THE CLIMATE CHANGE PHENOMENON - POLICIES AND LEGAL FRAMEWORK

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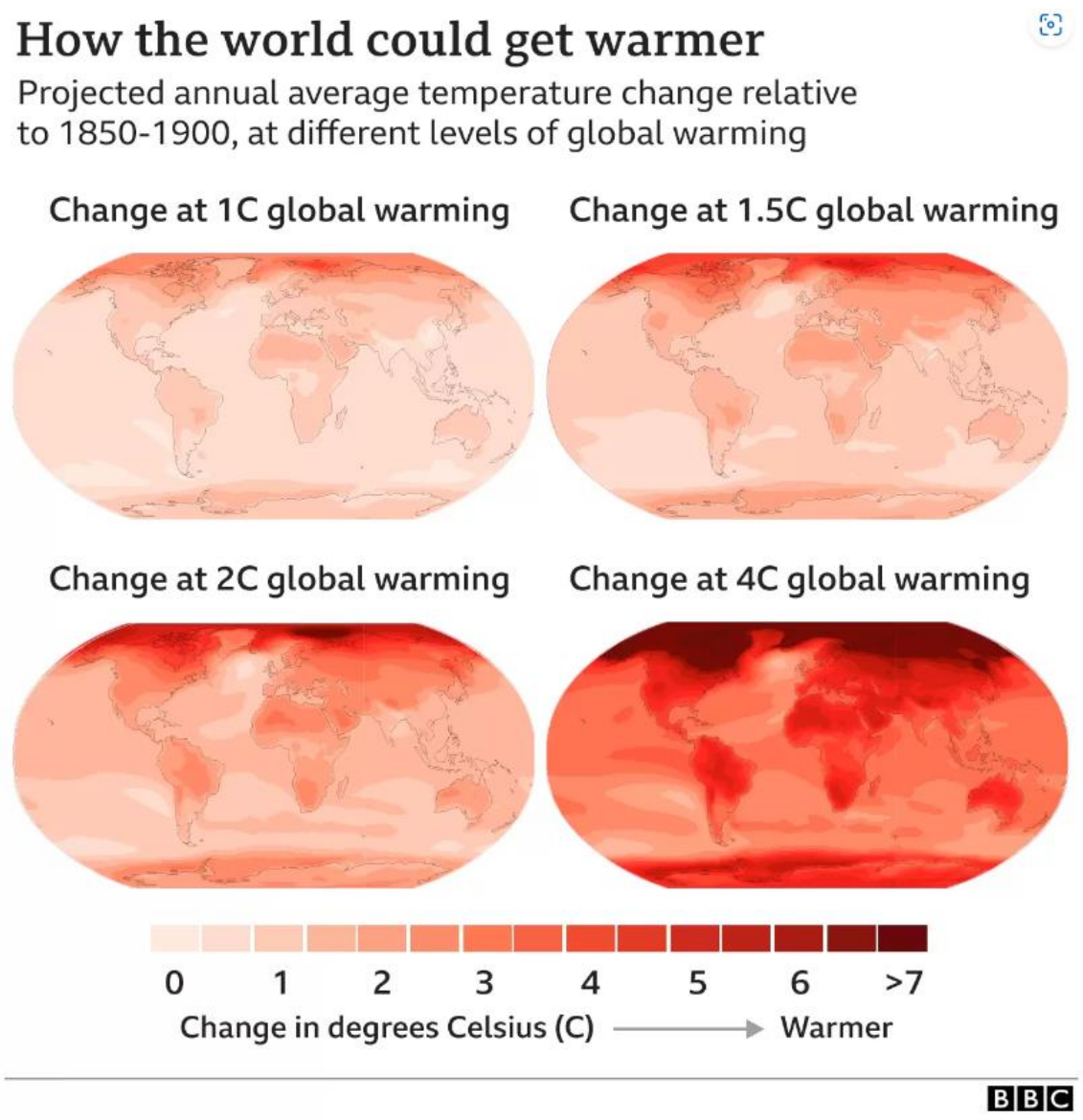
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1. INTRODUCTION : - THE CLIMATE CHANGE PHENOMENON



The Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Report of 2021 to 2023, indicates that it is unequivocal that human influence has warmed the atmosphere, ocean and land and that widespread and rapid changes in the atmosphere, ocean and biosphere, among others, have occurred. The average global temperatures for the past five years were the highest on record. Further, the report states that the future annual global mean near-surface temperature is likely to be at least 1°c warmer than pre-industrial levels each year over 2021-2025. Global warming levels of 1.5°c and 2°c will be exceeded during the 21st century. That this can only be avoided if deep cuts in carbon dioxide emissions are made rapidly, in the 2020s and that net-zero emissions are reached by 2050. Moreover, global surface temperatures will continue to increase until at least the mid-century under all emissions scenarios considered. As the warming continues, an increase in the frequency and intensity of hot extremes, marine heat waves and heavy precipitation is projected, as well as agricultural and ecological droughts in some regions and reductions in arctic sea ice.

Undoubtedly, Climate Change poses unprecedented challenges to the survival of humans, animals, plant life and ecosystems. It threatens social and economic systems, while putting development gains at risk. Relief programmes and other responses to disasters may require countries to redirect limited resources intended for other development priorities.

Despite Africa having contributed less than 4% of Global Greenhouse Gas (GHG) emissions, and negligible historical responsibility, it is one of the regions that are most vulnerable to climate variability and change. This is due to the continent's biophysical make-up as well as numerous socio-economic vulnerabilities, including a high dependence on raid-fed agriculture and natural resource-based sectors broadly, a lack of alternative livelihood support, widespread poverty and inequality, weak adaptive capacity, low levels of education, and inequitable access to financial resources, credit, markets and climate information services.

The 55 African States collectively have an estimated population of over 1.2 billion people, making it the eleventh is largest economy in the world, with a nominal gross domestic product (GDP) of about USD 2.263 trillion. The African population is the youngest in the world and the continent is set to be the most populous by 2025. The average growth of Africa's economy between 2002 and 2020 was 3.3%. This was largely driven by climate-sensitive sectors : - agriculture, energy, industry, maritime economy and service sectors, such as tourism and hospitality, real estate, banking and transport.

The contribution of the 15 Economic Community of West African States (ECOWAS) to global warming is minimal, currently representing about 1.8% of global greenhouse gas (GHG) emissions. However, according to the most alarming scenarios, West Africa will experience, by 2060, a temperature increase of +2.3°c, or a warming of +0.6°c per decade. Precipitation will be more erratic and will lead to an increase in the frequency and intensity of the extremes weather conditions already being experienced in West Africa:- floods, increased variability of rainfall, coastal and soil erosion in river basins, extremely long pockets of drought among other factors, with dramatic human and economic consequences befallen all components of economic development and impacting negatively on the livelihood of vulnerable population in the region, particularly, women, youth and the elderly.

The realization of Africa's Agenda 2063, the Africa We Want, cannot be possible without proactive collective continental efforts aimed at addressing the impacts and consequences of climate change, which hampers Africa's economic integration and sustainable development. Responding effectively to climate change is going to require comprehensive and strategic policy and legal frameworks at the continental, regional and national levels, and meaningful partnerships with broader international community for increase in climate financing. This approach is necessary because both policy and law have a responsive role to play in addressing the effects of climate change on the present and future generations. This requires upholding the evolving concept Climate Rule of Law and Justice, which primarily is about legal approaches and mechanisms that provide for the following: -

i. climate protection against harm as a legal duty of the state and other duty bearers in the private and public sectors;

ii. Inclusive participation of the most affected local communities and vulnerable population in climate action decision making processes, relating to adaptation and mitigation measures, affecting their lives and means of livelihood,

iii. Legal empowerment of vulnerable groups and local communities to access justice in climate matters relating to climate Inaction by duty bearers to put measures of adaptation and mitigation of the effect of climate change in society. Access to Climate justice for legal redress or remedy is a core component of the rule of law. This may be pursued through climate litigation and other forms of mechanisms for redress or dispute resolutions/32,

iv. Enhancing access to climate information relating to vulnerabilities, risks, services, measures, etc.

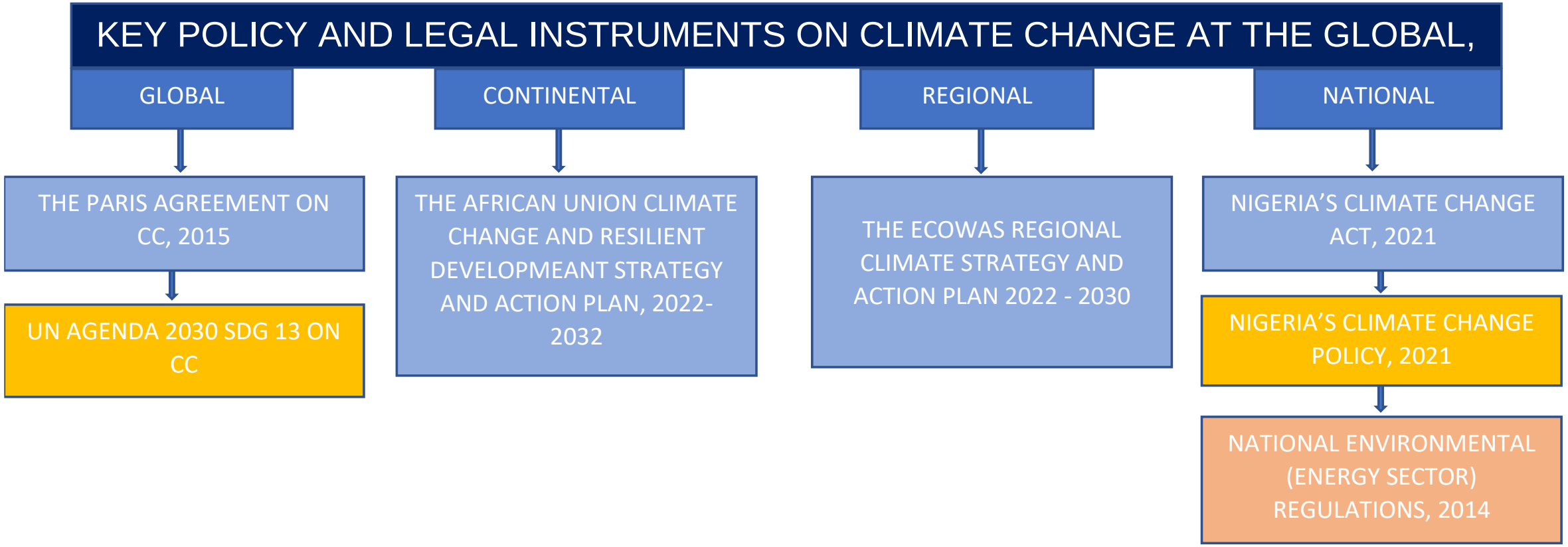
it is against this background that this paper seeks to achieve the following objectives: -

i. To provide an overview of the recent global, continental, regional and national policy and legal initiatives seeking to address the effects of climate change, protect climate against harm and enhance access to climate justice in the context of climate rule of law with particular. reference to Africa, including the ECOWAS region and Nigeria.

ii. To identify the recent trend of case law on the application of climate change policies and legal instruments for climate justice and sustainable development.

iii. To conclude with the way forward.

2. OVERVIEW OF RECENT GLOBAL, AFRICAN CONTINENTAL, ECOWAS AND NIGERIAN POLICY AND LEGAL INITIATIVES ON CLIMATE CHANGE: - 2015 TO 2022



This section will be discussed in the following three parts: -

2.1 GLOBAL LEGALLY BINDING AGREEMENT AND COMMITMENTS TO CLIMATE CHANGE: - THE PARIS AGREEMENT ON CLIMATE CHANGE, 2015 AND GOAL 13 OF THE UN AGENDA 2030 FOR SUSTAINABLE DEVELOPMENT AND GOALS (SDGS)

2.1.1. The Paris Agreement on Climate Change, 2015

The Paris Agreement was adopted as the first ever Universal, legally binding global climate deal by 196 signatories at the UN Climate Change Conference (COP 21) in Paris, France, on 12 December 2015. It entered into force on 4 November 2016, thirty days after the so-called "double threshold" requirement of ratification by 55 countries that account for at least 55% of global emissions, had been met.

The rationale behind the Paris Agreement is to hold the increase in the global average temperature to “well below 2^{o}C above pre – industrial levels and to pursue efforts to limit the temperature increase to 1.5^{o}C above pre – industrial levels”. In addition, the Agreement aims at increasing “the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production”, and to make “finance flows consistent with a pathway towards low GHG emissions and climate resilient development”. All these objectives are set “in the context of sustainable development and efforts to eradicate poverty”. The latter is an acknowledgement of developing countries development concerns, which needs to be taken into account in efforts to combat climate change.

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SDG 13 as the Blueprint for Climate Action:- Implications of the Paris Agreement.

Failure to address climate change effectively will compromise the ability of many developing countries to reach many of the SDGs. SDG 13 specifically urges urgent action to combat climate change and its impacts. The targets under this Goal include strengthening resilience and adaptative capacity to climate related hazards and natural disasters in all countries; integrating climate change measures into national policies, strategies and planning; improving education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning; promoting mechanisms for raising capacity for effective climate change –related planning and management in least developed countries and small island developing States, including focusing on women, youth and local and marginalized communities. Clearly, SDG 13 and its targets as well as the indicators for the Goal, do relatively well in linking the fight against poverty with climate- resilient and low – carbon development.

In addition, many other SDGs such as Goals 9, 11, 12, 14 and 15 have climate-related targets. These goals indicators seek to ensure that actions for climate adaptation and mitigation are based on social protection floors, reduce the carbon footprints of enterprises, and create decent work as part of a Just transition to human dignity for all by 2030.

Climate Change and the Energy Sector

Global momentum to tackle climate change by reducing emissions from fossil fuels poses a new challenge to the extractives-led growth model. Depending on the strength of climate change policies, peak demand for fuel is a near-term possibility, albeit with different time frames for coal, oil and gas. If ambitions to mitigate climate change under the new Paris Agreement are realized, significant volumes of fuels will be left 'unburned'. Given that the period from resource discovery to full production is typically 10-20 years, governments in emerging and prospective exporting countries have an interest in understanding what this means for their future markets.

The implications of climate change policies for gas, metals and minerals are more complex than those for coal and oil; and they vary among resources and among potential markets. However, in the longer term, aspirations to decouple resource use from economic growth and the transition towards a low carbon economy could have a similar potential impact to that of climate change policies.

Recent policy initiative in Nigeria is the Promulgation of the National Environmental (Energy Sector) Regulations, 2014:- The purpose of these Regulations is to prevent or minimize pollution and encourage energy efficiency pollution and encourage energy efficiency in all operations and ancillary activities of the energy sector in achieving sustainable economic development in Nigeria. In terms of scope, these Regulations are meant to cover electric power generation, transmission and distribution from the following: - (a) combustion processes fueled by gaseous, liquid and solid fossil fuels designed to deliver electrical or mechanical power, steam, heat or any combination of these, regardless of the fuel type; (b) renewable energy (hydro, wave, wind, solar, geothermal, biomass) sources; and (c) nuclear sources. Annex One to these Regulations, provides for recommended best practices for the prevention, minimization and control of *air emissions from power plants and for energy efficiency and Greenhouse Gases (GHG) emissions.* On the other hand, annex 2 provides for recommended best practices for the prevention or control of impacts on water resources and acquatic habitats including water usage and conservation of water resources.

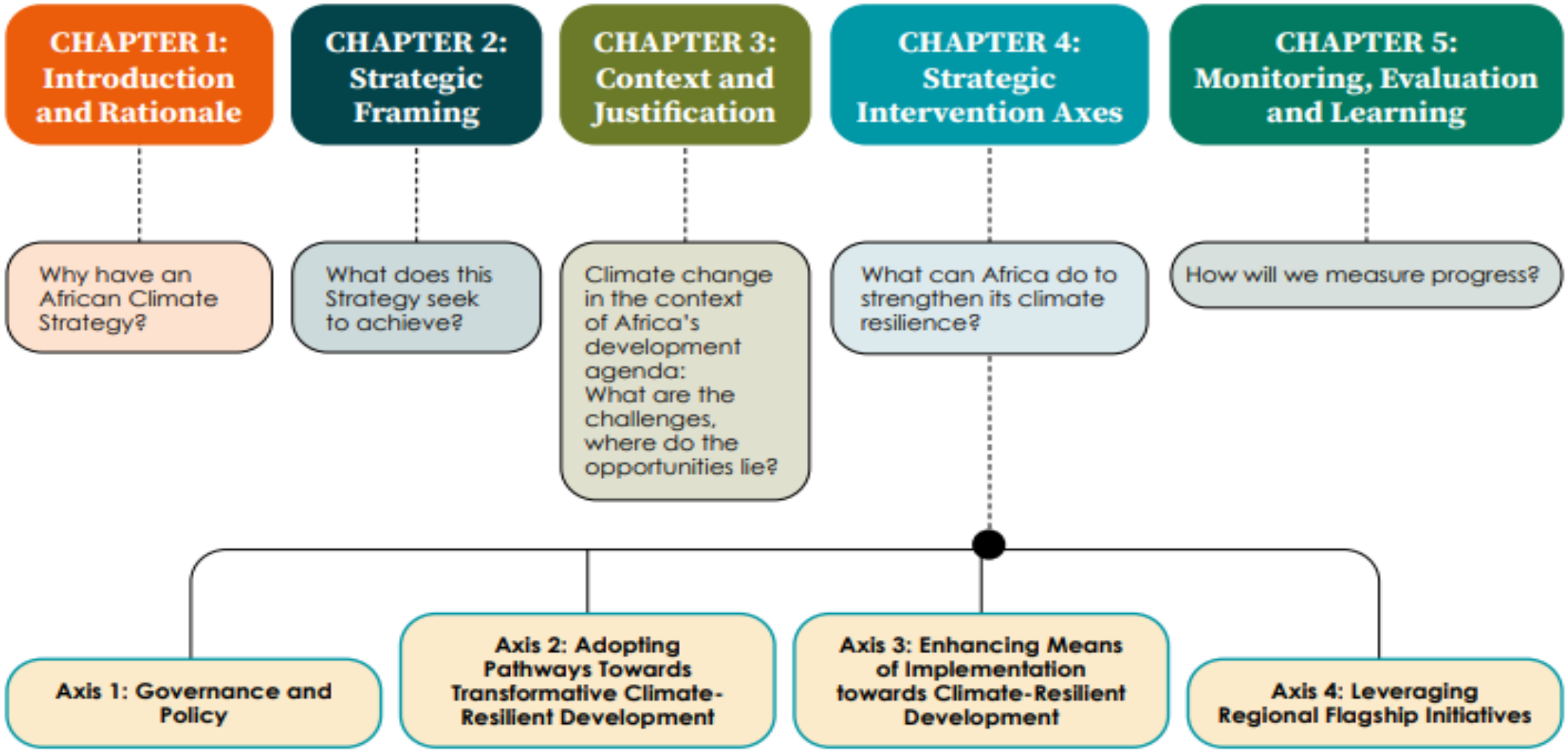
2.2 AFRICAN UNION AND ECOWAS POLICY INITIATIVES ON CLIMATE CHANGE, 2022-2030 AND 2032

2.2.1 REVIEW OF THE AFRICAN UNION CLIMATE CHANGE AND RESILIENT DEVELOPMENT STRATEGY AND ACTION PLAN (2022-2032) COMPARED WITH THE ECOWAS REGIONAL CLIMATE STRATEGY AND ACTION PLAN (2022-2030)

Below is the Chart and Figure that Summarises the vision, goal, objectives, guiding principles and chapterization of the AU Climate Change Strategy and Action Plan.







Support for the implementation of this Strategy and its Action Plan from regional economic communities, member states, citizens at large, and local and international partners, is key to achieving the climate goals of the continent over the next ten years.

2.2.2. Economic Community of West African States Regional Climate Strategy and Action Plan 2022-2030

Content structure

The RSC is structured into four main parts: Part 1 provides the context, approach and vision for a fair and ambitious regional climate strategy, Part 2 is titled “towards a region that is resilient to the impacts and vulnerabilities linked to climate change, Part 3 seeks to encourage low-carbon development and trajectories and favour economic opportunities while Part 4 provides institutional mechanism, monitoring-assessment and transversal means of implementation.

Legal Basis of the Guiding Principles of the Regional Climate Action

ECOWAS’ climate action is fully embedded in the organisation’s founding treaties. Although it is not a Contracting Party to the Paris Agreement, its action at the regional level is to support and supplement that of its Member States, which are committed by the Paris Agreement to participate in the global response to fight climate change.

This climate action is carried out in compliance with its powers and the fundamental principles provided in the revised Treaty and in particular the principles of solidarity and inter-state cooperation, policy harmonisation and programme integration, promotion and strengthening of good relations with neighbours and fair and equitable sharing of the costs and benefits of cooperation and economic integration.

In accordance with Article 18 of Additional Protocol A/SP.1/06/06 of 14 June 2006 amending the revised ECOWAS Treaty, the Commission intends to exercise its power of initiative with this regional strategy aimed at promoting regional cooperation to fight against the immense and urgent challenge posed by climate change. On the basis of primary law and with secondary law instruments, ECOWAS has the powers to make its climate action effective. This effectiveness of the Community's climate action is reinforced by the commitment made by each Member State to create enabling conditions in order to achieve the Community's objectives, as well as by their adherence to the principle of recognition and respect for the rules and principles of the Community's legal framework (Article 4 (i) of the aforementioned 2006 Protocol).

The legal basis for ECOWAS climate action is specified in Chapters IV (cooperation in the field of agriculture), V (cooperation in the fields of energy, science and technology), VI (cooperation for the protection of the environment and natural resources, including combating deforestation or forest deterioration and desertification), VII (cooperation in the field of transport) and XI (cooperation in the fields of human resources, information, social and cultural affairs, and in particular the integration of gender equality in article 63). Therefore, in accordance with the sectoral anchoring of the revised Treaty, the Regional Climate Strategy has a sectoral structure allowing shared responsibility between the various Commission directorates, and allowing an operational and effective implementation.

Overview of the Climate Change Act 2021

It is against this contextual background that this article seeks to provide an overview of the rationale, structure and contents of the Nigeria's 2021 Climate Change Act. In terms of Rationale, the Act provides for a framework for mainstreaming climate change actions, a system of carbon budgeting and the establishment of the National Council on Climate Change.

The Act is structured into eight parts of thirty-six sections and a schedule. The Act sets out its objectives and scope of application; establishment of the National Council on Climate Change; Administration and control of the National Council on Climate change; financial provisions; carbon budget and National Climate Change Action Plan; Obligations relating to climate change; nature-based solutions; and miscellaneous matters.

Rationale, Adaptation and Mitigation Measures of the National Climate Change Policy for Nigeria, 2021-2030

The 2021 policy is structured into seven parts. Part one provides a general background on climate change in Nigeria, the rationale for the policy review, approach adopted as well as the link between the current policy and other related national policies, strategies and plans. Part two puts climate change in the national context with emphasis on Nigerian's Vulnerability and impact, as well as policy, legal and institutional responses to the challenge. The relevance to the Paris Agreement on Climate Change in influencing the national response to climate change is highlighted in this part. The vision, objectives and guiding principles for the policy is given in part three. Policy Statements that would accelerate the needed process and implementation of climate change mitigation initiatives are made in part four, while part five elaborates on the key policy directions for adaptation on climate change in the country. Part six addresses a number of enabling conditions that are necessary for actualizing the vision of ensuring a climate resilient economy. Part seven elaborates on the imperative for functional means of implementation that can propel the country in the path of ensuring climate resilient compatible with sustainable development.

The Future of Climate Change Litigation in Nigeria

The cumulative effect of sections 1 and 22-25 of the 2021 Climate Change Act is providing a solid framework for climate action needed to achieve Nigeria's short, medium and long-term goals on climate mitigation and adaption, and the obligations imposed on both the public and private entities to promote low carbon economy and sustainable livelihood, as well as the responsibility of the Council and its Secretariat to partner with relevant Stakeholders, especially CSOs, constitutes sufficient tool for strategic advocacy on climate education and a sound legal foundation for potential climate litigation.

The Climate Change Act, 2021 and the Revised 2021 National Climate Change Policy are clear demonstrations of commitment to the implementation of Nigeria's treaty obligations under the Paris Agreement on Climate Change and the constitutional obligations placed on the Nigerian State by section 20: - "The State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria".

Having read together the provisions of sections 20 and 33 of the Constitution of Nigeria and Articles 16 and 24 of the African Charter on Human and Peoples' Rights, the Supreme Court of Nigeria in the recent case of Centre for Oil Pollution Watch v. NNPC (2019) 5 NWLR pt. 1666, p. 518, expanded the frontiers of locus standing to environmental litigation and held that the right to a clean and healthy environment to sustain life is a fundamental human right of citizens and the State, owes the community (represented by the plaintiff) a duty to protect them against noxious and toxicant pollutants from the exploration and production activities of oil companies. In a much earlier case of Jonah Gbemre v. Shell, NNPC and AGF(2005) FHC/B/CS/53/05, the Federal High Court of Nigeria ruled that oil companies must stop gas flaring in the Niger Delta due to its environmental pollution impact on the communities' collective survival and its contribution to adverse and potentially life-threatening climate changes, including acid rain. The court held that the practice of massive and unceasingly intense gas flaring in the community violates the citizens' fundamental rights to life and human dignity guaranteed in the Nigerian Constitution and the African Charter.

The trend of case law from the Celebrated cases of Juliana et al USA, Urgenda v. Netherlands to Neubauer v. Germany, the courts have recognised the State's climate protection obligations against harm, were based on the protection of the fundamental human rights to life, health and dignity guaranteed under national Constitutions or climate change legislations or both, and the State's obligation to ensure that the so-called "tipping points" or thresholds are not exceeded in order to ensure a stable or safe climate.

From the current stage of legal development (both statutory and case law), apart from the inspiring Article 5 of the Climate Law of Portugal, that expressly grants to everyone the 'right to climate balance', including the right to defend oneself against the effects of climate change and the right to require public authorities and private entities to perform their duties in relation to the climate (mitigation and adaptation), none of the World's Constitutions or Climate change legislations provide for an explicitly expressed human right to a safe or stable climate.

While climate rights-based provisions are relatively scarce, at least two national constitutions that explicitly connect their climate provisions to environmental rights are worthnoting. Tunisia's 2014 Constitution guarantees "the right to a healthy and balanced environment and the right to PARTICIPATE in the protection of the Climate. The State shall provide the necessary means to eradicate pollution of the environment". The Venezuelan Constitutional provision connects the individual and collective rights to a healthy environment to the State's fundamental duty to ensure the population "develops in a pollution-free environment in which ……. CLIMATE……RECEIVES SPECIAL PROTECTION".

Potential avenue for rights-based Climate litigation in Nigeria

This trend of case law provides a baseline for future climate litigation that is grounded on the right to a clean and healthy environment. The possible interaction between rights-based climate litigation with climate litigation under the 2021 Climate Change Act lies in the following approaches:

1. Any action against the State relating to its failure or inadequate implementation of the Act in a timely manner could be purposively interpreted as offending the constitutional fundamental rights to life (Section 33) which includes the right to a clean and healthy environment (Article 24 of the African Charter on Human and People's Rights) and the right to human dignity (Section 34);

2. These fundamental rights should be read together with the State's constitutional obligation to protect the environment against harm (section 20) and the principles of: (i) equality of rights, obligations and opportunities before the law (Section 17(2)(a)); (ii) independence, impartiality and integrity of courts of law, and access to justice (section 17(2)(e)). These provisions should provide the necessary judicial toolkit to monitor the government's response to climate change as mandated by the Act.

This conclusion is supported by the following statutory obligations of the courts in Nigeria to protect the environment and would fail in that duty if they do not facilitate the protection that the laws have put in place under sections 16(2), 17(2)(d) and (3) and 20 of the constitution and section 34(2) of the Climate Change Act, 2021 as well as Section 17(4) of the Oil Pipeline Act.



CONCLUSION