

Climate Justice: Protecting the Rights to Life and Health of Marginalized Rural Communities in
Canada and Nigeria

by

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ABSTRACT

This study examines the negative impacts of climate change on the rights to life and health of marginalized communities by using as cases studies, rural Niger-Delta and Indigenous communities in oil producing areas of Nigeria and Canada. The case studies reveal that marginalization and inequality limits the enjoyment of the rights to life and health. The study further examines the adequacy of the legal framework in protecting and enforcing these rights in both jurisdictions, and alternatively under regional and international human rights systems. It argues that the rights of both groups are not adequately protected in both jurisdictions as they are marginalized in comparison with the rest of the population. Consequently, climate change will inevitably exacerbate their plight and further violate these rights. The thesis proposes ways of protecting these rights as well as seeking remedies for the infringements of the rights. The thesis comprises six chapters. Chapter 1 provides the context to the thesis through the introduction. Chapter 2 presents the literature review of the thesis. Chapter 3 examines the rights to life and health. Chapter 4 analyzes Nigeria as a case study by looking at the impacts of climate change on rights to life and health of the marginalized Niger Delta group in rural communities in Nigeria. Similarly, Chapter 5 uses Canada as a case study by assessing the First Nations in the Treaty 8 territory and how their rights to life and health will be adversely affected by climate change. Chapter 6 proposes ways of protecting the enumerated rights as well as obtaining redress for the infringement of the rights and concludes the thesis.

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List of Abbreviations

BHCPF - Basic Health Care Provision Fund

CCIA - Climate Change Impact Assessment

CFRN - Constitution of the Federal Republic of Nigeria

EIA - Environmental Impact Assessment

ESC - Economic, Social and Cultural

FNIHB - First Nations Inuit Health Branch

GHG - Greenhouse Gases

HRC - Human Rights Committee

IACHR - Inter-American Commission on Human Rights

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

IPCC - Intergovernmental Panel on Climate Change

NIHB - Non-Insured Health Benefits

NDC - Nationally Determined Contributions

OAS - Organization of American States

SDG - Sustainable Development Goals

UDHR - Universal Declaration of Human Rights

UHC- Universal Health Coverage

UN - United Nations

UNDRIP - United Nations Declaration on the Rights of Indigenous Peoples

UNFCCC - United Nations Framework Convention on Climate Change

WHO - World Health Organization

Chapter 1: Introduction

1.1 Background to the Study

Climate change is both a globally significant and defining event of this era.¹ Its adverse effects manifest in varying degrees in the Northern and Southern Hemispheres. The Intergovernmental Panel on Climate Change (IPCC) states with high confidence that without a substantial and immediate reduction in the rate of greenhouse gases (GHG) emissions, there will be a further increase in temperature with dire consequences.² The immediate and potential effects of climate change on both nations and their populace are quite extensive ranging from social, political, economic to environmental outcomes. A critical consequence of climate change is the infringement of several human rights.³

Climate change threatens several human rights including the rights to life, health, food and water due to loss of lives, diseases and effects on the eco-system.⁴ Although it is difficult to trace a distinct connection between a state's contribution to GHG emissions and its effect on

¹ *Climate Change 'Defining Issue of Our Era,' Says Ban Ki-Moon, Hailing G8 Action* (8 June 2007), (last visited 17 October 2019) online: *UN News* <news.un.org/en/story/2007/06/221622-climate-change-defining-issue-our-era-says-ban-ki-moon-hailing-g8-action>).

² The dire consequences will be particularly onerous for Indigenous populations and local communities' dependent on agriculture and coastal livelihoods, arctic ecosystems and human health. See IPCC, *2018: Summary for Policymakers Special Report* (Switzerland: Intergovernmental Panel on Climate Change, 2018) pp SPM 11 (B5.1, B5.2) 11 [IPCC 2018].

³ Svitlana Kravchenko, "Right to Carbon or Right to Life: Human rights Approaches to Climate Change" (2008) 9:3 *Vermont Journal of Environmental Law* 513 at 523.

⁴ David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human rights and the Environment* (Vancouver: The University of British Columbia Press, 2012) at 10; Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights A/HRC/10/61, 15 January 2009, 8-13.

human rights,⁵ a state may infringe on these rights enumerated under several human rights instruments including the *International Covenant of Civil and Political Rights (ICCPR)*,⁶ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁷ when the State Party fails to comply with its treaty obligations to protect its residents.⁸

Climate change is significantly detrimental to vulnerable people who are highly dependent on the environment for their survival.⁹ These vulnerable people, who are often poor people in developed and developing countries, suffer disproportionately from the consequences of climate change despite their nominal contributions to GHG emissions.¹⁰ Rural communities exemplify such vulnerable people and can be classified as casualties of climate change. They greatly depend on natural resources, the environment and agriculture.¹¹ Rural communities can

⁵ John Knox, *Human Rights Principles and Climate Change* in Kevin R. Gray, Richard Tarasofsky, and Cinnamon Carlame eds *The Oxford Handbook of International Climate Change Law* (2015); Wake Forest Univ. Legal Studies Paper No. 2523599 (9 July 2014) (last visited 12 August 2019) <ssrn.com/abstract=2523599> 8.

⁶ *International Covenant on Civil and Political Rights* 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

⁷ *International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force on 3 January 1976.*

⁸ For instance, the *General Comment 36* by the United Nations Human Rights Committee (UNHRC) which expands on the right to life in article 6(1) states in paragraph 62 that State Parties must comply with their obligations in International environmental law on climate change to preserve the life of present and future generations, and requires State Parties to take positive measures to protect the right to life in paragraph 26. Also see John Knox, *Human Rights Principles and Climate Change* in Kevin R. Gray, Richard Tarasofsky, and Cinnamon Carlame eds *The Oxford Handbook of International Climate Change Law* (2015); Wake Forest Univ. Legal Studies Paper No. 2523599 (9 July 2014) (last visited 12 August 2019) <ssrn.com/abstract=2523599> 8-9, 10.

⁹ The United Nations Environmental Programme (UNEP), *Adaptation Report 2018* defines vulnerability as “the propensity or predisposition to be adversely affected by climate impacts.” See UNEP: *The Adaptation Gap Report* (Nairobi, Kenya: United Nations Environmental Programme, 2018) vii [UNEP Adaptation Report].

¹⁰ David Monsma, “Equal Rights, Governance and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility” (2006) 33 *Ecology Law Quarterly* 443 at 489; Lindsay F. Wiley, “Healthy Planet, Healthy People: Integrating Global Health into the International Response to Climate Change” (2009) 24 *J. Envtl. L & Litig.* 206.

¹¹ IPCC, 2014: Summary for Policymakers. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Field, C.B., V.R. Barros, D.J. Dokken, K.J. Mach, M.D. Mastrandrea, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)] (Cambridge, United Kingdom and New York, NY, USA: Cambridge University Press, 2014) at 618 [IPCC 2014].

further be described as marginalized because of their isolation and neglect by policy-makers, lower levels of education, minimal access to information, and decision making processes.¹² Within rural communities exist groups which may be further marginalized and thus, more susceptible to the effects of climate change. This thesis examines the people of the Niger Delta region and First Nations in the rural communities of Southern Nigeria and the Treaty 8 territory of Alberta, Canada respectively who exemplify marginalized groups comprising subsistence fishermen, hunters, trappers and farmers¹³ that are particularly vulnerable to climate change. They greatly depend on natural resources, the environment and agriculture and can be deemed as one of the most climate-related vulnerable groups with their rights to life and health threatened by climate change.¹⁴

This study compares marginalized rural populations of the Niger Delta region and the Treaty 8 territory. They are appropriate candidates for discussion owing to similar proximate industrial challenges, living in countries with Common Law legal systems and written constitutions, and on-going struggles with exercising their guaranteed rights to life and health. It is hoped that this comparative study will provide prompts to state, legislative, and litigation actions to create positive change for the people studied and the broader global community. Also, the First Nations of the Treaty 8 territory is compared with the Sami of Norway particularly with respect to their health status.

¹² *Ibid.*

¹³ David Aworawo, “Deprivation and Resistance: Environmental Crisis, Political Action, and Conflict Resolution in the Niger Delta since the 1980s” (2013) *Journal of International and Global Studies* 57; Melina Laboucarn-Massimo, “Awaiting Justice: The Ceaseless Struggle of the Lubicon Cree” in Toban Black et al eds, *A Line in the Tar Sands: Struggles for Environmental Justice* (Canada, USA: Between the Lines and PM Press, 2014) 113.

¹⁴ *The Convention on the Elimination of All Forms of Violence Against Women* GA Res 34/180, UN GAOR, 1979, UN Doc. A/RES/34/180 Entered into force 3 September 1981, in article (1) recognized the vulnerable status of rural women.

The status of the subjects of the thesis as ethnic minorities¹⁵ further reinforces their marginalized status and the inequalities they experience. For instance, they reside in oil-producing regions and despite the economic benefits accruing to their states and provinces from oil extraction activities in these regions; some of the marginalized groups are sidelined from the economic benefits and experience the detrimental effects of oil activities which affects their subsistence lifestyles.¹⁶ However, some of the groups in the Treaty 8 territory benefit from the oil sector while First Nations also hold diverse views on oil exploitation activities and its impacts.¹⁷ Although the subjects of the study are located in different geographical locations and climates, the effects of a changing climate on their lives and health are similar in the two jurisdictions. In the predominantly coastal Niger Delta region of Nigeria, sea level rise is envisaged to cause erosion and increased flooding resulting in deaths, physical

¹⁵ Indigenous peoples in Canada are recognized as ethnic minorities under article 27 of the *International Covenant on Civil and Political Rights*. This has been upheld in *Communication No. 24/1977 Sandra Lovelace v. Canada* CCPR/C/13/D/24/1977, *Communication No. 24/1977 Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* CCPR/C/38/D/167/1984; Charles Quaker-Dokubo, “Ethnic Minority Problems in the Niger Delta” (25 June 2000) (last visited 7 August 2019) online: *Accord* <www.accord.org.za/ajcr-issues/ethnic-minority-problems-in-the-niger-delta/>.

¹⁶ Melissa A. Jamison, “Rural Electric Cooperatives: A Model for Indigenous Peoples’ Permanent Sovereignty Over their Natural Resources” (2005) 12 *Tulsa J. Comp. & Int’l L.* 407-408; Melina Laboucan-Massimo, “Awaiting Justice: The Ceaseless Struggle of the Lubicon Cree” in Toban Black et al, *supra* note 13 at 115-117; Josephine Adekola et al, “Health Risks from Environmental Degradation in the Niger Delta, Nigeria” (2017) 35:2 *Environmental and Planning C: Politics and Space*.

¹⁷ Tuccaro, “Our Story” (last visited 23 December 2019) online: *Tuccaro* <<http://www.tuccaro.com/our-story/>>; Shawn McCarthy, “Where Oil and Water Mix” (6 November 2019) (last visited 24 December 2019) online: *The Globe and Mail* <<https://www.theglobeandmail.com/news/alberta/where-oil-and-water-mix-oil-sands-development-leaves-fort-mckays-indigenous-communitytorn/article27151333/>>; Katie Dancie-Downs, “The Indigenous Climate Action Women Fighting for Mother Earth” (21 February 2018) (last visited 24 December 2019) online: *Ecology* <<https://theecologist.org/2018/feb/21/indigenous-climate-action-women-fighting-mother-earth-katiedancey-lushtimesen/>>; The Guardian, “Canada's Tar Sands Aren't Just Oil Fields. They're Sacred Lands for My People: Eriel Tchekwie Deranger” (23 June 2015) (last visited 24 December 2019) online: *The Guardian* <<https://www.theguardian.com/commentisfree/2015/jun/23/canadas-tar-sands-oil-fields-sacred-lands>>; Heather Yourex-West, “Western Canadian First Nations Groups Making Progress in Bid to Purchase TMX” (22 May 2019) (last visited 24 December 2019) online: *Intricate* <<https://www.intricategroup.com/western-canadian-first-nations-groups-making-progress-in-bid-to-purchase-tmx/>>; Iron Coalition, “About” (last visited 24 December 2019) online: *Iron Coalition* <<https://ironcoalition.com/>>.

injuries and a high risk of diseases like cholera, typhoid and malaria.¹⁸ Fishing as well as farming activities, will be affected thereby causing a decline in livelihoods, occupational change or modification, and malnutrition.¹⁹ Inevitably, sea level rise may also require relocation to safer areas. In Canada, climate change is expected to cause more wildfires in Alberta specifically in the Treaty 8 territory and a reduction in freshwater leading to severe ecological consequences, including rapid loss of aquatic habitat is envisaged.²⁰ This could result in injuries, loss of lives, homes, ancestral lands, and permanent relocation. Moreover, it could trigger the loss of animal and plant species, and cause food-insecurity and inevitably malnutrition.²¹

In both jurisdictions, the changing climate will impinge on lives, and affect mental and physical health. Consequently, climate change will impair the rights to life and health listed in the *ICCPR* and *ICESCR* which are ratified by both State Parties.²² However, the countries face

¹⁸ Emmanuel Oladipo, “Towards Enhancing the Adaptive Capacity of Nigeria: A Review of the Country’s State of Preparedness for Climate Change Adaptation” (Heinrich Boll Foundation Nigeria) (September 2010) (last visited 7 August 2019) online: *Heinrich Boll Stiftung Nigeria* <www.google.com/url?sa=t&source=web&rct=j&url=https://ng.boell.org/sites/default/files/uploads/2013/10/nigeria_pr_of_oladipo_final_cga_study.pdf&ved=2ahUKEwj0geaHjAhW_HTQIHbTwAVUQFjAAegQIBhAC&usg=AOvVaw2v472espYMTsStCFfBB3ZA> 10, 38-39; Emeka Ndimele, *The Political Ecology of Oil and Gas Activities in the Nigerian Aquatic Ecosystem* (United Kingdom: Academic Press, Kindle Edition, 2018) location 8258, 8262 of 13486; Randall S. Abate and Elizabeth Ann Kronk, “Commonality among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples” in Randall S. Abate and Elizabeth Ann Kronk eds, *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Cheltenham, UK: Edward Elgar Publishing, 2013) at 17; Anthony Costello et al, “Managing the Health Effects of Climate Change” (2009) 373 *the Lancet* 1706; A Watkins et al, “Alma Ata at 40 Years: Reflections from the Lancet Commission on Investing in Health” (2018) 392 *the Lancet* 1439

¹⁹ Marie-Caroline Badjeck et al, “Impact of Climate Variability and Change on Fishery-Based Livelihoods” (2009) *Marine Policy*, DOI:10.1016/j.marpol.2009.08.007 at 1-4.

²⁰ Canada’s Changing Climate Report, *supra* note 320 at 117, 181, 281, 283, 305 and 306.

²¹ Julie L. Drolet & Tiffany Sampson, “Addressing Climate Change from A Social Development Approach: Small cities and Rural Communities Adaptation and Response to Climate Change in British Columbia” (2017) 60:1 *International Social Work* 61 at 67; Costello, *supra* note 18 at 1706.

²² United Nations Treaty Collection, “Human Rights: International Covenant on Civil and Political Rights” (last modified 14 August 2019) (last visited 14 August 2019) online: *United Nations* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_e>; United Nations Treaty Collection, “Human Rights: International Covenant on Economic, Social and Cultural Rights” (last modified 14

a dual challenge of deficient health as well as obtaining redress for the infringement of the rights by climate change under domestic law. Currently in Nigeria, the right to life is interpreted as a negative obligation while the right to health is non-justiciable, therefore aggrieved parties may find it difficult to obtain a remedy for the infringement of their rights under climate change conditions.²³ Similarly in Canada, parties have been unsuccessful in climate change litigation.²⁴

The Human Rights Committee (HRC) of the *ICCPR* in its recent *General Comment No. 36* elucidated the right to life and its limitation by climate change.²⁵ This interpretation requires State Parties to comply with their obligations under international environmental law to respect the right to life. Consequently, this presents a means of obtaining redress for the infringement of rights as illustrated in the recent claim instituted by the Torres Strait Islanders against Australia.²⁶ Both jurisdictions have ratified several international agreements on climate change such as the *United Nations Framework Convention on Climate Change (UNFCCC)*,²⁷ the

August 2019) (last visited 14 August 2019) online: *United Nations* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=en>

²³ The only act which explicitly refers to climate change is the *National Environmental Standards and Regulations Enforcement (Establishment) Agency Act 2007 (NESREA)*.

²⁴ See for example, *Turp v. Canada (Attorney General)*, *Federal Court of Canada [2012] FC 893, T-110-12*; *Friends of the Earth v. The Governor in Council et al [2008] 3 F.C.R. 201*; *ENvironment JEUnesse v. Attorney General of Canada 500-06*.

²⁵ OHCHR, Human Rights Committee: General Committee No. 36 on Article 6 of the International Covenant on Civil and Political Rights - Right to Life (last visited 13 August 2019) <www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>.

²⁶ Katharine Murphy, “Torres Strait Islanders Take Climate Change Complaint to the United Nations” (12 May 2019) (last visited 13 August 2019) online: *The Guardian* <www.google.com/amp/s/amp.theguardian.com/australia-news/2019/may/13/torres-strait-islanders-take-climate-change-complaint-to-the-united-nations>.

²⁷ United Nations Treaty Collection, “Environment: United Nations Framework Convention on Climate Change” (last amended 5 October 2019) (last visited 5 October 2019) online: *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en>.

*Kyoto Protocol*²⁸ and the *Paris Agreement*²⁹ with corresponding commitments under their Nationally Determined Contributions (NDCs);³⁰ and therefore can institute actions to obtain remedies based on the *General Comment*.

Conversely, instituting claims for the right to health may pose a challenge because of the non-justiciability of the right to health in both jurisdictions. To resolve this challenge, legal redress may be obtained for inadequate health care in Canada by framing it under the right to life.³¹ Redress may be obtained in Nigeria through regional human rights treaty bodies as illustrated in the case of *[t]he Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria (SERAC v. Nigeria)*.³²

1.2 Central Thesis

The thesis of this study argues that Nigeria and Canada have not adequately protected the rights to life and health of marginalized Niger Delta and Indigenous peoples in rural communities negatively impacted by oil and gas explorations in comparison with the rest of the population in both jurisdictions. Residents of these marginalized rural communities are typically subsistence farmers, fishermen, trappers and hunters whose lives and health will be negatively impacted by climate change. The study also examines the role of the underlying

²⁸ United Nations Treaty Collection, “Environment: Kyoto Protocol to the United Nations Framework Convention on Climate Change” (last amended 5 October 2019) (last visited 5 October 2019) online: *United Nations Treaty Collection* <treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en>. Canada withdrew from the Kyoto Protocol effectively on 15 December 2012.

²⁹ United Nations Treaty Collection, “Environment: Paris Agreement” (last amended 5 October 2019) (last visited 5 October 2019) online: *United Nations Treaty Collection* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en>.

³⁰ UNFCCC, Nationally Determined Contributions (NDCs): The Paris Agreement and NDCs (last visited 12 July 2019) online: *UNFCCC* <unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs>.

³¹ See *Communication No. 2348/2014 Neil Touissant v. Canada*.

³² *Communication 155/96, Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (2001) AHRLR [SERAC v. Nigeria].

determinants of health in improving and preserving health. With the perspective that climate change exacerbates existing situations, the thesis further argues that there may be a health crisis in a changing climate if the existing deficient health care systems for these groups are not improved thereby endangering the lives and health of numerous people and infringing on their rights. As the rights to life and health under climate change may be non-justiciable in both jurisdictions, this thesis also proposes utilizing international environmental law and international human rights law substantively and procedurally to protect as well as obtain remedies for the infringement of the rights to life and health.

1.3 Research Questions

The study attempts to answer the following questions:

1. How will climate change define, impact on or exacerbate the rights to life and health of marginalized Niger Delta and Indigenous minorities in oil-producing rural communities in the Niger Delta region of Nigeria and the Treaty 8 territory of Canada?
2. What are the current gaps in the Nigerian and Canadian legal and policy framework in guaranteeing the rights to life and health of these marginalized groups in rural communities particularly under climate change conditions?
3. What are the factors responsible for the limitations of the legal and policy framework?
4. What changes can be incorporated to the Canadian and Nigerian legal and policy framework from other jurisdictions?

The answers to these questions are essential because of the current challenge in international and domestic law in protecting human rights and obtaining redress for the infringement of rights under the climate change regime. The *UNFCCC*, *Kyoto Protocol* and *Paris Agreement* which are major

international agreements on climate change do not explicitly stipulate the protection of human rights neither does it provide for a means of obtaining redress for violation of human rights.

1.4 Theoretical Framework and Research Methodology

The predominant theory employed in this thesis is that of marginalized people in oil and gas producing regions who suffer disproportionately from the effects of climate change without benefitting from the industries in certain cases and have inadequate access to or protection by their legal systems. This theory is influenced by the idea of justice particularly justice as fairness propounded by John Rawls.³³ Rawls's justice as fairness aims to inspire a just society as well as to ensure justice and equality for the most disadvantaged in the society and aligns with the argument in this thesis to protect the rights of marginalized population in rural communities from the negative impacts of climate change to which they made nominal contributions.³⁴ Furthermore, the theory resonates with the inequalities inherent in climate change resulting in climate injustice. Justice as fairness recognizes that to ensure equality, parties under a veil of ignorance without knowledge of their place in society, class position, social status or the generation they belong to would accept two basic principles: ensuring "equality in the assignment of basic rights and duties," and "social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society."³⁵ The first principle correlates with ensuring that everyone including the marginalized people have comparable access to health care particularly during climate change. The second principle relates to climate injustice for the marginalized people who have experienced economic

³³ John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press 1999) 10-11.

³⁴ *Ibid* at 13.

³⁵ *Ibid*.

inequality through the detrimental effects of oil exploration activities depriving them of their subsistence livelihood and may once more be economically and socially disadvantaged by climate change.

Due to the interdisciplinary nature of the thesis, it adopts the doctrinal research methodology to analyze relevant laws and jurisprudence as well as the non-doctrinal research approach otherwise known as socio-legal research approach drawing insights from disciplines such as sociology, law, history and science.

Comparative analysis approach was applied to learn and acquire knowledge about the law in a different jurisdiction.³⁶ The research question(s), research interest and socio-economic condition of the subjects of the research constitute the basis for the choice of jurisdictions.³⁷ Furthermore, both marginalized populations share certain similarities making them appropriate for jurisdictional comparison. The First Nations of the Treaty 8 territory, Canada is also compared with the Sami of Norway.

This thesis was completed based on library research using primary and secondary sources. Primary sources comprised international and domestic laws as well as jurisprudence from international treaty bodies, regional treaty bodies and domestic courts. Secondary sources such as academic articles, books, media articles and internet sources were also relied upon.

1.5 Structure of Thesis

³⁶ H. Patrick Glenn, *Aims of Comparative Law* in Jan M Smits eds. *Elgar Encyclopaedia of Comparative Law* (Cheltenham, United Kingdom: Edward Elgar Publishing, 2006) 58-59; Eberle, Edward J. "The Methodology of Comparative Law" (2011) 16:1 *Roger Williams University Law Review* 56-57.

³⁷ Mark Van Hoecke, "Methodology of Comparative Legal Research" (2015) 12 *Law and Method*, DOI: 10.5553/REM/.000010 at 5-7.

Chapter 1 introduces the thesis with a background statement providing the context. It subsequently sets out the central thesis, research questions, theoretical framework and research methodology, structure and limitation of the thesis.

Chapter 2 presents the literature review of the thesis on climate change, climate justice, rural people, and human rights.

Chapter 3 explores the rights to life and health and their enforceability particularly under climate change conditions.

Chapter 4 looks at Nigeria as a case study by examining the marginalized Niger Delta group in rural communities. It further examines climate change in Nigeria, and subsequently the rights to life and health in Nigeria. It argues that the Niger Delta peoples are marginalized and their right to health is inadequately protected both with respect to health care and the underlying determinants of health. Thereafter, it notes the effect of climate change on the people of Niger Delta in rural communities, its consequence on the rights to life and health in view of their occupation as subsistence farmers and fishermen, and argues that based on the existing poor health status of the people, their rights to life and health will be contravened by Nigeria in climate change conditions.

Chapter 5 considers Canada as a case study. It commences with a synopsis of Canada and climate change in Canada. It thereafter assesses Indigenous peoples in Canada specifically in the light of their marginalized status. The chapter also examines the rights to life and health in Canada and argues that Indigenous peoples are discriminated against when compared with the non-Indigenous population in the provision of health care and the underlying determinants of health. Thereafter, it notes the importance of the determinants of health to Indigenous peoples. The chapter ends by analyzing the proposed impacts of climate change on the rights to life and health of Indigenous peoples and argues that based on the present poor health status and deficient health care

as well as underlying determinants of health of the Indigenous peoples, their rights to life and health will further be infringed upon by Canada due to its government's insufficient climate action.

Chapter 6 proffers recommendations to protect the rights to life and health of the Niger Delta and Indigenous peoples and obtain redress for the infringement of these rights through the international and regional human rights treaty bodies. This chapter also concludes the thesis.

1.6 Limitations

This thesis addresses the rights to life and health of the Niger Delta and Indigenous peoples of Canada and Nigeria. It however does not address the treaty or aboriginal rights of the Indigenous peoples of Canada although it may refer to some rights.

Chapter 2: Literature Review

2.1 Climate Change

Climate change is an environmental issue which differs substantially from other conventional environmental challenges due to its multi-faceted nature stemming from its predominantly anthropogenic basis, consequence on present and future generations, the varied responses to resolve the challenge of global climate change, and diverse international sources and effects.³⁸ The UNFCCC defines climate change as “... a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”³⁹

Scholars such as Rayfuse, Scott and Lazarus assert that climate change exacerbates existing threats,⁴⁰ by making sea level rising more rapid; heat waves, flooding, droughts, fires more severe and frequent.⁴¹ My thesis aligns itself with these scholars based on the increased severity and frequency of wildfires in Alberta and the escalating rate in sea level rise in the Niger Delta region. Brunee and others also claim climate change is quite complex due to its human components.⁴² First,

³⁸ See *UN Framework Convention on Climate Change* (last visited 4 November 2018) online: (pdf) unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf art. 1, para 1 [UNFCCC]; Rosemary Rayfuse and Shirley V. Scott, *International Law in the Era of Climate Change* (Cheltenham, UK: Edward Elgar Publishing Limited, 2012) 3, 10.

³⁹ *United Nations Framework Convention on Climate Change* 1992, 1771 UNTS 107 art. 1(2) [UNFCCC].

⁴⁰ Rosemary Rayfuse and Shirley V. Scott, “Mapping the Impact of Climate Change on International Law” in Rosemary Rayfuse and Shirley V. Scott, *supra* note 38 at 9; Richard J. Lazarus, “Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future” (2009) 94 *Cornell Law Review* 1159-1170.

⁴¹ IPCC 2014, *supra* note 11 at 1-32, 4-8, 14; Rayfuse, *supra* note 38 at 9.

⁴² Jutta Brunnee et al, “Overview of Legal Issues Relevant to Climate Change” in Jutta Brunnee et al, *Climate Change Liability: Transnational Law and Practice* (New York: Cambridge University Press, 2012) at 1, para. 1.01; Hari M. Osofsky and Lesley K. McAllister, *Climate Change Law and Policy* (New York: Wolters Kluwer, 2012) at 1-2, 5; Rayfuse, *supra* note 38 at 3; *The Economist*, “The Great Inaction: Why is Climate Change So Hard to Tackle?” (29 November 2018) (last visited on 10 December 2018). Online: *the economist* <www.economist.com/leaders/2018/11/29/why-is-climate-change-so-hard-to-tackle>.

Lazarus aptly describes climate change as a super wicked problem,⁴³ because it will be more difficult to address as time progresses.⁴⁴ Second, Lazarus posits that states with significant GHG emissions are the appropriate parties to tackle climate change but are not incentivized to reduce their emissions or be held accountable.⁴⁵ Finally, he notes that the absence of a global lawmaking body possessing the jurisdiction and authority to adequately address climate change constitutes a challenge.⁴⁶ Lazarus's observations are accurate as the United States, a significant source of GHG proposes to withdraw from the Paris Agreement.⁴⁷ Also, the IPCC Summary for Policymakers 2018 states that climate change adaptation will be more challenging for ecosystems, food, health systems and vulnerable areas with a temperature increase to 2°C in comparison with an increase to 1.5°C.⁴⁸

Further on the human angle, climate change poses a risk to human health, livelihood, culture, water-supply, food-security, human security and economic growth.⁴⁹ Human health is expected to be negatively affected by climate change particularly if global efforts to limit an increase in temperature to 1.5°C are unsuccessful.⁵⁰ Rayfuse states that extreme temperature will cause a variety

⁴³ Lazarus clarifies a “wicked problem” as a public-policy problem that “defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by an effort to develop a solution” such as AIDS, healthcare and terrorism. See Lazarus, *supra* note 40 at 1159-1160.

⁴⁴ *Ibid*. He also affirms that these states are most probable to experience the least impacts of climate change in the short-term.

⁴⁵ *Ibid* at 1171-1172. Lazarus further states that the central thesis of his article is the necessity for forthcoming executive and legislative branch of the US government to create, maintain and implement flexible and steadfast climate change legislation particularly in the interest and benefit of the future generation. *Ibid* at 1156-1157, 1179-1189, 1193-1231.

⁴⁶ *Ibid* at 1160-1161.

⁴⁷ The United States is a significant contributor to GHG emissions and plans to withdraw from the Paris Agreement. See Michael D. Shear, “Trump Will Withdraw U.S. From Paris Climate Agreement” (1 June 2017), (last visited 15 February 2019) online: *New York Times* <www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

⁴⁸ Lazarus, *supra* note 40 at 1193. The IPCC 2018 Summary for Policymakers states that climate change adaptation will be more challenging for ecosystems, food, health systems and vulnerable areas with a temperature increase to 2°C than 1.5°C; see IPCC 2018, *supra* note 2.

⁴⁹ IPCC 2018, *supra* note 2 at para. 5.

⁵⁰ *Ibid* at para. 5.1.

of negative human health impacts such as malnutrition, water-borne and food-borne diseases.⁵¹ The IPCC also predicts that a shortage in water-supply may also occur with an increase in temperature.⁵² All these will certainly impact on human lives. This thesis agrees with Rayfuse and the IPCC's view and refers to the recent Mozambican cyclone which resulted in flooding, numerous deaths and diseases as an illustration of the impact of climate change on human lives and health while emphasizing the necessity for governments to act to forestall such events by both mitigation and adaptation measures.⁵³

According to the IPCC Summary for Policymakers 2018, disadvantaged and vulnerable populations, some Indigenous peoples, and local communities dependent on agricultural or coastal livelihoods are expected to be at risk of the adverse effects of climate change with a temperature increase of 1.5°C or above.⁵⁴ The nature of climate change is particularly striking because of its disproportionate impact on vulnerable people with minimal contributions to GHG particularly in developing countries who may further be affected by measures taken to mitigate and adapt to it.⁵⁵ Climate change will also intensify pressure on vulnerable communities and limit resources for

⁵¹ Rayfuse, *supra* note 38 at 9.

⁵² IPCC 2018, *supra* note 2 para. 5.4.

⁵³ Cyclone Idai: Cholera cases reported in storm-hit Mozambique (22 March 2019) (last visited 19 April 2019) online: *BBC News* <www.bbc.com/news/world-africa-47674253>; Cyclone-hit Mozambique: Cases of cholera, malaria, typhoid (23 March 2019) (last visited 19 April 2019) online: *Aljazeera* <www.aljazeera.com/news/2019/03/mozambique-cholera-malaria-cases-reported-cyclone-hit-beira-190323060006297.html>; Amy Yee, "Mozambique Looks Beyond Cyclone Idai to Better Protection in the Future" (12 May 2019) (last visited 17 May 2019) online: *The New York Times* <https://www.nytimes.com/2019/05/12/climate/mozambique-climate-change-protection.html?em_pos=small&ref=headline&nl_art=2&te=1&nl=climate-fwd&emc=edit_clim_20190515>

⁵⁴ IPCC 2018, *supra* note 2 para. 5.2.

⁵⁵ Lazarus, *supra* note 40 at 1171. Although vulnerable people exist in both developed and developing countries, they are mostly in developing countries and have limited capacity to adapt in contrast with countries with high GHG emission. See Osofsky, *supra* note 42 at 2; Dale Jamieson, *Adaptation, Mitigation and Justice* in Sinoth-Armstrong et al (eds) *Perspectives on Climate Change: Science, Economy, Politics, Ethics* (United Kingdom: Emerald Book Publishing, 2005) at 227.

mitigation and adaptation.⁵⁶ Lazarus and the IPCC note that vulnerable and disadvantaged communities in all countries will be the primary victims of climate change due to conditions such as poverty, age, gender and minority status.⁵⁷ My thesis builds on these observations and goes further by identifying vulnerable and disadvantaged communities based on their rural locations and minority status.

2.2 Climate Justice

Climate justice essentially seeks to address the inequalities caused or exacerbated by climate change.⁵⁸ Humphreys identifies the most vulnerable people to climate change as “those who already lack resources - who have been on the wrong end of colonialism ... or who have suffered neglect, exclusion or simple rapacity at the hands of their own governments. They are those who have benefitted little or nothing from a carbon-intensive global economy, but who have long suffered its side effects - food price spikes, corruption, resource stripping, and now the ravages of climate change.”⁵⁹ This definition fairly illustrates the marginalized people in this thesis.

Olawuyi observes that climate justice has had different meanings at diverse times.⁶⁰ Climate justice has been interpreted as predominantly conferring responsibility for climate change on developed countries.⁶¹ Climate justice in this sense has evolved from the initial historical

⁵⁶ Siobhan McInerney-Lankford, Mac Darrow and Lavanya Rajamani, “Human Rights and Climate Change: A Review of International Legal Dimensions (Washington DC: The World Bank, 2011) 1.

⁵⁷ Lazarus, *supra* note 40 at 1171; IPCC 2014, *supra* note 11 at 12.

⁵⁸ The *Paris Agreement* also acknowledges the concept of climate justice in its preamble. See *Paris Agreement on Climate Change*, UN Doc. FCCC/CP/2015/L.9/Rev.1 (12 December 2015) Preambular para.7 [*Paris Agreement*].

⁵⁹ Stephen Humphreys, “Climate Justice: The Claim of the Past” (2014) 5 *J. Hum. Rts. & Env’t* 138.

⁶⁰ Damilola Olawuyi, “Advancing Climate Justice in International Law: An Evaluation of the United Nations Human Rights-Based Approach” (2015) 11:1 *Fla. A&M U.L Rev* 105-106.

⁶¹ *Ibid* at 105; Chukwumerije Okereke and Philip Coventry, “Climate Justice and the International Regime: Before, During, and After Paris” (2016) 7 *WIREs Clim Change* 837.

responsibility principle to the common but differentiated responsibility principle, and subsequently to the common but differentiated responsibility and respective capabilities principle.⁶² Olawuyi proceeds that climate justice also conveys the necessity for international law to protect the rights of vulnerable people who bear the disproportionate impacts of climate change.⁶³ He concludes that climate justice has recently been expanded to include projects and policy measures to mitigate climate change but which infringe on human rights because of the exclusion of citizens from projects and inability to obtain redress particularly in developing countries.⁶⁴ This thesis basically focuses on the second interpretation of climate justice as it considers marginalized people who are presently and also envisaged to be disproportionately impacted by climate change with no means of obtaining redress for the infringement of their human rights.

Okereke as well as other scholars' concept of climate justice tilts mainly towards developing countries⁶⁵ while my thesis argues that climate justice equally applies to certain vulnerable groups in both developed and developing countries. Hurlbert declares that climate justice is an offshoot of, and supplementary to environmental justice.⁶⁶ She construes climate justice as encompassing

⁶² Olawuyi, *supra* note 60 at 105-106; Okereke and Coventry, *supra* note 61 at 837. The historical responsibility principle states that developed countries are primarily responsible for climate change because of their previous or historical GHG emissions. The common but differentiated responsibility principle states that all countries have a common responsibility towards tackling climate change but developed countries due to their previous or historical emissions must lead in tackling climate change and assisting developing countries. Developed countries rejected this principle stating that their historical emissions occurred while they were ignorant of the consequences and could only take a leadership position based on their economic and technological advantage.

⁶³ Olawuyi, *supra* note 60 at 105-106

⁶⁴ *Ibid* at 107.

⁶⁵ Okereke and Coventry, *supra* note 61 at 834-851. See also Margot A. Hurlbert, "Evaluating Climate Justice: Attitudes and Opinions of Individual Stakeholders in the United Nations Framework Climate Change Convention Conference of the Parties" (2011) 8:4 *Journal of Integrative Environmental Sciences* 267 [Hurlbert, "Evaluating Climate Justice"].

⁶⁶ Hurlbert, "Evaluating Climate Justice" *supra* note 65 at 269. See also Jennifer Huang, "Climate Justice and the Paris Agreement" (2017) 9 *J. Animal & Env'tl. L.* 25. Environmental justice has been defined as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." See United States Environmental Protection Agency, "Environmental Justice" (last visited 18 October 2019) <www.epa.gov/environmentaljustice>.

distributive justice, legal justice, participatory justice and ethical practice with distributive justice playing a crucial role.⁶⁷ She explains that distributive justice involves the equitable allocation of environmental blessings and burdens, and argues that the reverse is applicable in practice with no means of ensuring fair distribution.⁶⁸ Hurlbert defines legal justice as comprising substantive and procedural justice to protect against climate harms and obtain redress⁶⁹ while participatory justice attempts to solve the failings of distributive justice by ensuring access to information, involvement in decision-making and access to justice to everyone.⁷⁰ She also considers climate justice as an ethical obligation to address the concerns of those most vulnerable to climate change and are often marginalized.⁷¹ This thesis agrees with Hurlbert's definition of climate justice.

Hulbert asserts that to eliminate inequality, the decision-making structure of the UNFCCC adopts climate justice as an ethical practice and considers the concerns of marginalized people or "the neediest" who are specifically vulnerable to climate change, thus enhancing participation.⁷² This thesis however, argues from the perspective of marginalized groups within states, and not from the context of the UNFCCC decision-making structure which is basically accomplished at the state level, and may therefore not fully consider the interest of marginalized groups within the state.

Grear approaches climate justice from the perspective of corporate capitalism.⁷³ She notes the law's complicity with immensely powerful corporations who exert substantial influence on states to

⁶⁷ Hurlbert, "Evaluating Climate Justice", *supra* note 65 at 269-271.

⁶⁸ *Ibid* at 270.

⁶⁹ *Ibid* at 269; Margot Hurlbert, "Climate Justice: A Call for Leadership" (2015) 8:2 Environmental Justice 51-52 [Hurlbert, "Climate Justice"].

⁷⁰ *Ibid*.

⁷¹ *Ibid*.

⁷² *Ibid* at 271.

⁷³ Anna Grear, "Towards 'Climate Justice'? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy" (2014) 5 Journal of Human Rights and the Environment 103-133.

create a legal system for capitalism to thrive makes it difficult to hold corporations accountable for climate justice.⁷⁴ I argue from a different view stating that states are liable under their obligations in international law to protect the rights of their citizens by regulating the GHG emissions of corporations in their jurisdiction to comply with their treaty obligations under international human rights and environmental/climate change law.

Olawuyi proposes that international regimes and national authorities adopt the United Nations Human Rights-Based Approach (UN HRBA) in addressing climate injustice occurring in climate change mitigation and adaptation projects because the UN HRBA incorporates human rights norms and principles into the decision-making process.⁷⁵ The government and project proponents are to ensure participation and inclusion; access to information; non-discrimination and equality; empowerment and accountability; and legality and access to justice (the “PANEL” Principles) for all stages of a climate-related project.⁷⁶ While this thesis does not emphasize applying the UN HRBA approach, it aligns itself with the PANEL principles and its application for protecting the rights to life and health particularly for environmental impact assessments (EIAs) and adapting to climate change conditions. It accentuates this for Nigeria and recognizes that the recently passed Canadian *Impact Assessment Act* possesses these principles for Indigenous peoples as part of their aboriginal/treaty rights under section 35 of the Constitution but not as human rights.⁷⁷

2.3 Rural Communities

⁷⁴ *Ibid* at 104-109.

⁷⁵ Olawuyi, *supra* note 60 at 110-125.

⁷⁶ Olawuyi, *supra* note 60 at 114.

⁷⁷ *Impact Assessment Act*, C 69, section 3 and 6(1) (g). The Act which is fairly recent, does not explicitly refer to human rights and how it will be applied is presently unknown.

The IPCC notes that the word ‘rural’ is difficult to define based on its subjective interpretation, which varies with different countries and organizations.⁷⁸ However, the IPCC and Hallstrom also explain that rural can be broadly construed as the opposite of, or outstanding from urban, and usually denotes open country and small settlements.⁷⁹ Rural communities are situated in both developed and developing countries. They may be isolated, marginalized and excluded from decision-making processes.⁸⁰ Rural populations particularly the rural poor, in remote locations and those with restricted access to land and infrastructure are projected to be disproportionately and negatively affected by climate change impacts of water availability and supply, food security and livelihoods.⁸¹ Rural people are highly susceptible to climate change due to their dependence on land, natural resources and the environment for agriculture, fishing, hunting, tourism and exploitation of natural resources hence they experience climate change in a more direct and immediate manner than their urban counterparts by the loss of jobs, rural-urban migration, change in livelihoods, change in economic situation, declining health status and domestic violence.⁸²

⁷⁸ IPCC 2014, *supra* note 11 at 613-657, 618-619; Lars K. Hallstrom et al., “Policy Design in Rural Manitoba: Alternatives and Opportunities in the Midst of Change” (2015) 38 Man. L.J. 184 at 189-190; Joe Blankenau, “Comparing Rural Health and Health Care in Canada and the United States: The Influence of Federalism” (2010) 40:2 Non-Metropolitan Policy and Governance 332 at 333.

⁷⁹ IPCC 2014, *supra* note 11 at 613-657, 618-619. It can also be described in terms of population and distance, see Hallstrom, *supra* note 78 at 189-190.

⁸⁰ See IPCC 2014, *supra* note 11 at 618; Emeka Polycarp Amechi, “Linking Environmental Protection and Poverty Reduction in Africa: An Analysis of the Regional Legal Responses to Environmental Protection” (2010) 6:2 Law, Environment and Development Journal 112 at 114, 129; Also in Canada, thousands of First Nations peoples in rural communities do not have access to safe drinking water, lack running water and indoor toilets. See David R. Boyd, “No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada” (2011) 57 McGill L.J. 81 at 83; Alice Fentiman, “The Anthropology of Oil: The Impact of Oil Industry on a Fishing Community in the Niger Delta” (1996) 23:4 Social Justice 97-98.

⁸¹ IPCC 2014, *supra* note 11 at 18.

⁸² IPCC 2014, *supra* note 11 at 618; IPCC 2018, note 2; Amechi, *supra* note 80 at 114. See also Drolet & Sampson, *supra* note 21 at 67; Nunavut Climate Change Centre, “Climate Change Impacts” (last visited 18 October 2019) <<https://www.climatechangenunavut.ca/en/understanding-climate-change/climate-change-impact>>; Salvador Barrios, Luisito Bertinelli & Eric Strobl, “Climatic change and rural–urban migration: The case of sub-Saharan Africa” (2006) 60 Journal of Urban Economics 357.

Dryzek et al and Olawuyi observe that most rural people and local communities usually bear the brunt of climate change and the negative effects of actions taken to mitigate and adapt to climate change.⁸³ The IPCC states that in addition, they may lack or have inadequate access to information, participation in decision-making and access to justice.⁸⁴ Usually, rural communities cope with normal changes in the climate through changing practices, Indigenous knowledge, and diversifying or changing their occupations.⁸⁵ Osofsky indicates that rural communities may lack the capacity to tackle threats affecting their lives and health which lies in the government's purview and outside their scope as they lack the ability to adapt due to the pace of current changes.⁸⁶ My thesis agrees with this perspective and identifies groups within rural communities in the oil producing regions of their countries who may be unable to adapt to climate change due to the listed reasons and prior experiences of marginalization by their governments in addition to the detrimental effects they suffer from oil extraction and ancillary activities.⁸⁷

⁸³ John S. Dryzek, Richard B. Norgaard & David Schlosberg, *Oxford Handbook of Climate Change and Society* (Oxford: Oxford University Press, 2011) at 9. Negative effects include land grabs for REDD+ projects. See Damilola S. Olawuyi, "Advancing Climate Justice in National Climate Actions: The Promise and Limitations of the United Nations Human Rights-Based Approach" in Randall S. Abate eds, *Climate Justice: Case Studies in Global and Regional Governance Challenges* (Washington, D.C.: Environmental Law Institute, 2016) at 17.

⁸⁴ IPCC 2014, *supra* note 11 at 618.

⁸⁵ *Ibid.*

⁸⁶ Osofsky, *supra* note 42 at 385.

⁸⁷ See Fentiman, *supra* note 80 at 87, 89-98 where she explains that environmental and cultural degradation with negative effects on economic, political, social and ritual obligations are consequences of oil extraction on a rural fishing community in the Niger-Delta region and which is reminiscent of other rural communities in the Niger-Delta. See also Stephane M. McLachlan, "'Water is a Living Thing": Environmental and Human Health Implications of the Athabaskan Oil Sands for the Mikisew Cree First Nation and Athabaskan Chipewyan First Nation in Northern Alberta" (Phase Two Report: July 7, 2014) (last visited 27 June 2019) <www.google.com/url?sa=t&source=web&rct=j&url=https://www.worldcat.org/title/water-is-a-living-thing-environmental-and-human-health-implications-of-the-athabasca-oil-sands-for-the-mikisew-cree-first-nation-and-athabasca-chipewyan-first-nation-in-northern-alberta-phase-two-report-july-7-2014/oclc/893013658&ved=2ahUKEwjloY_ai6jjAhXiJzQIHQ7cCagQFjACegQIBhAB&usq=AOvVaw19loRBU6ENGHyy3FGgRwlM>.

Costello and other scholars note that climate change will impinge on health, therefore there arises the need to provide access and availability of health services for rural areas.⁸⁸ Also, the existence of good health helps to increase resilience to the harmful effects of climate change. The adverse effects of climate change inhibit the exercise of an individual's fundamental human rights including the rights to life and health. Krachvenko asserts that the right to life of rural communities takes on a different connotation when considered in the context of the environment, natural resources and land which is quite indispensable to rural communities and is severely affected by climate change.⁸⁹ Thus, their rights including the right to life are contravened by climate change.⁹⁰ Specific groups who have contributed the least to climate change⁹¹ such as women, Indigenous peoples, children, the elderly and the poor tend to be more susceptible to the effects of climate change than others⁹² These groups are identified as marginalized in the context of climate justice because of their vulnerability to climate change and distributive justice.⁹³

The Niger Delta and Indigenous groups represent marginalized minorities in their respective jurisdictions. In Canada, Indigenous peoples are "racially marginalized" in several ways⁹⁴ including unsafe drinking water, poor health care,⁹⁵ and oil extraction activities which impinge on their health,

⁸⁸ Anthony Costello et al, "Managing the Health Effects of Climate Change" (2009) 373 *The Lancet* 1714.

⁸⁹ Kravchenko, *supra* note 3.

⁹⁰ This can occur through high temperatures, changing seasonal patterns and extreme weather conditions including floods, droughts and desertification effectively resulting in loss of livelihoods and leading to deaths. See DARA and the Climate Vulnerable Forum, *Climate Vulnerability Monitor: A Guide to the Cold Calculus of a Hot Planet*" 2nd Edition (Spain: Fundacion DARA Internacional, 2012) at 17.

⁹¹ Costello, *supra* note 18 at 1694.

⁹² Costello, *supra* note 18 at 1694; Paris Agreement Preamble.

⁹³ Hurlbert, "Evaluating Climate Justice", *supra* note 65 at 269.

⁹⁴ Randolph Hahuza-DeLay et al, "Speaking for Ourselves, Speaking Together: Environmental Justice in Canada" in Julian Agyeman et al (eds) *Speaking for Ourselves: Environmental Justice in Canada*, (Vancouver, British Columbia: UBC Press, 2009) 11-12.

⁹⁵ Melina Laboucan-Massimo, "Awaiting Justice: The Ceaseless Struggle of the Lubicon Cree" in Toban Black et al, *supra* note 13 at 114.

culture, livelihood and food security.⁹⁶ A similar situation exists for the Niger Delta people in Nigeria.⁹⁷

2.4 Climate Change and Human Rights

Currently, some of the impacts of climate change are manifesting while a considerable number of the predicted impacts are yet to occur.⁹⁸ The Paris Agreement takes note of the connection between climate change and human rights thus:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of Indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.⁹⁹

Okereke argues that oil bearing communities can apply the human rights clause in this preamble to the Paris Agreement to tackle climate change by challenging climate policies and blocking oil exploration.¹⁰⁰ I further argue that the subjects of my thesis can institute actions at the UN HRC based on the *ICCPR* or through their regional treaty bodies.

⁹⁶ David Vasey, “The Environmental NGO Industry and Frontline Communities” in Toban Black et al, *supra* note 13 at 69-72.

⁹⁷ E.E. Nkwocha, “Water Supply Deficiency and Implications for Rural Development in the Niger-Delta Region of Nigeria” (2009) 90:3 *Social Indicators Research* 409-418; Fentiman, *supra* note 80 at 90-97.

⁹⁸ Stephen Humphreys, “International Human Rights Law” in Rayfuse & Scott *supra* note 38 at 30-31; Okereke & Coventry, *supra* note 61 at 834-843.

⁹⁹ *Paris Agreement*, preamble, para. 11. Human rights was initially slated to be inserted in the main text of the Paris Agreement rather than the preamble. See Huang *supra* note 8 at 49; Human Rights in Climate Pact Under Fire: Norway, Saudis, US Blocking Strong Position (7 December 2015) (last visited 17 May 2019) online: *Human Rights Watch* <<https://www.hrw.org/news/2015/12/07/human-rights-climate-pact-under-fire>> John Vidal and Adam Vaughan, “Climate Talks: Anger Over Removal of Human Rights Reference from Final Text” (11 December 2015), (last visited 15 February 2019) online: *Guardian* <www.theguardian.com/global-development/2015/dec/11/paris-climate-talks-anger-removal-reference-human-rights-from-final-draft>

¹⁰⁰ Okereke & Coventry, *supra* note 61 at 840.

The UN Human Rights Council observes that previously international climate negotiations focused on economic, environmental, and scientific considerations, and relegated human rights to the background.¹⁰¹ According to Brunnee, there is a recent emphasis on the connection between climate change and human rights in addition to numerous calls for the inclusion of human rights to address the effects of climate change.¹⁰²

Furthermore, considering human rights in climate change negotiations is beneficial as they assist in empowering the most marginalized groups and strengthening accountability for adaptation measures by imposing obligations on parties. On the other hand, Humphreys admits that the challenge lies in the fact that the rights affected are predominantly economic, social and cultural rights (ESC) as incorporated in the *ICESCR* which may be non-justiciable depending on the state concerned.¹⁰³ Thus states may be compelled to waive the ESC rights of the populace if they lack adequate resources to implement them. Humphreys further claims that states may be obliged under their national and international obligations to protect their citizens from potential violations of their rights where there is the existence of reasonable proof of the effects of climate change, the likely victims and place of occurrence of potential violations as affirmed by the IPCC.¹⁰⁴ Humphreys declares that a state may also be liable on the ground of predictability if despite the complexities and uncertainties of climate science it was aware that the rights of people may be infringed and failed to forestall the infringement.¹⁰⁵ This thesis supports Humphreys' position and argues that based on reports predicting the effect of climate change on the Niger-Delta and Indigenous peoples, and

¹⁰¹ UN Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights A/HRC/10/61, (15 January 2009) (last visited 5 October 2019) *online*: United Nations <<https://www.refworld.org/docid/498811532.html> 4>.

¹⁰² Brunnee, *supra* note 42 at 38, para. 3.32.

¹⁰³ Humphreys, *supra* note 98 at 35.

¹⁰⁴ *Ibid* at 33.

¹⁰⁵ *Ibid* at 32.

Canada and Nigeria's regional and international obligations to protect their citizens, Nigeria and Canada will be liable for the infringement of the right to life.

Chapter 3: Climate Change and the Rights to Life and Health

3.1 Introduction

Climate change affects several human rights. This chapter focuses on the rights to life and health generally and how these rights are impacted by climate change. While the right to life is usually justiciable, it may not be justiciable in some jurisdictions for climate change conditions. A similar challenge exists for the right to health which is typically non-justiciable in some jurisdictions.

3.2 Right to Life

The right to life can be regarded as crucial and necessary for the realization of other rights.¹⁰⁶ Recognizing the significance of this right, it is incorporated in several international and regional human rights instruments as well as national constitutions. The *Universal Declaration of Human Rights (UDHR)* states “[e]veryone has the right to life, liberty and security of the person.”¹⁰⁷ The *ICCPR* further provides, “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹⁰⁸

The right to life is not to be derogated from. It is also a negative right which implies that the state is prohibited from interfering with an individual’s right to life. The UN HRC in its *General Comment No. 36* broadly interprets the right to life as a positive right mandating states to adopt

¹⁰⁶ Jumoke Oduwale & Akinola Akintayo, “The Right to Life, Health and Development: The Ebola Virus and Nigeria” (2017) 17 African Human Rights Law Journal 197, 199.

¹⁰⁷ *Universal Declaration of Human Rights*, G.A. Res. 217 (111) A, U.N. Doc. A/RES/217(III), art. 3. [*UDHR*].

¹⁰⁸ *ICCPR*, art. 6(1). See also the *United Nations Declaration on the Rights of Indigenous Peoples*, art. 7(1); *Convention on the Rights of the Child*, G.A. Res. 44/25, (Nov. 20, 1989) art. 6(1) [*CRC*]; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 312 U.N.T.S. 222, 246, art. 2(1) [*European Convention*]; *European Union Charter of Fundamental Rights*, art 2(1) [*European Union Charter*]; *African Charter on Human and Peoples’ Rights*, June 27, 1981, O.A.U. Doc. CABILEG/67/3 rev. 5, 21 I.L.M. 58 entered into force October 21, 1986, art. 4 [*African Charter*]; *American Convention on Human Rights*, July 18, 1978, 1144 U.N.T.S. 143, art. 4 [*American Convention*] and *American Declaration of the Rights and Duties of Man*, art. 1 [*American Declaration*]

positive measures to enhance public expectancy by preventing and eliminating epidemics¹⁰⁹ Based on this, it can be inferred that ensuring the good health of residents of a state is necessary to protect the right to life. The *General Comment* also highlights the critical threat that environmental degradation, climate change and unsustainable development pose to the ability of present and future generations to enjoy the right to life.¹¹⁰ It enjoins states to comply with their obligations under international environmental law to respect and protect the right to life by preserving the environment and protecting it from climate change caused by public and private actors through measures such as EIAs in addition to taking a precautionary approach.¹¹¹

The African Charter on Human and Peoples Rights in its *General Comment No. 3* also expounds on the right to life.¹¹² The *General Comment No. 3* broadly interprets the states' duty to protect life by taking positive and preventive measures for the preservation and protection of the natural environment, and the outbreak of infectious diseases.¹¹³ Similar to the above interpretation, the right to life also incorporates the rights to health and a healthy environment. In *Sudan Human Rights Organization & Another v Sudan*, the Commission interprets the right to life as the foremost right

¹⁰⁹ ICCPR General Comment No. 36: *Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, adopted by the Human Rights Committee in 2018 UN Doc. CCPR/C/GC/36, para. 26 [*General Comment No. 36*].

¹¹⁰ *Ibid* at para. 62.

¹¹¹ *Ibid*. This is reflected in the recent and novel petition submitted by the Torres Strait Islanders against Australia for the infringement of several rights including the right to life. See Sabin Centre for Climate Change Law, "Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change (05/13/2019)" (last visited 9 October 2019), online: *Sabin Centre for Climate Change Law, Columbia University* <<http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/?cn-reloaded=1>>. See also, Client Earth, "Torres Strait FAQ" (last visited 9 October 2019) online: *Sabin Centre for Climate Change Law, Columbia University* http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190513_Not-Available_press-release-1.pdf; Client Earth, "Human rights and climate change: World-first case to protect Indigenous Australians" (12 May 2019) (last visited 9 October 2019) online: *Client Earth* <<https://www.clientearth.org/human-rights-and-climate-change-world-first-case-to-protect-Indigenous-australians/>>.

¹¹² African Commission on Human and Peoples' Rights *General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life* (Article 4) [*ACHPR Gen. Comment No. 3*].

¹¹³ *Ibid*, arts 3, 41.

from which other rights derive their meaning.¹¹⁴ It further notes that foreign courts have broadly construed the right to life to incorporate the rights to dignity and livelihood.¹¹⁵

The IPCC declares that climate change will affect lives in rural areas. This can arise through extreme weather events including floods and storms causing deaths.¹¹⁶ It can also occur through the effect of climate change on agriculture or ecosystems and ecosystem services on which rural communities are reliant.”¹¹⁷ The IPCC’s report envisages that climate change will cause deaths.¹¹⁸ It states that there has been an increase in heat-related deaths and predicts a further increase especially with a rise in temperature.¹¹⁹

Several individuals and non-governmental organizations have instituted suits against the government and organizations claiming climate change has violated the right to life.¹²⁰ For example, in *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (Gbemre v. Shell)* where the applicants filed an action for the violation of their rights to life and dignity of human person due to the respondents continuous flaring of gas and further alleged that gas flaring in the community “[c]ontributes to adverse climate change as it emits carbon dioxide and methane which causes warming of the environment, pollutes their food and water.”¹²¹ The Court decided in favour of the applicants and held that the respondents’ continuous flaring of gas

¹¹⁴ *Communication 279/03-296/05 Sudan Human Rights Organization & Another v Sudan*, para 146.

¹¹⁵ *Ibid.*

¹¹⁶ IPCC 2014, *supra* note 11 at 630.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid* at 6; IPCC 2018, *supra* note 2 at 11, para B.5.2.

¹¹⁹ *Ibid.*

¹²⁰ *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* suit FHC/B/CS/53/05, 14 November 2005 [*Gbemre v. Shell*]; *Ashgari Leghari v Federation of Pakistan* W.P. No. 25501/2015; *ENvironment JEUnesse*.

¹²¹ *Gbemre v. Shell*, *supra* note 120 at para 4 (7) (c).

constituted an infringement of the right to life under Section 33(1) of the *Nigerian Constitution* and Article 4 of the *African Charter on Human and Peoples Rights (African Charter)*.¹²² Also, in *[t]he State of The Netherlands (Ministry of Infrastructure and the Environment), v Urgenda Foundation (Urgenda)* where the Claimant requested the state to reduce its emissions by 25- 40 per cent of its 1990 level by 2020 contrary to the state's target of 14 -17 per cent of its 1990 level by 2020, the Court of Appeal held that the right to life applied to environment-related situations that affected or threatened to impact on the right to life, and imposed a positive obligation on the government to take specific measures to avert an impending violation of the right.¹²³ Furthermore, the Court in *Gbemre v. Shell* broadly interpreted the infringement of the right to life to include the right to a healthy environment.¹²⁴

3.3 Right to Health

The right to health is a basic human right closely linked to the right to life. Although the right to health is an ESC right, it is equally as crucial as the right to life as it is required in the exercise and realization of other human rights.¹²⁵ Similarly, the UN Sustainable Development Goals (SDGs) aim to ensure healthy lives and promote well-being for all at all ages.¹²⁶

¹²² *Ibid* at paras 5(4) & (6).

¹²³ *The State of The Netherlands (Ministry of Infrastructure and the Environment), v Urgenda Foundation* Case/cause list number: C/09/456689/ HA ZA 13-1396; Case number: 200.178.245/0, paras 40-43 [*Urgenda*].

¹²⁴ *Gbemre v. Shell*, *supra* note 120; The Environment and Human Rights (State Obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity- interpretation and scope of Articles 4(1) and 5(1) of the American Convention of Human Rights) Advisory Opinion OC-23/17, IACtHR Ser A No 23 (15 November 2017) [*Advisory Opinion*].

¹²⁵ ICESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, art. 12, adopted by UN Committee on ICESCR in 2000 UN doc. E/C.12/2000/4, para. 3 [*General Comment No. 14*]; Obiajulu Nnamuchi, "Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria" (2008) 52 *Journal of African Law* 1 at 10; Bahar Jibriel, "The Justiciability and Enforcement of the Right to Health under the African Human Rights System" (2012) 1:2 *Haramaya Law Review* 35.

¹²⁶ "Goal 3: Good Health and Well-Being" (last visited 14 April 2019) online: *Sustainable Development Goals* <www.un.org/sustainabledevelopment/health/>. Other ancillary goals are Goal 6 which is to ensure access to water and sanitation to all and Goal 10, to reduce inequalities within and between countries. See "Goal 6: Clean Water and

The right to health has been acknowledged in several international and regional human rights instruments as well as national constitutions.¹²⁷ The World Health Organization (WHO) defines health as a “state of complete physical, mental and social well-being.”¹²⁸ The *ICESCR* captures the most comprehensive definition of the right to health.¹²⁹ It declares that “[t]he State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹³⁰

The *Covenant* further enumerates the steps necessary to fully realize the right as:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.¹³¹

The right to health connotes that everyone, irrespective of financial status should have access to the acceptable and quality health services they need, at any time and any place they need them.¹³²

The UN Economic, Social and Cultural Rights (ESCR) Committee in its *General Comment No. 14* clarifies the right to health in Article 12(2) of the *Covenant* to include the underlying determinants

Sanitation” (last visited 14 April 2019) online: *Sustainable Development Goals* <www.un.org/sustainabledevelopment/water-and-sanitation/>; “Goal 10: Reduced Inequalities” (last visited 14 April 2019) online: *Sustainable Development Goals* <<https://www.un.org/sustainabledevelopment/inequality/>>

¹²⁷ *UDHR*, art. 25; *ICESCR*, art. 12; *CRC*, art. 24; *African Charter*, art. 16.

¹²⁸ *Constitution of the World Health Organization*, July 22, 1946, Stat. 2676, 14 U.N.T.S. 217, preamble.

¹²⁹ *General Comment No. 14*

¹³⁰ *International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature by General Assembly Resolution 2200A (XXI) of 16 December 1966 entered into force on 3 January 1976*, art. 12 (1) [*ICESCR*].

¹³¹ *ICESCR*, art. 12 (2).

¹³² *General Comment No. 14*, para. 12; World Health Organisation, “Health is a Fundamental Human Right” (Media Centre: Statement by Dr Tedros Adhanom Ghebreyesus’, WHO Director-General on 10 December 2017) (last visited 12 December 2018) online: *World Health Organization* www.who.int/mediacentre/news/statements/fundamental-human-right/en/; the UNEP Adaptation Report, *supra* note 9 at 33; *General Comment No. 14*, para. 12; Jibriel, *supra* note 125 at 29.

of health such as access to food, access to potable water, shelter and a healthy environment.¹³³ It can be surmised that the right to health is not limited to accessible, available, acceptable and quality health care, but encompasses the underlying determinants of health comprising potable water, shelter, access to food and a healthy environment. The *General Comment* further emphasizes the significance of marginalized and vulnerable citizens.¹³⁴

ESC rights, for example the right to health may not be justiciable by State Parties as they are to be achieved progressively and reliant upon a state's resources to implement it. The ICESCR states that:

Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measure.¹³⁵

The ESCR Committee in its *General Comment No. 3* stipulates minimum core obligations consisting of minimum essential levels for each right whereby a state claiming inadequate resources must establish its efforts and its prioritizing of its available resources to fulfil those minimum obligations.¹³⁶ For example, the right to health presupposes the provision of health for a significant number of the population. Bantekas and Oette express that despite a state party's justification of inadequacy of resources as typical of developing countries, this should not constitute a defence for

¹³³ *General Comment No. 14*, paras. 4 and 11; Jibriel, *supra* note 125 at 35.

¹³⁴ *General Comment No. 14*, paras. 12(b)(i)(ii), 35, 37, 40, 43(a), (f), 52, 62, 65.

¹³⁵ ICESCR, art. 2. The word "maximum" in the article has been interpreted as idealism while available means reality. See Robert E. Robertson, "Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights" (1994) 16:4 Human Rights Quarterly 694.

¹³⁶ UN Office of the High Commissioner for Human Rights, *ICESCR General Comment 3: Nature of ICESCR obligations*, UN Doc. E/1991/23 (14 December 1990), para. 10; Ilias Bantekas & Lutz Oette, "Economic, Social and Cultural Rights" in Ilias Bantekas & Lutz Oette, *supra* note 136 at 375; Robertson, *supra* note 135 at 701.

the non-implementation of the main core.¹³⁷ Conversely, Bantekas and Oette proceed that assertions of satisfying the requirement of using the maximum of its adequate resources for ESC rights may be unsatisfactory because the state may not be using the resources judiciously.¹³⁸ This is factual considering that Canada as a developed country fails to satisfy the requirement of using the maximum of its adequate resources judiciously considering the poor state of health of its Indigenous peoples which will be discussed in a subsequent chapter.

The ESCR Committee further states in its *General Comment No. 14 (2000)* that health is a fundamental human right essential to other rights.¹³⁹ The Committee declares that the right to health may be attained by creating health policies, implementing health programmes by the WHO or using legal instruments.¹⁴⁰ This right depends on the attainment of other fundamental rights such as the rights to life, food, housing, work, human dignity, privacy, access to information, education, non-discrimination and equality.¹⁴¹ This thesis argues that the failure to achieve the right to health, resulting in deficient health care systems in both jurisdictions arises from the non-attainment of the rights to housing, equality, freedom from non-discrimination and inadequate access to information and proposes that the right can be achieved by through the enactment of laws and creation of health policies. This occurs in both jurisdictions due to inadequate accessibility to health care and the determinants of health such as safe water, food and housing and can be resolved through the development of a regulatory framework for health and safe water for the First Nations. These rights

¹³⁷ Ilias Bantekas & Lutz Oette, “Economic, Social and Cultural Rights” in Ilias Bantekas & Lutz Oette eds, *International Human Rights Law and Practice* (New York, Cambridge University Press: 2013) 375.

¹³⁸ Ilias Bantekas & Lutz Oette, “Economic, Social and Cultural Rights” in Ilias Bantekas & Lutz Oette, *supra* note 136 at 375.

¹³⁹ *General Comment No. 14*, para. 1.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid*, para. 3.

will further be infringed upon during a changing climate as floods and wildfires may contaminate water-supply and destroy houses and crops while health facilities may be overstretched.

Smith, Vargo and Hoverter caution that climate change poses a risk to the right to health because it will have short or long-term and direct or indirect effects on public health by exacerbating existing threats.¹⁴² The IPCC warns that climate change exerts an influence on health directly by extreme weather condition and increased temperature, and indirectly by changes in the ecosystem causing an increase in disease vectors, decrease in plants and displacement of people.¹⁴³ In addition, climate change affects underlying determinants of health such as clean air, adequate food, potable water and adequate shelter.¹⁴⁴ Presently, the health impact of climate change is minimal although existing public health problems are anticipated to worsen particularly in low-income developing countries and indigent populations with poor health.¹⁴⁵ Climate change will exert pressure on health care particularly those in countries with deficient health infrastructure, indigence and inequality.¹⁴⁶

¹⁴² Jason A. Smith, Jason Vargo, & Sara Pollock Hoverter, “Climate Change and Public Health Policy” (2017) *The Journal of Law, Medicine & Ethics* 82 at 83; See the Preamble to the *Paris Agreement*, para 11. See also World Health Organization, “United Nations Framework Convention on Climate Change Conference of Parties 24 Special Report: Health & Climate Change” 20 (last visited 5 December 2018) online: *World Health Organization* <<https://www.who.int/globalchange/mediacentre/news/cop24-events5Dec2018/en/>>.

¹⁴³ IPCC 2014, *supra* note 11 at 741; Office of the United Nations High Commissioner for Human Rights (29 August 2016) Response to UNFCCC Secretariat Request for Submissions on: Nairobi Work Programme on Impacts, Vulnerability and Adaptation to Climate Change - Health Impacts, including Occupational Health, Safety and Social Protection, FCCC/SBSTA/2016/2, para 15(a) (i) 3.

¹⁴⁴ IPCC 2014, *supra* note 11 at 741; Margaux J. Hall, “Advancing Climate Justice and the Right to Health through Procedural Rights” (2014) 16:1 *Health and Human Rights Journal* 10; Costello, *supra* note 18 at 1694.

¹⁴⁵ IPCC 2014 Summary for Policymakers, *supra* note 11 at 19; Smith, Vargo & Hoverter, *supra* note 142 at 83; World Health Organization, “Climate Change and Health: Key Facts” (1st February 2018), (last visited 5 December 2018) online: *World Health Organization* <www.who.int/news-room/fact-sheets/detail/climate-change-and-health>; Catherine M Cooney, 'Preparing a People: Climate Change and Public Health (2011) 119:4 *Environmental Health Perspectives* A169; Hall, *supra* note 144 at 10.

¹⁴⁶ Costello, *supra* note 18 at 1703-1704.

Climate change will adversely affect health by causing about 250 000 more deaths annually from diseases such as malaria,¹⁴⁷ diarrhoea,¹⁴⁸ childhood malnutrition,¹⁴⁹ cholera, Lyme disease, respiratory disease and heat stress between 2030 and 2050.¹⁵⁰ The United Nations Adaptation report has equally identified adaptation gaps in health that may worsen negative health impacts arising from climate change.¹⁵¹ Countries, communities, organizations and individuals are to formulate adaptation strategies to plan and protect themselves against the impact of climate change.¹⁵² This will involve the improvement of health services to cope with the effects of climate change and to avert overwhelming the health sector. As health effects differ from state to state, adaptation actions for climate-related diseases and illnesses should be mostly undertaken at the national level.¹⁵³ Several health officials have remarked on the significance of the health implications of climate change and its usefulness in making well-informed decisions on adapting to climate change while criticizing the unavailability or insufficient information on the health impacts of climate change in comparison with other impacts of climate change.¹⁵⁴ This may be due to climate change, other

¹⁴⁷ UNEP Adaptation Report, *supra* note 9 at 33. About 60,000 additional deaths annually are predicted to result from malaria for 2030 and 33,000 deaths for 2050.

¹⁴⁸ *Ibid.* About 48,000 additional deaths annually in children below 15 years are predicted to result from diarrhoea for 2030 and 33,000 deaths for 2050.

¹⁴⁹ *Ibid.* About 4.8 million additional cases of child undernutrition will result from climate-related causes in 2050. See World Health Organization, “World Hunger Again on the Rise, Driven by Conflict and Climate Change, New UN Report Says” (15 September 2017) (last visited 12 November 2019) online: *World Health Organization* <<https://www.who.int/news-room/detail/15-09-2017-world-hunger-again-on-the-rise-driven-by-conflict-and-climate-change-new-un-report-says>>; Costello, *supra* note 18 at 1704

¹⁵⁰ Michael Burger & Justin Gundlach, *Climate Change, Public Health, and the Law* (Cambridge, United Kingdom: Cambridge University Press, 2018) at 2.

¹⁵¹ UNEP Adaptation Report, *supra* note 9 at 29-37.

¹⁵² Cooney, *supra* note 145 at A169-A170.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid* at A168-A169; Tony McMichael, Hugh Montgomery & Anthony Costello, “Health Risks from Climate Change” (2012) 344:7489 *British Medical Journal* 26.

critical concerns and insufficient resources.¹⁵⁵ Climate change therefore presents an opportunity for countries to improve on their health services.¹⁵⁶

Framing climate change as a public health issue also tends to make climate change a live issue to a larger number of people rather than an abstract, political or economic idea involving carbon taxes or threats to ecosystems and thus enhance public engagement.¹⁵⁷ This will also be beneficial to several poor and vulnerable people presently experiencing climate-related diseases and illnesses such as under-nutrition, diarrhoea, and cholera in contrast to the urban population.¹⁵⁸

A key element in ensuring the right to life and health is the environment.¹⁵⁹ The environment is a determinant of health. The right to a healthy environment is inextricably linked with the right to health.¹⁶⁰ A healthy environment is essential to a healthy life as it ensures everybody enjoys clean air, safe water, fertile soil, and nutritious food in addition to the conservation of biological diversity and ecosystem functions.¹⁶¹ Boyd emphasizes the connection between the right to a healthy environment and the right to life and health, as a healthy environment impacts positively on people's lives, health and well-being.¹⁶² Furthermore, the absence of a healthy environment is harmful to a person or a group.

¹⁵⁵ Cooney, *supra* note 145 at A168-A169.

¹⁵⁶ Smith, Vargo & Hoverter, *supra* note 142 at 83.

¹⁵⁷ Cooney, *supra* note 145 at A171; Wiley, *supra* note 10 at 223-224.

¹⁵⁸ McMichael, Montgomery & Costello, *supra* note 154 at 26.

¹⁵⁹ Burger & Gundlach, *supra* note 92 at 21. Also see *Communication 155/96, Social and Economic Rights Action Center and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) (15th Activity Report) para. 51.*

¹⁶⁰ Jibriel, *supra* note 125 at 35.

¹⁶¹ David Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: The University of British Columbia Press, 2012) 1.

¹⁶² *Ibid.*

The right to a healthy environment substantively encompasses the right to environmental quality and procedurally, means of safeguarding the right such as access to information, right to participate in decision-making and access to justice and remedy for infringement.¹⁶³ About 155 countries recognize the right to a healthy environment.¹⁶⁴ Some countries have recognized the necessity of the environment to health by explicitly providing for the right to a healthy environment in their constitutions while others have implicitly recognized it in court decisions based on provisions in national and international law.¹⁶⁵

Some international and regional law instruments also provide for a healthy environment.¹⁶⁶ The *American Convention on Human Rights “Pact of San Jose, Costa Rica” (Pact of San Jose)* declares “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services. The States Parties shall promote the protection, preservation, and improvement of the environment.”¹⁶⁷ The *African Charter* also states, “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.”¹⁶⁸

Birnie, Boyle and Redgewell explain that the *African Charter* is the sole human right treaty that illustrates environmental rights expansively as Article 16 of the treaty protects individual and their rights to the best attainable state of physical and mental health while Article 24 grants collective

¹⁶³ Boyd *supra* note 161 at 2.

¹⁶⁴ Boyd, *supra* note 161 at 1; United Nations Human Rights Office of the High Commissioner, “Air Pollution: The Silent Killer That Claims 7 Million Lives Each Year” (last visited 7 March 2019) online: *United Nations* <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24248&LangID=E>.

¹⁶⁵ Kaniye Ebeku, “Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v. Shell* Revisited” (2007) 16:3 RECIEL312 at 313.

¹⁶⁶ *African Charter*, art. 24; *European Union Charter*, art. 37; *San Salvador Protocol to the American Convention on Human Rights* Adopted in San Salvador on November 17, 1988, art 11 [*San Salvador Protocol*] and *United Nations Declaration on the Rights of Indigenous Peoples* UN GA Res 61/295, annex (13 September 2007), art. 29.

¹⁶⁷ *Pact of San Jose*, art. 4(1), 5(1).

¹⁶⁸ *African Charter*, art. 24.

rights to a general satisfactory environment favourable to their development.¹⁶⁹ The expansive nature of the treaty was reflected in *Social and Economic Rights Action Centre and Another v Nigeria* where the African Commission on Human and Peoples Rights (African Commission) held that Articles 16 and 24 of the *Charter* imposed a duty on governments not to directly threaten the health and environment of their citizens. Articles 16 and 24 were read in conjunction with Article 12 of the *ICESCR* which recognized everyone's right to enjoy the maximum level of physical and mental health. Several scholars analyzed the decision as innovative in comparison with its predecessors in broadly interpreting the right to a healthy environment.¹⁷⁰

Boyd acknowledges that the constitutional right to a healthy environment ensures the government's protection of human rights and the environment.¹⁷¹ He further states that the absence of a constitutional right to a healthy environment is not fatal as this may be implied in the right to life or other constitutional rights and therefore enforceable.¹⁷² This is relevant both on the national and regional level. In *Gbemre v Shell*, the court *inter alia* held that the massive and continuous flaring of associated gas without considering its negative consequences including its contribution to anthropogenic climate change and taking precautions such as conducting an EIA, violated the right to life which was inclusive of the right to a healthy environment and dignity of human persons and consequently ordered the defendant to desist from gas flaring.¹⁷³

¹⁶⁹ Patricia Birnie, Alan Boyle & Catherine Redgewell, *International Law & the Environment* (New York, US: Oxford university Press, 3rd Edition, 2009) 273-274.

¹⁷⁰ *Ibid*; Dinah Shelton, "Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights V. Nigeria). Case No. ACHPR/COMM/A044/1" (2002) 96 *American Journal of International Law* 941-942.

¹⁷¹ Boyd, *supra* note 4 at 4.

¹⁷² Boyd, *supra* note 161 at 3, 87.

¹⁷³ *Gbemre v Shell*, *supra* note 120.

In *SERAC v. Nigeria*, the African Commission held that Nigeria had contravened the right to a clean environment as laid down in Article 24 of the *African Charter* by failing to protect the health and environment of the Ogoni community from the risk caused by oil operations.¹⁷⁴ This was read in conjunction with Article 16 (1) of the *Charter* which provides for the right to health and Article 12 (2) (b) of the *ICESCR* which mandated Nigeria as a party to take necessary steps to achieve the improvement of all aspects of environmental and industrial hygiene.

Furthermore, the Inter-American Court of Human Rights issued an advisory opinion in response to a request sought by the State of Colombia which sought to clarify the state's environmental obligations in relation to the right to life and personal integrity as stated in Articles 4(1) and 5(1) of the *American Convention on Human Rights (American Convention)*, and Article 4(1) and 5(1) of the *Pact of San Jose*.

The advisory opinion was quite expansive as the Court recognized the autonomous right to a healthy environment and its effect on other rights as environmental degradation affects the realization of other rights.¹⁷⁵ It identified the individual and collective nature of the right to a healthy environment which can apply to the present and future generation collectively, and also individually apply to several rights such as the right itself, the rights to health, life and personal integrity. The opinion also noted the procedural and substantive role of the right as well as the plight of vulnerable peoples such as Indigenous peoples and communities dependent on natural resources.

3.4 Conclusion

¹⁷⁴ *SERAC v. Nigeria*, *supra* note 32; Article 24 of the *African Charter* states: "All peoples shall have the right to a general satisfactory environment favourable to their development."

¹⁷⁵ *Advisory Opinion*.

Climate change presents an opportunity for countries to improve their health systems and prevent the loss of lives while enhancing the lives and health of their populace particularly the rural populace. Often, the health sector in most countries is tilted in favour of the urban population rather than the rural population. Also, climate change exacerbates existing weather conditions and consequently multiplies health risks thereby overwhelming health systems and widening existing levels of inequality between the urban and rural population. Improving the health systems for the rural population will prevent health epidemics caused by climate change as well as adhere with the UN SDGs which aim to ensure healthy lives and promote well-being for all at all ages, ensure access to water and sanitation to all and to reduce inequalities within and between countries.¹⁷⁶

Climate change policies addressing public health as an adaptation strategy must also consider mitigation to ensure effectiveness.¹⁷⁷ Ensuring the provision of the underlying determinants of health such as potable water and a healthy environment can serve as mitigative measures. For instance, EIAs taking cognizance of climate change can be incorporated to guarantee a healthy environment.

The 2017 advisory opinion rendered by the Inter-American Court of Human Rights presents an interesting and innovative dimension to the right to a healthy environment in comparison with previous decisions as it offers an expansive interpretation. Notwithstanding its being an advisory opinion and therefore an interpretative guide, it will be useful to see how the opinion will be applied in subsequent court decisions with respect to environmental degradation and climate change at regional courts and its influence even beyond the American jurisdiction.

¹⁷⁶ Sustainable Development Goals, *supra* note 126.

¹⁷⁷ Smith, Vargo & Hoverter, *supra* note 142 at 84.

The advisory opinion in the context of the right to a healthy environment will also be significant to Indigenous communities and other people who are mostly dependent on natural resources for their source of living, food and health through agricultural, fishing, pastoral and tourism activities. The right to a healthy environment may emerge as a panacea to vulnerable people who are direly affected by climate change and have no means of redress.

Chapter 4 Case Study: Nigeria

4.1 Introduction

This chapter gives an overview of Nigeria, examines rural people particularly those in the Niger Delta region of Nigeria, their marginalized status and how climate change may intensify their condition. Also, it examines the rights to life and health in Nigeria as well as the application of international and regional human rights instruments in the context of climate change in Nigeria and subsequently conclude the chapter.

4.2 Overview of Nigeria

Nigeria is a lower middle-income country located in West Africa with abundant human and natural resources.¹⁷⁸ It has a population of about 195,870,000 people.¹⁷⁹ In 2018, Nigeria was the 12th largest petroleum producer globally¹⁸⁰ and as of 2015 had the largest natural gas reserves in Africa.¹⁸¹ Nigeria strives to maintain a balance between key competing concerns of enhancing the development of its fossil fuel industry and protecting the environment.¹⁸²

¹⁷⁸ The World Bank, “Nigeria” (last visited 18 October 2019) online: *The World Bank* <data.worldbank.org/country/nigeria>.

¹⁷⁹ World Bank Data, “Country Profile: Nigeria”(last visited 18 October 2019) online: *The World Bank* <databank.worldbank.org/data/views/reports/reportwidget.aspx?Report_Name=CountryProfile&Id=b450fd57&tbar=y&dd=y&inf=n&zm=n&country=NGA>.

¹⁸⁰ US Energy Information Agency, “Nigeria: Total Petroleum and Other Liquids Production 2018” (last visited 18 October 2019) online: *US Energy Information Agency* <<https://www.eia.gov/beta/international/rankings/?iso=NGA#?cy=2018>>.

¹⁸¹ US Energy Information Agency, “Nigeria: Overview: Nigeria's Key Energy Statistics” (last visited 18 October 2019) online: *US Energy Information Agency* (6 May 2016) (last visited 18 October 2019) online: *US Energy Information Agency* <www.eia.gov/beta/international/country.php?iso=NGA>.

¹⁸² Nigeria’s (NDC), *supra* note 8 at 1. Nigeria cannot be categorized as one of the major emitters nonetheless it certainly contributes its fair share mainly through the extraction and production of fossil fuel.

Nigeria is a party to several international and regional instruments on various issues including the environment and human rights. It is a party to the *ICCPR*,¹⁸³ the *ICESCR*,¹⁸⁴ the *UNFCCC*¹⁸⁵ as well as its *Kyoto Protocol*¹⁸⁶ and the *Paris Agreement*¹⁸⁷ which seek to address climate change.

The *Constitution of the Federal Republic of Nigeria 1999 (CFRN)*¹⁸⁸ requires, “the State to protect the environment, and safeguard the water, air and land, forest and wildlife of Nigeria.”¹⁸⁹ Despite this provision, this section is not justiciable as it is stated as merely a fundamental directive of the state under section 6(6)(c) of the *CFRN* which provides for the Fundamental Objectives and Directive Principles of State Policy. The *National Environmental Standards and Regulations Enforcement (Establishment) Agency Act 2007 (NESREA)*¹⁹⁰ regulates climate change as the Act is mandated to:

Enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment including *climate change*, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wildlife, pollution, sanitation and such other environmental agreements as may from time to time come into force.¹⁹¹ (Emphasis mine)

¹⁸³ United Nations Treaty Collection, “Human Rights: International Covenant on Civil and Political Rights” (last modified 19 August 2019) (last visited 19 August 2019) online: *United Nations* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-4&chapter=4&clang=_e>.

¹⁸⁴ United Nations Treaty Collection, “Human Rights: International Covenant on Economic, Social and Cultural Rights” (last modified 19 August 2019) (last visited 19 August 2019) online: *United Nations* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-3&chapter=4&clang=en>

¹⁸⁵ United Nations Treaty Collection, “Environment: United Nations Framework Convention on Climate Change” *supra* note 27.

¹⁸⁶ United Nations Treaty Collection, “Environment: Kyoto Protocol to the United Nations Framework Convention on Climate Change”, *supra* note 28.

¹⁸⁷ United Nations Treaty Collection, “Environment: Paris Agreement”, *supra* note 29

¹⁸⁸ *The Constitution of the Federal Republic of Nigeria 1999*, Cap C23 Laws of the Federation of Nigeria [*CFRN*].

¹⁸⁹ *CFRN*, s. 20.

¹⁹⁰ *National Environmental Standards and Regulations Enforcement (Establishment) Agency Act 57 of 2007*, [*NESREA Act*].

¹⁹¹ *NESREA Act*, s. 7(c). See also Mohammed Tawfiq Ladan, “Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria” (2012) 8:1 *Law Environment and Development Journal* 116 at 122-123.

Nigeria has not implemented its ratified international agreements on climate change.¹⁹² Presently, Nigeria has no law for climate change.¹⁹³ There are some policies relevant to climate change such as the NDC, National Adaptation Strategy and Plan of Action on Climate Change for Nigeria 2011 (NASPA-CCN), and the Economic Recovery & Growth Plan 2017-2020 (ERGV).¹⁹⁴ Nigeria's NDC aims to reduce its emissions by 20 per cent (unconditionally) and 45 per cent (conditional on international support) below its 2010-2014 level by 2030.¹⁹⁵ There are also policies and plans relevant to climate change in several sectors including energy, agriculture, water resources, health and transportation.¹⁹⁶

Recently, the rate of floods, droughts and desertification have intensified in Nigeria with forecasts of further increase in floods, droughts and health risks in Nigeria because of climate change.¹⁹⁷ Climate change has a profound impact on agriculture particularly in sub-Saharan Africa. Most economies of sub-Saharan African countries as well as a substantial population of Africans residing in the rural areas are greatly dependent on the agricultural sector.¹⁹⁸ The resulting effect is

¹⁹² Nigeria is a dualist state. Dualist states require ratified international instruments be domesticated into local law before they can be binding in that state. See Magnus Killander, "How International Human Rights Law Influences Domestic Law in Africa" (2013) 17 *Law Democracy & Dev.* 378-380.

¹⁹³ The President refused to assent to the climate change bill on the ground that the scope and guiding principles in the bill replicated the functions of the Federal Ministry of Environment, and setting up a Council as envisaged in the Bill would be unwieldy and expensive because of existing agencies performing the functions envisaged by the Bill. See "Buhari Declines Assent to Digital Rights and Freedom Bill, Four Others" (20 March 2019), (last visited 16 April 2019) online: *Channels Television* <www.channelstv.com/2019/03/20/buhari-declines-assent-to-digital-rights-and-freedom-bill-four-others/>; Ahuraka Isah, Sunday Isuwa, "PMB Declines Assent to 5 Bills" (19 March 2019) (last visited 16 April 2019) online: *Leadership Newspaper Nigeria* <leadership.ng/2019/03/21/pmb-declines-assent-to-5-bills/>

¹⁹⁴ Olanrewaju A. Fagbohun & Erimma Gloria Orie, "Nigeria: Law and Policy Issues in Climate Change" (Lagos, Nigeria: Environmental Law Research Institute, 2015) Kindle Edition (Location 579 and 588 of 1906). See Federal Republic of Nigeria, Economic Recovery & Growth Plan 2017-2020 (Nigeria: Ministry of Budget & National Planning, February 2017) [ERGV 2017-2020].

¹⁹⁵ NDC "Nigeria's First NDC", (last visited 3 July 2019) online: *UNFCCC* <www4.unfccc.int/sites/NDCStaging/pages/Party.aspx?party=NGA> [Nigeria's NDC]

¹⁹⁶ Fagbohun & Orie, *supra* note 194 at location 588 of 1906.

¹⁹⁷ Michael Addaney, Elsabe Boshoff & Bamisaye Olutola, "The Climate Change and Human Rights Nexus in Africa" (2017) 9:3 *Amsterdam Law Forum* 5 at 19.

¹⁹⁸ NEPAD Comprehensive Africa Agriculture Development Programme, "Comprehensive Africa Agriculture Development Programme" (New Partnership for Africa's Development 2003) 1 (last visited 18 October 2019) online:

overwhelming in Nigeria particularly in the rural areas mostly because they lack the ability and resources to address climate change.¹⁹⁹ Presently, the floods which occur generally in Nigeria generally and the droughts in the northern Nigeria are expected to lead to food insecurity as food is mostly cultivated in rural areas and will consequently have a severe effect on the entire nation.²⁰⁰

Fagbohun views climate change as a global critical challenge and a likely cause of harmful and irreversible impact on infrastructure, food production and water supplies.²⁰¹ Indisputably floods have destroyed lives, houses and farmlands in Nigeria and consequently affected food production. Also, the drying up of Lake Chad, a source of livelihood and food for many, due to several reasons including climate change, has rendered many farmers and fishermen jobless.²⁰² The health sector is also a major casualty of climate change in Africa as vector and water-borne diseases are anticipated to intensify specifically in areas with deficient health care.²⁰³ Other impending health risks include malnutrition, air pollution, heat stress and water shortages.²⁰⁴ This was evidenced in the numerous cases of malnutrition in the Lake Chad region.²⁰⁵

4.3 Rural People of the Niger-Delta Region of Nigeria

New Partnership for Africa's Development 1 <<https://www.nepad.org/caadp/publication/comprehensive-africa-agriculture-development-programme>> .

¹⁹⁹ O.A. Olaniyi, Z.O. Ojekunle & B.T. Amujo, "Review of Climate Change and Its Effect on Nigeria Ecosystem" (2013) 1 *International Journal of African and Asian Studies* 57 at 58, 60; Piya Abeygunawardena et al, "Poverty and Climate Change: Reducing the Vulnerability of the Poor through Adaptation" (2009) 1 *World Bank Working Paper* 52176, (last visited 18 October 2019) online: *the World Bank* 1 at 8. <documents.worldbank.org/curated/en/534871468155709473/Poverty-and-climate-change-reducing-the-vulnerability-of-the-poor-through-adaptation>.

²⁰⁰ Addaney, Boshoff & Olutola, *supra* note 197 at 6.

²⁰¹ Fagbohun & Orié, *supra* note 194 at location 673 of 1906.

²⁰² Nigeria's NDC, *supra* 195 at 16; Shantha Bloemen, "Lake Chad's Receding Water Level Heightens Risk of Malnutrition and Disease" (last visited 18 October 2019) online: *UNICEF* <www.unicef.org/infobycountry/chad_57642.html>

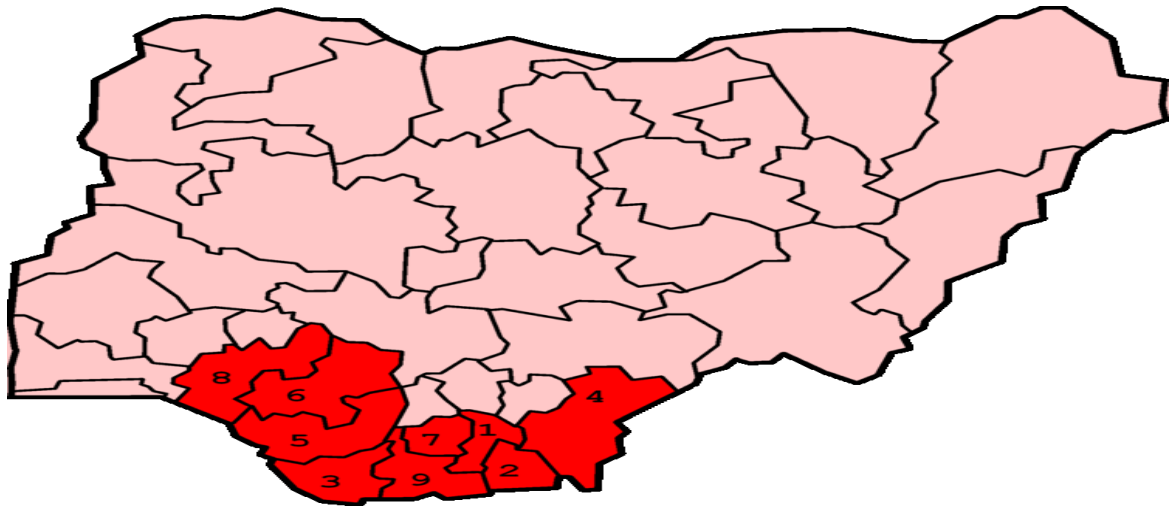
²⁰³ Osofsky, *supra* note 42 at 385.

²⁰⁴ *Ibid.*

²⁰⁵ World Health Organization, "Emergencies: Lake Chad Basin Humanitarian Response 2017" (last visited 18 October 2019) online: *World Health Organization* <www.who.int/emergencies/response-plans/2017/lake-chad-basin/en/>

Figure 1:

Map of Nigeria Highlighting the Niger Delta States



Map of Nigeria numerically showing states typically considered part of the Niger Delta region: 1. Abia, 2. Akwa Ibom, 3. Bayelsa, 4. Cross River, 5. Delta, 6. Edo, 7. Imo, 8. Ondo, 9. Rivers.

Source: Wikipedia

In certain instances, disadvantaged and excluded communities who are disproportionately subjected to environmental risks are also disproportionately exposed to its consequences.²⁰⁶ A key example of such marginalized communities are rural communities in the Niger Delta region in Nigeria which has experienced several oil-spills over the years that has made their traditional occupation of the inhabitants mainly fishing and farming of the inhabitants challenging.²⁰⁷ Land and water resources serve as a source of livelihood and hold cultural significance for the indigenes who are mostly subsistence farmers and fishermen.²⁰⁸

²⁰⁶ Rhuks Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (Routledge Explorations in Environmental Studies Kindle Edition Taylor and Francis).

²⁰⁷ Amnesty International, “Niger Delta Negligence” (last visited 5 March 2019) online: *Amnesty International* <www.amnesty.org/en/latest/news/2018/03/niger-delta-oil-spills-decoders/>.

²⁰⁸ Ifeanyi I. Onwuazombe, “Human Rights Abuse and Violations in Nigeria: A Case Study of the Oil-Producing Communities in the Niger Delta Region” (2017) 22 *Ann. Surv. Int'l & Comp. L.*, 146-147; Ndimele, *supra* note 18 at location 749, 789 &794. of 13486.

The Niger Delta which is the heartland of oil in Nigeria comprises Abia, Akwa-Ibom, Bayelsa, Cross-River, Delta, Edo, Imo, Ondo and Rivers in the Southern part of Nigeria.²⁰⁹ The region has a population of about 32 million people comprising ethnic minorities such as Bini, Efik, Ibibio, Annang, Oron, Ijaw, Itsekiri, Isoko, Urhobo, Ukwuani, Ogoni and Kalabari with certain tribes residing in 2 states or more.²¹⁰ Based on population size, about 94 per cent of the 13,329 settlements have populations of less than 5000 people,²¹¹ therefore the region can be considered as mostly rural in nature.

The people of the region despite comprising ethnic minorities cannot be categorized as Indigenous peoples under the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* or under the *International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989 (No. 169)(ILO Convention)*.²¹² While the Niger Delta people have some similarities with Indigenous peoples such as minority status in comparison with the three dominant ethnic groups consisting of the Hausas, Igbos and Yorubas in Nigeria, it can be argued that they do not qualify as indigenous groups because other ethnic groups in Nigeria are also original inhabitants of other parts or areas in Nigeria prior to colonization and also retain some or

²⁰⁹ Patricia Taft and Nate Haven, *Violence in Nigeria: Patterns and Trends* (Switzerland: Springer, 2015) 9, 18, 31, 22, 27, 34, 38, 41, 44, 47.

²¹⁰ Al Chukwuma Okoli, "The Political Ecology of the Niger Delta Crisis and the Prospects of Lasting Peace in the Post-Amnesty Period" (2013) 13:3 *Global Journal of Human Social Science* 39; United Nations Development Programme, "Niger Delta Human Development Report" (Abuja, Nigeria: 2006) 21-22 [UNDP]; Taft & Haven, *supra* note 209 at 9.

²¹¹ There are 7,686 settlements with less than 1,000 people, 4,781 settlements with 1000 to 5000 people, 764 settlements with 5000 to 20000 people, and 98 settlements with a population exceeding 20000 people. See United Nations Development Programme, "Niger Delta Human Development Report" (Abuja, Nigeria: 2006) 23.

²¹² *International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989 (No. 169) [ILO Convention]*; *United Nations Declaration on the Rights of Indigenous Peoples UN GA Res 61/295, annex (13 September 2007), [UNDRIP]*. Article 1(b) of the *ILO Convention* defines Indigenous peoples as, [p]eoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions

all of their own social, economic, cultural and political institutions.²¹³ Furthermore, they have also not suffered from peculiar historic injustices resulting from their colonization distinct from other Nigerian ethnic groups as stated in the *UNDRIP*.²¹⁴

Nigeria's oil, which is predominantly located in the region can be described as mostly a curse to the indigenes specifically those in rural areas as oil activities have been detrimental to their livelihoods, health and culture in terms of the extraction.²¹⁵ The GHG emissions from gas flaring in the Niger Delta region is higher than the emissions in the entire sub-Saharan Africa region.²¹⁶ The deficiencies revealed above reflect the susceptibility of rural areas to environmental degradation and climate change.

The inhabitants of the rural areas in the Niger Delta region are more marginalized than similar rural areas in Nigeria because they lack access to health services, potable water, education and sanitation.²¹⁷ Inhabitants from some communities are beneficiaries of employment opportunities from oil companies.²¹⁸ On the other hand, there is also a high rate of unemployment and underemployment rendering local inhabitants unable to benefit from the industry in terms of employment opportunities because they have minimal education, lack employable skills or financial

²¹³ OHCHR, "Indigenous Peoples and the United Nations Human Rights System: Fact Sheet No. 9 /Rev. 2" (New York and Geneva: United Nations, 2013) 2 (last visited 14 November 2019) online: *United Nations* <ohchr.org/Documents/Publications/fs9Rev.2.pdf>. See also Yinka Omorogbe, *Oil and Gas Law in Nigeria Simplified* (Lagos, Nigeria: Malthouse Press Limited) 146-148.

²¹⁴ Preamble of *UNDRIP*.

²¹⁵ Fentiman, *supra* note 80 at 87-99; I. Onwuazombe, *supra* note 208 at 115; Ndimele, *supra* note 18 at location 789, 794, 815 & 819 of 13486.

²¹⁶ Ndimele, *supra* note 18 at location 8258, 8262 of 13486; Randall S. Abate and Elizabeth Ann Kronk, "Commonality among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples" in Randall S. Abate and Elizabeth Ann Kronk, *supra* note 18 at 17.

²¹⁷ Onwuazombe, *supra* note 208 at 137-138, 148.

²¹⁸ UNDP, *supra* note 210 at 26.

resources.²¹⁹ They are also politically marginalized with respect to political representation, resource allocation and development.²²⁰ During the peak of Nigeria's oil-boom, not much was done to improve the quality of life of the rural areas in terms of public facilities, health care and education thereby contributing to their low level of social development as well as the present state of poverty which is worse than it was prior to the discovery of oil.²²¹ This poverty reflects in the needless numerous deaths caused by yellow fever, malaria and diarrhoea.²²² Food, water, shelter, education, employment and health services have been identified as essential to improve the standard of living of the rural population.²²³

Life expectancy in the rural communities of Niger Delta is slightly above 40 years²²⁴ in comparison with that of Nigeria which is about 53 years.²²⁵ Also, about half of the inhabitants of the communities' lack access to potable water.²²⁶ A study from two local government areas in Abia state of the region revealed that the insufficiency of water-supply resulted in diseases like malaria, diarrhoea, cholera, dysentery and typhoid.²²⁷ In terms of health services in Nigeria, the urban populace has access to more health services while the rural populace is usually deprived of essential services.²²⁸ Also, health workers are not incentivized to seek employment opportunities in the rural

²¹⁹ *Ibid* at 3, 130.

²²⁰ Okoli, *supra* note 210 at 41.

²²¹ Francis C. Okafor, "Basic Needs in Rural Nigeria" (1985) 17:2 Social Indicators Research 115; Federal Ministry of Health National Health Policy 2016: Promoting the Health of Nigerians to Accelerate Socio-economic Development, 7.

²²² Okafor, *ibid* at 116.

²²³ *Ibid* at 117.

²²⁴ Onwuazombe, *supra* note 208 at 137.

²²⁵ United Nations Development Programme, "Nigeria: Human Development Indicators" (last visited 13 November 2019) online: *United Nations Development Programme* <hdr.undp.org/en/countries/profiles/NGA#>.

²²⁶ *Ibid*.

²²⁷ Nkwocha, *supra* note 97 at 410, 415. The study was conducted in Isiala Ngwo North and South Local Government Area made up of 13 communities.

²²⁸ Onwujekwe et al., "Are the poor differentially benefiting from provision of priority public health services? A benefit incidence" (2012) 11:70 *International Journal for Equity in Health*.

areas thereby causing a shortage of health workers. It has been observed that the enhancement of health care structures in rural areas is necessary to combat sicknesses and diseases.²²⁹

4.4 Right to Life in Nigeria

The right to life is regarded as a fundamental human right globally as well as in Nigeria. Accordingly, Nigeria has ratified several international and regional human rights instruments with the right to life including the *ICCPR*,²³⁰ the *CRC*²³¹ and the *African Charter*.²³²

In the municipal sphere, the right to life is contained within the *CFRN* and provides “[e]very person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria”.²³³ Also, Nigeria has ratified and domesticated into its national law the *African Charter* which also recognizes the right to life. The *Charter* states, “[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”.²³⁴

In considering Nigeria’s obligation to protect the lives of the populace, its obligations under international and regional human rights instruments will be examined. The preceding chapter stated that the *ICPPR* through its HRC in its *General Comment No. 36* had expanded its interpretation of the right to life to include the imposition of the duty on the state to adopt positive measures to

²²⁹ Akinola Akomolafe et al, “Air Pollution and Climate Change in Lagos, Nigeria: Needs for Proactive Approaches to Risk Management and Adaptation” (2014) 10:4 *American Journal of Environmental Sciences* 412 at 422.

²³⁰ *ICCPR* (entered into force 23 March 1976 and accession by Nigeria in 1993), art. 6.

²³¹ *CRC*, art. 24.

²³² *African Charter*, art. 4. Nigeria ratified the African Charter of Human and Peoples Rights on 22nd June 1983. See “List of Countries Which Have Signed, Ratified/Accessed to the African Charter on Human and Peoples Rights” (last visited 29 March 2019) online: *African Union* <au.int/en/treaties?field_treaty_ratifedby_tid%5B%5D=48>.

²³³ *CFRN*, section 33(1).

²³⁴ *African Charter*, art. 4.

enhance public expectancy by preventing and eliminating epidemics.²³⁵ Furthermore, the *General Comment* requires states to comply with their obligations under international environmental law such as climate change to guarantee the rights to life for the present and future generations.²³⁶ This will necessitate states to protect the environment from climate change by public and private actors by measures such as EIAs.²³⁷ Nigeria's *Environmental Impact Assessment Act* does not specifically refer to climate change although it can be expanded to incorporate climate change as it specifies that before a decision is taken on any activity, the environmental effects of the activity must be considered.²³⁸ The Act's major flaw lies in its failure to ensure public participation despite its provision to allow members of the public, government agencies, experts and interested groups to make comments before a decision is given on a proposed activity.²³⁹ Hence, the provisions of the Act on public participation have largely been flouted.²⁴⁰

The *General Comment* can be construed in the light of climate change and its role as a multiplier of health risks. In addition, it can be read as imposing climate adaptation and mitigation obligations on states to improve their health systems and adopt detailed EIAs which consider climate change. However, General Comments are not binding, and Nigeria has not ratified the Optional Protocol to the *ICPPR*, therefore Nigeria may not recognize the *General Comments* or attach much weight to them. Nonetheless, the *African Charter* can resolve this challenge as the

²³⁵ *General Comment No. 36*, para. 26.

²³⁶ *Ibid*, para 62.

²³⁷ *Ibid*.

²³⁸ *Environmental Impact Act*, Cap E12 Laws of the Federation of Nigeria, 2004, s. 1(a).

²³⁹ *Ibid* s. 7; Osa Ekhaton, "The Impact of the African Charter on Human and People's' Rights on Domestic Law: A Case Study of Nigeria" (2015) 41:2 Commonwealth Law Bulletin 253 at 260; Uzoazo Etemire, "A Fresh Perspective on the Human Right to Political Participation and Environmental Decision-Making in Nigeria" (2018) 26 Afr. J. Int'l & Comp. L. 568-571.

²⁴⁰ Etemire, *supra* note 239.

Charter has become part of Nigeria's law through its ratification and domestication into Nigerian law.²⁴¹ Moreover, the important role the *African Charter* plays in the Nigerian legal system was highlighted in the case of *Abacha v. Fawehinmi* where the Supreme Court held that the *African Charter* was superior to all Nigerian laws excluding the *CFRN* by declaring that:

No doubt Cap. 10 [the African Charter on Human and Peoples' Rights as domesticated by Cap. 10] is a statute with international flavor. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the court below that the Charter possesses "a greater vigor and strength" than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by ... learned counsel for the respondent.²⁴²

The *African Charter* was also instrumental in expanding the right to life and dignity under the *CFRN* to incorporate the right to a clean or healthy environment as the right to life in the *CFRN* is usually interpreted as a negative obligation and did not consider a healthy environment.²⁴³ In *Gbemre v Shell*, the right to life was broadly interpreted to include the environment as it held:

That this Court has the inherent jurisdiction to grant leave to the applicants who are bona fide citizens and residents of the Federal Republic of Nigeria, to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33 and 34 of the Constitution of the Federal Republic of Nigeria, 1999. That these constitutionally guaranteed rights inevitably include the right to clean, poison-free, pollution-free healthy environment.²⁴⁴

²⁴¹ Section 12 of the *CFRN* stipulates for the implementation of international treaties into Nigerian law. See also Flora Alohan Onomrerhinor, "A Re-Examination of the Requirement of Domestication of Treaties in Nigeria" (2016) 7 *Nnamdi Azikiwe U. J. Int'l L. & Juris.* 17.

²⁴² *Abacha & Others v Fawehinmi*, (2000) 6 *NWLR* 660 at 228.

²⁴³ Muhammed Tawfiq Ladan, "Achieving Sustainable Development Goals Through Effective Domestic Laws and Policies on Environment and Climate Change" (2018) 42 *Environmental Policy and Law* at 51; Amos O. Enabulele, "The Right to Life or the Right to Compensation upon Death: Perspectives on an Inclusive Understanding of the Constitutional Right to Life in Nigeria" (2014) 3 *J. Sustainable Dev. L. & Pol'y* 101-103.

²⁴⁴ *Gbemre v Shell* supra note 120 at para 5(2), (3). See also Rhuks Temitope Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (Abingdon, Oxon [England]: Routledge, 2013) 24-25.

The *African Charter* does not rely solely on its instruments in arriving at a decision but also draws inspiration from international human rights instruments as stated in Article 60:

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.²⁴⁵

This was illustrated in the decision in *Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt* where the Commission considered General Comment 18 of the UN HRC in arriving at a decision to determine if discrimination had occurred.²⁴⁶

4.5 Right to Health in Nigeria

Health is a fundamental human right.²⁴⁷ The right to health is nevertheless not included in every constitution. The *CFRN* does not expressly provide for the right to health as section 17(3) states “[t]he State shall direct its policy towards ensuring that - the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused; there are adequate medical and health facilities for all persons.”²⁴⁸ This right to health is incorporated in chapter II of the *CFRN* which provides for the Fundamental Objectives and Directive Principles of State Policy for Nigeria. This chapter has been held to be aspirational and therefore not justiciable by virtue of section 6(6)(c) of the *CFRN*, which states that “[t]he judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this Constitution,

²⁴⁵ *African Charter*, art. 60, 61.

²⁴⁶ Communication 323/06: *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, paras. 146-149.

²⁴⁷ *General Comment No. 14*, para. 1.

²⁴⁸ *CFRN*, s 17(3)(c)(d).

extend to any issue or question as to whether any act of omission by any authority or person as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.”²⁴⁹

Nigeria is party to several international instruments which recognize the right to health. It is a party to the *ICESCR* which acknowledges the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. However, Nigeria has not ratified the Optional Protocol to the *ICESCR*.²⁵⁰ It is also party to the *African Charter* which also asserts the right to health “1. Every individual shall have the right to enjoy the best attainable state of physical and mental health; 2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”²⁵¹

The provision of health care services in Nigeria is shared between the three tiers of government namely the federal, state and local governments.²⁵² The federal government plays a supervisory role over health issues in Nigeria and also provides tertiary health care services. The state government provides health care services and offers technical assistance to the local government which provides primary health care services.²⁵³ The Nigerian health sector is deficient and there has been minimal progress in the past 20 years.²⁵⁴ These deficiencies in the health sector are attributed to several factors including inadequate financing, inadequate and inequitable access, limited human resources

²⁴⁹ Nnamuchi, *supra* note 125 at 2-11.

²⁵⁰ OHCHR, “Status of Ratification Interactive Dashboard” (last visited 16 November 2019) <<https://indicators.ohchr.org/>>

²⁵¹ *African Charter*, art. 16.

²⁵² K.T. Ijadunola, “Free Health Services in Nigeria: How Beneficial to the Poor” (last visited 29 August 2019) <perma.cc/A4AH-FCSP>; Benjamin Uzochukwu et al, “Accountability Mechanisms for Implementing A Health Financing Option: the Case of the Basic Health Care Provision (BHCPF) in Nigeria” (2018) 17: 100 *International Journal for Equity in Health* 2-3.

²⁵³ Uzochukwu, *supra* note 252.

²⁵⁴ ERGV 2017-2020, *supra* note 134 at 85.

capacities and inadequate coordination, cohesion and accountability.²⁵⁵ For instance, the African Union in the 2001 Abuja Declaration²⁵⁶ proposed that each country on the continent expends 15 per cent of its annual budget on the health sector to achieve “universal or better health care services”.²⁵⁷ However, Nigeria has failed to adhere with this. In addition, Nigeria plans to expend only about 4 per cent of its 2019 budget on health.²⁵⁸

The legal and policy framework for health in Nigeria include the *National Health Act 2014*²⁵⁹ and the National Health Policy 2016.²⁶⁰ Nigeria’s health policy seeks to enhance available, accessible, affordable and quality health services by improving access to primary health care services, increasing health coverage and enhancing the quality of health services delivery.²⁶¹ This is in line with the right to health as expressed in the *General Comment No. 14*.²⁶² The health policy has developed several strategies to revitalize the primary health care system, roll out universal health coverage i.e. National Health Insurance Scheme (NHIS), strengthen delivery beyond the

²⁵⁵ *Ibid.* The Concluding Observations of the Committee on Economic, Social and Cultural Rights noted the inadequate funding and management of health services resulted in the deterioration of the health sector. It further observed the impact of oil exploration on the health and well-being of the Niger-Delta people and their environment. See Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights; Nigeria, Committee on Economic, Social and Cultural Rights, at 28, 29, U.N. Doc. E/C.12/1/Add. 23 16 June 1998

²⁵⁶ Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases OAU/SPS/ABUJA/3 African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases Abuja, Nigeria 24-27 April 2001 (last visited 27 July 2019) <www.aidswatchafrica.net/index.php/commitments/declarations/document/29-2001-abuja-declaration/14> para 26 [Abuja Declaration].

²⁵⁷ Abuja Declaration, para 26.

²⁵⁸ Budget Office of the Federation, Federal Republic of Nigeria, “2019 Budget” (last modified 30 May 2019) (last visited 21 August 2019) <www.budgetoffice.gov.ng/index.php/2019-budget>

²⁵⁹ *National Health Act*, 2014 (Act No. 8 of 2014)

²⁶⁰ Federal Ministry of Health, “National Health Policy 2016: Promoting the Health of Nigerians to Accelerate Socio-economic Development” (Federal Ministry of Health, September 2016) (last visited 21 August 2019) <www.google.com/url?sa=t&source=web&rct=j&url=http://www.nationalplanningcycles.org/sites/default/files/planning_cycle_repository/nigeria/draft_nigeria_national_health_policy_final_december_fmoh_edited.pdf&ved=2ahUKEwjEy_yfnZTtAhWaHTQIHgD9QQFjABegQIDhAG&usg=AOvVaw38V2sOm2LNAUDgMdfBkyjE>

²⁶¹ *Ibid.*

²⁶² *General Comment No. 14*, paras 4, 11.

primary health care system, partner with the private sector to construct model mega-health and build the capacity of health care personnel to improve service delivery.²⁶³ The NHIS, which is aimed at reducing or cushioning the burden of health expenditure for the poor, is ineffective as the scheme is seldom subscribed to by the poor.²⁶⁴ The National Health Policy further acknowledges that pre-emptive measures must be taken to tackle heat-waves, extreme rainfall and increased flooding resulting from climate change, and identifies the eradication and control of communicable and non-communicable diseases as its key public health concerns.²⁶⁵

As earlier stated, the right to health consists of two components namely available, accessible, acceptable and quality health care, and the underlying determinants of health.²⁶⁶ The second component primarily serves as a preventive measure to protect public health. Oduwole and Akintayo affirm that the second component of the public health dimension of the right to health by preventing diseases and protecting the health of the entire population is more important to Africans than the first component which highlights available, accessible, acceptable and quality health care because of the inadequacy of resources in poor countries.²⁶⁷ This is accurate as it will be cost-effective in the long-term to prevent public health epidemics than to deal with its actual occurrence and the resultant loss of lives.

There is no provision for the right to a healthy environment under the Nigerian law but Article 24 of the *African Charter* stipulates that: “All peoples shall have the right to a general satisfactory

²⁶³ ERGV 2017-2020, *supra* note 194 at 86.

²⁶⁴ Cheluchi Onyemelukwe, “Intersections of Violence against Women and Health: Implications for Health Law and Policy in Nigeria” (2016) 22 *William & Mary Journal of Women and the Law* 649; Abiodun Awosusi, Temitope Folaranmi & Robert Yates, “Nigeria’s New Government and Public Financing for Universal Health Coverage” (2015) 3:9 *Lancet Global Health* 514.

²⁶⁵ National Health Policy 2016, at 8, 29.

²⁶⁶ Nnamuchi, *supra* note 125.

²⁶⁷ Oduwole & Akintayo, *supra* note 106 at 200.

environment favorable to their development.”²⁶⁸ This has been construed as a right to a clean or healthy environment. In *SERAC v. Nigeria*, the complainants, two non-governmental organizations submitted a communication to the Commission asserting that the Nigerian government had violated the right to health and right to a clean environment as stated in Articles 16 and 24 of the *African Charter*. The complainants alleged that the Nigerian government had directly participated in contaminating the air, water and soil and consequently harmed the health of the Ogoni people by condoning violations of the *African Charter* and international environmental standards by the State oil company, the Nigerian National Petroleum Company (NNPC) and its partner Shell Petroleum Development Corporation (SPDC); and using its security forces to facilitate damage to the Ogoni people instead of protecting them.²⁶⁹ Furthermore, they claimed that the government failed to provide or permit studies of potential or actual environmental and health risks resulting from that oil operation.²⁷⁰

The African Commission found in favour of the complainants that the Nigerian government had indeed violated the Ogoni peoples right to health and a clean environment as laid down in Articles 16 and 24 of the *African Charter*. This was read into Article 12 of the *ICESCR* which recognized the right of all to enjoy the maximum level of physical and mental health and mandated governments to take measures to improve environmental and industrial hygiene. The Commission directed the Nigerian government *inter alia* to comply with the *African Charter* by:

Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry or the particular industry; and

²⁶⁸ *African Charter*, art. 24.

²⁶⁹ *SERAC v. Nigeria*, *supra* note 32.

²⁷⁰ *Ibid* at para 60.

[p]roviding information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations or any development project.²⁷¹

In examining these two claims in the light of climate change, which was not raised then, it is pertinent to note these claims are vital in addressing climate-related public health challenge as the effects will not be restricted to the Niger Delta people. Furthermore, based on *General Comment No. 36*, the Commission could direct the Nigerian government to conduct a climate change impact assessment (CCIA) as part of an EIA to determine the various impacts of the project on the populace. For instance, in *Earthlife Africa Johannesburg v. The Minister of Environmental Affairs & ors (Earthlife Africa)*, the applicant, a non-profit environmental organization had instituted an action contesting the legality of the first and second respondents' grant of an environmental authorization for a coal-fired power station without the inclusion of a CCIA which was necessary as climate change would impact on water resources, human health and biodiversity and South Africa's duty to mitigate its emission.²⁷²

The Court held that although there was no express statutory provision required to conduct a CCIA to grant an environmental authorization, it was necessary to conduct a CCIA prior to authorizing new power stations and further directed that the Minister's initial ruling be set aside and based on the new evidence in the climate change report, re-evaluate the impacts of climate change and grant fresh authorization while interested and affected parties be allowed to comment.²⁷³ The Court in arriving at its decision noted South Africa's status as a significant contributor to GHG emissions particularly through coal-fired power plants in addition to the high risks climate change

²⁷¹ *Ibid* at para. 69.

²⁷² *Earthlife Africa Johannesburg v. The Minister of Environmental Affairs & ors*. Case number: 65662/16, para 54 [*Earthlife Africa*].

²⁷³ *Ibid* at paras 76- 91; pp paras 78, 79, 80, 81, 82, 83, 88, 90, 91, 121.

poses to South Africa, a water-stressed country in terms of water scarcity for local communities and power-generation.²⁷⁴

The *African Charter* directs its State Parties to take necessary steps to protect the health of their people and ensure they receive medical attention when they are sick.²⁷⁵ The *ICESCR* has similar provisions and further highlights some of the steps to be taken by the State Parties.²⁷⁶ It can be asserted that Nigeria has not satisfied the steps enumerated and therefore not safeguarded the right to health for its citizens and residents particularly those in the rural areas because health services in Nigeria are inadequate to meet the needs of its inhabitants.²⁷⁷ There is for instance, a prevalence of infectious diseases in Nigeria such as tuberculosis.²⁷⁸

4.6 Examining the Rights to Life and Health of Rural People in the Niger Delta Region in the Context of Climate Change

Nigeria's NDC acknowledges that climate change directly impacts remote communities which have minimal capacity to adapt to climate change in comparison with urban areas.²⁷⁹ It further affirms that they have less influence than the typical urban populace.²⁸⁰ Studies from agrarian rural communities in Nigeria indicate climate change causes the loss of agricultural jobs, food insecurity,

²⁷⁴ *Ibid* at paras 25, 4, 49, 82.

²⁷⁵ Art 16 (2).

²⁷⁶ *ICESCR*, art 16 (2). See also Jibriel, *supra* note 125 at 34.

²⁷⁷ ERGV 2017-2020, *supra* note 194 at 85.

²⁷⁸ *Ibid*.

²⁷⁹ Nigeria's NDC, *supra* note 195 at 16.

²⁸⁰ *Ibid*.

water shortages, flooding, land-based conflicts, health problems and erosion.²⁸¹ Furthermore, there were concerns by the respondents of the study that these incidents may increase.²⁸²

The rights to life and health of the rural populace of the Niger-Delta region will be severely affected in view of the envisaged overwhelming effects of climate change. The IPCC predicts with high confidence that climate change will impact on coastal regions through sea level rise.²⁸³ Consequently, the Niger Delta region will be affected.²⁸⁴ The region has experienced sea level rise causing erosion and flooding,²⁸⁵ and resulting in loss of plant and animal species with negative impacts on the subsistence farmers and fishermen in the region.²⁸⁶ A further sea level rise is expected to cause increased erosion and flooding in the region²⁸⁷ leading to deaths, drownings, physical injuries and displacement of the residents.²⁸⁸ There also exists a high risk of diseases like cholera, typhoid and malaria.²⁸⁹ Climate change through sea-level rise will impact negatively on the health and livelihood of fish-dependent communities in the Niger Delta by disrupting fishing operations and cause a decline in fish stock, leading to malnutrition and requiring fishermen to

²⁸¹ Chidi Nzeadibe et al, “Indigenous Innovations for Climate Change Adaptation in the Niger Delta Region of Nigeria” (2012) 14:6 Environment, Development and Sustainability 901 at 909; Roland Clement Abah, “Rural perception to the Effects of Climate Change in Otukpo” (2014) 108:2 Nigeria Journal of Agriculture and Environment for International Development 153 at 158.

²⁸² Abah, *supra* note 281 at 158.

²⁸³ IPCC, 2014: Summary for policymakers. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 13.

²⁸⁴ Oladipo, *supra* note 18 at 10.

²⁸⁵ Etiosa Uyigie & Matthew Agni, “Coping with Climate Change and Environmental Degradation in the Niger Delta of Southern Nigeria” (Edo State: Nigeria, 2007) (Community Research and Development Centre) 8-9.

²⁸⁶ *Ibid* at 9.

²⁸⁷ *Ibid* at 8.

²⁸⁸ Oladipo, *supra* note 18 at 10; Ndimele, *supra* note 18 at location 8258, 8262 of 13486; Randall S. Abate and Elizabeth Ann Kronk, “Commonality among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples” in Randall S. Abate and Elizabeth Ann Kronk, *supra* note 18 at 17; Costello, *supra* note 18 at 1706.

²⁸⁹ Oladipo, *supra* note 18 at 12.

change occupations.²⁹⁰ In addition, a rise in the sea-level will necessitate the relocation of the indigenes to safer areas. This will result in mental health issues due to difficulties in adapting to occupational changes and cultural challenges in their new locations.

It can be surmised that climate change will impact on the residents physical and mental health while the health facilities to alleviate the situation are presently non-existent or inadequate. Moreover, the existing poor health-status of the residents of the region would render them susceptible to the health impacts. The primary and voluntary health insurance scheme in Nigeria, the NHIS is usually not subscribed to by the informal sector.²⁹¹ Improvements in health-care may be difficult to effect because of inadequate funds while qualified health-workers may not be incentivized to relocate to the region because of the predominantly rural and coastal location.

The NASPA-CCN has observed these challenges and accordingly developed some strategies to address the health impacts of climate change while taking into consideration environmental impacts on health.²⁹² In the same vein, the federal government identifies the Niger Delta region as vulnerable to climate change and generally plans to reduce inequality in the region by investing in social programmes and providing social amenities.²⁹³ Also, the NDC recognizes the need to conduct research to comprehend the impacts of climate change on health.²⁹⁴ Despite these policies, Nigeria might not effect the necessary changes because of inadequate funds.

²⁹⁰ Badjeck et al, *supra* note 19.

²⁹¹ Onyemelukwe, *supra* note 264; Awosusi, Folaranmi & Yates, *supra* note 264. Informal sector refers to small -scale businesses or activities that are not registered or taxed by the government. See OECD, “Glossary of Statistical Terms” (last visited 23 December 2019) online: *OECD* <<https://stats.oecd.org/glossary/detail.asp?ID=1350>>.

²⁹² Federal Ministry of Environment, Climate Change Department, National Adaptation Strategy and Plan of Action on Climate Change for Nigeria (NASPA-CCN) 50.

²⁹³ ERGV 2017-2020, *supra* note 194 at 28.

²⁹⁴ Nigeria’s NDC, *supra* note 195 at 20-21.

4.7 Conclusion

From the foregoing, it can be surmised that Nigeria has not sufficiently protected the right to life and health of the Niger Delta indigenes. This can be considered in the light of the right to life as interpreted by the HRC in its *General Comment No. 36* where it directed states to comply with their obligations under climate change agreements, prevent epidemics and adopt a precautionary approach to protect the right to life. Furthermore, by Nigeria's inadequate provision of health care as well as the underlying determinants of health such as potable water and a healthy environment as stated in Article 12(2)(b)(c) & (d) of the *ICESCR* and Article 16 of the *African Charter*, it has failed to protect the right to health. To prevent the grave consequences of climate change on public health and the resultant loss of lives, states are directed to comply with the provisions of these instruments.

While the above measures are not binding, it is recommended that Nigeria considers and adopts them into its prospective policies for human health especially as Nigeria's NDC recommends new inclusive policies and measures which considers socioeconomic status of rural areas and are culturally appropriate to enhance their income security, improve resilience and reduce emissions.²⁹⁵ These policies and measures can consider the provision of the underlying determinants of health as well as health services for rural areas to guarantee their right to health and reduce inequality.

Mitigation measures are also required in all sectors to ensure successful adaptation.²⁹⁶ Nigeria's EIA does not also take into cognizance the health effects of climate change neither does it ensure public participation. In the Niger-Delta context, EIAs incorporating CCIA requiring public participation particularly from those in the Niger-Delta will be effective.

²⁹⁵ NDC, *supra* note 198 at 16.

²⁹⁶ Wiley, *supra* note 10 at 228.

If Nigeria refuses to consider and adopt the proposed measures above, the people of the Niger Delta region are restricted to filing actions for the violation of their rights solely at the national and regional level because Nigeria has not ratified the Optional Protocols of the *ICCPR* and *ICESCR* which allows individuals to submit communications against State Parties of the treaties for the violation of their rights at UN treaty bodies.

The Niger Delta people can file an action for an infringement of the right to life against Nigeria relying on section 33(1) of the *CFRN*, Article 4 of the *African Charter*, Article 12 of the *ICESCR*, and the *Fundamental Rights (Enforcement Procedure) Rules 2009 (FREPR Rules 2009)*²⁹⁷ to a High Court in Nigeria similar to *Gbemre v. Shell*. Also, the rural people of the Niger Delta region can submit a communication against Nigeria for the infringement of the rights to life and health based on Articles 4, 16 and 24 of the *African Charter*, Article 6(1) of the *ICCPR* and Article 12 of the *ICESCR* to the African Commission. Similarly, an action can be instituted against Nigeria at the Court of Justice Economic Community of West African States (ECOWAS) for the infringement of the rights to life and health by relying on section 33(1) of the *CFRN* Articles 4, 16 and 24 of the *African Charter*, Article 6(1) of the *ICCPR* and Article 12 of the *ICESCR*.

It is envisaged that these measures will alleviate the plight of the Niger Delta people residing in rural areas whose rights are infringed, and whose conditions are quite similar to the First Nations in the Treaty 8 territory discussed in the next chapter.

²⁹⁷ The *Fundamental Rights (Enforcement Procedure) Rules, 2009* is made pursuant to section 46(3) of the *CFRN*/

Chapter 5: Case Study: Canada

5.1 Introduction

This chapter gives a synopsis of Canada. Thereafter it examines rural Indigenous peoples particularly those in the Treaty 8 territory, their marginalized status and how climate change negatively impacts on them. It also reviews the rights to life and health in Canada and under regional and international human rights instruments in the context of climate change, and subsequently concludes the chapter. While this chapter refers to rural First Nations, it may also be applicable to other Indigenous peoples.

5.2 Overview of Canada

Canada is a high-income country in North America²⁹⁸ with diverse natural resources.²⁹⁹ It has a population of 37,412,852 people.³⁰⁰ Canada has a thriving energy industry. In 2018, it was the world's fourth top energy producer of petroleum and had the third largest proved oil reserves as of January 2019.³⁰¹ Canada also tackles the problem of balancing competing concerns of economic development and environmental protection.³⁰²

²⁹⁸ The World Bank, *Country Profile: Canada* (last visited 12 June 2019) <databank.worldbank.org/data/views/reports/reportwidget.aspx?Report_Name=CountryProfile&Id=b450fd57&tbar=y&dd=y&inf=n&zm=n&country=CAN>.

²⁹⁹ Nazrul Kazi, *Canada's Quarterly Natural Resource Wealth* (30 May 2016 (last visited 18 October 2019) <<https://www150.statcan.gc.ca/n1/pub/16-002-x/2017001/article/14825-eng.htm>>.

³⁰⁰ Statistics Canada, "Canada's Population Estimates, First Quarter 2019" (19 June 2019) (last visited 18 October 2019) online: *Statistics Canada* <<https://www150.statcan.gc.ca/n1/daily-quotidien/190619/dq190619c-eng.htm>>.

³⁰¹ US Energy Information Agency, *Canada: Analysis* (7 October 2019) (last visited 18 October 2019) <www.eia.gov/beta/international/analysis.php?iso=CAN>.

³⁰² Andrew Green, "On Thin Ice: Meeting Canada's Paris Climate Commitments" (2018) 32 *Journal of Environmental Law and Practice* at 103-107.

Canada is a party to several regional and international instruments in diverse areas including the environment and human rights. It is party to the *ICCPR*,³⁰³ the *ICESCR*,³⁰⁴ the *UNFCCC*,³⁰⁵ the *Kyoto Protocol*³⁰⁶ and the *Paris Agreement*.³⁰⁷

Canada's Constitution, the *Constitution Act, 1867*³⁰⁸ at its inception did not explicitly provide for the environment inevitably creating legal challenges between the federal and provincial governments on jurisdiction primarily because the provinces are vested with exclusive jurisdiction on property and civil rights, and natural resources.³⁰⁹ Invariably, the Supreme Court rose to this challenge on several occasions to pronounce that neither the federal and provincial governments

³⁰³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976). See also United Nations Treaty Collection, "Human Rights: International Covenant on Civil and Political Rights" (last modified 14 August 2019) (last visited 14 August 2019) online: *United Nations* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en>.

³⁰⁴ *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976) See also United Nations Treaty Collection, "Human Rights: International Covenant on Economic, Social and Cultural Rights" (last modified 14 August 2019) (last visited 14 August 2019) online: *United Nations* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-3&chapter=4&clang=_en>.

³⁰⁵ *United Nations Framework Convention on Climate Change*, 4 June 1992, 1771 UNTS 107 (entered into force 21 March 2004). See also United Nations Treaty Collection, *Environment: United Nations Framework Convention on Climate Change* (last visited 12 June 2019) <treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXVII-7&chapter=27&Temp=mtmsg3&clang=_en>.

³⁰⁶ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 16 March 1998, 2303 UNTS 162 United Nations Treaty Collection, *Environment: Kyoto Protocol to the United Nations Framework Convention on Climate Change* (last visited 12 June 2019) <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-7-a&chapter=27&clang=_en>.

³⁰⁷ *Paris Agreement*, 22 April 2016 (entered into force 4 November 2016). See also United Nations Treaty Collection, *Environment: Paris Agreement* (last visited 12 June 2019) <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-7-d&chapter=27&clang=_en>.

³⁰⁸ *The Constitution Act, 1867*, 30 & 31 Vict, c 3, (*Constitution Act*, 1867)

³⁰⁹ *The Constitution Act, 1867*, ss. 91(13) and 92A. See also Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials* (Second Edition Canada: Thomson Reuters, 2013) at 166-172.

had exclusive jurisdiction over the environment as both had varying roles in protecting the environment.³¹⁰ In *R v. Hydro-Quebec*, the SCC held that:

This Court in *Oldman River, supra*, made it clear that the environment is not, as such, a subject of legislation made under the Constitution Act 1867. As it was put there, ‘the Constitution Act, 1867 has not assigned the matter of “environment” sui generis to either the provinces or Parliament’ (p.63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, prohibit pollution, and the like.³¹¹

Climate change, a significant issue in Canada, also poses a similar jurisdictional challenge because of the federal government’s bid to adhere with its international commitments to protect the environment and some provinces’ goal to develop their natural resources.³¹² In 2017, Canada’s GHG emissions were about 716 megatonnes of carbon dioxide equivalent (Mt CO₂ eq).³¹³ In the same year, Canada was rated the tenth largest emitter with the energy sector contributing about 82 per cent of Canada’s total GHG emissions.³¹⁴ Canada seeks to reduce its GHG emissions by 30 per cent below 2005 level by 2030.³¹⁵ Presently, Canada has no omnibus law on climate change but

³¹⁰ *Friends of Oldman River Society v. Canada (Minister of Transport)*, 1 S.C.R. 3, *R v. Hydro-Quebec*, [1997] 3 S.C.R. 213 and *R v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

³¹¹ *R v. Hydro-Quebec*, [1997] 3 S.C.R. 213 para. 112.

³¹² The Canadian News, Saskatchewan Takes Federal Carbon Tax Fight to Supreme Court (31 May 2019) (last visited 12 June 2019) online: *CTV News* <www.ctvnews.ca/politics/saskatchewan-takes-federal-carbon-tax-fight-to-supreme-court-of-canada-1.4446473>; Stephanie Taylor, “Federal Carbon Tax Ruled Constitutional: Ottawa Pressures Premier to Get on Board” (3 May 2019) (last visited 12 June 2019) <www.ctvnews.ca/canada/federal-carbon-tax-ruled-constitutional-ottawa-pressures-premiers-to-get-on-board-1.4406418>

³¹³ Environment Canada, “Greenhouse Gas Emissions: National Greenhouse Gas Emissions” (last modified 17 April 2019) <www.canada.ca/en/environment-climate-change/services/environmental-indicators/greenhouse-gas-emissions.html>.

³¹⁴ Johannes Friedrich, Mengpin Ge & Andrew Perkins, This Interactive Chart Explains World’s Top 10 Emitters, and How They’ve Changed, <11 April 2017> (last visited 10 July 2019) online: *World Resources Institute* <www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-they-ve-changed>; Environment and Climate Change Canada, Greenhouse Gas Sources and Sinks: Executive Summary 2019, (23 April 2019) (last visited 23 April 2019) online: Environment and Climate Change Canada <www.canada.ca/en/environment-climate-change/services/climate-change/greenhouse-gas-emissions/sources-sinks-executive-summary-2019.html>.

³¹⁵ UNFCCC NDC Registry, “Canada’s 2017 Nationally Determined Contribution Submission to The United Nations Framework Convention on Climate Change” (last visited 12 June 2019)

there is the *Greenhouse Gas Pollution Pricing Act*,³¹⁶ *Energy Efficiency Act*³¹⁷ as well as the *Canadian Environmental Protection Act (CEPA)* which also accommodates climate change.³¹⁸

There are also policies such as the Pan-Canadian Framework on Clean Growth and Climate Change (Pan-Canadian Framework) and the Federal Sustainable Development Strategy for Canada, 2016-2019 to complement the laws.³¹⁹

Climate change and measures to address it constitute a challenge in Canada. Physically, Canada is warming at more than twice the global rate as well as the Arctic region which is warming at thrice the global rate with more predictions of imminent warmings.³²⁰ Canada has undergone and is expected to experience considerable changes in temperature, wildfires, floods, precipitation, decline in ice conditions, rapidly melting permafrost, sea level rise and extreme storms in the coastal areas.³²¹ Second, several provinces are opposed to the joint federal and provincial government's measures to reduce GHG emissions.³²² Third, there are health implications arising from increased

<www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Canada%20First/Canada%20First%20NDC-Revised%20submission%202017-05-11.pdf> at 1 [Canada's NDC].

³¹⁶ *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186.

³¹⁷ *Energy Efficiency Act*, S.C. 1992, c. 36.

³¹⁸ *Canadian Environmental Protection Act*, S.C. 1999, c. 33, Schedule 1 provides for the regulation of GHGs while sections 93, 140 and 162 stipulate the regulation of emissions in the transportation and electricity sectors. See Sharon Mascher, "Neglected Sovereignty: Filling Canada's Climate Change Gap with Unilateral Measures" (2016) 29 *Journal of Environmental Law and Policy* 368-369.

³¹⁹ Environment Canada, Pan-Canadian Framework for Clean Growth and Climate Change (last visited 4 June 2019) online: <publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf>; 2016-2019 Federal Sustainable Development Strategy (last visited 4 June 2019) online: <2016-2019.fdsd-sfdd.ca/downloads/FSDS_2016-2019_Final.pdf> [Pan-Canadian Framework].

³²⁰ Bush, E. & Lemmen, D.S. *Canada's Changing Climate Report*; (Ottawa, Ontario: Government of Canada, 2019) at 84, 116, 145-154 [Canada's Changing Climate Report].

³²¹ *Ibid* at 116, 117, 141, 154-174, 181, 377, 378, 380-391; Meinhard Doelle, Dennis Mahony & Alex Smith, "Canada" in Richard Lord, et al (Eds) in *Climate Change Liability: Transnational Law and Practice* (Cambridge, UK: Cambridge University Press, 2012) at 529.

³²² Adam Hunter, "Saskatchewan files notice of carbon tax appeal to Supreme Court of Canada" (31 May 2019) (last visited 13 June 2019) online: *CBC News* <www.cbc.ca/news/canada/saskatchewan/sask-carbon-tax-supreme-court-appeal-1.5157465>; Steve Lambert, "New Manitoba Plan Contains No Carbon Tax, Higher Carbon Emissions Level (10 June 2019) (last visited 13 June 2019) online: *CBC News* <www.cbc.ca/news/canada/manitoba/manitoba-green-plan-carbon-tax-1.5169822>.

temperatures, air quality and natural hazards such as heat stress, respiratory diseases and Lyme disease.³²³ Finally, the detrimental effects of climate change are felt particularly in rural areas and on Indigenous populations as it exacerbates existing vulnerabilities and negatively affects traditional ways of life of Indigenous peoples.³²⁴

5.3 First Nations of the Treaty 8 Territory in Canada

Figure 2: Map of Numbered Treaties in Canada



Source: Wikipedia

³²³ Health Canada, Climate Change and Health: Health Effects (last visited 7 June 2019) online: *Health Canada* <www.canada.ca/en/health-canada/services/climate-change-health.html>; Health Canada, *Adapting to Extreme Heat Events: Guidelines for Assessing Health Vulnerability* (last visited 7 June 2019) <www.canada.ca/content/dam/hc-sc/migration/hc-sc/ewh-semt/alt_formats/hecs-sesc/pdf/pubs/climat/adapt/adapt-eng.pdf>; Canada's NDC *supra*, note 315 at 3, Pan-Canadian Framework, *supra* note 319 at 32.

³²⁴ Meinhard Doelle, Dennis Mahony & Alex Smith, *Canada* in Richard Lord et al, *supra* note 321 at 529.

Rural communities in Canada have historically relied on primary resources such as energy, forestry, fisheries and agriculture.³²⁵ Within rural Canada are rural Indigenous groups who are often marginalized in several ways and can also be categorized as vulnerable.³²⁶ The *Constitution Act, 1982* divides Indigenous peoples into three categories: Indians, Inuit, and Métis while the *Constitution Act, 1867* places “Indians and Lands reserved for the Indians” [s. 91] under the exclusive jurisdiction of the federal government.³²⁷ For the purposes of this thesis, I will largely be discussing those people referred to as ‘Indians,’ although I will use the term First Nations as Indian is now often seen as pejorative. An example of a vulnerable community in rural Canada is the First Nations³²⁸ who are placed under the exclusive jurisdiction of the federal government because of their unique position as the earliest inhabitants of Canada.

The advent of European settlers prompted the negotiation and signing of several treaties between the Crown and the Indigenous peoples for their lands. Consequently, various Indigenous and treaty rights have been constitutionally recognized hence, “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”³²⁹ One of the treaties signed and which is pivotal to this thesis is Treaty 8. Treaty 8 refers to the treaty number of one of the 11 numbered treaties signed between the Queen and Indigenous groups comprising Cree and Dene First Nations in Lesser Slave Lake, Alberta on June 21, 1899 which resulted in the

³²⁵ Hallstrom, *supra* note 78 at 190.

³²⁶ Blankenau, *supra* note 78 at 333; Rosamund L. Harrison et al, “Brighter Smiles: Service Learning, Inter-Professional Collaboration and Health Promotion in a First Nations Community” (2006) 97:3 *Canadian Journal of Public Health* 237.

³²⁷ *Constitution Act 1867*, s. 91 (24).

³²⁸ Blankenau, *supra* note 78 at 336.

³²⁹ *Constitution Act, 1982*, s. 35 (1).

surrender of land rich in natural resources, petroleum, and natural gas to the Crown in exchange for the First Nations rights to hunt, trap and fish for their sustenance, incentives as well as reserves.³³⁰

The Treaty 8 territory encompasses Northern Alberta, North Western Saskatchewan, Southern parts of the Northwest Territories and North-Eastern British Columbia.³³¹ There are 24 First Nations communities living in the Treaty 8 territory in Alberta.³³² They include the Athabasca Chipewyan First Nation, Dene Tha' First Nation, Fort McMurray First Nation, Lubicon Lake First Nation, Mikisew Cree First Nation and the Peerless Trout First Nation living in the Treaty 8 territory in Alberta.³³³ Most First Nations reserves in Alberta can be described as rural³³⁴ and those in the Treaty 8 territory are no exception. This is illustrated in each of the 24 reserves which have a population of less than 5000, and 14 reserves which have a population below 500 people.³³⁵ There are 18,640 First Nations living in Treaty 8 reserves.³³⁶ First Nations usually regard cultural and

³³⁰ Robert Metes & Christopher G Devlin, "Land Entitlement under Treaty 8" (2004) 41:4 Alta L Rev 951 at 952, 953; Monique M Ross & Cheryl Y Sharvit, "Forest Management in Alberta and Rights to Hunt, Trap and Fish under Treaty 8" (1998) 36:3 Alta L Rev 645 at 646. Dennis F.K. Madill, "Treaty Research Report – Treaty Eight (1899)" (last modified 15 September 2010) (last visited 19 November 2019) online: *Indian and Northern Affairs Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1100100028809/1564415096517>>.

³³¹ *Ibid.*

³³² Indian and Northern Affairs Canada, First Nations in Alberta (15 September 2010) (last visited 21 December 2019) online: *Indigenous and Northern Affairs Canada* <<https://www.aadnc-aandc.gc.ca/eng/1100100020670/1100100020675>>.

³³³ Cora Voyageur, Angeline Letendre & Bonnie Healy, *Alberta Baseline Assessment Report: Canadian Partnership against Cancer First Nations, Métis and Inuit Cancer Control Initiative – Increased Access to Culturally Safe Cancer Care Pathways by Alberta First Nations in Rural, Remote, and Isolated Communities* (Alberta: The Alberta First Nations Information Governance Centre, 2013) 12 [Alberta Baseline Report].

³³⁴ Alberta Government, *Aboriginal Peoples of Alberta: Yesterday, Today, and Tomorrow* (Edmonton: Alberta Aboriginal Relations, November 2013) 40 (last visited 10 July 2019) <open.alberta.ca/publications/9781460113080>.

³³⁵ Health Canada, "Health Determinants for First Nations in Alberta 2016" (Ottawa, Ontario: Health Canada, 2016) 29 (last visited 20 November 2019) <http://publications.gc.ca/collections/collection_2016/sc-hc/H34-217-2016-eng.pdf> [Health Determinants for First Nations].

³³⁶ *Ibid* at 27.

spiritual practices on the land as significant, and are traditionally subsistence hunters, fishermen and trappers with some presently maintaining the vocation.³³⁷

Presently, First Nations in the Treaty 8 territory as well as other Indigenous peoples in Canada experience marginalization, racism and disparities in several areas including health, education and housing.³³⁸ This is traced to colonization that disrupted their way of life in terms of culture, religion and subsistence which pre-existed before the advent of European settlers.³³⁹ The law through the *Indian Act* serves to perpetuate colonialism and discrimination by restrictively regulating the way of life of the First Nations.³⁴⁰ For example, they were displaced from their traditional lands to reserves, some in remote and rural areas.³⁴¹ In addition, the Act introduced the residential school system as well as the sixties scoop to children welfare homes to assimilate Indigenous children to European

³³⁷ Mark Nelson, David C. Hatcher & Clifford G. Hickey, “Social and Economic Barriers to Subsistence Harvesting in a Northern Alberta Aboriginal Community” (2005) 47:2 *Anthropological* 289 at 290-291; Nikki Way and Erin Flanagan, “The Right to a Healthy Environment Documenting the Need for Environmental Rights in Canada, Case Study 3: Regional Impacts of Oil Sands Development in Northern Alberta” (April 2017) (last visited 26 June 2019) online: (pdf) *The Pembina Foundation* <www.pembina.org/pub/right-to-a-healthy-environment> 7.

³³⁸ Carrie Mendel-Meadow, “Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse and Injustice (2014) 64:4 *UTLJ* 620 at 637. See also Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the: Concluding Observations of the Committee on Economic, Social and Cultural Rights on the 5th Periodic Report of Canada; Canada, Committee on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/CAN/CO/6 23 March 2016 para. 19.

³³⁹ Margo Greenwood & Nicole Marie Lindsay, “A commentary on Land, Health, and Indigenous knowledge(s)” (2019) 26:3 *IUHPE – Global Health Promotion* 82; Michael Gracey & Malcolm King, “Indigenous Health Part 1: Determinants and Disease Patterns” (2009) 374 *The Lancet* 65-66.

³⁴⁰ *Indian Act*, R.S.C., 1985 c. I-5. See also Stephanie A. Nixon et al, “Canada’s Global Health Role: Supporting Equity and Global Citizenship as A Middle Power” (2018) 391 *the Lancet* 1743-1744; Margo Luanne Greenwood & Sarah Naomi de Leeuwenhoek, “Social Determinants of Health and the Future Well-Being of Aboriginal Children in Canada” (2012) 17:7 *Paediatric Child Health* 382.

³⁴¹ Shirley Thompson, Myrle Ballard & Donna Martin, “Lake St. Martin First Nation Community Members’ Experiences of Induced Displacement: “We’re Like Refugees” 29:2 *Refuge* 77; Truth and Reconciliation Commission of Canada, Truth and Reconciliation Commission of Canada: Calls to Action (Winnipeg: TRC, 2015) at 1, 53 [Truth and Reconciliation Commission].

culture thereby resulting in high mortality rates, impairment of the health of numerous students and overall culminated in negative intergenerational effect on Indigenous peoples.³⁴²

Canada on realizing these injustices and its effects, formally apologized in 2008 for the residential schools,³⁴³ following a Statement of Reconciliation issued in March 1998³⁴⁴ and further initiated reconciliation processes including the Truth and Reconciliation Commission (TRC) and adoption of the recommendations of the TRC such as the implementation of the *UNDRIP*.³⁴⁵

Nonetheless, the Indigenous peoples including the First Nations of the Treaty 8 territory remain marginalized, mostly poor and undergo several inequities, and can be characterized as socially vulnerable.³⁴⁶ Indigenous peoples particularly those residing in rural areas or reserves are more marginalized than other rural people in Canada as they lack adequate housing,³⁴⁷ lack

³⁴² Yvonne Boyer, *Moving Aboriginal Health Forward: Discarding Canada's Legal Barriers* (Saskatchewan, Canada: Purich Publishing Limited, 2014) 10 [Boyer, *Moving Aboriginal Health Forward*]; Malcolm King, Alexandra Smith & Michael Gracey, "Indigenous Health Part 2: The Underlying Causes of the Health Gap" (2009) 374 *The Lancet* 76 at 79; Yvonne Boyer, *First Nations, Métis, and Inuit Women's Health: A Rights-Based Approach* (2017) 54 *Alta. L. Rev.* 611 at 618.

³⁴³ Indigenous and Northern Affairs Canada, *Statement of Apology to a Former Students of Indian Residential Schools* (15 September 2010) (last visited 3 July 2019) online: *Indigenous and Northern Affairs* <www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

³⁴⁴ Indigenous and Northern Affairs Canada, "Address by the Honourable Jane Stewart Minister of Indian Affairs and Northern Development on the Occasion of the Unveiling of Gathering Strength-Canada's Aboriginal Action Plan" (15 September 2010) (last visited 14 July 2019) online: *Indigenous and Northern Affairs Canada* <www.aadnc-aandc.gc.ca/eng/1100100015725/1100100015726>.

³⁴⁵ Mendel-Meadow, *supra* note 338 at 628; Government of Canada, *United Nations Declaration on the Rights of Indigenous Peoples* (last visited 2 June 2019) online: *Government of Canada* <www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>; Government of Canada, *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (30 July 2012) (last visited 2 June 2019) <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>; Government of Canada, *United Nations Declaration on the Rights of Indigenous Peoples* (3 August 2017) (last visited 18 October 2019) online: *Government of Canada* <www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>; Truth and Reconciliation Commission, *supra* note 341.

³⁴⁶ Mirjam Macchi, "Indigenous and Traditional Peoples and Climate Change" (2008) *International Union for Conservation of Nature Issues Paper* 18.

³⁴⁷ *Health Determinants for First Nations in Alberta 2016*, *supra* note 335 at 109, 112.

adequate access to health care,³⁴⁸ and sometimes experience racism when accessing health care which is reflected in their poor health status.³⁴⁹ For example, the Key Health Inequalities in Canada report 2018 states that life expectancy at birth was 79.0 years and 84.4 years for non-Indigenous Canadian men and women respectively while it was 67.6 years and 73.7 years for First Nations men and women respectively.³⁵⁰ Also, the rate of tuberculosis is higher in comparison with other First Nations and non-Indigenous Canadians.³⁵¹ Thus, they may lack the capacity to cope with the stress of climate change despite their traditional knowledge which is usually a coping mechanism.³⁵²

It is also important to note the plight of First Nations in the Treaty 8 territory as victims of environmental injustice. Some of them live in rural reserves adjoining the oil sands deposits in the oil-rich province of Alberta³⁵³ which was the highest GHG emitting province in 2017 with 273 (Mt CO₂ eq) mainly from oil and gas operations.³⁵⁴ Despite the benefits of oil extraction and production

³⁴⁸ McLachlan, *supra* note 87 at 131; Banjul R. Shah, Nadia Gunraj & Janet E. Hux, “Markers of Access to and Quality of Primary Care for Aboriginal People in Ontario, Canada” (2003) 93:5 *American Journal of Public Health* 798.

³⁴⁹ Sarah de Leeuw et al, “With Reserves: Colonial Geographies and First Nations Health” (2012) 102:5 *Annals of the Association of American Geographers* 904, 907-908; Kelly Geraldine Malone, Indigenous Patients Still Waiting for Equity in Health Care: Canadian Doctor (21 August 2018) (last visited 10 July 2019) online: *Global News* <globalnews.ca/news/4398976/Indigenous-patients-still-waiting-for-equity-in-health-care-canadian-doctor/>

³⁵⁰ Public Health Agency of Canada, Key Health Inequalities in Canada: A National Portrait (Minister of Health, May 2018) at 60, 62, online (pdf) *Public Health Agency of Canada* <www.canada.ca/en/public-health/services/publications/science-research-data/key-health-inequalities-canada-national-portrait-executive-summary.html> [Key Health Inequalities Report].

³⁵¹ Government of Alberta, *Tuberculosis Surveillance Report 2005 to 2009 with Preliminary Summary* (Edmonton: Government of Alberta, 2012) 17; Alberta Health, Office of the Chief Medical Officer of Health, *Tuberculosis in Alberta Surveillance Report 2010 to 2012* (Edmonton, Government of Alberta, 2014) 15.

³⁵² Pan-Canadian Framework, *supra* note 319 at 1, 27.

³⁵³ Alberta Government, *Aboriginal Peoples of Alberta: Yesterday, Today, and Tomorrow*” (Edmonton: Alberta Aboriginal Relations, November 2013) 40 (last visited 10 July 2019) online: *Government of Alberta* <open.alberta.ca/publications/9781460113080>.

³⁵⁴ Environment and Climate Change Canada, *Greenhouse Gas Sources and Sinks: Executive Summary 2019*, (8 August 2019) (last visited 18 October 2019) online: *Environment and Climate Change Canada* <www.canada.ca/en/environment-climate-change/services/climate-change/greenhouse-gas-emissions/sources-sinks-executive-summary-2019.html>.

activities to Alberta and Canada,³⁵⁵ oil-related activities by the construction of roads, oil wells and resource exploitation-related fires have caused a decline in the livelihoods, food security and traditional way of life of some of these rural communities as illustrated by the Lubicon Lake people, the Athabasca Chipewyan First Nations and the Mikisew Cree in rural reserves in northern Alberta.³⁵⁶ However, some First Nations have also benefited from oil exploitation through employment and investment in the sector.³⁵⁷ It should also be noted that First Nations in the Treaty 8 territory hold diverse views on oil exploitation activities and its impacts. While some have supported the development of oil, others have expressed their concerns on its impact.³⁵⁸

In the same vein, these First Nations communities in the Treaty 8 territory will be casualties of climate injustice. These communities have experienced an increased rate in the severity and of wildfires. For example, in 2016 there was a large wildfire in Fort McMurray in northern Alberta

³⁵⁵ Warrick Baijus & Robert J. Patrick, “We Don’t Drink the Water Here”: The Reproduction of Undrinkable Water for First Nations in Canada” (2019) 11 *Water* 3-4.

³⁵⁶ Kaitlyn Mitchell & Zachary D’Onofrio, “Environmental Injustice and Racism in Canada: The First Step Is Admitting We Have a Problem” (2016) 29 *J. Env. L. & Prac.* 305 at 322; Chief Bernand Ominayak & Kevin Thomas, *These are Lubicon Lands: A First Nation Forced to Step into the Regulatory Gap* in Julian Agyeman et al, *supra* note 94 at 111-112; Nikki Way & Erin Flanagan, *supra* note 335 at 7-8.

³⁵⁷ Ken Coates, “First Nations Engagement in the Energy Sector in Western Canada” (Alberta, Indian Resource Council, 2016) 5, 11-21 (last visited 21 December 2019) online: *Indian Resource Council* <<https://s3.amazonaws.com/rgi-documents/627a6a8c9486a7bbf5ce466e0cb29456ec042c0f.pdf>>; Fort McKay Group of Companies, “Business: Invested in Our Future” (last visited 23 December 2019) online: *Fort McKay Group of Companies* <<http://fortmckay.com/nationownedcompanies/>>; Syncrude, “Community: Employment” (last visited 23 December 2019) online: *Syncrude* <<https://www.syncrude.ca/community/aboriginal-relations/employment>>.

³⁵⁸ Shawn McCarthy, “Where Oil and Water Mix” (6 November 2019) (last visited 24 December 2019) online: *The Globe and Mail* <<https://www.theglobeandmail.com/news/alberta/where-oil-and-water-mix-oil-sands-development-leaves-fort-mckays-indigenous-communitytorn/article27151333/>>; Katie Dancie-Downs, “The Indigenous Climate Action Women Fighting for Mother Earth” (21 February 2018) (last visited 24 December 2019) online: *Ecology* <<https://theecologist.org/2018/feb/21/indigenous-climate-action-women-fighting-mother-earth-katiedancey-lushtimesen/>>; The Guardian, “Canada’s Tar Sands Aren’t Just Oil Fields. They’re Sacred Lands for My People: Eriel Tchekwie Deranger” (23 June 2015) (last visited 24 December 2019) online: *The Guardian* <<https://www.theguardian.com/commentisfree/2015/jun/23/canadas-tar-sands-oil-fields-sacred-lands>>; Heather Yourex-West, “Western Canadian First Nations Groups Making Progress in Bid to Purchase TMX” (22 May 2019) (last visited 24 December 2019) online: *Intricate* <<https://www.intricategroup.com/western-canadian-first-nations-groups-making-progress-in-bid-to-purchase-tmx/>>; Iron Coalition, “About” (last visited 24 December 2019) online: *Iron Coalition* <<https://ironcoalition.com/>>.

that burned a large expanse of land area and resulted in the evacuation of over 80,000 residents.³⁵⁹

In 2019, several wildfires and evacuations have also occurred with First Nations communities affected.³⁶⁰ The increased severity and frequency of the wildfires are mainly attributed to anthropogenic climate change.³⁶¹ The impacts of climate change are particularly striking on Indigenous peoples who have made minimal contributions to climate change and will consequently be greatly impacted because of their traditional lifestyles which is dependent on land, nature and environment for their livelihood, culture and survival. The lands and waters of Indigenous peoples are of considerable significance to them because they serve diverse purposes encompassing hunting, trapping, fishing, burial-sites, source of food and medicines as well as being culturally and spiritually important.³⁶² Consequently, climate change will have a substantial impact on them, their livelihoods, culture and health.

5.4 Right to Life in Canada

The right to life is regarded as fundamental in Canada. Canada is party to several regional and international human rights instruments specifying the right to life such as the *ICCPR*, the *CRC*, the *American Declaration on the Rights and Duties of Man (American Declaration)*, the *UNDRIP* and the *UDHR*. Canada has ratified the Optional Protocol to the *ICCPR* and therefore individuals can

³⁵⁹ Canada's Changing Climate Report, *supra* note 320 at 176, 181.

³⁶⁰ Travis McEwan, "We've Been through it Before': Dene Tha' First Nation Practised Evacuation Years Before Recent Wildfire" (28 May 2019) (last visited 2 June 2019) online: *CBC News* <www.cbc.ca/news/canada/edmonton/dene-tha-first-nation-evacuation-1.5152156?utm_medium=email&utm_source=actionkit>; Alberta Wildfire Coordination Centre, PM Fire Weather Forecast <wildfire.alberta.ca/files/pmfcast.pdf>; Hollie Silverman & Joe Sutton, "11,000 People Have Been Forced to Evacuate as Firefighters Battle Fire in Alberta" (4 June 2019) (last visited 5 June 2019) online: *CNN US Edition* <www.cnn.com/2019/06/04/world/alberta-wildfires-evacuations/index.html?utm_source=CNN+Five+Things&utm_campaign=50ea84799e-EMAIL_CAMPAIGN_2019_06_05_07_56&utm_medium=email&utm_term=0_6da287d761-50ea84799e-97008249>.

³⁶¹ Canada's Changing Climate Report, *supra* note 320 at 176, 181.

³⁶² Chief Bernand Ominayak & Kevin Thomas, *These are Lubicon Lands: A First Nation Forced to Step into the Regulatory Gap* in Julian Agyeman et al, *supra* note 94 at 118.

submit communications before the HRC.³⁶³ Similarly, Canada is a member of the Organization of American States (OAS), hence Canadian residents can submit communications based on the *American Declaration* to the IACHR.

International law is relevant in Canada particularly in the interpretation of the *Charter of Rights and Freedoms (Charter)*.³⁶⁴ Several scholars have observed that Canadian courts often choose to interpret the *Charter* in line with Canada's international obligations particularly in the light of international human rights law.³⁶⁵ Peter Hogg notes the significance of the UN HRC of the *ICCPR* in interpreting the *Charter*:

...The decisions of the Human Rights Committee of the United Nations are relevant to the interpretation of the Charter, not only because Canada is a party to the Covenant which they interpret, but also because they are considered interpretations by distinguished jurists of language and ideas that are similar to the language and ideas of the Charter. Even if Canada were not a party to the Covenant, the Committee's decision would enjoy the same kind of persuasive value for Canadian Courts as the decisions of a foreign country: the search for wisdom is not to be circumscribed by national boundaries.³⁶⁶

He further elucidates on Canada's membership of the OAS.

Canada is a member of the Organization of American States (OAS). The American Declaration of the Rights and Duties of Man 1948 is applicable to the members of OAS. Canadians may petition the Inter-American Commission on Human Rights if they claim a breach by Canada of their rights under the Declaration. Few cases have been brought

³⁶³ Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976), art. 1. In HRC Communication No. 24/1977 *Sandra Lovelace v. Canada* CCPR/C/13/D/24/1977, where the author submitted a communication against Canada for sex discrimination based on the Indian Act.

³⁶⁴ This position was also reflected in *Suresh v. Canada (Minister of Citizenship & Immigration)* [2002] 1 S.C.R. 72 paras 60-78; *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 7 [*Charter*].

³⁶⁵ Lynda M. Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedom (2009) 26 Windsor Review of Legal and Social Issues 9; Peter Hogg, *Constitutional Law of Canada*, Fifth Edition Supplement (Toronto: Thompson Reuters, 2007, 2016), (loose-leaf updated 2018, release 1) ch 36.9 (c).

³⁶⁶ Hogg, *supra* note 365 at ch 36.9 (c).

against Canada, but the Commission's jurisprudence is another possible source of interpretation of the Canadian Charter.³⁶⁷

In Canada, the right to life is incorporated in section 7 of the *Charter* and stipulates, “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.³⁶⁸ This section is mostly interpreted as a negative obligation in Canada.³⁶⁹ This is contradictory to the tenets of human rights law which interprets the right to life as both a negative and positive obligation. The *General Comment No. 36* in paragraphs 3 and 26 explains that the right to life should not be construed narrowly but requires the state to adopt positive measures to prevent direct threats to life and protect an individual's right to dignity. In Communication 2348/2014 *Nell Touissant v. Canada*, the HRC elucidated that:

The protection of this right requires that States adopt positive measures. The Committee considers that the right to life concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Furthermore, the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. State parties may be in violation of article 6 even if such threats and situations does not result in loss of life.³⁷⁰

The General Comment further clarifies the obligation imposed by the right to life on State Parties to comply with their obligations under international environmental law such as climate change to guarantee the rights to life for the present and future generations. This will necessitate states to protect the environment from climate change by public and private actors by measures such as EIAs.³⁷¹

³⁶⁷ *Ibid.*

³⁶⁸ *Charter*, s. 7.

³⁶⁹ Scott McAlpine, “More Than Wishful Thinking: Recent Developments in Recognizing the “Right to Housing” Under S 7 of the *Charter*” (2017) 38 *Windsor Rev. Legal & Soc. Issues* 2; Boyd, “No Taps, No Toilets” *supra* note 80 at 101.

³⁷⁰ *Touissant v. Canada*, *supra* note 31.

³⁷¹ *General Comment No. 36*, para. 62.

In essence, this provision expects Canada to protect its residents lives particularly those vulnerable to climate change. While Canada aims to reduce its emission by 30 per cent below its 2005 level by 2030, this target may be insufficient to avert the negative effects of climate change in view of the IPCC's warning to reduce emissions by 2030 to prevent a rise to 2⁰C.³⁷² Inadequate reduction of emissions by a State may infer a failure to protect the rights of citizens as reflected in *Urgenda* where the Claimant requested the state to reduce its emissions by 25-40 per cent of its 1990 level by 2020 contrary to the state's target of 14 -17 per cent of its 1990 level by 2020.³⁷³ The Hague Court of Appeal held that Article 2 and 8 of the *European Convention for Human Rights* which protected the right to life; and right to private life, family life, home and correspondence respectively applied to environment-related situations.³⁷⁴ It further held that both rights imposed on the government negative and positive obligations, involving the positive obligation to take concrete actions to prevent a future violation of these rights concerned from climate change particularly through dangerous industrial activities.³⁷⁵

Similarly, this is applicable in the context of Indigenous peoples and how climate change peculiarly affects them as illustrated by the recent communication submitted by the Torres Strait Islanders to the HRC against the failure of the Australian government to reduce its GHG emissions therefore contributing to sea-level rise affecting their homes, and thus failing to protect their rights to life and culture.³⁷⁶

³⁷² See IPCC 2018, *supra* note 2.

³⁷³ *Urgenda*, *supra* note 123.

³⁷⁴ *Ibid* at para. 40.

³⁷⁵ *Ibid* at paras. 41, 43-45, 76.

³⁷⁶ Livia Albeck-Ripka, "Their Islands Are Being Eroded. So Are Their Human Rights, They Say" (12 May 2019) (last visited 12 June 2019) online: *The New York Times* <www.nytimes.com/2019/05/12/world/australia/climate-change-torres-strait-islands.html>.

Both cases emphasize the necessity for Canada to protect the right to life of its residents specifically Canada's Indigenous peoples as climate change may cause wild-fires, loss of food-supply, loss of biodiversity resulting in deaths, destruction of homes and lands, food-insecurity consequently infringing on their rights to life and culture. Notwithstanding Canada's recent declaration of a climate emergency and passage into law of the *Impact Assessment Act* which seeks to promote sustainability, address climate change and protect health,³⁷⁷ these measures might be ineffective in achieving its goal to emphasize the urgency and threat posed by climate change due to its act in re-approving the expansion of the Trans Mountain pipeline.³⁷⁸ Moreover, the climate emergency does not state the measures to achieve its stated aim.

The HRC further enjoins states to protect life by taking appropriate action to tackle situations that may distinctly pose a threat to life or inhibit the right to dignity.³⁷⁹ This duty extends to: “deprivation of land, territories and resources of Indigenous peoples, the prevalence of life threatening diseases, such as AIDS, tuberculosis or malaria, extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness.”³⁸⁰ It urges states to take immediate and appropriate measures to protect the right to life including providing, “access to essential goods and services such as food, water, shelter, health-care, electricity and sanitation, and

³⁷⁷ *Impact Assessment Act*, ss. 6(1) (a) (b), 22 (2) (1) (l). The Act examines the effect of a designated project on Indigenous groups as well as any adverse effect on the rights of Indigenous peoples and further considers the extent to which the project contributes or hinders the Canadian government's potential to meet its climate change obligations and commitments. See ss. 22(1) (c), (l)

³⁷⁸ Ian Austen, “Canada Approves Expansion of Controversial Trans Mountain Pipeline” (18 June 2019) (last visited 15 July 2019) online: *The New York Times* <www.google.com/amp/s/www.nytimes.com/2019/06/18/world/canada/trudeau/trans-mountain-pipeline.amp.html>

³⁷⁹ *General Comment No. 36*, para. 26.

³⁸⁰ *Ibid.*

other measures designed to promote and facilitate adequate general conditions such as the bolstering of effective emergency health services... and social housing programs.”³⁸¹

This provision calls for Canada to provide adequate health care, shelter, water and sanitation to protect the right to life of its citizens prone to ill-health, extreme poverty and homelessness. It requires Canada to enhance the health of its Indigenous population by developing a coherent legal framework for their health and cultural needs thereby protecting their lives. As the *General Comment* can be interpreted in the context of climate change intensifying health risks,³⁸² it should serve to galvanize Canada to taking mitigative measures to further reduce its emissions and adopt measures to enhance health systems to strengthen the health of its residents with a view to protecting their lives in view of climate change and its impact on health.

Also in 2017, the Inter-American Court of Human Rights delivered an advisory opinion which expanded the right to life in Article 4(1) of the *American Convention* and Article 4(1) of the *Pact of San Jose* to include the right to a healthy environment.³⁸³ This advisory opinion will therefore be relevant to Canada as it is a part of the Inter-American system.

5.5 Right to Health in Canada

The right to health is indispensable to the enjoyment of other human rights. Canada has ratified several international and regional human rights instruments which recognize the right to health such as the *ICESCR* and the *CRC*.³⁸⁴

³⁸¹ *Ibid.*

³⁸² Wiley, *supra* note 10 at 207.

³⁸³ Inter-American Court of Human Rights, Environment and Human Rights Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia, paras 49-61, 99-105.

³⁸⁴ *American Declaration*, art. 11.

The *Constitution Act, 1867* makes no express reference to health therefore granting neither the federal or provincial governments exclusive jurisdiction over health.³⁸⁵ The constitutional basis for health in Canada is implicit in the right to life and security of the person in the *Charter*.³⁸⁶ This was illustrated in *Chaoulli v Quebec (Attorney General)*, where access to health care was read into the right to life and security of the person in section 7 of the *Charter*.³⁸⁷

The legal and policy framework for health in Canada includes the *Canada Health Act*,³⁸⁸ the *Public Health Agency Act*³⁸⁹ and the *Department of Health Act*.³⁹⁰ The primary objective of the Canadian health care policy as stated in the *Canada Health Act* is “..to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.”³⁹¹ This is analogous to accessibility, one of the essential components of the right to health in the *ICESCR*.³⁹² Canada practices a publicly funded universal health care coverage system for its residents administered by provinces and territories, with assistance from the federal government.³⁹³ A distinctive feature of the health care system is the provision of necessary services to residents on the basis of need rather than the ability to pay which

³⁸⁵ Boyer, *Moving Aboriginal Health Forward*, *supra* note 342 at 93; Blankenau, *supra* note 78 at 333-334; Danielle Martin et al, *Canada’s Universal Health-care System: Achieving its Potential* (2018) 391 *The Lancet* 1719. Section 91(11) grants the federal government exclusive jurisdiction over Marine hospitals while section 92(7) gives the provinces exclusive jurisdiction over hospitals and other health Institutions in the Province excluding Marine hospitals.”

³⁸⁶ *Charter*, s. 7.

³⁸⁷ *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 [2005] 1 S.C.R. 791 [*Chaoulli*].

³⁸⁸ *Canada Health Act*, R.S.C., 1985, c. C-6.

³⁸⁹ *Public Health Agency Act*, S.C. 2006, c.5.

³⁹⁰ *Department of Health Act*, S.C. 1996, c. 8.

³⁹¹ The *Canada Health Act* R.S.C., 1985, c. C-6, s. 1 [Canada Health Act]. See also Yude M Henteleff, Mary J Shariff & Darcy L MacPherson, "Palliative Care: An Enforceable Canadian Human Right?" (2011) 5 *McGill J. L. & Health* 107 at 114.

³⁹² *General Comment No. 14*, para. 12 (b).

³⁹³ Government of Canada, *Canada's Health Care System* (last visited 27 May 2019) <www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html>; Danielle Martin et al, *supra* note 385 at 1718; James William, Meghan Vis-Dunbar & Jens Weber, "First Nations Privacy and Modern Health Care Delivery" (2011) 10 *Indigenous L.J.* 101 at 105.

indicates fairness and equity.³⁹⁴ This is exemplified in the primary objective of the Canadian health care policy.³⁹⁵

As Canadians, Indigenous peoples are qualified to access health care under the provincial health care system.³⁹⁶ However in practice, accessing health services is an intricate process for Indigenous peoples due to jurisdictional uncertainty on whether the federal or provincial government has the responsibility for provision or payment of services. As earlier stated, the Constitution grants the federal government exclusive jurisdiction over Indigenous peoples.³⁹⁷ In addition, the *Indian Act* grants the Governor in Council the discretionary power to make regulations for the health of First Nations.³⁹⁸ The *Indian Act* also empowers Band Councils to make by-laws on health conforming with federal regulations for the reserve's residents.³⁹⁹

Hence there exists an inadequate and incoherent legal and policy framework with provinces mostly regarding Indigenous health as a federal responsibility except in certain situations, therefore creating gaps in delivery of health care. For example, the federal government through its First Nations and Inuit Health Branch (FNIHB) offers some health services to registered First Nations on reserves and Inuit living in their traditional territories.⁴⁰⁰ Also, all First Nations registered under the *Indian Act* and Inuit regardless of their residence are entitled to other health services from the

³⁹⁴ Canada's Health Care System, (last visited 27 May 2019) <www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html>.

³⁹⁵ The *Canada Health Act* R.S.C., 1985, c. C-6, s. 1 [Canada Health Act].

³⁹⁶ James William, Meghan Vis-Dunbar & Jens Weber, *supra* note 393 at 110.

³⁹⁷ *Constitution Act, 1867* s. 91(24); *Constitution Act, 1982* s. 35(2).

³⁹⁸ *Indian Act*, s. 73(1) reads: The Governor in Council may make regulations

(g) to provide medical treatment and health services for Indians;

(h) to provide compulsory hospitalization and treatment for infectious diseases among Indians.

³⁹⁹ *Indian Act*, s. 81(1)(a).

⁴⁰⁰ Josee G. Lavoie, "Policy Silences: Why Canada Needs a National First Nations, Inuit and Metis Health Policy" (2013) *Int'l. J. Circumpolar Health* 2 [Lavoie, "Policy Silences"].

federal government under the Non-Insured Health Benefits (NIHB).⁴⁰¹ The healthcare of other Indigenous peoples health care fall under provincial and territorial jurisdiction. This has resulted in jurisdictional issues between both levels of government attempting to deflect responsibility of Indigenous health care and thus, contributing to the poor health of Indigenous peoples.⁴⁰²

The FNIHB in recognizing the poor health status of the Indigenous peoples introduced the Health Transfer Policy (HTP) in 1989.⁴⁰³ This policy made pursuant to the Indian Policy of 1979,⁴⁰⁴ granted the First Nations and Inuit a minimal level of autonomy in developing and managing community health programs with the FNIHB still providing NIHB.⁴⁰⁵ This policy can be regarded successful to an extent as it is managed by Indigenous peoples and culturally attuned to the health needs of Indigenous peoples, but has been hampered by inadequate funding.⁴⁰⁶ The First Nations Health Authority (FNHA) in British Columbia can be cited as a successful example of the First Nations managing their health with significant autonomy.⁴⁰⁷

Despite the HTP and limited data on the health status of Indigenous peoples, there is a glaring disparity in the health of Indigenous and non-Indigenous Canadians.⁴⁰⁸ There is a high rate of

⁴⁰¹ James William, Meghan Vis-Dunbar & Jens Weber, *supra* note 393 at 110.

⁴⁰² Melanie Mackinnon, “A First Nations Voice in the Present Creates Healing” (2005) 96 *Canadian Journal of Public Health* 514.

⁴⁰³ Lavoie, “Policy Silences”, *supra* note 400 at 3.

⁴⁰⁴ Indigenous Services Canada, Indian Health Policy 1979 (last modified 9 July 2014) (last visited 14 July 2019) <www.canada.ca/en/Indigenous-services-canada/corporate/first-nations-inuit-health-branch/indian-health-policy-1979.html>.

⁴⁰⁵ Lavoie, “Policy Silences”, *supra* note 400 at 3; Health Canada, “Ten Years of Health Transfer First Nation and Inuit Control” (last modified 21 April 2005) (last visited 15 July 2019) <www.canada.ca/en/Indigenous-services-canada/services/first-nations-inuit-health/reports-publications/funding/years-health-transfer-first-nation-inuit-control-health-canada-1999.html>.

⁴⁰⁶ Josee G. Lavoie, “Medicare and the Care of First Nations, Métis and Inuit” (2018) 13 *Health Economics, Policy and Law* 287-288 [Lavoie, “Medicare”]; Derek Kornelsen et al, “Reciprocal Accountability and Fiduciary Duty: Implications for Indigenous Health in Canada, New Zealand and Australia” (2015) 19:2 *AILR* 18.

⁴⁰⁷ Lavoie, “Medicare”, *supra* note 406 at 288.

⁴⁰⁸ Danielle Martin et al, *supra* note 385 at 1718; Boyer, *Moving Aboriginal Health Forward*, *supra* note 342 at 10; S. James Anaya, Report of the Special Rapporteur on the Rights of Indigenous Peoples in the Situation of Indigenous

diseases, chronic illnesses and suicides among Indigenous peoples.⁴⁰⁹ For example, the rate of tuberculosis between 2010 and 2014 among First Nations living on reserve was about 32 times that of non-Indigenous Canadians at 23.0 per 100 000 people while those for non-Indigenous Canadians was 0.7 per 100,000 people.⁴¹⁰ The report also revealed that the First Nations had a high rate of infant mortality of about 4.6 infant deaths for 1000 live births.⁴¹¹

This poor state of health can be traced to several underlying determinants of health including environmental contaminants, unsafe water, inadequate housing, inaccessibility to health care services, poverty and inequality.⁴¹² The determinants of health also align with the Indigenous concept of health as holistic in nature comprising a balance in the physical, emotional, mental and spiritual sphere as well as an individual living in harmony with others, their community and their spirit worlds.⁴¹³

Peoples in Canada, (2015) 32 *Ariz. J. Int'l & Comp. L.* 152 para. 29; Martin Cooke, Daniel Beavon & Mindy McHardy, "Measuring the Well-Being of Aboriginal People: An Application of the United Nations' Human Development Index to Registered Indians in Canada, 1981–2001" (Ottawa: Indian Affairs and Northern Development, 2004); Greenwood & de Leeuwenhoek, *supra* note 322 at 381; Gracey & King, *supra* note 339 at 65.

⁴⁰⁹ Alberta Government & The Alberta First Nations Information Governance Centre, "First Nations Health Trends in Alberta: Suicide Rates among First Nations People in Alberta" (28 June 2016) (last visited 20 November 2019) online: *The Alberta First Nations Information Governance Centre* <<http://www.afnigc.ca/main/includes/media/pdf/fnhta/HTAFN-2016-06-28-Suicide.pdf>>

⁴¹⁰ Key Health Inequalities Report, *supra* note 350 at 278-281 [Canadian Tuberculosis Reporting System (2010–2014)]. See also Government of Canada, Tuberculosis in Indigenous Communities (last visited 27 May 2019) <www.canada.ca/en/Indigenous-services-canada/services/first-nations-inuit-health/diseases-health-conditions/tuberculosis/tuberculosis-Indigenous-communities.html>. The rate of tuberculosis is also higher among Indigenous communities in Canada than Australia and the United States. See Key Health Inequalities report, *supra* note 350 at 282.

⁴¹¹ Key Health Inequalities Report, *supra* note 350 at 79.

⁴¹² Boyer, *Moving Aboriginal Health Forward*, *supra* note 342 at 10; Mitchell & D'Onofrio, *supra* note 356 at 310; S. James Anaya, Report of the Special Rapporteur on the Rights of Indigenous Peoples in the Situation of Indigenous Peoples in Canada, (2015) 32 *Ariz. J. Int'l & Comp. L.* 152 para. 29.

⁴¹³ King, Smith & Gracey, *supra* note 342 at 77, 82.

The determinants of health are identified as important in improving the health of Indigenous peoples due to their history and negative health outcomes.⁴¹⁴ The Lalonde report⁴¹⁵ emphasized the importance of factors including a healthy environment, good sanitary measures and improvement in the standard of living besides the provision of health care as ways of maintaining and improving health particularly Indigenous health in Canada.⁴¹⁶ The report recommended the prevention of sicknesses and reducing the rate of sicknesses through the social determinants of health.⁴¹⁷ The subsequent Epp Report also reiterated the influence of the social determinants of health in reducing health inequalities between income groups and identified a healthy environment as an intrinsic part of health care.⁴¹⁸ The aftermath was the Ottawa Charter for Health Promotion which listed the fundamental conditions and resources of health as peace, shelter, education, food, income, a stable eco-system, sustainable resources, and social justice alongside equity.⁴¹⁹

The relevance of determinants of health to Indigenous peoples is exemplified in the living conditions on many reserves which is deficient and described as similar to developing countries.⁴²⁰

⁴¹⁴ Mitchell & D'Onofrio, *supra* note 356 at 311; King, Smith & Gracey, *supra* note 342 at 77. There are also determinants peculiar to Indigenous health encompassing “social support network, economic and educational opportunity, spirituality, relationship to the land, health systems, dislocation, food security, history, culture, language, social exclusion, knowledge systems and daily micro-aggressions arising from racism and colonialism”. See Stephanie Montesanti et al, “A First Nation Framework for Emergency Planning: A Community-Based Response to the Health and Social Effects from a Flood” (2019) 14:1 IJH 91; King, Smith & Gracey, *supra* note 342 at 77.

⁴¹⁵ Mark Lalonde, *A New Perspective on the Health of Canadians: A Working Instrument* (Ottawa, Canada: Government of Canada, April 1974) [Lalonde Report]; Nixon et al, *supra* note 322 at 1740.

⁴¹⁶ Lalonde Report, *supra* note 415 at 5, 17, 14, 18. The report noted the disproportionately high mortality rate of Indigenous infants resulting from environmental and self-imposed factors.

⁴¹⁷ *Ibid* at 31, 37, 63-72.

⁴¹⁸ Epp, J, *Achieving Health for All: A Framework for Health Promotion* (Ottawa, Canada: Health and Welfare Canada, 1986) (last visited 10 June 2019) online: *Health Canada* <www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/achieving-health-framework-health-promotion.html>. See also John Eyles, *Environmental Justice, and the Distribution of Diseases: Ideas and Practices from Canada* in Julian Agyeman et al, *supra* note 94 at 124.

⁴¹⁹ The World Health Organization, *Health Promotion: The Ottawa Charter for Health Promotion* (last visited 10 June 2019) <www.who.int/healthpromotion/conferences/previous/ottawa/en/>; Nixon et al, *supra* note 322 at 1740.

⁴²⁰ Crystal Lameman, *Kihci Pikiskwewin - Speaking the Truth* in Toban Black et al, *supra* note 13 124; Boyer, *Moving Aboriginal Health Forward*, *supra* note 342 at 10; S. James Anaya, Report of the Special Rapporteur on the Rights of

Housing are deficient for many First Nations people in reserves as several houses are overcrowded, moldy and lack clean water thereby contributing to diseases such as tuberculosis.⁴²¹ For example, in 2011 about 35 per cent of First Nations in reserves in Alberta lived in crowded homes whereas 54 per cent of First Nations on reserves lived in homes in a substantial state of disrepair.⁴²² In addition, there is a longstanding issue of inadequate access to safe drinking water and poor sanitary conditions.⁴²³ The *Safe Drinking Water for First Nations Act* to regulate water standards and treatment of wastewater for Indigenous peoples is ineffective due to its non-implementation.⁴²⁴ No regulations were enacted pursuant to the Act and neither was the Act drafted in consultation with the First Nations.⁴²⁵ Unsafe water has severe effects on human health such as an increase in the risk of infectious diseases, poor mental health and a higher risk of death.⁴²⁶ Nonetheless recently in Alberta, improvements were observed in access to safe drinking water due to collaboration between the First Nations, the Alberta government, municipalities and federal government.⁴²⁷ However, this

Indigenous Peoples in the Situation of Indigenous Peoples in Canada, (2015) 32 *Ariz. J. Int'l & Comp. L.* 152 para. 29; Cooke, Beavon & McHardy, *supra* note 408.

⁴²¹ Key Health Inequalities Report, *supra* note 350 at 354; King, Smith & Gracey, *supra* note 342 at 81.

⁴²² Statistics Canada, Aboriginal Peoples, Fact Sheet for Alberta (14 March 2016) (last visited 27 May 2019) <www150.statcan.gc.ca/n1/pub/89-656-x/89-656-x2016010-eng.htm>.

⁴²³ Boyer, *Moving Aboriginal Health Forward*, *supra* note 342 at 16, 17, 18, 19, 21; Boyd, “No Taps, No Toilets” *supra* note 80; Jessica Lukawiecki, “Glass Half Empty? Year 1 Progress Toward Resolving Drinking Water Advisories in Nine First Nations in Ontario” (February 2017) (last visited 26 June 2019) online (pdf): *David Suzuki Foundation* <davidsuzuki.org/science-learning-centre-article/report-glass-half-empty-year-1-progress-toward-resolving-drinking-water-advisories-nine-first-nations-ontario> pp 6. See also Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights on the 5th Periodic Report of Canada; Canada, Committee on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/CAN/CO/6 23 March 2016 paras. 43 & 44; Health Council of Canada, *Canada's Most Vulnerable: Improving Healthcare for First Nations, Inuit and Metis Seniors* (Toronto, ON: Health Council of Canada. healthcouncilcanada.ca, November 2013) 9, 16; Mitchell & D'Onofrio, *supra* note 356 at 324-325.

⁴²⁴ *Safe Drinking Water for First Nations Act* (S.C. 2013, c. 21).

⁴²⁵ See Lukawiecki, *supra* note 423 at 14, 17-18.

⁴²⁶ Key Health Inequalities Report, *supra* note 350 at 354; Mitchell & D'Onofrio, *supra* note 356 at 324 -325.

⁴²⁷ Government of Canada, Indigenous Services Canada Water in First Nations Communities: Ending Long-Term Drinking Advisories (last visited 17 May 2019) online: *Government of Canada* <www.sac-isc.gc.ca/eng/1506514143353/1533317130660>; Government of Alberta Media Inquiries, “First Nations Getting New Water Systems” (15 March 2015) (last visited 7 July 2019) online: *Government of Alberta* <www.alberta.ca/release.cfm?xID=63709171F67B5-A3Ff-C3B7-97367F30261607A2>.

arrangement may not be sustainable because of its unenforceability and the possibility of modification by a change of government.

A healthy environment is also important in realizing the right to health particularly for the Indigenous peoples who are closely linked to the environment.⁴²⁸ The Canadian *Constitution* does not explicitly stipulate the right to a healthy environment but several scholars assert that the right to a healthy environment may be implicit in section 7 of the *Charter*.⁴²⁹ The *UNDRIP* also specifies the right to a healthy environment.⁴³⁰

Generally, the health inequities experienced by Indigenous peoples can be attributed to the absence of an adequate legal framework for health and inadequate attention to the social determinants of health. There is no national health policy for Indigenous peoples in Canada in contrast to the non-Indigenous Canadian residents who fall under provincial jurisdiction.⁴³¹ Thus, Boyer aptly describes the law as another determinant of health.⁴³²

The right to health is closely linked with and depends on realizing other human rights including the rights to non-discrimination and equality.⁴³³ Non-discrimination is also a vital element in the right to health. The *General Comment* further observes that in ensuring that the right to health, there must be non-discrimination as health facilities, goods and services comprising medical care and underlying determinants of health must be accessible to everyone particularly the most vulnerable

⁴²⁸ Mitchell & D'Onofrio, *supra* note 356 at 311; Archibald, *supra* note 163 at 4-8, 23-25, 41-42.

⁴²⁹ Mitchell & D'Onofrio, *supra* note 356 at 337-339; David W.L. Wu, "Embedding Environmental Rights in Section 7 of the Canadian Charter: Resolving the Tension Between the Need for Precaution and Harm" (2014) 33 Nat'l. J. Const. L 191.

⁴³⁰ *United Nations Declaration on the Rights of Indigenous Peoples* UN GA Res 61/295, annex (13 September 2007), art. 29.

⁴³¹ Boyer, *Moving Aboriginal Health Forward*, *supra* note 342 at 101-102.

⁴³² Boyer, *Moving Aboriginal Health Forward*, *supra* note 342 at 92-125. She cites the example of challenges in getting accurate health statistics on Indigenous peoples and the Jordan Principle which arose because of the gaps in healthcare for the Indigenous populace. See Boyer, *Moving Aboriginal Health Forward*, *supra* note 342 at 101-102.

⁴³³ *General Comment No. 14*, para 3.

and marginalized populace inclusive of ethnic minorities and Indigenous peoples.⁴³⁴ In addition, it prohibits non-discrimination in access to health or any underlying determinant of health on any ground with the intent or effect of nullifying or impairing the right to health.⁴³⁵

From the foregoing, in examining the health care system for the First Nations based on the underlying determinants of health and resultant health statistics, it can be surmised that it is discriminatory in comparison with the non-Indigenous population. It also violates section 15(1) of the *Charter* which states that, “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁴³⁶ The Supreme Court held in *Eldridge v British Columbia* that the legal distinction need not have a discriminatory intent or purpose to limit an individual or group to violate section 15(1) but that the effect must have denied someone the equal protection or benefit of the law.⁴³⁷ In this case, the distinction in the legal basis of health care between the Indigenous and non-Indigenous population might not have had a discriminatory intent or purpose to cause a disadvantage but the effect has clearly denied the Indigenous peoples the equal protection of the law.

5.6 Examining the Rights to Life and Health for First Nations in Treaty 8 Territory in the Context of Climate Change

⁴³⁴ *Ibid* at para 12 (b) (i) (ii).

⁴³⁵ *Ibid* at para 18.

⁴³⁶ *Charter*, s.15(1).

⁴³⁷ *Eldridge v British Columbia*, [1997] 3 SCR 624 at para.62.

The *Paris Agreement* acknowledges the predisposition of the rights of Indigenous peoples to climate change, “[a]cknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of Indigenous peoples...”⁴³⁸ Similarly, the Pan-Canadian Framework recognizes that climate change poses a distinctive threat to Indigenous peoples and their health because of several reasons including their remote locations, dependence on wild foods, culture and dependence on their lands.⁴³⁹

Climate change will impair the right to life as well as intensify health conditions in several ways. Climate change is projected to cause more wildfires in Alberta particularly in Treaty 8 territory.⁴⁴⁰ This could result in injuries, loss of lives, homes, ancestral lands, and permanent relocation. Wildfires could also interfere with the migratory routes of some animal species which are hunted by Indigenous peoples and destruction of certain plant species used for food and medicine causing food insecurity.

There is expected to be a reduction in freshwater which will inevitably cause severe ecological consequences, including rapid loss of aquatic habitat resulting in a loss of food sources such as animal and plant species and affect cultural ceremonies where these species are used.⁴⁴¹ Food-security would be affected as the traditional diet of the Indigenous peoples could decrease causing

⁴³⁸ Paris Agreement, preambular paragraph 12.

⁴³⁹ Pan-Canadian Framework, *supra* note 319 at 27, 32. See also Margo W. Parkes, Sarah de Leeuw & Margo Greenwood, “Warming up to the Embodied Context of First Nations Child Health: A Critical Intervention into and Analysis of Health and Climate Change Research (2010) 2:4 International Public Health Journal 477-485; James D. Ford, “Dangerous Climate Change and the Importance of Adaptation for the Arctic’s Inuit Population” (2009) 4 Environ. Res. Lett. 024006.

⁴⁴⁰ Canada’s Changing Climate Report, *supra* note 320 at 117, 181.

⁴⁴¹ Canada’s Changing Climate Report, *supra* note 320 at 281- 283, 305 and 306.

malnutrition⁴⁴² with mental health effects as land and food are regarded as essential to Indigenous determinants of health.⁴⁴³

Species such as caribou and other activities upon which Indigenous peoples rely on for food, source of livelihood, cultural and social identities will be affected as some of the species will be endangered or threatened while some species become extinct.⁴⁴⁴ Inevitably because of their distinct way of life, the Indigenous communities may consider this the end of life as they know it.⁴⁴⁵

Consequently, proposed health impacts of climate change on rural Indigenous peoples include a decline in mental health, malnutrition, diseases, injuries, violence and death because of their connection to land, loss of subsistence and livelihood.⁴⁴⁶ Another important consequence may be cultural loss resulting from relocation.⁴⁴⁷ Climate change by destroying spiritual and cultural sites may undermine the right of Indigenous peoples to enjoy their cultural rights and lead to a loss of

⁴⁴² Right to food is defined as “sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear”. See Special Rapporteur on the Right to Food, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Human Rights Council, U.N. Doc. A/HR/C/7/5, 17 (Jan. 10, 2008). See also Angela Duger and Martha F. Davis, “A Human Rights-Based Approach to Food Security (2012) 46 Clearinghouse Rev. 203-204.

⁴⁴³ See King, Smith & Gracey, *supra* note 342 at 76 - 77.

⁴⁴⁴ Jay Williams, “The Impact of Climate Change on Indigenous People – the Implications for the Cultural, Spiritual, Economic and Legal Rights of Indigenous People” (2012) 16:4 The International Journal of Human Rights, 648 at 653 - 654.

⁴⁴⁵ Lilian Apomte Miranda, “Introduction to Indigenous Peoples’ Status and Rights Under International Human Rights Law”, in Randall S. Abate & Elizabeth Ann Kronk, *supra* note 18 at 39.

⁴⁴⁶ Drolet & Sampson, *supra* note 21; David A Watkins et al, “Alma Ata at 40 Years: Reflections from the Lancet Commission on Investing in Health” (2018) 392 the Lancet 1439. Displacement and permanent relocation to a new reserve due to extreme weather resulting from climate change may cause mental health issues like depression, miscarriages and intensify chronic illnesses like diabetes. See Thompson, Ballard & Martin, *supra* note 341 at 80-81, 84.

⁴⁴⁷ Cultural losses are defined as “adverse impacts on the range of traditional activities, emotional well-being, or social relations engaged in by an individual and/or an aboriginal community as the result of changes in the land.” See Robin Gregory and William Trousdale, “Compensating Aboriginal Cultural Losses: An Alternative Approach to Assessing Environmental Damages” (2009) 90:8 Journal of Environmental Management 2469, DOI: 10.1016/j.jenvman.2008.12.019.

cultural identity causing mental health issues. This may be inimical to the rights to health and life.⁴⁴⁸

In *Yanomami v. Brazil*,⁴⁴⁹ the Inter-American Commission of Human Rights (IACHR) held that the Brazilian government's failure to "adopt timely and effective measures in favour of the Yanomami Indians" led to the displacement of the Yanomami Indians from their ancestral lands and hence infringed on several rights including their rights to preservation of health and well-being as enunciated in Article 11 of the *American Declaration*. In analyzing the case, the IACHR pronounced that member states of the OAS considered the protection of Indigenous peoples as inviolable for historical reasons.⁴⁵⁰ It further observed that the displacement of the Yanomami Indians from their ancestral lands had negatively impacted their culture, tradition and customs contrary to Article 27 of the *ICCPR* which specially protects the right of ethnic groups to language, religion and preservation of their culture.⁴⁵¹ It emphasized that the OAS considered the preservation and strengthening of the cultural heritage of ethnic groups as paramount.⁴⁵²

Canada's NDC acknowledges the vulnerability of Indigenous peoples and their communities to climate change and declares that measures to support Indigenous communities to monitor the

⁴⁴⁸ A study conducted of the psychological and medical impacts of the threat of compulsory relocation for the members of an Indigenous community revealed that the community in comparison with a similar community without threat of relocation experienced severe psychological distress and used considerable more medical services particularly those residing in rural reservations because their homeland was of considerable consequence psychologically in their individual lives and to their cultural identity as a people. See Michael J. O'Sullivan and Paul J. Handel, "Medical and Psychological Effects of the Threats of Compulsory Relocation for an American Indian Tribe" (1988) 2:1 *American Indian and Alaska Native Mental Health Research*.

⁴⁴⁹ *Yanomami v. Brazil*, Inter-American Commission on Human Rights, Res No 12/85, Case No 7615 (5 March 1985) [*Yanomami v. Brazil*].

⁴⁵⁰ *Ibid* at para 10.

⁴⁵¹ *Ibid* at paras 2 & 5. Article 27 of the *ICCPR* states, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

⁴⁵² *Ibid*, para 5. The HRC considered a similar issue of the threat to the way and life of the Lubicon Lake Band way of life under article 27 of *ICCPR* in *Communication No. 167/1984 Lubicon Lake Band v. Canada*.

impacts of climate change and tackle them are being adopted for the communities' resilience.⁴⁵³

The Pan-Canadian Framework recognizes the effects of climate change on human health especially on the Indigenous populace.⁴⁵⁴ Consequently, to protect the health and well-being of Indigenous peoples, the framework has indicated its readiness to assist Indigenous peoples to cope with climate change and initiate adaptive health projects to protect public health.⁴⁵⁵

In line with the Pan-Canadian Framework's goal to protect health and wellbeing, the Government of Canada is assisting the First Nations Communities to evaluate and to address changes in the climate in several areas involving ensuring food security, access to traditional food, access to safe drinking water, coping with impacts of extreme weather events, supporting women to cope with climate change and its impacts on mental health and documentation of traditional medicines.⁴⁵⁶ This is done by collaborating with Indigenous peoples by providing funding for research and projects through Health Canada's Climate Change and Adaptation Program for First Nations South of 60⁰N.⁴⁵⁷

In view of the existing poor health status of the Indigenous peoples; Canada needs to improve upon the underlying determinants of health for its Indigenous peoples, improve on health care and ensure the reduction of its emissions.

⁴⁵³ Canada's NDC *supra*, note 315 at 3.

⁴⁵⁴ Pan-Canadian Framework, *supra* note 319 at 28, 32.

⁴⁵⁵ Pan-Canadian Framework, *supra* note 319 at 28, 32.

⁴⁵⁶ Pan-Canadian Framework, *supra* note 319 at 32, 49; Government of Canada, Climate Change and Health Adaptation Program (last visited 2 June 2019) <www.sac-isc.gc.ca/eng/1536238477403/1536780059794>; Indigenous and Northern Affairs Canada, First Nation Adapt Program (last visited 2 June 2019) <www.aadnc-aandc.gc.ca/eng/1481305681144/1481305709311>; Government of Canada, Government of Canada Supporting First Nation Communities to Assess and Respond to a Changing Climate (News Release (24 May 2019) (last visited 2 June 2019) online: *Crown-Indigenous Relations and Northern Affairs Canada* <www.canada.ca/en/crown-Indigenous-relations-northern-affairs/news/2019/05/government-of-canada-supporting-first-nation-communities-to-assess-and-respond-to-a-changing-climate.html>.

⁴⁵⁷ Health Canada, Climate Change and Health Adaptation Guide for First Nations South of 60⁰ N: Funding Application Guide (August 2017) (last visited 2 June 2019) online: <www.climate-telling.info/uploads/2/5/6/1/25611440/24-17-1884-cchap-guide-en.pdf>.

5.7 Conclusion

Canada endeavours to protect the rights to life and health of its residents but there exists a disparity in the level of protection afforded to the Indigenous peoples with respect to health. Consequently, their rights to life and health among other rights will be disproportionately affected by climate change. While Canada has made commendable strides in seeking to reduce its emissions and tackle the effects of climate change by declaring a climate emergency, the passage of the *Impact Assessment Act* and the implementation of Pan-Canadian Framework, these measures may be insufficient. For example, based on the re-approval of the expansion of the Trans Mountain pipeline and its plans to produce more fossil fuels by 2030, it may be unable to achieve the goals of the Paris Agreements.⁴⁵⁸

Going by the requirements of the HRC in its *General Comment No. 36* to protect the right to life and Article 12 of the *ICESCR* for the provision of health care and the determinants of health, the rights to life and health of the Indigenous peoples are not adequately protected because of the disparities in health between the Indigenous and non-Indigenous peoples. Moreover, these disparities arise basically from non-legal factors such as colonialism, racism and cultural factors which are difficult to resolve legally. Legal barriers which can be resolved include creating an adequate legal framework for health, that is health care and the underlying determinants of health such as water; provision of adequate funding and ensuring the participation of Indigenous peoples on issues relevant to them which is not limited to industrial or developmental projects. Climate change mitigation and adaptation in Canada therefore presents an opportunity for Canada to improve on the health of Indigenous peoples and reduce its emissions to avert a climate catastrophe.

⁴⁵⁸ SEI et al, “The Production Gap: The Discrepancy between Countries’ Planned Fossil Production and Global Production Levels Consistent with Limiting Warming to 1.5°C or 2°C (SEI, IISD, ODI, Climate Analytics, CICERO & UNEP, 2019) 25, 26, 36 <<http://productiongap.org>>.

Alternatively, if Canada does not voluntarily commit to climate mitigation activities, the First Nations of the Treaty 8 territory can institute an action in Canada or submit a communication to the HRC of the *ICCPR* or the IACHR for the infringement of their rights. In filing a domestic action for the infringement of their right to life and health, the First Nations can rely on sections 7 and 15 of the *Charter*. Section 7 states that, “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.⁴⁵⁹ Through Canada’s actions and inaction to reduce its GHG emissions, it contributes to climate change which endangers the lives and health of the First Nations. A claimant asserting a violation of section 7 must prove that a deprivation of the right to life, liberty and security of the person has occurred, and that the deprivation was not in accordance with the principles of fundamental justice.

The increased severity and frequency in wildfires in the Treaty 8 territory endangers the lives and increases the risk of death of the First Nations in the territory while there may also be increased risk of suicides arising mental health issues from relocation and cultural loss. The First Nations right to security of the person is being infringed as they experience serious physical and psychological harms from the effects of climate change. Their right to liberty is also contravened as their freedom of movement is restricted during wildfires and they may also be compelled to relocate.

The deprivations of the right to life, liberty and security of the person are not in accordance with the principles of fundamental justice because they infringe on section 15 of the *Charter* which grants equal protection of the law to every individual, do not conform with Canada’s commitments

⁴⁵⁹ *Charter*, s.7.

under international law to protect the right to life and culture of Indigenous peoples, and Canada's commitments and goal to address climate change.

Canada's failure to reduce its emissions also infringes on section 15 of the *Charter* which grants equality and equal protection of the law for the First Nations of the Treaty 8 territory as they risk the loss of cultural rights and practices, loss of enjoyment of and connection to the land and face the threat of relocation. Also, the inequality reinforces the discrimination experienced by Indigenous peoples including the First Nations in several areas and intensifies their pre-existing disadvantages as climate change disproportionately impacts them in comparison with non-Indigenous Canadians because of their tradition, customs and culture.

Furthermore, the First Nations can submit a communication to the HRC of the *ICCPR* on the infringement of the right to life based on Articles 26 and 62 of *General Comment No 36* elucidating the right to life after the exhaustion of domestic remedies. Canada is a party to the Optional Protocol that allows individuals to file claims against State Parties. The infringement of their right to health can also be framed under the right to life.

Finally, the First Nations can file a communication to the IACHR based on the violation of the rights to life and health in the *American Declaration*.⁴⁶⁰

⁴⁶⁰ *American Declaration*, arts. 1 & 11.

Chapter 6 Charting a Path Towards Protecting the Rights to Life and Health

6.1 Introduction

This chapter examines the protection of the rights to life and health in Nigeria and Canada. This will comprise several recommendations including accessing finance to protect health, obtaining remedies for the infringement of rights and comparison with a similar country. The chapter initially focuses on Nigeria, and thereafter Canada.

6.2 Nigeria

The impact of climate change is presently taking its toll on the rural people of the Niger Delta region of Nigeria and is anticipated to worsen in the coming years. Considering that oil exploration and production activities in the region have negatively impacted subsistence farming and fishing activities which is the main occupation of the rural inhabitants as well as their health and lives, it is expected that the Nigerian government strives to mitigate and tackle the impact of climate change on them. An effective mechanism of mitigating and adapting to climate change is by conducting EIAs incorporating a CCIA as rightly observed by the *General Comment No. 36* and the *Earthlife case*. This can reduce emissions in oil exploitation activities and adaptation to the health impacts of climate change

EIAs conducted in the Niger Delta region consider climate change but neglect climate change adaptation and consultation which are important to the people.⁴⁶¹ This significantly inhibits the residents of rural Niger Delta from effectively enjoying their rights to life and health. The *NESREA Act* which regulates environmental issues does not offer participatory rights. In the same vein, the *EIA Act* of Nigeria which regulates environmental assessments in Nigeria provides for public

⁴⁶¹ Saheed Matemilola et al, "Mainstreaming Climate Change into the EIA Process in Nigeria: Perspectives from Projects in the Niger Delta Region" (2019) 7:2 Climate, DOI: 10.3390/ cli7020029.

participation, but this provision is usually not applied in practice. As a result, the Niger Delta people are precluded from being involved in decision making which affects their lives and health. In the light of this, I propose a review of the *NESREA Act* to include participatory rights. Furthermore, I suggest the review of the *EIA Act*. For instance, section 15 (1) obviates the need for an EIA where the President or the Council of the relevant environmental agency opines that a project is likely to have minimal environmental effects, during a national emergency and in the interest of public health or safety.⁴⁶² This provision is arbitrary, inhibits participation, defeats the purpose of the Act, and should be repealed as it fails to consider the input of relevant stakeholders or the negative effects the project may have on the lives and health of people. Also, section 1 of the *EIA Act* only considers “any activity that may likely or to a significant extent affect the environment or have environmental effects on those activities” which is quite vague and limited in scope according to current environmental standards. Therefore, I suggest the consideration of climate change impacts or a CCIA should be incorporated and read into the new EIA Act to mitigate the adverse impacts of climate change and enhance adaptation especially on the health of the Niger Delta population, Nigerian population and the global population.

Protecting the Right to Health

Presently, a State Health Insurance Scheme (SHIS) is being implemented in several states of Nigeria to decentralize NHIS.⁴⁶³ However, I go further to propose that the SHIS should be independent of the NHIS instead of merely decentralizing from the NHIS as this will give each state

⁴⁶² Etemire, *supra* note 239 at 569-570.

⁴⁶³ PricewaterhouseCoopers, “Sustainability of State Health Insurance Schemes in Nigeria: Beyond the Launch” (2019) (last visited 19 September 2019) online (pdf): *PricewaterhouseCoopers* <<https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.pwc.com/ng/en/assets/pdf/sustainability-state-health-insurance-nigeria.pdf&ved=2ahUKEwjU8Jrco93kAhWHqZ4KHbAWBXsQFjAKegQIAhAB&usg=AOvVaw0e5ZbCp5gAluiYiLNByzqc>>.

government more autonomy to structure the SHIS according to the needs of the state. Consequently, the federal government through the Ministry of Health could make policies, play a supervisory function over the health sector and make financial contributions to the SHIS while maintaining its tertiary health care services. A SHIS can be a means to improve health in the rural areas as an advantage of an independent SHIS is the easy penetration of the informal sector unlike the present NHIS scheme.

Furthermore, the SHIS should not be voluntary but mandatory for all residents of the state who could pay a specific sum to access health services while workers in the formal sector could have a specific percentage deducted from their wages. The payment of a fixed and minimal sum by rural residents or workers in the informal sector could be viewed as unfavourable by the rural poor but studies have shown that free health services offered to the poor in Nigeria are generally ineffective and do not achieve the required result as the free services are mostly acquired for a fee.⁴⁶⁴ In addition, this fixed payment of a minimal sum for health care for rural residents or those in the informal sector is also preferable to variable and indeterminate payments for out of pocket expenses made by rural communities for some supposedly free services and which is usually higher for rural communities in comparison with urban communities.⁴⁶⁵ Also, this will also ensure that rural residents can demand accountability for deficient health services. Alternatively, the rural poor can be subsidized or even offered free health care services through the derivation fund allocated to states in the Niger Delta region, the Ministry of Niger-Delta Affairs and assistance from international donors. This can occur after a specific time frame when the tax base of rural residents

⁴⁶⁴ Ijadunola, *supra* note 252.

⁴⁶⁵ Hodo B. Riman & Emmanuel S. Akpan, "Healthcare Financing and Health Outcomes in Nigeria: A State Level Study Using Multivariate Analysis" (2012) 2:15 International Journal of Humanities and Social Science 296 at 303.

or the informal sector is mostly accurate. Moreover, the SHIS can also be supplemented by the basic health care provision fund discussed below.

The basic health care provision fund (BHCPF) in the *National Health Act* offers an opportunity to improve the poor health status of the rural people of the Niger Delta region. The BHCPF was developed to ensure a basic minimum package of health services for Nigerians and assist Nigeria achieve UHC.⁴⁶⁶ The Guidelines to the BHCPF emphasizes on the provision of health care to rural areas particularly for the poor.⁴⁶⁷ It can therefore be utilized to enhance the rural health sector. With the BHCPF's commencement, states or local governments can access the fund to enhance health care for the populace if they make a counterpart funding of not less than 25 per cent.⁴⁶⁸ The BHCPF can also be beneficial in resolving the challenge of limited human resources capacities noted in the ERGV considering that 10 per cent of the fund is earmarked for the development of human resources for primary health care.⁴⁶⁹ In complying with this provision, states in the Niger Delta region can use this sum to attract, train and incentivize human resources in the medical field to the rural Niger Delta region.

To further enhance the health sector and provide health services for residents particularly those in the rural Niger Delta region, it is proposed that the revenue derived from Company Income tax and Petroleum Profit tax should not be paid solely to the federal government coffers but a certain percentage derived from the respective states be disbursed to the Niger Delta states. This fund can

⁴⁶⁶ It is funded by the government disbursing 1 per cent of its annual consolidated revenue, donors and other sources. Primary health care facilities receive 45 per cent while the NHIS receives 50 per cent to fund primary and secondary health care. See National Health Act, s. 11 (2) (a) (b) (c), (3) (a) (b) (c) (d).

⁴⁶⁷ Guidelines for the Administration, Disbursement, Monitoring and Fund Management of the Basic Healthcare Provision Fund (Federal Ministry of Health, National Health Insurance Scheme and the National Primary Care Development Agency, August 2016) at 36, 37, 38, 39, 42.

⁴⁶⁸ National Health Act, s. 11 (5) (a) (b); Ayodamola Owoseye, "Buhari Rolls Out Basic Health Care Provision Fund (8 January 2019) (last visited 18 September 2019) online: *Premium Times* <www.premiumtimesng.com/health/health-news/304833-buhari-rolls-out-basic-health-care-provision-fund.html>.

⁴⁶⁹ *Ibid*, s 11 (3) (d).

thereafter be used by the states concerned to improve on their rural health sector and the determinants of health. To ensure that the funds are used for the Niger Delta communities and not diverted for another purpose, a committee of people with high integrity may be appointed instead of the state to administer the funds.

Obtaining Remedies for the Infringement of the Rights to Life and Health

If Nigeria refuses to commit to voluntary action to reduce its emissions, and protect the rights to life and health of the rural people of the Niger Delta region, they can institute actions against Nigeria for the infringement of the rights to life and health based on the *CFRN* and the *African Charter* among other laws in Nigerian courts, the Court of Justice ECOWAS and at the African Commission.

The rural Niger Delta people can institute an action at a High Court for Nigeria's infringement of their right to life through the flaring of gas and oil exploration activities which contributes to climate change as illustrated in *Gbemre v Shell*. They can rely on section 33(1) of the *CFRN*, Articles 4 and 16 of the *African Charter*, Article 3 of the *UDHR*, and Article 6(1) of the *ICCPR* pursuant to the *FREP Rules, 2009* for the loss of lives, imminent loss of lives, ill-health and inadequate health care facilities caused by the effects of climate change. The *FREP Rules, 2009* will be effective⁴⁷⁰ in addressing the infringement of the right of life by climate change as the preamble states that “[t]he Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them.”⁴⁷¹ It further states

⁴⁷⁰ R.K. Salman & F.J. Oniekoro, “Death of Locus Standing and the Rebirth of Public Interest Litigation in the Enforcement of Human Rights in Nigeria: Fundamental Rights (Enforcement Procedure) Rules 2009 in Focus” (2015) 23:1 *IIUM Law Journal* 107 at 125.

⁴⁷¹ Preamble 3(a). Order 2 further interprets fundamental rights to mean any of the rights stated in Chapter IV of the *CFRN* and includes any rights provided in the *African Charter*.

the intention of the Court to respect municipal, regional and international bill of rights cited or brought to its attention such as the *African Charter* and other instruments in the African regional human rights system, the *UDHR* and other instruments (including protocols) in the UN human rights system.⁴⁷²

A claim can also be made by the rural people of the Niger Delta region at the ECOWAS Court of Justice relying on Article 13(1) of the *African Charter* which grants participatory rights to citizens of a country and which is also applicable to Nigeria as a State Party.⁴⁷³ Alternatively, the enforcement of public participation in decision-making process of EIAs and obtaining redress for non-participation may also be achieved by submit a communication at the African Commission of Human and Peoples Rights. This will ensure that the people participate in the EIA process and identify the effects of climate change which could impact their lives and health.

The rural people of the Niger Delta region can also seek legal redress for the infringement of their rights to life and health by Nigeria and oil companies by filing a communication to the African Commission as exemplified by the *SERAC v Nigeria* decision. The claims can be based on the Nigerian government's and oil companies' failure to conduct EIAs and thereby consider the impacts of climate change through a CCIA. The failure of the oil companies to consult with the relevant rural people of the Niger Delta region particularly on the impacts of climate change on them and adaptation strategies and thus, ensure participation will also form the basis of the claim. Reliance can be placed on Articles 4, 13, 16 and 24 of the *African Charter*, Article 6(1) of the *ICCPR* and Article 12 of the *ICESCR* to the African Commission.

⁴⁷² Preamble 3(b).

⁴⁷³ *African Charter*, art 13 (1). See also Etemire, *supra* note 239 at 573-584.

Similarly, an action can be instituted against Nigeria at the Court of Justice of ECOWAS for the infringement of the rights to life and health by relying on section 33(1) of the *CFRN* Articles 4, 16 and 24 of the *African Charter*, Article 6(1) of the *ICCPR* and Article 12 of the *ICESCR*.

Filing of actions at the regional and international human rights treaty bodies is advantageous can be because of the international prominence they attract. This in essence can shame and incentivize the Nigerian government to comply with decisions as illustrated in *SERAC v Nigeria* which compelled Nigeria's adoption of several regulatory measures including the establishment of the National Oil Spill Detection and Response Agency (NOSDRA).⁴⁷⁴

Lobbying

Lobbying is proposed for the rural people of the Niger Delta region to resolve the challenges they face such as deficient health care, deficient underlying determinants of health and non-participation in EIAs which has been detrimental to their lives, health and standard of living. Several options to resolve these challenges such as litigation and resorting to violence have been explored but have been futile so far. Therefore, lobbying at the State Houses of Assembly in the region as well as the National Assembly may be considered as an option to resolve these challenges.

Civil society organizations from the Niger Delta region such as the Movement for the Emancipation of Niger Delta can employ the services of lobbyists to influence the provision of adequate health services in public hospitals and the determinants of health in the region. Furthermore, lobbying can be used as a tool to compel Nigeria to reduce its emissions and ensure

⁴⁷⁴ Evaristus Oshionebo, "Citizen Enforcement of Environmental Regulation in Africa's Extractive Industries" (2017) 17 *Asper Rev. Int'l Bus. & Trade L.* 46-47.

the participation of the rural people of the Niger Delta region in EIAs for projects vital to their lives and health.

6.3 Canada

A key issue that Canada needs to address in protecting the rights to life and health of the First Nations in the Treaty 8 territory is the reduction of its emissions. Canada plans to reduce its emissions by 30 per cent of its 2005 level by 2030. As earlier discussed, Canada is taking several measures to achieve the reduction of its emissions including the imposition of a carbon tax. However, considering its significant emissions, it needs to adopt a more ambitious target. This section will not consider EIAs due to the recent passage of a new EIA law, the *Impact Assessment Act*.⁴⁷⁵ In proffering suggestions to enhance the health status of the First Nations of the Treaty 8 territory, this thesis will consider Norway and its marginalized Indigenous population, the Sami based on their excellent health status instead of the standard comparison with countries such as Australia, New-Zealand and the United States.

Protecting the Right to Health

Norway is a high-income Scandinavian country in Europe.⁴⁷⁶ It has a population of about 5,314,336 people.⁴⁷⁷ Norway and Canada share several common characteristics.⁴⁷⁸ They are

⁴⁷⁵ Environment Canada, “A Proposed New Impact Assessment Act” (last modified 26 September 2019) (last visited 7 October 2019) *online*: Environment Canada
<<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html>>

⁴⁷⁶ The World Bank “Country Profile: Norway” *online*: *The World Bank* (last visited 26 November 2019)
<<https://data.worldbank.org/country/norway?view=chart>>.

⁴⁷⁷ The World Bank “Country Profile: Norway” *online*: *The World Bank* (last visited 26 November 2019)
<https://databank.worldbank.org/views/reports/reportwidget.aspx?Report_Name=CountryProfile&Id=b450fd57&tbar=y&dd=y&inf=n&zm=n&country=NOR>.

⁴⁷⁸ Josee G. Lavoie, “Policy and Practice Options for Equitable Access to Primary Healthcare for Indigenous Peoples in British Columbia and Norway (2014) 5:1 *International Indigenous Policy Journal* 3-5 [Lavoie, “Policy and Practice Options”].

developed, and oil-producing countries located.⁴⁷⁹ Both countries are located within the arctic region. They also have Indigenous groups. The government of both countries are constitutional monarchies and parliamentary democracies. They also have common and civil law legal systems. The Constitutions of both countries also recognize Indigenous rights.⁴⁸⁰ Norway and Canada share a similar health care system including a publicly funded health care.⁴⁸¹

The Sami which is the Indigenous in Norway also shares several similarities with the First Nations Indigenous group in the Treaty 8 territory of Canada. Both groups are minority groups in their countries. Similar to the First Nations, the Sami have undergone a process of assimilation by the Norwegian government including through the Residential School system.⁴⁸² The Sami also experience discrimination from the non-Indigenous Norwegians because of their cultural identity.⁴⁸³ The Sami and First Nations have a close connection to the land and environment.⁴⁸⁴ Some of the Sami also work in their traditional occupations of reindeer herding, subsistence farming and

⁴⁷⁹ EIA, “Norway” (last modified 7 January 2019) (last visited 16 July 2019) online: *EIA* <www.eia.gov/beta/international/analysis.pho?iso=NOR>.

⁴⁸⁰ The Constitution of the Kingdom of Norway of 1814, art. 108 states that “[t]he authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”

⁴⁸¹ Anen Reinhard et al, *Norway: Health System Review 2013* (Copenhagen, Denmark: World Health Organization, 2013) 25; Lavoie, “Policy and Practice Options”, *supra* note 478 at 2-3.

⁴⁸² Nathan John Albury, “Holding Them at Arm’s Length: A Critical Review of Norway’s Policy on Sami Language Maintenance (2016) 1 *Journal of Home Language Research* 1, 2.

⁴⁸³ Eiliv Lund, Magritte Brustad & Asle Hogmanay, “The Sami: Living Conditions and Health” (2008) 67:1 *International Journal of Circumpolar Health* 7; Norwegian Ministry of Health and Care Services, “National Strategy to Reduce Social Inequalities in Health” Report No. 20 (2006-2007) to the Storting 28.

⁴⁸⁴ *Ibid.*

fishing.⁴⁸⁵ In the same vein, both Indigenous groups are vulnerable to climate change.⁴⁸⁶ From the foregoing, it can be inferred that Canada and Norway are analogous in several areas.

The health situation of the Indigenous peoples in Canada can be contrasted with the Indigenous peoples of Norway. Unlike the non-Indigenous Canadians, there exists a narrow disparity between the health status of the Sami people and the non-Indigenous Norwegians⁴⁸⁷ albeit the discrimination the Sami face because of their cultural identity.⁴⁸⁸ This may be attributed to the uniform legal framework for health for both Indigenous and non-Indigenous Norwegians despite socio-economic status or location.⁴⁸⁹ This can be traced to the basis for the healthcare system in Norway which is to provide equal access to health services while the main purpose of the Canadian health care policy is to provide accessible health care services.⁴⁹⁰ Based on the excellent health of the Sami which is almost at par with non-Indigenous Norwegians, I suggest the development of a legal framework by the federal government, provinces and Indigenous peoples giving Indigenous peoples access to provincial health services similar to non-Indigenous Canadians under the *Canada Health Act*. This will forestall gaps in accessing health care and jurisdictional issues in and around different provinces therefore ensuring equality and uniformity as applicable in Norway.

⁴⁸⁵ Bodil Hansen Blix, Torunn Hamran & Hans Ketil Norman, “The Old Sami” – Who Is He and How Should He Be Cared For? A Discourse Analysis of Norwegian Policy Documents Regarding Care Services for Elderly Sami?” (2013) 30:1 *Acta Borealia* 75 at 77.

⁴⁸⁶ Jouni J.K. Jaakkola, Sufi Juntunen & Klemetti Nakkalajarvi, “The Holistic Effects of Climate Change on the Culture, Well-Being, and Health of the Sami, the Only Indigenous People in the European Union” (2018) 5:4 *Curr Environ Health Rpt* 401-417.

⁴⁸⁷ Per Sjolander, “What is Known about the Health and Living Conditions of the Indigenous People of Northern Scandinavia, the Sami?” (2011) 4 *Global Health Action*.

⁴⁸⁸ Lund, Brustad & Hogmanay, *supra* note 483 at 7; Norwegian Ministry of Health and Care Services, “National Strategy to Reduce Social Inequalities in Health” Report No. 20 (2006-2007) to the Storting 28.

⁴⁸⁹ Lavoie, “Policy and Practice Options”, *supra* note 478 at 2.

⁴⁹⁰ World Health Organization, “Regional Office for Europe: Norway” (last visited 26 November 2019) online: *World Health Organization* www.euro.who.int/en/countries/norway.

A similar legal framework by the federal government, provinces and indigenous peoples could also be developed for water as a determinant of health instead of temporary measures or arrangements between provinces and Indigenous peoples which may not be sustainable. This is essential to protect the rights to life and health of Indigenous peoples. It is also recommended that Indigenous peoples are well-informed and meaningfully involved in the development of the legal framework and its implementation to ensure that their interests are served.⁴⁹¹

In addressing the issue of discrimination and racism experienced by Canadian Indigenous peoples which is similar to Norwegian Indigenous people in accessing health care, and constitutes a barrier to good health, the establishment of primary health care centres for First Nations and managed by First Nations in rural reserves and provinces is recommended. This will tackle the discriminatory attitudes experienced by First Nations when accessing health services in provinces while aligning with certain cultural and traditional beliefs. These health centres could be similar to the present arrangements under the HTP for First Nations in reserves and Inuit in their traditional territory. To resolve the issue of inadequate funding applicable to health transfer arrangements and fund the health centers stated above, alternative sources of funding may be explored. For example, some of the income tax of First Nations in non-reserves can be directed towards this health arrangement thereby allowing the payees to demand accountability.⁴⁹² Furthermore, part of the revenue from the royalties from oil exploration and production activities and benefits paid to First

⁴⁹¹ A study conducted on water and sanitation revealed that First Nations reserves in the Prairie region were excluded from decision-making resulting in negative health issues for the communities and high expenses for the federal government. A similar situation applies to housing. Baijus & Patrick, *supra* note 355 at 6-13; Roberta Stout, "The Built Environment: Understanding How Physical Environments Influence the Health and Well-Being of First Nations People Living On-Reserve" (2018) (last visited 16 July 2019) online (pdf): *National Collaborating Centre for Indigenous Health* 13-15 <www.google.com/url?sa=t&source=web&rct=j&url=https://www.ccsa.ca/docs/emerging/RPT-Built-Environment-Stout-EN.pdf&ved=2ahUKewi12MiUorrjAhXig-AKHTzjC8UQFjAAegQIBxAC&usg=AOvVaw30d9mBq0hxN4mN4aE_OmOB>13-15.

⁴⁹² See Douglas Sanderson, "Overlapping Consensus, Legislative Reform and the Indian Act" (2014) 39:2 *Queen's LJ* 511 at 543 where a similar idea was proposed.

Nations communities in oil producing regions can be used for these health arrangements.⁴⁹³ These measures will enhance Indigenous autonomy in the management of their health, and consequently result in better health care for First Nations which will be responsive to their needs. This has also been reflected in a study stating that Indigenous control of Indigenous health care improves health outcomes.⁴⁹⁴ This may also serve as a model for other countries with Indigenous populations facing discrimination in accessing health services including Norway.

The *Indian Act* which regulates the lives of First Nations including those in the Treaty 8 territory of Canada can be identified as a primary source for the marginalization and inequalities experienced by the First Nations particularly in the area of health. Therefore, a review of the *Indian Act* or the enactment of a legislation to govern the culture, language and way of life of the First Nations or the Indigenous peoples in general similar to the Sami Act is recommended. Although, there are differences between the Sami and the First Nations such as the reserve system, it is proposed that a review or the enactment of a new law indicates an opportunity for the First Nations to have a decisive say in their affairs in contrast to the *Indian Act*.

Obtaining Remedies for the Infringement of the Rights to Life and Health

If Canada does not voluntarily commit to reduce its emissions, the First Nations of the Treaty 8 territory can file an action in Canada for the infringement of their right to life and health relying on sections 7 and 15 of the *Charter*. Section 7 states that, “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁴⁹⁵ The claim can state that Canada contributes to climate change

⁴⁹³ *Indian Act*, s. 64(1)(a), (k). See also C.A. Webb, “Indian Oil and Gas: Control, Regulations and Responsibilities” (1987) 26:1 *Alta L Review* 77 at 78.

⁴⁹⁴ Paul Webster, “Local Control over Aboriginal Health Care Improves Outcome, Study Indicates” (24 November 2009) 181:11 *CMAJ* 109-3072.

⁴⁹⁵ *Charter*, s.7.

which endangers the lives and health of First Nations through its actions and inaction to reduce its GHG emissions. The claimant(s) by asserting a violation of section 7 must prove that a deprivation of the right to life, liberty and security of the person has occurred, and that the deprivation was not in accordance with the principles of fundamental justice.

There is a deprivation of the right to life due to increased severity and frequency in wildfires in the Treaty 8 territory which endangers the lives and increases the risk of death of the First Nations in the region from wildfires and suicides arising from mental health issues due to relocation and cultural loss. The right to security of the person of the First Nations is being infringed because of the serious physical and psychological harms they experience arising from the effects of climate change. Their right to liberty is also contravened as their freedom of movement is restricted during wildfires and they may be compelled to relocate.

The deprivations of the right to life, liberty and security of the person are not in accordance with the principles of fundamental justice because they infringe on a right guaranteed in the *Charter* [section 15] which grants equal protection of the law to every individual and will be discussed below. Also, the deprivations do not conform with Canada's commitments under international law to protect the right to life and culture of Indigenous peoples, and Canada's commitments and goal to address climate change.

Canada's failure to reduce its emissions infringes on section 15 of the *Charter* which grants equality and equal protection of the law for the First Nations of the Treaty 8 territory as they risk the loss of cultural rights and practices, loss of enjoyment of and connection to the land, and face the threat of relocation. Also, the inequality reinforces the discrimination experienced by Indigenous peoples including the First Nations in several areas and intensifies their pre-existing

disadvantages as climate change disproportionately impacts them in comparison with non-Indigenous Canadians because of their tradition, customs and culture.

The First Nations can also submit a communication to the HRC of the *ICCPR* on Canada's infringement of their right to life based on paragraphs 26 and 62 of *General Comment No. 36* elucidating the right to life. The right to health can be subsumed under the right to life. Canada is a party to the Optional Protocol that allows individuals of to file claims against State Parties.

Also, the First Nations can file a communication to the IACHR based on the violation of the rights to life and health in the *American Declaration*.⁴⁹⁶

Lobbying

The First Nations can utilize lobbying as a tool to protect their lives and health. Indigenous groups such as the Assembly of First Nations, band chiefs and First Nations on reserves can employ the services of lobbyists to influence decisions to the benefit of the First Nations. Lobbying can be employed at the legislature at the provincial and federal levels to compel Canada to reduce its emissions and increase its climate targets. This can be done by emphasizing the significance of culture and tradition to their way of life and the disproportionate effect of climate. Lobbying will also be effective in representing the necessity of a legal framework for Indigenous health and the determinants of health to enhance their health status.

6.4 Conclusion

Climate change is prevalent with its effects constituting a major source of concern worldwide because of the challenges in addressing climate change and its effects on several rights on present and future generations. This thesis examined the impact of climate change on both marginalized

⁴⁹⁶ *American Declaration*, arts. 1 & 11.

populations in their respective locations, and further established that the Niger Delta and Indigenous peoples will be substantially affected by climate change in their respective jurisdictions.

I have argued in this thesis that climate change will infringe on the rights to life and health of marginalized groups in rural communities in Nigeria and Canada respectively which have been adversely affected by oil extraction activities. I further argued that the right to health of these groups are presently inadequately protected and based on the existing poor health status, and inadequate health care for the rural Niger Delta people and First Nations in the Treaty 8 territory, there is an increased risk of ill health and inability of the health sector to cope with an envisaged health crisis which may overwhelm the health sector consequent to climate change impacts.

The preceding chapters of this thesis also observed that while commendable efforts have been made by both jurisdictions to address the impact of climate change, more efforts can be made to protect human rights specifically the rights to life and health of their marginalized populations. Consistently protecting the rights to life and health of all, particularly marginalized people is necessary in view of anthropogenic climate change which is bound to exacerbate existing conditions and cause health crisis in countries with inadequate health care systems. Presently, protecting the rights to life and health under climate change may constitute a challenge in Nigeria and Canada. However, actions may be filed for the infringement of these rights and redress obtained at domestic courts, regional and international human rights treaty bodies with actions filed at regional and international human rights treaty bodies being beneficial because of the global prominence they attract.⁴⁹⁷

⁴⁹⁷ Eric A. Posner, "Climate Change and International Human Rights Litigation: A Critical Appraisal" (2007) 155 University of Pennsylvania Law Review 1925 at 1931-1932.

A common thread running through the health care system of both jurisdictions is the emphasis on social determinants of health which can serve as a preventive measure rather than relying on curative measures as applicable to the marginalized population of both jurisdictions. The minimal emphasis on the social determinants of health also constitutes a noticeable gap. Consequently, this is reflected in the poor health status of the groups discussed in this thesis. The importance of the determinants of health cannot be understated as it enhances good health and its preventive component can be more effective and crucial in contrast to relying on curative measures both groups. Overall, this will in turn result in the government savings funds for curative measures generally, avert straining health resources during climate change and improvement of health. A further lacuna observed was the inadequate research conducted on the poor health of the Niger Delta and Indigenous peoples' health which may hamper the ability to effectively tackle the challenges involved in protecting the rights to life and health. In addition, Nigeria needs to conduct more research on climate change particularly climate change adaptation.

For the rural Niger Delta people, their poor health status can be enhanced by accessibility and availability of quality and acceptable health care and determinants of health. This will ensure that they are healthy and able to withstand the onslaught of climate-related health issues. Financing constitutes a major barrier towards achieving good health care for the rural Niger Delta and Nigerians generally. This can be achieved by measures as stated in the thesis. Climate mitigative measures such as participatory rights in environmental assessment is also essential to protect the rights to life and health.

In the case of Indigenous peoples of Canada, racism, discrimination and minimal emphasis on the determinants of health are major factors hindering their deficient health status. Despite the funds expended and plans developed to enhance the health status of the Indigenous peoples, the current

health challenges persist because of the neglect of the determinants of health, inadequate legal framework and the lack of coordination or cooperation between the federal and provincial on Indigenous health issues.

In conclusion, adopting climate mitigative and adaptive measures to protect the rights to life and health of marginalized groups will not solely be beneficial to address climate change but will be beneficial to the rest of the population and other sectors of the economy in the long-term.

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