident of contamination.¹⁵⁸

The development of the commingled product theory should illustrate to courts that they have the authority to fashion new approaches to obtain justice in the face of new wrongs. As new forms of injustice emerge over time, courts develop new approaches to secure justice. Climate change is a new, unique injustice and it will require a new approach to prevent and remedy it.

¹⁵⁶ *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1073 (N.Y. 1989).

¹⁵⁷ *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 379 F. Supp. 2d 348 (S.D.N.Y. 2005)

¹⁵⁸ *Id.* at 377-378.

Conclusion

The damage that humans are doing to the global climate may be one of the gravest injustices of all time. Some people are profiting enormously from damaging the climate, while others will bear the costs of that climate damage. Many who will suffer the most are contributing almost nothing to the damage. The fundamental purpose of legal systems and courts is to prevent and remedy injustices, and we appreciate this opportunity to mobilize courts to prevent and remedy this grave injustice. We hope that this report will help continue the dialogue about how communities can address climate injustices and we look forward to hearing about other hopeful paths forward.