

# Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent

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## Abstract

Although climate change litigation is rapidly increasing worldwide, and despite Africa being one of the regions predicted to be most severely affected by climate change, the continent has not yet seen any significant growth in this specialized form of litigation. Only a comparatively small number of court cases have to date been recognized as climate change conflicts in Africa. While briefly reflecting on possible reasons for this surprising trend, the primary objective of this article is to offer a first comprehensive interrogation of the state and future prospects of climate change litigation in Africa with a focus on three cases from South Africa, Uganda and Nigeria. The analysis commences with a characterization of current trends in and forms of climate change litigation that are emerging the world over, including a brief assessment of the types of climate change conflicts that are usually litigated, and the challenges and advantages associated with this specialized form of litigation. The article then offers a discussion of the unique nature of climate change impacts in Africa and assesses how this could shape the type of litigable climate change conflicts on the continent. Drawing on three cases from the countries mentioned above, and mindful of the risk of over-generalizing, the authors highlight and critically reflect on possible emerging climate change litigation trends in African courts, while also comparing them to trends now emerging worldwide.

## Keywords

climate change conflicts; climate change litigation; judiciary; human rights; Africa; South Africa; Nigeria, Uganda

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## 1 Introduction

Climate change litigation is a fairly recent addition to the broader portfolio of environmental judicial dispute resolution; but it is an important addition that has been ‘transformed from a creative lawyering strategy to a major force in transnational regulatory governance of greenhouse gas emissions’.<sup>1</sup> This specialized form of litigation has its roots predominantly in the United States; a country which also boasts the highest number of climate change cases.<sup>2</sup> Outside of the United States, the bulk of climate change litigation is occurring in countries such as Australia, New Zealand, Canada, Germany, Spain and the United Kingdom,<sup>3</sup> with landmark and highly publicized cases such as *Urgenda Foundation v Kingdom of the Netherlands* and its recent appeal, decided in the Netherlands.<sup>4</sup> By comparison, fewer (although often groundbreaking)<sup>5</sup> cases have been litigated in developing countries such as India, Micronesia, Philippines, Brazil, Colombia, Ecuador and Pakistan.<sup>6</sup> Lagging substantially behind these and other regions in the world is Africa. This is surprising considering the continent’s size that spans 54 independently recognized states and the high levels of vulnerability of its people and ecosystems to climate change. In tandem with, and possibly consequential on, the muted incidence of climate law cases, is the lack of extensive Africa-focused climate change litigation scholarship compared to the burgeoning scholarship focusing on other regions, with Africa and its few cases often mentioned only in passing, and the surrounding doctrinal issues being pushed to the periphery of scientific interest. A recent study concludes ‘while the number of legal cases in the Global South has been growing in quantity and importance (e.g., Pakistan, India, the Philippines, South Africa, Colombia, and Brazil), these are yet to receive much scholarly attention.’<sup>7</sup>

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<sup>1</sup> William C. G. Burns & Hari M. Osofsky, *Overview: The Exigencies that Drive Potential Causes of Action for Climate Change*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 1 (2009). See, also Joana Setzer & Lisa Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance* WIRES: CLIMATE CHANGE (2019).

<sup>2</sup> Michael Gerrard & Meredith Wilensky, *The Role of National Courts in GHG Emissions Reductions*, in CLIMATE CHANGE LAW: VOLUME I 359-71 (2016); Julia Schatz, *Climate Change Litigation in Canada and the US*, 18 RECIEL 129 (2009); and most recently, Joana Setzer & Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot* (2019), [http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI\\_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf](http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf).

<sup>3</sup> Meredith Wilensky, *Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation*, 26 DUKE ENVTL L. & POL'Y F. 131 (2015).

<sup>4</sup> *Urgenda Foundation v. Kingdom of the Netherlands* [2015] HAZA C/09/00456689. In this case, the District Court of the Hague found that the state has a duty to embark on climate change mitigation measures due to ‘the severity of the consequences of climate change and the great risk of climate change occurring’. At para 4.83 in the unofficial translation available at [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150624\\_2015-HAZA-C0900456689\\_decision-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150624_2015-HAZA-C0900456689_decision-1.pdf). On 9 October 2018, the Hague Court of Appeal upheld the District Court's ruling. Available at [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009\\_2015-HAZA-C0900456689\\_decision-4.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf).

<sup>5</sup> For example, the Pakistani case *Ashgar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 and 14 September 2015 (hereinafter *Ashgar Leghari*).

<sup>6</sup> See Sabin Centre for Climate Change Law, *Non-U.S. Jurisdiction* (2019), <http://climatecasechart.com/non-us-jurisdiction/>.

<sup>7</sup> Setzer & Vanhala, *supra* note 1 at 4-5. But there are examples suggesting that more focused scholarship is emerging such as Jean-Claude Ashukem, *Setting the Scene for Climate Change Litigation in South Africa: Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] ZAGPPHC 58 (2017) 65662/16, 13 LEAD 37 (2017); Tracy-Lynn Humby, *The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs*, 30 JEL 145 (2018); and some Africa-focused chapters in Oliver C. Ruppel, Christian Roschmann & Katharina Ruppel-Schlichting eds.,

This is, however, not to say that courts in Africa have not been playing an important and often active role in mediating environmental conflicts on the continent. Although there are numerous and legitimate concerns in some African countries related to the lack of the rule of law, judicial independence and access to courts, many litigants and domestic courts in Africa have been innovatively engaging with broader environmental and related socio-economic disputes over the years, sometimes with trailblazing precedent-setting effect.<sup>8</sup> For example, the African Commission on Human and Peoples' Rights (ACommHPR), in its widely celebrated Social and Economic Rights Action Center (SERAC) Communication, was the first judicial forum globally to pronounce in detail on a regional right to a healthy environment and related rights in the African Charter on Human and Peoples' Rights of 1981 (ACHPR).<sup>9</sup> According to the Communication, the military government of Nigeria had been directly involved in oil production through the state-owned Nigerian National Petroleum Company, and those operations caused environmental contamination which led to health problems among the Ogoni people (an indigenous community) resulting from environmental contamination. A major hallmark of the Communication is the ACommHPR's elaboration of a range of qualitative standards of obligation that the Charter's right to a healthy environment creates, manifesting at 'four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights'.<sup>10</sup> Another example is human rights case law emanating from South African courts, which is often considered a model elsewhere on the continent and in the world on the basis of the judiciary's creative engagement with environmental and related socio-economic rights issues.<sup>11</sup>

Civil society activism in some African countries is also increasing playing an important role in holding governments to account for environment-related human rights abuses. The increased involvement of environmental non-governmental organizations (NGOs) in litigating environmental harms, and their limited but steadily growing success, is a case in point.<sup>12</sup> An example is the victory of the Social and Economic Rights Action Center and Center for Economic and Social Rights in their *actio popularis* against the Nigerian government and Shell

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CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE. VOLUME 1. LEGAL RESPONSES AND GLOBAL RESPONSIBILITY (2013).

<sup>8</sup> See Louis J. Kotzé & Alexander Paterson eds., *THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES* (2009).

<sup>9</sup> ACHPR 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria 2001 (hereinafter ACHPR 155/96). According to the Communication, the military government of Nigeria had been directly involved in oil production through the state-owned Nigerian National Petroleum Company in which Shell Petroleum company has a major stake, and those operations caused environmental contamination which led to health problems among the Ogoni people. It was alleged that a number of avoidable oil spills had occurred with resultant pollution of water, soil and air. The Communication alleged the violation, among others, of articles 16 (the right to health), 21 (the right to the free disposal of wealth and resources), and article 24 (the right to a healthy environment) of the ACHPR. The ACommHPR ultimately found that the Nigerian government had failed to uphold the many human rights duties it derives from the ACHPR. Louis J. Kotzé & Anél du Plessis, *The African Charter on Human and Peoples' Rights and Environmental Rights Standards*, in *ENVIRONMENTAL RIGHTS: THE DEVELOPMENT OF STANDARDS* 93-115 (2019).

<sup>10</sup> ACHPR 155/96, *supra* note 9, at para 44.

<sup>11</sup> See Louis J. Kotzé & Anél du Plessis, *Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa*, 3 J COURT INNOV 157 (2010); Oliver Fuo & Anél du Plessis, *In the Face of Judicial Deference: Taking the 'Minimum Core' of Socio-Economic Rights to the Local Government Sphere*, 19 LDD 1 (2015).

<sup>12</sup> See among the many publications in this respect Thomas Princen & Matthias Finger, *ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL* (1994).

Petroleum Company in the SERAC Communication.<sup>13</sup> In view of this trend, and considering that climate change conflicts and their litigation are often championed by civil society actors, one would have expected a much higher incidence of and frequency in climate change litigation on the African continent.

Moreover, Africa is among the regions of the world projected to suffer most from the impacts of climate change while being the least able to adapt to its impacts and to bolster the resilience of people and ecosystems to changing climatic conditions.<sup>14</sup> Africa is thus particularly susceptible to climate change conflicts arising in many socio-economic and environmental contexts, leading one intuitively to expect that such conflicts, including those that are predisposed to being litigated in court, will emerge much more frequently than is currently the case. In response to climate change on the continent, a considerable number of African countries has ratified the Paris Climate Agreement,<sup>15</sup> and numerous African countries have developed environmental and climate change policies and laws,<sup>16</sup> suggesting that at least some public and private sector legal obligations do exist with respect to climate change. As is the case elsewhere around the globe, it is highly unlikely that these obligations are always entirely and diligently observed by everyone everywhere, thus presumably providing the legal foundation, including appropriate remedies, to adjudicate matters and conflicts that arise from non-observance of such obligations. Yet, judging from the absence of climate change litigation on the continent, it does not appear as if the available domestic legal and policy frameworks have yet been utilized to their full extent and force.

While a thorough study of the reasons behind the lack of climate change litigation in Africa is undoubtedly a worthwhile project, it is not one we pursue here. What we instead aim to do is to offer the first in-depth comparative survey of climate change litigation in Africa. Drawing from a wealth of existing literature on this issue, the analysis is set against, and commences in Part 2 immediately below, with a characterization of current trends in and forms of climate change litigation that are emerging the world over, including a brief assessment of the types of climate change conflicts that are usually litigated and the challenges and advantages associated with this specialized form of litigation.

Part 3 of the article then offers a discussion of the unique nature of climate change impacts in Africa and assesses how this may shape the type of litigable climate change conflicts that might arise on the continent.

Part 4 analyses in some detail three climate cases in South Africa, Nigeria and Uganda. In the absence of generally accepted criteria that determine what a climate change case is, we focus for present purposes on the three cases that are included in the authoritative Sabin Centre for Climate Change Law database and that have been recognized in the literature as climate change cases.<sup>17</sup> This includes two cases that have already been decided, namely in South Africa, *Earthlife Africa v Minister of Environmental Affairs and Others (Thabametsi)*;<sup>18</sup> and in Nigeria, *Gbemre v Shell Petroleum Development Company of Nigeria Ltd. and Others*

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<sup>13</sup> Morné van der Linde & Lurette Louw, *Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication*, 3 AHRLJ 167 (2003).

<sup>14</sup> Paul Collier, Gordon Conway & Tony Venables, *Climate Change and Africa*, 24 OXFORD REV ECON POL 337 (2008).

<sup>15</sup> United Nations Climate Change, *Paris Agreement* (2015), [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php).

<sup>16</sup> Michal Nachmany et al., *THE GLOBE CLIMATE LEGISLATION STUDY: A REVIEW OF CLIMATE CHANGE LEGISLATION IN 66 COUNTRIES* (4th ed. 2014).

<sup>17</sup> See Sabin Centre for Climate Change Law, *supra* note 6.

<sup>18</sup> *Earthlife Africa v. Minister of Environmental Affairs and Others*, Unreported Case No. 65662/16 (Gauteng High Court Pretoria, 8 March 2017) (hereinafter *Thabametsi*).

(*Gbemre*).<sup>19</sup> In Uganda, the case of *Mbabazi and Others v The Attorney General and National Environmental Management Authority (Mbabazi)*<sup>20</sup> is still in its preparatory phase and the decision remains pending at the time of writing. This case, more than its South African and Nigerian counterparts, could resemble a form of climate trust litigation that is emerging elsewhere in the world.<sup>21</sup> We agree with Setzer and Vanhala that ‘the pre-litigation stage of mobilizing the law can be enormously impactful, and has the power to shape policy ... in ways that until now have remained invisible to scholars.’<sup>22</sup> Therefore, despite its not having been heard yet, we provide brief thoughts on the Mbabazi case based on available pre-trial materials since we believe it could offer useful insights into the potential of climate trust litigation in Africa.

Mindful of the risk of over-generalizing, and to the extent that these are evident, Part 5 concludes the discussion by means of a comparison by highlighting emerging climate change litigation trends in African courts, while also comparing them to the more generic trends emerging worldwide that were identified in Part 2. In the final instance, the discussion critically reflects on the state of and future prospects for climate change litigation on the continent.

## 2 Litigating climate change: a synopsis

The legal dimensions of climate change have really come to the fore only in the 1990s with the worldwide, if not universal, adoption of the United Nations Framework Convention on Climate Change in 1992 (UNFCCC), and in 1997 its Kyoto Protocol. The adoption of the Paris Climate Agreement in 2015 further solidified the central role of law in global climate mitigation, adaptation and resilience governance, while in that same year climate change emerged as one of 17 key development concerns of states through its explicit incorporation in the Sustainable Development Goals (SDGs) as SDG 13 and the targets set for SDGs 1 and 11.<sup>23</sup> In tandem with and often spurred on by these developments on the international plane, some geographically clustered states have over the years developed regional climate change laws and policies specifically suited for their needs and circumstances. These range from highly developed normative frameworks such as in the European Union to more rhetorically ambitious but non-committal and far less impactful policy statements and strategic guidelines such as in the African Union.<sup>24</sup>

In the wake of these international and regional developments, perhaps more so than in any other environment-oriented regulatory domain, climate change policies and laws have been mushrooming in numerous countries around the world:<sup>25</sup> ‘the volume of legislation, private standard setting, judicial decisions and legal scholarship has now become almost

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<sup>19</sup> *Gbemre v. Shell Petroleum Development Co.*, Suit No. FHC/CS/B/153/2005 (hereinafter *Gbemre*).

<sup>20</sup> *Mbabazi and Others v. The Attorney General and National Environmental Management Authority*, Civil Suit No. 283 of 2012 (hereinafter *Mbabazi*).

<sup>21</sup> See, for example, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (hereinafter *Juliana v. United States*).

<sup>22</sup> Setzer & Vanhala, *supra* note 1 at 12.

<sup>23</sup> For a broader discussion of environmental and related climate matters and the SDGs, see Duncan French & Louis J. Kotzé eds., *Sustainable Development Goals: Law, Theory and Implementation* (2018).

<sup>24</sup> Daniel Pallangyo & Werner Scholtz, *Africa and Climate Change: Legal Perspectives from the AU*, in *REGIONAL ENVIRONMENTAL LAW: TRANSREGIONAL COMPARATIVE LESSONS IN PURSUIT OF SUSTAINABLE DEVELOPMENT* (2015); Javier de Cendra de Larragán, *EU Climate Change Law: A Credible Example?*, in *REGIONAL ENVIRONMENTAL LAW: TRANSREGIONAL COMPARATIVE LESSONS IN PURSUIT OF SUSTAINABLE DEVELOPMENT* (2015).

<sup>25</sup> Nachmany et al., *supra* note 16.

overwhelming'.<sup>26</sup> Collectively, this burgeoning transnational normative climate change framework has recognized new rights and created new private and public actor duties with respect to governing climate change within and beyond state borders. Where rights and duties are created, especially in a relatively novel juridical domain such as climate change, the resolution of legal disputes arising from the application of these laws and the enforcement of rights and duties emanating from them are sure to follow, including through litigation. Moreover, the complexity of climate change as a so-called 'super wicked' problem (i.e., a problem that 'defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution'),<sup>27</sup> including especially its myriad societal impacts, is set to give rise to a wide range of complex disputes, many that will ultimately have to be settled in courts:

Climate change is inevitably the business of courts. Courts do many things: they uphold the rule of law, they interpret and apply the law, they resolve disputes, they attribute responsibility and determine liability, they hold decision makers to account, they ensure that laws and other forms of binding agreements are implemented and they delineate the boundaries of legitimate authority and lawful executive action. Climate change issues can be involved in all these tasks.<sup>28</sup>

In an attempt to define it, Peel says climate change litigation seeks 'redress for damage arising from human activities said to be causing global climate change'.<sup>29</sup> We agree in part with such a characterization and would caution against broadening the scope of climate change litigation's subject matter too much; i.e., one that would essentially embrace all damage arising directly or indirectly from all climate, and consequentially *environment*-related human activities. After all, if everything is climate change litigation, then nothing is, and this special litigation category then merely blends into the broader body of environmental litigation, of which it is an essential but autonomous part; an autonomy it should arguably retain if it were to continue riding the wave of interest, positive sentiments and enthusiasm currently surrounding it. We would suggest, however, that climate change litigation is not exclusively concerned only with redressing *damage* caused by climate change. Climate change litigation ideally should and often does address both the causes and consequences of climate change, thereby also providing the legal means, properly backed as these are by judicial authority, to deter actions and inaction that could lead to damage, as well as the legal means to force actors to avoid damage, to reduce greenhouse gas emissions and to take measures to increase resilience and reduce vulnerability in the face of a changing climate. In a nutshell then, climate change litigation could simply be defined as all litigious means offered by judicial and quasi-judicial fora to adjudicate juridical conflicts emanating directly from the risks and impacts of climate change.

Such an expanded but nevertheless focused view of climate change litigation is further contextualized by the many types of conflicts that arise from climate change concerns and that are susceptible to litigation. These have to do with a range of motivations that also usefully intimate why climate change litigation has become increasingly popular. For example: a government could be forced through judicial means to address climate change where its policies, laws and actions are deemed non-existent or ineffective. Climate change litigation is

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<sup>26</sup> Daniel A. Farber & Marjan Peeters, *Introduction to Volume I*, in CLIMATE CHANGE LAW: VOLUME I 1 (2016).

<sup>27</sup> Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159 (2009).

<sup>28</sup> Elizabeth Fisher & Eloise Scotford, *Climate Change Adjudication: The Need to Foster Legal Capacity: An Editorial Comment*, 28 JEL 1, 3-4 (2016).

<sup>29</sup> Jacqueline Peel, *The Role of Climate Change Litigation in Australia's Response to Global Warming*, 24 EPLJ 90, 91 (2007).

increasingly considered a viable option in such instances to provoke regulatory change and to stimulate legislative action, and could be a temporary or longer-term alternative to delayed legislative or executive action.<sup>30</sup> Where climate laws do exist, climate change litigation usually focusses on challenging the validity of these laws as well as their interpretation, application and enforcement.<sup>31</sup> Through litigious means the public is afforded a legitimate political voice to confront what Stern calls aspirational ‘symbolic regulation’ that ‘lacks regulatory bite’,<sup>32</sup> while forcing legislators and policymakers through a process of judicial oversight to be more ambitious and thorough in their approaches to climate change, thus at once endeavoring to fill governance gaps. To this end, climate change litigation is seen as an important mechanism in what has been termed ‘climate change lawfare’, a phenomenon which refers to the ‘diverse strategies [including litigation] in which rights and legal institutions figure prominently, are adopted intentionally, and used strategically with the aim of helping deliver or at least catalyze social transformation and human development’ in the context of climate change.<sup>33</sup> Importantly, all of the foregoing were underlying motivations for litigation in the three African cases, as we shall see below.

Relatedly, consequent upon the failures of some governments to implement the international climate law regime, as well as their reluctance to develop domestic legal responses that act in tandem with this regime, various state and non-state actors are increasingly looking to the judiciary for solutions to address global climate change.<sup>34</sup>

National legislatures bear the primary responsibility to give legal effect to the commitments undertaken by states under the Paris agreement. However, the courts will also have an important role in holding their governments to account, and, so far as possible within the constraints of their individual legal systems, in ensuring that those commitments are given practical and enforceable effect.<sup>35</sup>

While the foregoing reflects on the crucial role courts play in upholding the rule of law, it also strongly resonates with the general idea of ‘glocalisation’,<sup>36</sup> in terms of which the ineffectiveness of international climate law and governance is addressed at lower but no less important and potentially far more effective regulatory levels.<sup>37</sup> As Aust and Du Plessis say, our trite understanding of top-down hierarchical global environmental governance is steadily being challenged, thus opening up regulatory spaces for the accommodation of local governance actors to address global climate change through powerful judicial means that are available to them and through which they could instigate regulatory change in a bottom-up

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<sup>30</sup> David Browne, *Causation and Damages in Climate Litigation: Evaluating the Role of Human Rights Law*, 6 IYIL 49, 51 (2011).

<sup>31</sup> UN Environment, *THE STATUS OF CLIMATE CHANGE LITIGATION: A GLOBAL REVIEW* 4 (2017).

<sup>32</sup> That is, when ‘vote-hungry legislators attempt to appease public demand for environmental protection by enacting weak legislation or passing sweeping mandates that shift responsibility to agencies’. Stephanie M. Stern, *State Action as Political Voice in Climate Change Policy: A Case Study of the Minnesota Environmental Cost Valuation Regulation*, in *ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES* 39 *et seq* (2009).

<sup>33</sup> Siri Gloppen & Asuncion Lera St. Claire, *Climate Change Lawfare*, 79 SOCIAL RESEARCH 899, 907 (2012).

<sup>34</sup> Burns and Osofsky, *supra* note 1, at 20.

<sup>35</sup> Lord Carnwath JSC, *Climate Change Adjudication After Paris: A Reflection*, 28 JEL 5, 9 (2016).

<sup>36</sup> See, for example, Zygmunt Bauman, *On Glocalization: Or Globalization for Some, Localization for Others*, 54 THESIS ELEVEN 37 (1998).

<sup>37</sup> See Katherine Trisolini & Jonathan Zasloff, *Cities, Land Use, and the Global Commons: Genesis and the Urban Politics of Climate Change*, in *ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES* 72-98 (2009).

way.<sup>38</sup> At the same time, being part of the *trias politica*, courts are often well placed to remind the other two branches of government (i.e., the executive and legislative authorities) of their international climate law obligations, and/or to directly incorporate international climate, environmental and human rights law obligations into domestic legal systems when they adjudicate climate change conflicts. The courts in both *Thabametsi* and *Gbemre* have followed such an international law-friendly approach, as we shall see below.

In addition to formally providing non-governmental actors the opportunity to have a say in, and hopefully to meaningfully impact on, climate change governance in a country, climate change litigation also fulfils a valuable informal socio-legal role, notably to the extent that courts provide an independent, non-political public forum to voice concerns and to have claims heard and determined;<sup>39</sup> an important consideration given the highly politicized nature of climate change. To this end Osofsky says climate change litigation also

... provides a mechanism for dialogue and awareness, in addition to a more formal forcing or limiting role, in a regulatory environment in which policies have not caught up with the problem. At least as important, it creates diagonal interactions through which different levels and branches of regulators interact and grapple with what is needed. These cases help to bring attention to regulatory options and debates, and push policymakers to address more nuances of the problem in the process.<sup>40</sup>

This might be a particularly critical concern in some African countries where limited possibilities and potential exist for active and inclusive civil society participation and representation in and influence on government-dominated climate governance processes.<sup>41</sup> The courts are often the only available institutional means through which civil society is able to influence climate change governance. Unsurprisingly, then, in all three cases we analyze below, the applicants have been concerned civil society actors (also acting on behalf of others unable to represent themselves).

Climate change litigation could take many forms depending, among others, on the type of legal system where it occurs, on the nature of the particular conflict, on the parties involved, and on whether it is a federal or a unitary state where the case is heard. For example, in federal states such as the United States, litigation encompasses federal statutory and constitutional claims as well as state law claims and usually consists of common law tortious actions, where claimants sue on the basis of negligence or nuisance. Such actions often extend beyond private persons *inter partes* to the state, where it is argued that the state has written or unwritten duties to protect its citizens. In other instances, litigation could be based on environmental administrative/procedural law actions focusing on environmental impact assessments (EIAs), permitting or planning laws.<sup>42</sup>

More recently, however, climate change and litigation have become central concerns in the human rights paradigm. The United Nations Human Rights Council recognized in 2008 that

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<sup>38</sup> Helmut Aust & Anél du Plessis, *Good Urban Governance as a Global Aspiration: On the Potential and Limits of Sustainable Development Goal 11*, in SUSTAINABLE DEVELOPMENT GOALS: LAW, THEORY AND IMPLEMENTATION 208 (2018).

<sup>39</sup> Brian J. Preston, *The Contribution of the Courts in Tackling Climate Change*, 28 JEL 11, 12 (2016).

<sup>40</sup> Hari Osofsky, *Conclusion: Adjudicating Climate Change Across Scales*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 383 (2009).

<sup>41</sup> Jean-Claude Ashukem, *A RIGHTS-BASED APPROACH TO FOREIGN AGRO-INVESTMENT GOVERNANCE IN CAMEROON, UGANDA AND SOUTH AFRICA* (2016) (LLD thesis, North-West University); Caiphas Brewsters Soyapi, *THE ROLE OF THE JUDICIARY IN ADVANCING THE RIGHT TO A HEALTHY ENVIRONMENT: EASTERN AND SOUTHERN AFRICAN PERSPECTIVES* (2018) (LLD thesis, North-West University).

<sup>42</sup> An approach followed to a significant extent in Australia in the context of EIA approvals for new coal mines. See Lesley McAllister, *Litigating Climate Change at the Coal Mine*, in CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 48-71 (2009).



‘climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights’.<sup>43</sup> It is therefore no surprise that in some parts of the world, notably in countries of the Global South, where courts often directly rely on bills of rights, climate change litigation frequently involves a rights-based approach and manifests as constitutional claims.<sup>44</sup> Human rights are also a central feature in the three African cases we analyze below. While human rights law usually remains aspirational with little immediate effect, and while most human rights obligations apply to states and not to the non-state corporations that are major contributors to climate change,<sup>45</sup> a rights-based approach is increasingly seen as holding out several benefits, especially to the extent that climate change litigation that is framed in the language of rights ‘could offer minimum rights thresholds and strengthen the adaptive and preventative mechanisms available, particularly for those who are more vulnerable and marginalised’.<sup>46</sup> Human rights also have the ability to ‘invoke a sense of profundity and moral weight that comports with the enormity and gravity of the climate change problem’.<sup>47</sup>

As a matter of corrective justice, climate change litigation could be used to act against a government where it allows carbon-intensive developments such as the proliferation of coal-fired power stations that could cause harm. Private industry actors such as energy and petroleum companies could also be taken to task for their climate-damaging activities, and there has been a steep rise in climate change litigation against corporations, as a recent report indicates: ‘[C]limate litigation targeting fossil fuel companies is a growing trend and it is likely to remain as one as more groups see it as a tool to prompt shifts among the companies that have managed to avoid their share of responsibility for the accelerated impacts of climate change.’<sup>48</sup> Both of these approaches were evident in *Thabametsi* and *Gbemre*.

Although not at issues in our three cases, it is also possible that private citizens could litigate against one another where one or the other does not adhere to climate-related legal obligations in a classic neighbor, property, delictual or tort law set-up. Staying with the private law sphere, the far-reaching present and future potential impacts of climate change on the insurance industry (an industry particularly familiar to litigation) already foreshadow the potential for a rise in insurance claims and the associated judicial conflict resolution.<sup>49</sup>

Litigating on the back of the property rights-based public trust doctrine in climate cases is also an emerging trend in terms of which claimants are able to argue that certain natural resources belong to the public and should as such be protected by the state against the impacts of climate change.<sup>50</sup> Atmospheric or climate trust litigation, as it is categorized in the United States, departs from the premise that all governments hold the climate as a public resource in trust for their citizens and they bear the fiduciary obligation to protect it for present and future generations. Where they do not, they could be forced to do so through litigious means and the authority of the courts; with the courts well positioned in the light of the *trias politica* doctrine

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<sup>43</sup> UNHRC, *Resolution 7/23: Human Rights and Climate Change* (2008), [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_23.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf).

<sup>44</sup> Notably *Ashgar Leghari*, *supra* note 5. See Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TEL 1 (2017).

<sup>45</sup> Marilyn Averill, *Linking Climate Litigation and Human Rights*, 18 RECIEL 139, 141 (2009).

<sup>46</sup> Browne, *supra* note 30, at 49.

<sup>47</sup> Amy Sinden, *An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 174 (2009).

<sup>48</sup> For a recent survey see Business and Human Rights Resource Centre, TURNING UP THE HEAT: CORPORATE LEGAL ACCOUNTABILITY FOR CLIMATE CHANGE 4 (2018).

<sup>49</sup> Jeffrey Stempel, *Insurance and Climate Change Litigation*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 230-51 (2009).

<sup>50</sup> Anél du Plessis, *Climate Change, Public Trusteeship and Tomorrows of the Unborn*, 31 SAJHR 269 (2015).

and their powers of judicial oversight ‘to define these duties by tying them directly to scientists’ concrete prescription for carbon reduction’.<sup>51</sup> The *Mbabazi* case we discuss below is likely to be based largely on this climate trust litigation approach, and it might very well closely resemble the ongoing *Juliana* case in the United States noted earlier.

The foregoing mostly reflects on the positive attributes and advantages of climate change litigation. While dealt with in far greater detail in other texts,<sup>52</sup> because these are also present to a greater or lesser extent in the three African cases, it is worth noting here in brief some of the drawbacks and difficulties associated with climate change litigation. Browne<sup>53</sup> points out that because of climate change’s multi-faceted and diffused multi-scalar impacts, identifying appropriate plaintiffs and defendants and a proper judicial forum could be a complicated matter. So too is the fact that climate change damage is realized over very different time and spatial scales, rendering it an inter-generational concern that is unrestricted by geographical borders as well. With specific reference to the issue of time and the temporalities of environmental (and climate) law, Richardson indicates that:

The law can be too temporally one-dimensional, and indeed quite static, lacking the adaptive flexibility to adjust to new circumstances and unwilling to acknowledge past losses. Mired in an overly contemporaneous time frame preoccupied with the present, environmental law has struggled to recognize the frequently slow and temporally dispersed harms inflicted on nature. Insidious threats such as climate change, which gradually unleash mayhem rather than spectacularly erupting to jolt our complacency, are perpetuated with minimal (if any) legal sanctions.<sup>54</sup>

Relatedly, establishing proximate causation is a significant hurdle in the face of scientific uncertainty, as well as allocating culpability to actors for historic or non-point contributions to climate change.<sup>55</sup> Finally, in countries with restrictive *locus standi* and other procedural provisions, it might be difficult for claimants to gain access to courts or access to critical information.<sup>56</sup> We highlight throughout the discussion below some of these challenges where they are apparent in the three African cases.

### 3 Litigable climate change conflicts in Africa

The context within which litigable climate change conflicts arise in Africa is multifaceted, with several of the issues usually associated with climate conflicts being particularly pronounced in the African context. As a point of departure, this context revolves on key risks that climate change poses to Africa and its people, notably as determined by the Intergovernmental Panel

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<sup>51</sup> Mary Christina Wood, *Atmospheric Trust Litigation*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 109-10 (2009).

<sup>52</sup> For example, in William Burns & Hari Osofsky eds., ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES (2009).

<sup>53</sup> Browne, *supra* note 30, at 52-5.

<sup>54</sup> Benjamin Richardson, *Doing Time: The Temporalities of Environmental Law*, in ENVIRONMENTAL LAW AND GOVERNANCE FOR THE ANTHROPOCENE 56 (2017).

<sup>55</sup> Hari Osofsky, *The Intersection of Scale, Science, and Law in Massachusetts v. EPA*, in CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 129-44 (2009).

<sup>56</sup> See Giulio Corsi, *A Bottom-up Approach to Climate Governance: The New Wave of Climate Change Litigation* (October 2017), [http://www.iccgov.org/wp-content/uploads/2017/10/57\\_Climate-change-litigation\\_Giulio-Corsi.pdf](http://www.iccgov.org/wp-content/uploads/2017/10/57_Climate-change-litigation_Giulio-Corsi.pdf).

on Climate Change (IPCC) in its Fifth Assessment Report.<sup>57</sup> The risks include: shifts in biome distribution; compounded stress on water resources; degradation of ocean ecosystems; reduced crop productivity and increased food insecurity; adverse effects on livestock and impacts on rural communities; changes in the incidence and geographic range of vector- and water-borne diseases; undernutrition; increased in-country and cross-border migration; sea level rise; and extreme weather events. We explore below the types of litigable conflicts that might arise within this continental climate change risk and vulnerability profile.

Several African countries are carbon resource rich (notably Angola, South Africa and Nigeria) and still predominantly rely on relatively cheap but dirty and carbon-intensive resources for energy production, especially coal and oil, which are major contributors to climate change. African governments and energy corporations are determined to exploit these resources in the name of economic progress, and/or allowing these resources to be exploited by foreign governments and multinational corporations in exchange for money and other incentives.<sup>58</sup> This is an unsettling reality evidenced by Africa's continued (almost sole) dependence upon the same narrow range of commodity exports while it contributes to providing some of the world's carbon-rich resources that cause climate change,<sup>59</sup> a consideration that suggests Africa plays a critical role in the global carbon cycle. The continued use of fossil fuels to drive unsustainable socio-economic development is likely to give rise to future and aggravate existing climate-related conflicts in African countries, including conflicts associated with broader environmental destruction and impacts on the health and well-being of vulnerable people. As a case in point, although it has not been explicitly classified as a climate change dispute, the devastation occasioned by carbon-related oil extraction practices has already been exposed by the ACommHPR in the SERAC Communication mentioned above, and they are glaringly evident in the *Gbemre* case we discuss below.<sup>60</sup>

Intimately coupled with the foregoing is the clear trend in Africa's most industrialized nations, especially in South Africa and Nigeria, to ensure energy security by means of an almost exclusive reliance on carbon-intensive fossil fuel resources, notably coal. While there are some tentative efforts to expand the renewable energy sector, especially in South Africa through solar power projects, the abundant availability of cheap coal remains a significant consideration in and a key driver of energy security promotion policies and the development of power generation infrastructure.<sup>61</sup> Despite scientific evidence confirming the devastating climate impacts of fossil fuel-based power generation, especially in developing countries that are often unable to implement the best available but often prohibitively expensive power generation technologies with the least climate impacts, African governments, like other governments in the Global South, generally seem to be taking a decidedly short-term view, as evidenced by their enthusiastic support of expanding the fossil fuel-based energy sector across the continent.<sup>62</sup> As a case in point, the South African government's unequivocal support for the

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<sup>57</sup> Isabelle Niang et al., *Africa*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY. PART B: REGIONAL ASPECTS. CONTRIBUTION OF WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1237-8 (2014).

<sup>58</sup> Patrick Bond, *LOOTING AFRICA: THE ECONOMICS OF EXPLOITATION* (2007).

<sup>59</sup> It is estimated that 'African carbon dynamics are of global significance. The continent's vast carbon stocks seem to be highly vulnerable to climate change, evidenced by strong sensitivity of net ecosystem productivity and fire emissions to climate fluctuations'. Christopher A. Williams et al., *Africa and the Global Carbon Cycle*, 2 CARBON BALANCE MANAG. 1, 10 (2007).

<sup>60</sup> ACHPR 155/96, *supra* note 9.

<sup>61</sup> Anna Pegels, *Renewable Energy in South Africa: Potentials, Barriers and Options for Support*, 38 ENERGY POLICY 4945 (2010).

<sup>62</sup> See for an overview, Jamed Dorian, Herman Franssen & Dale Simbeck, *Global Challenges in Energy*, 34 ENERGY POLICY 1984 (2006).

construction of a coal-fired power station, despite damning evidence of its predicted climate and broader environmental impacts, was at the heart of the *Thabametsi* dispute.

The growing phenomenon of land-grabbing (a result of the convergence between the global food, energy, financial and climate crisis),<sup>63</sup> is another related concern, where Africans are dispossessed of their land for the sake of expanding climate change-related activities by foreign countries and multinational corporations on the continent.<sup>64</sup> The cultivation especially of biofuels (including on dispossessed land) is a pertinent concern in this respect, which is also a result of the governments of Northern countries being forced (ironically through their obligations emanating from the prevailing international climate law regime) to diversify their energy mix away from dirty carbon resources.<sup>65</sup> By expanding the agricultural sector, which also significantly contributes to global carbon emissions, Northern governments and powerful corporations are aggravating climate change globally and environmental destruction in Southern countries, while relocating responsibility for their actions, and the associated conflicts that might arise from these actions, to a continent far removed from their own back yards.<sup>66</sup> This is especially worrying if one considers that the large-scale use of bio-energy is threatening food security in Africa because productive lands for sustainable food production are used to produce biofuels that are exported to the North.<sup>67</sup> Another concern is the deliberate displacement (and often killing) of people living in areas that are rich in fossil fuels and that governments and petroleum corporations aim to develop. In the SERAC Communication, for example, it was alleged that the Nigerian Government-Shell Petroleum Consortium (the same entity that was also the respondent in the *Gbemre* case), ‘has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards’; and more worryingly, that ‘Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes’ in the oil rich area while ‘unarmed villagers running from the troops were shot from behind’.<sup>68</sup> Such practices especially impact ethnic minorities, indigenous people and other vulnerable groups such as women and children. They are closely dependent on natural resources and will probably suffer most from the impacts of climate change as well as the exploitative practices occasioned by exploitative government and corporate practices, including those practices related to agriculture, land-grabbing and forced removals.<sup>69</sup> Litigable climate conflicts might very well arise in the foregoing context between, for example, dispossessed landowners, farmers, governments and corporations.

While not a consideration in any of the three African cases we investigate below, apart from their involvement in carbon resource activities and biofuels, but related to these, corporations and foreign governments might increasingly capitalize on Africa’s disposition to act as a trash can for their harmful environmental waste in return for financial remuneration as a *quid pro quo*. The infamous 2006 Trafigura incident, where a ship chartered by the Singaporean-based

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<sup>63</sup> Saturnino Borrás et al., *Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction*, 38 J. PEASANT STUD. 209, 209 (2011).

<sup>64</sup> Ruth Hall, *Land Grabbing in Southern Africa: The Many Faces of the Investor Rush*, 38 ROAPE 193 (2011). See for a list of foreign private and government investors in developing countries, IFPRI, ‘*Land Grabbing*’ by Foreign Investors in Developing Countries: Risks and Opportunities (2009), <http://www.rrojasdatabank.info/landgrab/landgrabifprtab01.pdf>.

<sup>65</sup> Yi Yang, Junghan Bae, Junbeum Kim & Sangwon Suh, *Replacing Gasoline with Corn Ethanol Results in Significant Environmental Problem-shifting*, 46 ENVIRON. SCI. TECHNOL. 3671 (2012); Ashlie Delshad, Leigh Raymond, Vanessa Sawicki & Duane Wegener, *Public Attitudes Toward Political and Technological Options for Biofuels*, 38 ENERGY POLICY 3414 (2010).

<sup>66</sup> Ashukem, *supra* note 41.

<sup>67</sup> Jonathan Verschuuren, *The Paris Agreement on Climate Change: Agriculture and Food Security*, 7 EJRR 54, 55 (2016).

<sup>68</sup> ACHPR 155/96, *supra* note 9, at paras 2, 7 and 8.

<sup>69</sup> Browne, *supra* note 30, at 50-1.

oil and commodity shipping company Trafigura Beheer BV offloaded toxic waste in the Ivory Coast's city of Abidjan against payment to a local waste handling company, is a suggestive case in point.<sup>70</sup> The incident, during which several people died as a result of exposure to the toxic waste and thousands of others were seriously injured, foreshadows the severity, depth and complexity of similar litigable conflicts that might arise in the climate change context. This might happen, for example, where a government that is intent on moving away from coal-fired power plants increases its corporate owned and operated nuclear power facilities but disposes of its nuclear waste in an African country in such a way as to harm that country's population and environment. The potential litigable conflicts that might arise in this immensely complex web of transnational actors and movements, numerous overlapping jurisdictions, and intersecting juridical domains ranging from international, to corporate, human rights, environmental and climate laws is significant.

Many populations, especially rural people in Africa, are not resilient and able to effectively adapt to and/or to withstand erratic climatic and environmental conditions and disruptions as a result of climate change.<sup>71</sup> In the face of increased and highly unpredictable floods in some parts of the continent, severe droughts in others, and increased incidences of climate-related diseases that threaten livestock and human health and well-being, there is a real possibility of litigable conflicts arising between people (and countries) over dwindling resources.<sup>72</sup> Predominantly nestled in and emerging from the human rights paradigm, such conflicts can also arise between people and their governments, notably where governments are constitutionally and/or statutorily obliged to provide food, water and shelter to people, but refrain from doing so. As we show below, all of these are considerations that were present in the *Mbabazi* case. The devastating drought in Cape Town in 2017-2018 is another example, and it is possible that conflicts over the constitutionally entrenched rights of access to sufficient water and adequate housing that have already been litigated in the South African Constitutional Court,<sup>73</sup> might flare up again and find their way back to court in future. So too is the very real possibility of ethnic conflicts that might arise as a result of climate-induced migration and competition for food, water, shelter and other scarce socio-economic opportunities.<sup>74</sup> Drawing again from the South African example, while they have only been indirectly attributed to climate change impacts, the recent and continuously simmering xenophobic attacks across the country aimed specifically at non-South African immigrants, and the related ongoing municipal service delivery protests occurring across the country, suggest a possible escalation in litigable conflicts as a result of increased competition among expanding populations (also as a result of climate-induced migration and internal displacement) over dwindling socio-economic resources that are quantitatively and qualitatively being impacted upon by climate change.<sup>75</sup>

In a nutshell, while broadly mirroring climate conflicts that arise elsewhere in the world, the foregoing discussion suggests that the nature and types of litigable climate conflicts that could

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<sup>70</sup> See, among others, Liesbeth F. H. Enneking, *The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation: An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law*, 16 EUR. REV. PRIV. LAW 283 (2008).

<sup>71</sup> Niang et al., *supra* note 57, at 1199-265.

<sup>72</sup> Gwynne Dyer, CLIMATE WARS (2008).

<sup>73</sup> Sections 26 and 27 of the Constitution of the Republic of South Africa, 1996. *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28 (8 October 2009) and *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19 (4 October 2000). For a discussion, see Kotzé & du Plessis, *supra* note 11.

<sup>74</sup> Oksana Yakushko, *Xenophobia; Understanding the Roots and Consequences of Negative Attitudes Toward Immigrants*, 37 COUNS. PSYCHOL. 36 (2009).

<sup>75</sup> Caiphaz Soyapi and Louis J. Kotzé, *Environmental Racism, Slow Violence and the Extractive Industry in Post-apartheid South Africa: Marikana in Context*, 49 VRU 393 (2016).

arise in Africa are also unique to a developing country context, especially in the sense that they are closely intertwined with concerns arising from the ‘environmentalism of the poor’ paradigm;<sup>76</sup> a paradigm that centers on social justice, survival, the preservation of livelihoods and indigenous worldviews, including claims to recognition and participation that build on the premise that ‘the fights for human rights and environment are inseparable ... The environmentalism of the poor relates to actions and concerns in situations where the environment is a source of livelihood’.<sup>77</sup> To this end, litigable climate conflicts in Africa might very well go beyond typical concerns prevalent in developed countries. As a result of the continent’s unique attributes and socio-economic and environmental conditions, conflicts might mostly emanate from potentially existential issues of survival where basic conditions of human welfare are affected by climate change and the associated (in)actions of governments and corporations. We suggest that this in itself might render climate change litigation in Africa a thoroughly complex matter.

#### 4 Country analysis

It has already been suggested above that the African Union substantially lags behind its regional counterparts as far as developing and enforcing a comprehensive and effective regional climate law and governance framework is concerned. The bulk of the law and policy initiatives in this respect focus on efforts to strengthen Africa’s representation and influence at global climate negotiation summits, notably through the adoption by the African Union Summit in 2009 of the Nairobi Declaration on the African Process for Combatting Climate Change, which promoted a common African position on and highlighted continent-wide concerns about the impacts of climate change.<sup>78</sup> In 2014, the African Union adopted its Strategy on Climate Change, which is meant to serve as ‘strategic guidance’ to enable African countries to ‘effectively address climate change challenges’.<sup>79</sup> This non-binding strategy notes that climate change ‘could lead to insecurity and conflicts undermining peace in Africa’,<sup>80</sup> a tacit acknowledgement perhaps of the need to create appropriate institutions and processes to deal with such conflicts, if not through the courts, then through other means and institutions.

Also at a sub-regional level, in terms of instruments such as the Southern African Sub-Regional Framework of Climate Change Programmes of 2010<sup>81</sup> and the East African Community Climate Change Policy of 2010,<sup>82</sup> it cannot be said that African countries derive any regionally binding obligations to take concrete measures to reduce greenhouse gasses, or to develop and adopt appropriate climate change policies and laws, or to cater for aspects of climate governance, including the resolution of climate disputes through litigation in their domestic law and governance systems. These non-binding frameworks at most serve as suggestive roadmaps for the domestic development of climate policies, laws and institutions, and much of what is happening domestically is on the back of African states’ own initiatives

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<sup>76</sup> Rob Nixon, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* (2011).

<sup>77</sup> Joan Martinez-Alier, *The Environmentalism of the Poor*, 54 *GEOFORUM* 239, 240 (2014).

<sup>78</sup> See further Lesley Masters, *Sustaining the African Common Position on Climate Change: International Organisations, Africa and COP17*, 18 *S. AFR. J. INT. AFF.* 257 (2011).

<sup>79</sup> African Union, *Draft African Union Strategy on Climate Change* 3 (2014), [http://www.un.org/en/africa/osaa/pdf/au/cap\\_draft\\_aucclimatestrategy\\_2015.pdf](http://www.un.org/en/africa/osaa/pdf/au/cap_draft_aucclimatestrategy_2015.pdf).

<sup>80</sup> *Id.* at 55.

<sup>81</sup> SADC, *Southern Africa Sub-Regional Framework of Climate Change Programmes* (2010), [http://www.sadc.int/files/4813/5293/3518/Southern\\_Africa\\_Framework\\_of\\_Subregional\\_Climate\\_Change\\_Programmes.pdf](http://www.sadc.int/files/4813/5293/3518/Southern_Africa_Framework_of_Subregional_Climate_Change_Programmes.pdf).

<sup>82</sup> East African Community, *EAC Climate Change Policy* (2010), [http://www.bnbadvocates.com/publications/Climate\\_change\\_law/CCL00002.pdf](http://www.bnbadvocates.com/publications/Climate_change_law/CCL00002.pdf).

and in the light of the international law framework or domestic constitutional, administrative and environmental law. To this end, South Africa, Uganda and Nigeria are signatories to the Paris Climate Agreement, which has been ratified and has entered into force in all three countries. While these countries have elaborate constitutional and environmental law provisions, only South Africa and Nigeria have climate change policies. With South Africa expected to adopt its first framework climate change statute only in the course of 2019,<sup>83</sup> none has a specific designated climate change act yet. The climate disputes that have been litigated accordingly arose from within their non-binding climate policy frameworks and the more general constitutional, environmental and procedural law regimes, as we shall see below.

#### 4.1 *South Africa*

While Africa's contribution to global greenhouse gas emissions remains comparatively negligible, South Africa is an exception. As Africa's most developed economy and industrialized nation, it has one of the highest greenhouse gas contributions among developing countries worldwide.<sup>84</sup> Despite its level of economic development and relatively strong industrial performance, high poverty levels and weak socio-economic systems in several urban and rural areas threaten the resilience and adaptive capacity of many people.<sup>85</sup> The country boasts an advanced constitutional and environmental law regime; it is a constitutional democracy with its courts playing an active role in upholding the rule of law, including in environmental matters. Section 24 of its constitution provides for a right to a healthy environment, which is the center-piece of the country's environmental governance effort.<sup>86</sup> While it has a comprehensive environmental governance framework statute in the form of the National Environmental Management Act 107 of 1998 (NEMA) that provides for elaborate EIA procedures and the notion of public trusteeship as well as numerous sectoral environmental laws that operate under the NEMA framework,<sup>87</sup> to date it has only issued a consolidated climate change policy, i.e., the National Climate Change Response White Paper of 2011 (Climate Change White Paper),<sup>88</sup> and more recently the Climate Change Bill of 2018. The Climate Change White Paper is an ambitious policy vision for climate mitigation and adaptation, but while it envisages legislative innovation, Kidd and Couzens warn that 'its effectiveness looks likely to be undermined by simultaneous policy development in other branches of government confirming [their] continued commitment to fossil-fuel [sic] based sources of energy and indeed increased generation of energy from fossil fuels'.<sup>89</sup> For its part,

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<sup>83</sup> Department of Environmental Affairs, *Climate Change Bill* (Government Notice 580 in Government Gazette No. 41689 of 2018) (hereinafter Climate Change Bill).

<sup>84</sup> See USAID, *Greenhouse Gas Emissions in South Africa* (2012), [https://www.climatelinks.org/sites/default/files/asset/document/GHG%20Emissions%20Fact%20Sheet%20South%20Africa%20-%202017-5-16%20USAIDSAcomm\\_rev08-26-16\\_Clean.pdf](https://www.climatelinks.org/sites/default/files/asset/document/GHG%20Emissions%20Fact%20Sheet%20South%20Africa%20-%202017-5-16%20USAIDSAcomm_rev08-26-16_Clean.pdf).

<sup>85</sup> Anél du Plessis, *South Africa's Constitutional Environmental Rights Generously Interpreted: What is in it for Poverty?*, 27 SAJHR 279 (2011).

<sup>86</sup> Section 24 reads: 'Everyone has the right – (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.

<sup>87</sup> For a comprehensive discussion see Jan Glazewski, ENVIRONMENTAL LAW IN SOUTH AFRICA (3d ed. 2013).

<sup>88</sup> Department of Environmental Affairs, *National Climate Change Response White Paper* (2012), [https://www.environment.gov.za/sites/default/files/legislations/national\\_climatechange\\_response\\_whitepaper.pdf](https://www.environment.gov.za/sites/default/files/legislations/national_climatechange_response_whitepaper.pdf). See Tracy Humby et al. eds., CLIMATE CHANGE LAW AND GOVERNANCE IN SOUTH AFRICA (2016).

<sup>89</sup> Michael Kidd & Ed Couzens, *Climate Change Responses in South Africa*, in CLIMATE CHANGE AND THE LAW 620 (2013).

the objectives of the Climate Change Bill include, amongst others, to provide for the effective management of inevitable climate change impacts through enhancing the country's adaptive capacity, strengthening its resilience and reducing its vulnerability to climate change, with a view to building social, economic and environmental resilience and an adequate national adaptation response in the context of the global climate change response.<sup>90</sup> To this end, the Bill includes principles, measures for law and policy alignment, numerous institutional arrangements, climate change response duties at subnational level, national adaptation measures, and greenhouse gas emission and removal provisions that could all become relevant in litigable climate conflicts that might arise in the country. While the details of these provisions are expected to change in the process of finalizing the Bill, once adopted as law by Parliament, it might potentially have a significant influence on future climate change litigation in South Africa.

Returning to the present, hailed as South Africa's first and still only climate case, judgment was delivered in *Thabametsi* by the Pretoria High Court on 8 March 2017 in a lengthy, highly detailed, comprehensively reasoned, and at times complex and technical decision.<sup>91</sup> At the heart of the dispute were various potential environmental and climate impacts that would result from government's decision to build a 1,200 MW coal-fired power station in the water scarce and ecologically sensitive northern parts of the country. Not part of the scandal-ridden national energy provider Eskom, which has been implicated in systemic corruption under the previous Zuma administration,<sup>92</sup> the power station would be funded and operated by an independent power producer (IPP). The Minister of Environmental Affairs, the Chief Director of the national environmental authority and the IPP acted as respondents. The applicant, Earthlife Africa (ELA), is an influential environmental NGO that also successfully managed in 2005 to challenge government's decision in another energy-related matter; to build a pebble bed modular nuclear reactor close to Cape Town.<sup>93</sup> In the present case, ELA believed that coal-fired power stations were 'an inappropriate means to generate electricity since other forms of power generation are more sustainable and less damaging to the environment ... [and ELA] is motivated by a vision that all coal-fired power stations should not be permitted because they contribute to CO<sub>2</sub> emissions globally'.<sup>94</sup>

Prior to the construction of a coal-fired power station, a developer must obtain from the environmental authority, among others, an authorization that is issued only after consideration of an elaborate EIA in terms of the NEMA and its EIA Regulations.<sup>95</sup> Currently, the EIA Regulations do not require in any explicit terms that a climate change impact assessment (CCIA) be conducted, or that climate change be considered as part of the general EIA process. Consequent upon its approval of the EIA report, which allegedly 'failed to address the climate change impacts of the proposed coal-fired power station in any detail', and which stated that the 'climate change impacts are expected to be relatively small and low',<sup>96</sup> the environmental authority granted the authorization in March 2015. Focusing primarily on administrative and procedural considerations, in May of that year, ELA lodged an appeal with the Minister of Environmental Affairs to set aside the decision to grant the authorization. Its appeal rested, among other issues, on the assertion that EIAs for coal-fired power stations must 'as a matter

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<sup>90</sup> Section 2(b) of the Bill.

<sup>91</sup> Also see Humby, *supra* note 7.

<sup>92</sup> Philippe Alfroy, *Eskom: The Power Giant at the Core of South Africa's State Rot*, *The Citizen*, February 4, 2018, <https://citizen.co.za/news/news-africa/1805933/safrica-politics-energy-corruption/>.

<sup>93</sup> *Earthlife Africa (Cape Town) v Director General Department of Environmental Affairs and Tourism and Another* (7653/03) [2005] ZAWCHC 7 (26 January 2005).

<sup>94</sup> *Thabametsi*, *supra* note 18, at para. 23.

<sup>95</sup> Department of Environmental Affairs, *Environmental Impact Assessment Regulations 2014* (Government Notice R982 in Government Gazette 38282 of 4 December 2014) (hereinafter EIA Regulations).

<sup>96</sup> *Thabametsi*, *supra* note 18, at para. 42.



of policy’ include ‘climate change considerations in full’.<sup>97</sup> The Minister refused to set aside the authorization following her consideration of the appeal, but she accepted that ‘a climate change assessment was a relevant factor in deciding whether to grant the authorization’ and that the environmental authority ‘was required to take into account the GHG emissions and climate change impacts of the project’.<sup>98</sup> She accordingly amended the authorization by inserting a condition that a CCIA must be undertaken prior to the commencement of the project, but she did not make the authorization conditional on the CCIA’s being conducted. The Minister believed a CCIA was merely a useful tool to collect data to use in the formulation of future policy and mitigation measures, to assess and monitor the climate change impact of the Thabametsi power station, and to determine whether and when it might be necessary to amend or supplement the conditions in the power station’s environmental authorization.<sup>99</sup> In January 2017 the CCIA was concluded and published for public comment. The assessment determined in no uncertain terms that the power station would generate over 8,2 million tons of carbon dioxide per year and over 246 million tons of carbon dioxide over its lifetime; emissions that it characterized as ‘very large by international standards’.<sup>100</sup> It further highlighted several technological limitations in the design of the power station and that it would not be able to make use of carbon capture and storage.<sup>101</sup>

Contending that it was ‘unlawful, irrational and unreasonable’ for the environmental authority and the Minister to have granted the environmental authorization in the absence of a proper CCIA in the first place,<sup>102</sup> ELA launched judicial review proceedings against both the environmental authority’s initial authorization decision and the Minister’s appeal decision. The High Court upheld the judicial review claim, stating that without a full assessment of the climate change impact of the project there was ‘no rational basis for the environmental authority to endorse the baseless assertions’ that were made when the authorization was approved, which is an indication that the Chief-Director ‘failed to apply his mind’.<sup>103</sup> As far as the Minister’s decision was concerned, the Court believed that she correctly found that a CCIA needed to be conducted, but that she erred in upholding the environmental authorization and not referring it back to the environmental authority for reconsideration.<sup>104</sup> The Court nevertheless held that a more proportional remedy would not be a potentially far-reaching one that set aside the initial authorization, but rather a less intrusive one that ordered the Minister to constitute the appeal process afresh, during which process new information emerging from the CCIA had also to be considered.<sup>105</sup>

On 30 January 2018 the Minister published her reconsideration of the appeal, noting at the outset her ‘dissatisfaction with the [*Thabametsi*] judgment’.<sup>106</sup> Having considered, among other matters, the final CCIA and comments received from interested and affected parties on this assessment, the High Court’s judgment, and guidance issued by an environmental consultancy, she issued an order confirming the original environmental authorization that had been issued to the power station. In justifying her decision, she noted that the operation of the

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<sup>97</sup> *Id.* at para. 55.

<sup>98</sup> *Id.* at para. 65.

<sup>99</sup> *Id.* at para. 104.

<sup>100</sup> *Id.* at para. 47.

<sup>101</sup> *Id.* at para. 48.

<sup>102</sup> *Id.* at para. 10.

<sup>103</sup> *Id.* at para. 101.

<sup>104</sup> *Id.* at para. 107.

<sup>105</sup> *Id.* at para. 121.

<sup>106</sup> Minister of Environmental Affairs, *Reconsideration of the Appeal Against the Environmental Authorisation Issued for the Proposed Establishment of the 1200MW Thabametsi Coal-fired Power Station and Associated Infrastructure Near Lephalale, within the Jurisdiction of the Waterberg District Municipality, in the Limpopo Province* (30 January 2018) (hereinafter Appeal Decision). See para. 2.4.

power station would result in ‘significant GHG emissions and [would] therefore have climate change impacts’,<sup>107</sup> but that numerous mitigation measures had been put in place. The ‘significant risk relating to GHG emissions could be very high’; ‘water scarcity risks [were] very high’; and the high risk of GHG emissions ‘implic[ed] a high social cost’.<sup>108</sup> Collectively viewed, however, she believed this did ‘not necessarily represent a fatal flaw, provided that the benefits [were] justified and [could] be motivated.’<sup>109</sup> Disregarding any constitutional environmental injunctions and climate and environmental policies and laws, she instead justified these potential benefits by drawing solely on South Africa’s Integrated Resource Plan for Electricity 2010-2030 (IRP), a non-binding ‘planning tool’,<sup>110</sup> as she says herself, a strategic policy guideline document for the promotion of energy security, which she noted ‘does not prohibit the establishment of new coal-fired power stations’, but rather ‘permits that 6,3 GW of new generation capacity may be derived from coal’.<sup>111</sup> She emphasized in her decision that the overall thrust of the IRP is one supporting the view that the ‘harms that would result from the establishment of new coal-fired facilities ... were outweighed by the benefit to the country of having the additional energy generation capacity’.<sup>112</sup>

What this means in effect is that the Minister, in complying with the rule of law, obeyed the Court’s order and gave effect to it by constituting the appeal process afresh. But by merely relying on an energy-focused policy to justify her decision on appeal, and by disregarding any climate, environmental or human rights laws, she simply endorsed the status quo by confirming the validity of the environmental authorization that had been issued in the first place and that would allow construction of the power station to commence subject to the original conditions. While the Minister recognized the importance of conducting a CCIA, she rendered its potential impact on the outcome of her decision nugatory. This outcome confirms Kidd and Couzens’ fears above: it seems that if the national *environmental* authority of South Africa has its way, the promotion of socio-economic development in the country will prevail, even in the face of severe climate change threats that have been independently confirmed by means of a CCIA. Clearly, this is a worrying state of affairs from a climate protection point of view that is likely to augment pressure on civil society and the courts in their efforts to ensure government properly considers not only economic but also social and ecological issues and interests when it makes decisions related to promoting energy security that may have severe climate-related impacts.

In a letter dated 7 February 2018, lawyers from the Centre for Environmental Rights (CER), a group of activist environmental lawyers litigating environmental justice issues and acting on behalf of ELA, informed the Minister that they considered her decision ‘unlawful’ and that they intended instituting review proceedings against her decision in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).<sup>113</sup> At the time of writing, these review proceedings have not yet commenced. CER specifically avers that the manner in which the Minister came to her decision by relying only on energy policies is contentious, and it could be argued that she disregarded the Court’s finding in *Thabametsi* that ‘[p]olicy instruments developed by the Department of Energy cannot alter the requirements of environmental

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<sup>107</sup> *Id.* at para. 4.1.

<sup>108</sup> *Id.* at para. 4.4.

<sup>109</sup> *Id.* at para. 4.5.

<sup>110</sup> *Id.* at para. 4.7

<sup>111</sup> *Id.* at para. 4.10.

<sup>112</sup> *Id.* at para. 4.9.

<sup>113</sup> Centre for Environmental Rights, *Letter: Decision in Relation to Thabametsi Power Company (Pty) Ltd Environmental Authorisation Appeal* (7 February 2018), <https://cer.org.za/wp-content/uploads/2018/02/CER-Letter-to-Thabametsi-Power-Company-Pty-Ltd-7-2-18.pdf>.

legislation for relevant climate change factors to be considered'.<sup>114</sup> CER further notes that even if the sole reliance of an environmental protection authority on the energy promotion policy could somehow be justified, nothing in the Minister's decision suggests that she has considered the fact that Eskom is currently delivering excess electricity capacity and does in fact not need a new power station.<sup>115</sup>

Although the stage has clearly been set for a future climate change litigation battle in court, this outcome could arguably have been avoided had the Court granted ELA's request to set aside the authorization and to have it remitted to the environmental authority for reconsideration. It is empowered by PAJA to do so, as it acknowledged itself,<sup>116</sup> by virtue of section 8 of the Act which states:

8. (1) The court or tribunal, in proceedings for judicial review ... may grant *any order* that is *just and equitable*, including orders—
- (a) directing the administrator—
    - (i) to give reasons; or
    - (ii) to act in the manner the court or tribunal requires;
  - (b) prohibiting the administrator from acting in a particular manner;
  - (c) *setting aside the administrative action and—*
    - (i) *remitting the matter for reconsideration by the administrator*, with or without directions; or
    - (ii) in exceptional cases—
      - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
      - (bb) directing the administrator or any other party to the proceedings to pay compensation.<sup>117</sup>

Such an order would have required the environmental authorization process to commence anew, and would have been predicated upon 'the proposition that for obviously sound reasons the climate change impact assessment should precede the decision to authorize the project'.<sup>118</sup> However, as a result of the principles of severance and proportionality which the Court believed required it not to declare the whole of the administrative authorization decision invalid, but only the objectionable part, it reasoned that 'such a remedy in the circumstances of this case might be disproportionate'.<sup>119</sup> Was the Court being too cautious out of fear of engaging in judicial overreach, thereby possibly breaching the sacred lines of the separation of powers in doing so? Had it placed too much faith in the Minister's duty to exercise her discretion in a balanced, well-informed and proper way, which in the end she seemingly had not? From a procedural, administrative justice perspective the Court was probably correct in following such a cautious approach that showed considerable deference to judicial restraint and respect for the doctrine of the separation of powers. Such restraint must be lauded in and of itself in a maturing constitutional democracy such as South Africa's where the rule of law still struggles to find its feet. But it also highlights the limits and limitations of proceduralism. From a climate justice perspective we believe there was sufficient evidence of the likely grave impacts of the power station on people, their rights, the climate and the environment (evidence which was acknowledged throughout by the Court and by government) for the Court to have

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<sup>114</sup> *Thabametsi*, *supra* note 18, at para. 96. See the letter of the Centre sent to the environmental authority on 16 February 2018. Centre for Environmental Rights, *Letter: Minister's Decision to Uphold the Environmental Authorisation for the Proposed Thabametsi Coal-Fired Power Station* (16 February 2018), <https://cer.org.za/wp-content/uploads/2018/02/CER-Letter-to-PCEA-re-Thabametsi-16-2-18-1.pdf>.

<sup>115</sup> See, also Eskom, *Eskom is Now Delivering Excess Electricity Capacity to Power SA's Economic Growth* (24 January 2017), <http://www.eskom.co.za/news/Pages/Jann24.aspx>.

<sup>116</sup> *Thabametsi*, *supra* note 18, at para. 117.

<sup>117</sup> Own emphasis.

<sup>118</sup> *Thabametsi*, *supra* note 18, at para. 117.

<sup>119</sup> *Id.* at para. 119.

pursued a more stringent remedy. This could arguably have justified setting aside the Chief-Director’s decision, remitting the matter for reconsideration by him, or in such an ‘exceptional case’ even replacing or varying his decision through the provisions of PAJA mentioned above. It is quite possible that CER’s future planned challenge to the Minister’s appeal decision will reveal the extent to which another court might be willing to take bolder actions to ensure that power utility corporations abide by their legal obligations and government authorities consider, in a comprehensively balanced manner, all relevant climate change impacts in decision-making.

That said, in a recent analysis Humby lauded the *Thabametsi* judgment’s ‘meaningful contribution’ to climate change governance in South Africa, noting specially that the ‘court’s review of these decisions was framed by powerful statements associating climate change impact assessment with sustainable development, intergenerational justice, and the precautionary principle’.<sup>120</sup> We agree. The Court’s innovative reliance on the precautionary principle to justify that climate change must be considered as part of the EIA process is especially noteworthy.<sup>121</sup> So too is its reliance on the Constitution’s right to a healthy environment, and for connecting climate change in explicit, if not elaborate, terms with rights-based concerns. In a passage worth quoting in full, the Court believed:

Section 24 [the constitutional right to healthy environment] recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures protect the environment “for the benefit of present and future generations” and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences.<sup>122</sup>

The Court also demonstrated its appreciation of the fact that climate change is a global concern that is governed not only by domestic policies and laws, but importantly, also by an international law framework which creates far-ranging obligations and offers best practices, and which can neither be ignored by the judiciary nor by environmental authorities in South Africa:

Article 4(1)(f) of the UN Framework Convention [on Climate Change] imposes an obligation on all states parties to take climate change considerations into account in their relevant environmental policies and actions, and to employ appropriate methods to minimise adverse effects on public health and on the environment.<sup>123</sup>

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<sup>120</sup> Humby, *supra* note 7, at 149-50.

<sup>121</sup> Said the Court: ‘[T]he injunction to consider any pollution, environmental impacts or environmental degradation logically expects consideration of climate change. All the parties accepted in argument that the emission of GHGs from a coal-fired power station is pollution that brings about a change in the environment with adverse effects and will have such an effect in the future. All the relevant legislation and policy instruments enjoin the authorities to consider how to prevent, mitigate or remedy the environmental impacts of a project and this naturally, in my judgement, entails an assessment of the project’s climate change impact and measures to avoid, reduce or remedy them’. *Thabametsi*, *supra* note 18, at para. 78.

<sup>122</sup> *Thabametsi*, *supra* note 18, at para. 82.

<sup>123</sup> *Thabametsi*, *supra* note 18, at para. 83.

While it must still consider amending the current EIA Regulations to explicitly include CCIAAs, government published and further refined a set of Greenhouse Gas Emissions Reporting Regulations in April 2017.<sup>124</sup> In addition, the national Carbon Tax Act was assented to by the President in May 2019 and commenced on 1 June 2019.<sup>125</sup> The Department of Environmental Affairs also recently published a Draft National Climate Change Adaptation Strategy which outlines a common vision of climate change adaptation and climate resilience for the country, as well as priority areas for achieving this vision.<sup>126</sup> Alongside efforts to finalize South Africa's climate change statute, we believe that collectively, these are positive developments that bode well for climate governance in the country, and they could further solidify the legislative foundation upon which future climate conflicts might be litigated by claimants and adjudicated by the courts.

#### 4.2 Nigeria

Nigeria is Africa's most populous and one of its most industrialized countries. The majority of the population, however, lives in abject poverty and collectively this 'puts increasingly severe demands upon the natural environment, the institutional structures and the resources available to manage them'.<sup>127</sup> Such demands and the associated potential conflicts arising therefrom are vividly explicated by the country's notorious oil and gas industry, the mainstay of Nigeria's economy, the foremost source of national income and a source of deep, ongoing conflict at many levels.<sup>128</sup> National law vests the exclusive right to the exploration and extraction of natural resources in the Nigerian federal government, with Shell oil company and the Nigerian government playing by far the most significant role in oil production in the Niger Delta in terms of a joint venture; the very same private-public venture that was also at the heart of the SERAC dispute referred to earlier. Since the 1950s, when oil was discovered in the area, oil production activities have caused immense damage to the environment as a result of oil spills and outdated waste disposal techniques, while gas flaring continues to be standard practice, resulting in oil wells accompanied by 'a raging flame that burns twenty-four hours a day, reaching hundreds of feet into the sky, killing the surrounding vegetation with searing heat, emitting a deafening roar, and belching a cocktail of smoke, soot, and toxic chemicals into the air along with a potent mixture of greenhouse gasses'.<sup>129</sup> A significant contributor to climate change, gas flaring has been the preferred means of disposing associated or waste gas by various petroleum and production companies in the Niger Delta for the past five decades.<sup>130</sup> While the climate-related

<sup>124</sup> Department of Environmental Affairs, *National Greenhouse Gas Emission Reporting Regulations* (General Notice 275 in Government Gazette 40762 of 3 April 2017) and Department of Environmental Affairs, *National Greenhouse Gas Emission Reporting Regulations: Notice of Procedure to be Followed by Category A Data Providers for Registration and Reporting as a Category A Data Reporter* (General Notice 71 in Government Gazette 42203 of 1 February 2019).

<sup>125</sup> See National Carbon Tax Act 15 of 2019. The purpose of the Act is to provide for the imposition of a tax on the carbon dioxide (CO<sub>2</sub>) equivalent of greenhouse gas emissions and related matters. Notably, government is also in the process to amend its atmospheric emissions legislation. See Department of Environmental Affairs, *Notice of Intention to Amend the List of Activities which Result in Atmospheric Emissions Which Have or May Have a Significant Detrimental Effect on the Environment, Including Health, Social Conditions, Economic Conditions, Ecological Conditions or Cultural Heritage* (General Notice 686 in Government Gazette 42472 of 22 May 2019).

<sup>126</sup> Department of Environmental Affairs, *Draft National Climate Change Adaptation Strategy* (General Notice 644 in Government Gazette 42466 of 6 May 2019).

<sup>127</sup> Andrew Onwuemele, *Cities in the Flood: Vulnerability and Disaster Risk Management: Evidence from Ibadan, Nigeria*, in URBAN AREAS AND GLOBAL CLIMATE CHANGE 280 (2012).

<sup>128</sup> Augustine Okhobo Dokpesi, *The Oil Curse and the Nigerian Development Dilemma*, in CONTEMPORARY DEVELOPMENT ISSUES IN NIGERIA 157-8 (2015).

<sup>129</sup> Sinden, *supra* note 47, at 176.

<sup>130</sup> Aniefiok E. Ite and Udo J. Ibok, *Gas Flaring and Vention Associated with Petroleum Exploration and Production in the Nigeria's Niger Delta*, 1 AJEP 70, 70 (2013).

ecological destruction occasioned by the foregoing is evident, the devastating socio-economic impacts on the local communities living in the Delta are also matters of grave concern, with the numerous climate related vulnerabilities of and impacts on rural Nigerians now well documented.<sup>131</sup>

Nigeria's principal environmental law is the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007 (NESREA), which is complemented by the Environmental Impact Assessment Act, 2004 (EIA Act).<sup>132</sup> The environmental agency established in terms of part 1 of the NESREA is empowered to enforce compliance with environmental regulations and standards.<sup>133</sup> The lack of implementation and inadequacy of environmental law enforcement efforts are, however, major continuing concerns.<sup>134</sup> Unlike its South African counterpart, the Constitution of Nigeria of 1999 does not provide for a right to a healthy environment. The article 24 environmental right in the African Charter is instead incorporated in Nigerian law by virtue of its inclusion in the African Charter on Human and Peoples' Rights Procedure Rules (Ratification and Enforcement) Act, 2004 (ACHPR Ratification and Enforcement Act);<sup>135</sup> a national statute that gives domestic effect to the Charter in Nigerian law. Nigeria also does not have a dedicated climate change law, although some policy directions in this area are captured in the National Adaptation Strategy and Plan of Action on Climate Change for Nigeria, 2011 and the National Policy on Climate Change, 2015.

Unsurprisingly perhaps, the claims at the heart of the 2005 *Gbemre* dispute are based on virtually the same issues that gave rise to the claims in the SERAC Communication of 2001 we have noted earlier. The Shell Petroleum Development Company Nigeria Ltd (SPDC) and the Nigerian National Petroleum Corporation (NNPC) operate jointly and severally in the exploration and production of crude oil and other petroleum products in Nigeria and have been engaged in what has been referred to as 'massive, relentless and continuous gas flaring'<sup>136</sup> in the Ikwherekan Community. These entities have been flaring gas for years without adequately considering the health, environmental and other consequences of this practice while mainly concentrating on commercial interests and maximizing profit, at times without valid authorization (or ministerial gas flaring certificates) as required in terms of the Associated Gas Re-injection Act, 2004.<sup>137</sup>

Against this background, the applicant in this matter, Jonah Gbemre, was granted judicial leave to apply for an order enforcing the 'fundamental rights to life and dignity of [the] human person' and the associated environmental and other rights in the ACHRP (Ratification and

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<sup>131</sup> Godwin Etta Odok, CLIMATE CHANGE AND SOCIAL PROCESSES IN RURAL NIGERIA, IN DEVELOPMENT ISSUES IN NIGERIA 190-7 (2015). Also see BNRCC, *National Adaptation Strategy and Plan of Action on Climate Change for Nigeria* 1-25 (2011), <http://csdevnet.org/wp-content/uploads/NATIONAL-ADAPTATION-STRATEGY-AND-PLAN-OF-ACTION.pdf>.

<sup>132</sup> Environmental Impact Assessment Act, Cap E 12 Vol. 6, Laws of the Federation of Nigeria 2004.

<sup>133</sup> Section 2 of the NESREA.

<sup>134</sup> UNEP, *Environmental Assessment of Ogoniland* 9, 104 (2011), [http://wedocs.unep.org/bitstream/handle/20.500.11822/7947/-Environmental%20Assessment%20of%20Ogoniland-2011UNEP\\_OEA.pdf?sequence=3&isAllowed=y](http://wedocs.unep.org/bitstream/handle/20.500.11822/7947/-Environmental%20Assessment%20of%20Ogoniland-2011UNEP_OEA.pdf?sequence=3&isAllowed=y); Barisere Rachel Konne, *Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland*, 47 CORNELL INT'L L.J. 181 (2014).

<sup>135</sup> African Charter on Human and Peoples' Rights Procedure Rules (Ratification and Enforcement) Act Cap A9, Vol. 1 Laws of Federation of Nigeria, 2004.

<sup>136</sup> *Gbemre*, *supra* note 19, at 4.

<sup>137</sup> Associated Gas Re-injection Act, Cap A25 Vol. 1, Laws of the Federation of Nigeria, 2004. *Gbemre*, *supra* note 19, at 4.

Enforcement Act).<sup>138</sup> Gbemre commenced court proceedings in his own name as well as on behalf of the Iwherekan Community<sup>139</sup> in the Delta State of Nigeria against SPDC, the NNPC and the Attorney General of the Federation. The applicant sought five different remedies (four declarations and one judicial order) on the basis of a combination of the rights of the Iwherekan people vested in the Constitution of the Federal Republic of Nigeria of 1999, the ACHPR Ratification and Enforcement Act, as well as a range of Nigerian environmental laws. The complaint centered on the environmental and health impacts of gas flaring by the SPDC and the NNPC and the alleged subsequent human rights infringements.<sup>140</sup> The court was requested to issue a declaration that: i) the constitutional rights to life and dignity of the human person, as reinforced by the ACHPR Ratification and Enforcement Act,<sup>141</sup> included the right to a clean, poison-free, pollution-free and a healthy environment; ii) the actions of the SPDC and the NNPC in continuing to flare gas in the course of their oil exploration and production activities in the vicinity of the Iwherekan Community violated community members' right to life (including the right to a healthy environment) and their right to human dignity; iii) the failure of the SPDC and the NNPC to carry out an EIA in the area where the Iwherekan Community lived to determine the effects of the gas flaring activities was a violation of section 2(2) of the EIA Act,<sup>142</sup> while such a failure at once also contributed to several human rights violations; and iv) the provisions of sections 3(2)(a) and (b) of the Associated Gas Re-injection Act<sup>143</sup> and section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations<sup>144</sup> that permit gas flaring, were inconsistent with the protection of human rights and consequently unconstitutional. The applicant also requested an order of 'Perpetual Injunction' restraining the SPDC and the NNPC as well as their agents, employees and contractors from future gas flaring in the area where the Iwherekan Community lived.<sup>145</sup>

Particularly relevant to the present enquiry is the applicant's assertion that the gas flaring 'gives rise to poisons and pollutes the environment as it leads to the emission of carbon dioxide, the main green house gas';<sup>146</sup> '(c)ontributes to adverse climate change as it emits carbon dioxide and methane which causes [sic] warming of the environment, pollutes ... food and water'; and that it '(r)educes crop production and adversely impacts on their food security'.<sup>147</sup> The applicant claimed that the impacts of the unrestrained gas flaring on the lives and health of the community resulted in its members being 'grossly undeveloped [and] very poor and without adequate medical facilities to cope with the adverse and harmful effects on their health and lives.'<sup>148</sup> Clearly a predominantly rights-oriented case, the plea before the court was that

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<sup>138</sup> *Gbemre, supra* note 19, at 1. The court described this matter as 'Fundamental Rights Enforcement Procedure Proceedings' as provided for in section 46 of the Constitution of the Federal Republic of Nigeria, 1999. See *Gbemre, supra* note 19, at 26.

<sup>139</sup> The Court requested an initial 'copious unwieldy list of members' to be withdrawn from the case. *Gbemre, supra* note 19, at 1.

<sup>140</sup> *Gbemre, supra* note 19, at 2-6.

<sup>141</sup> Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the ACHPR Ratification and Enforcement Act.

<sup>142</sup> Environmental Impact Assessment Act, Cap E12 Vol. 6, Laws of the Federation of Nigeria, 2004.

<sup>143</sup> Section 3(2) empowers the Minister to issue a certificate allowing for the continued flaring of gas in a particular field or permitting the company to continue to flare gas in a particular field 'if the company pays such sum as the Minister may from time to time prescribe for every 28.317 cubic metre (SCM) of gas flared'. The provision also states that any payment shall be made in the same manner and be subject to the same procedure as for the payment of royalties to the Nigerian government by companies engaged in the production of oil.

<sup>144</sup> Associated Gas Re-injection (Continued Flaring of Gas) Regulations Section 1, 43 of 1984.

<sup>145</sup> *Gbemre, supra* note 19, at 2.

<sup>146</sup> *Id.* at 4.

<sup>147</sup> *Id.* at 5.

<sup>148</sup> *Id.* at 5.

the rights to life and dignity entrenched in sections 33(1) and 34(1) of the Nigerian Constitution include the right to clean, poison-free and pollution-free air and a healthy environment conducive to human habitation, development and enjoyment of life. The applicant argued that these rights have been and continue to be violated and threatened by ongoing gas flaring activities in his community.<sup>149</sup>

The respondents in this matter filed two separate counter-affidavits. They challenged the *locus standi* of the applicant on procedural grounds, stating that the applicant (interchangeably referred to as ‘the plaintiff’ in the judgment) was not authorized to represent the Iwherekan Community.<sup>150</sup> They further countered all of the applicant's claims stating, among other objections, that their ‘gas operation is carried out in accordance with the Laws, Regulations and Policy of the Federal Government and in conformity with International Standards and Practices and these have no ruinous or adverse consequences to [sic] either health or lives’.<sup>151</sup> Moreover, they indicated that while SPDC has an oil mining lease and flare certificate, they do not have a flare site in the Applicant's community.<sup>152</sup> The respondents further countered that when they commenced their operations in the area 37 years previously, an EIA was not a legal requirement and that there had not been any oil and gas development in the area where the community lived which required an EIA.<sup>153</sup> The respondents also alleged that notwithstanding the fact that their operations posed no present or future danger to the community and its members, they typically also engaged in corporate social responsibility projects in the area.<sup>154</sup> As far as it concerned the applicant's claim of human rights abuses, the respondents stated that gas flaring was not a matter embraced by the constitutional right to dignity,<sup>155</sup> and that ‘their operations [had] in no way affected the fundamental rights of the Applicant as alleged and that these oil and exploration activities [were] carried out in compliance with good oilfield practice and as permitted by the Laws of the Federal Republic of Nigeria’.<sup>156</sup>

After numerous and lengthy court proceedings including back and forth correspondence between the parties and the court (later described as ‘unduly lengthy submissions on miscellaneous issues like adjournment, transfer, stay of proceedings, stay of execution, notices of appeal, motions for stay at the Court of Appeal to restrain [the] Judge from sitting etc’),<sup>157</sup> Justice Nwokorie ruled on 30 November 2005 that ‘there must be an end to litigation, especially in this kind of specialized proceedings’.<sup>158</sup> The court came to the conclusion that the rights to life and human dignity inevitably include the right to a clean, poison-free, pollution-free and healthy environment,<sup>159</sup> and that the gas flaring in the course of the oil exploration and production activities amounted to a gross violation of these rights, to which the failure to carry out a compulsory EIA in terms of the EIA Act of Nigeria had contributed.<sup>160</sup> The court also confirmed that the relevant sections of the Association Gas Re-injection Act and Regulations were unconstitutional, null and void on the basis of their being inconsistent with the rights to life and human dignity as well as the environmental and other rights in the ACHPR Ratification and Enforcement Act.<sup>161</sup> The Court issued a restraining order prohibiting the SPDC and the

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<sup>149</sup> *Id.* at 6.

<sup>150</sup> *Id.* at 14.

<sup>151</sup> *Id.* at 14.

<sup>152</sup> *Id.* at 16.

<sup>153</sup> *Id.* at 15.

<sup>154</sup> For the specifics, see *Gbemre*, *supra* note 19, at 15.

<sup>155</sup> *Id.* at 17.

<sup>156</sup> *Id.* at 14 and 15.

<sup>157</sup> *Id.* at 29.

<sup>158</sup> *Id.* at 28.

<sup>159</sup> *Id.* at 30.

<sup>160</sup> *Id.* at 30 and 31.

<sup>161</sup> *Id.* at 31.



NNPC from any further gas flaring in the Applicant's community and ordered the Attorney-General of the Federation and Ministry of Justice to commence legislative procedures to amend the relevant sections of the Gas Re-injection law with a view to aligning these with the Constitution.<sup>162</sup> Notably, the court also considered section 7 of the Niger Delta Development Commission (Establishment) Act, 2004,<sup>163</sup> clarifying that it is the responsibility of the Commission to '(t)ackle environmental problems that arise from the exploration of oil mineral [sic] in the Niger-Delta area and advise the Federal Government and the member-states on the prevention and control of oil spillages, gas flaring and environmental pollution'.<sup>164</sup>

The cause of action in *Gbemre*, as in *Thabametsi*, evidently arose from within a context of powerful government-backed corporate concerns related to advancing the financial interests of the energy sector at the expense of the people and the environment. Far more than its South African counterpart, the *Gbemre* case almost entirely dealt with human rights issues and statutory environmental protection, including issues related to upholding the rule of law where national energy law that promotes oil extraction, allows gas flaring and consequently cause climate change, contradicts minimum constitutional human rights standards as a result. Similar to the ACommHPR in its SERAC Communication, the Court assumed a decidedly critical stance towards the socio-ecologically destructive activities of the government-owned energy company. It was especially critical of the delaying tactics employed by the respondents, which could easily have resulted in prohibitive costs and unnecessary postponement of corrective actions. To the court's credit, it refused to allow drawn out judicial proceedings, which could be indicative of the urgency it attached to resolving the conflict in question, to recognizing the imbalance of power and resources among the litigants, and to providing appropriate remedies to the applicant sooner rather than later.

In our view, the *Gbemre* case is first of all a victory for the interpretation and application of environmental rights. The court stated unequivocally that continuing to flare gas in the course of the respondents' oil exploration and production activities in the applicant's community is a violation of the community's 'fundamental rights to life (including [a] healthy environment) and dignity of [the] human person'.<sup>165</sup> Even though the Nigerian Constitution does not provide for a right to a healthy environment, the court did not shy away from linking the rights to life and dignity to environmental interests (for instance by stating that life and dignity are linked to EIA concerns),<sup>166</sup> or from affording significant weight to the statutory environmental right in article 24 of the ACHPR Ratification and Enforcement Act.

The willingness of the court to find provisions of the Gas Re-injection Act unconstitutional also suggests that it was critical of the country's national law promoting economic growth at the expense of environmental and human health. It further suggests that the Nigerian court might have been slightly more adventurous than its South African counterpart in exploring the limits of the separation of powers by laying down very clear directions to the executive and legislative branches of government.<sup>167</sup> In fact, the court went so far as to order an 'immediate'<sup>168</sup> stop to gas flaring, while finding it meaningful to state that the absence of an

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<sup>162</sup> *Id.* at 31.

<sup>163</sup> Niger Delta Development Commission (Establishment) Act, Cap N86, Laws of the Federation of Nigeria, 2004.

<sup>164</sup> *Gbemre*, *supra* note 19, at 12.

<sup>165</sup> *Id.* at 30.

<sup>166</sup> *Id.* at 31.

<sup>167</sup> The court ordered the Attorney-General of the Federation and Ministry of Justice to 'immediately set in motion, after due consultation with the Federal Executive Council, necessary processes for the Enactment of a Bill for an Act of the National Assembly for the *speedy amendment* of the relevant Sections of the Associated Gas Re-Injection Act and the Regulations made thereunder *to quickly bring them in line* with the provisions of Chapter 4 of the Constitution ...' (own emphasis). *Gbemre*, *supra* note 19, at 31.

<sup>168</sup> *Gbemre*, *supra* note 19, at 31.

EIA was a contravention of Nigerian law, which contributed to the violation of the applicants' rights to life and dignity and the right to a general satisfactory environment favorable to their development. To this end, the court order to stop the flaring of gas effectively muted the opportunity for the SPDC and the NNPC to retrospectively apply for an environmental authorization.

While its human rights and broader environmental constitutionalism relevance is clear, its explicit relationship with climate change and its potential contribution to the climate change litigation discourse are arguably less evident, especially when compared with *Thabametsi*, where climate change was a centrally explicit theme throughout. This is because climate change does not constitute a central leitmotif that lucidly and consistently percolates through the arguments of the litigating parties and the court's judgment. For example, the applicant argued that gas flaring '[c]ontributes to adverse climate change as it emits carbon dioxide and methane which causes [sic] warming of the environment, [and] pollutes ... food and water'.<sup>169</sup> The applicant also urged the court to 'hold that Gas Flaring has contributed to global warming of the Environment [sic] and depletion of the OZONE Layer [sic]'.<sup>170</sup>

In sum, while the court was predominantly concerned with and devoted the bulk of its analysis to the impact of gas flaring on the rights of the Iwherekan Community, it did so without any detailed reference to and links with climate change. Had it more explicitly engaged with climate change, this might not have changed its finding and order in the present case, but the court would have been able to set an important precedent by more explicitly indicating the links between oil extraction practices, climate change-inducing gas flaring, ecological and human vulnerability and the associated human rights abuses; all critical issues in carbon energy-rich Nigeria. As a result, the court also missed an opportunity to elaborate on how the impact of such carbon-intensive activities on human health and well-being negatively affect the adaptive capacity and resilience of people in relation to climate change, now and in future.<sup>171</sup> More disappointing perhaps, little was said about the liability and duties of petroleum companies in the context of climate change. This in our view represents a missed opportunity, early on, to have expressly confirmed on the basis of scientific evidence, the direct link between corporate driven and government-sanctioned carbon intensive activities and human rights abuses in Nigeria; a confirmation which could have gone a long way towards setting an important precedent for imposing human rights obligations not only on governments but also on corporations that contribute to climate change and associated human rights abuses.

### 4.3 Uganda

Uganda is a landlocked country<sup>172</sup> and in comparison with its tumultuous colonial and post-colonial past it is now relatively politically stable.<sup>173</sup> Less industrialized and socio-economically developed than South Africa and Nigeria, the country does have a wealth of natural resources including wetlands, forests, and rich biodiversity, which is threatened by deforestation, poaching and unsustainable land use practices.<sup>174</sup> The Ugandan economy is industry and agriculture-based with many people depending on rural subsistence farming.<sup>175</sup>

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<sup>169</sup> *Id.* at 5.

<sup>170</sup> *Id.* at 23.

<sup>171</sup> This is despite the fact that literature on the topic abounds. See, for example, Ite and Ibok, *supra* note 129, at 70-7; Elisha Jasper Dung et al., *The Effects of Gas Flaring on Crops in the Niger Delta, Nigeria*, 73 GEOJOURNAL 297 (2008).

<sup>172</sup> The Commonwealth, *Uganda* (2019), <http://thecommonwealth.org/our-member-countries/uganda>.

<sup>173</sup> The Commonwealth, *Uganda: History* (2019), <http://thecommonwealth.org/our-member-countries/uganda/history>.

<sup>174</sup> The Commonwealth, *Uganda* (2019), <http://thecommonwealth.org/our-member-countries/uganda>.

<sup>175</sup> The Commonwealth, *Uganda: Economy* (2019), <http://thecommonwealth.org/our-member-countries/uganda/economy>.

The country is self-sufficient in producing food, but access to food is unevenly distributed among the population.<sup>176</sup> Unsurprisingly, many of the reported impacts of climate change in the country are agriculture-related. They include changes in rainfall patterns, prolonged droughts, increasingly prevalent diseases like malaria in areas that were previously mosquito free, loss of soil fertility as a result of heavy rains, and an increased frequency of floods.<sup>177</sup> The overall impact of climate change in Uganda has been described as increasing poverty, famine and food insecurity, with 90 per cent of the country's natural disasters attributed to weather- and climatic factors.<sup>178</sup> Flooding, coupled with a poorly maintained sanitation infrastructure, has led to an increase in waterborne and water-related diseases such as the sporadic outbreaks of cholera in Kampala.<sup>179</sup> According to the Ugandan environmental authorities, while accurate data on pollution levels are limited, it is clear that air pollutants in Uganda originate mainly from imported second-hand vehicles, boiler emissions from industries, and the open-air burning of waste in city skips and landfills.<sup>180</sup> The transport sector is reported to account for 75 per cent of greenhouse gas emissions in the country, a contribution that is set to rise with considerably more vehicles expected to enter the transport sector in the near future.<sup>181</sup>

Uganda's first climate case was expected to commence towards the latter part of 2018, but at the time of writing, it is still pending. The *Mbabazi*-case is markedly different from its *Thabametsi* and *Gbemre* counterparts. It is unique in the sense that the plaintiffs are four minors, represented by a so-called next friend (*prochein ami*) and an NGO. The action has been brought on the plaintiffs' own behalf, on behalf of the children of Uganda (both born and unborn), and in the interest of the general public. Fairly closely resembling atmospheric trust litigation in the *Juliana* and *Urgenda* cases, it is therefore a much broader public interest matter arising from the government's alleged general inaction and failure to take measures to protect the Ugandan people from the impacts of climate change. It is accordingly neither explicitly directed at a specific carbon-intensive industry, nor at any one specific practice such as oil extraction, gas flaring or power generation that could cause climate change.

The judicial process commenced as far back as 2012 with an amendment of the defendants in 2015.<sup>182</sup> The papers (including the so-called 'Plaint' and 'Summary of Evidence') that were filed by the plaintiffs are publicly available,<sup>183</sup> and they set out the main arguments and law on the basis of which the court will have to adjudicate the dispute. While we are obviously unable to provide an analysis of the case due to its not yet having commenced, we provide a brief synopsis of the main issues raised in the preliminary papers while we attempt to foreshadow some climate change issues that might arise during adjudication, including some of the unique features of this case that are already apparent.

The case is an 'urgent action'<sup>184</sup> brought against the Attorney General of Uganda and the National Environment Management Authority in terms of articles 39, 50 and 237 of the

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<sup>176</sup> International Labour Organisation (ILO) and Uganda Bureau of Statistics (UBOS), *THE NATIONAL LABOUR FORCE AND CHILD ACTIVITIES SURVEY 2011/2012 2* (2013).

<sup>177</sup> Republic of Uganda, *National State of the Environment Report for Uganda 19* (2014), <http://nema.go.ug/sites/all/themes/nema/docs/FINAL%20NSOER%202014.pdf>.

<sup>178</sup> *Id.* at 125. Some of the extreme climatic events the country faced in recent years include the Teso floods of 2007 and 2010, the Kasese floods of 2013 and 2014, the Bududu landslides of 2010 and 2013 and the landslide in Bulambuli in 2014.

<sup>179</sup> Republic of Uganda, *supra* note 177, at 125.

<sup>180</sup> *Id.* at 73.

<sup>181</sup> *Id.*

<sup>182</sup> Initially only the Attorney General was cited as the defendant. The National Environmental Management Authority of Uganda was added in 2015.

<sup>183</sup> See Sabin Centre for Climate Change Law, *Mbabazi and Others v. The Attorney General and National Environmental Management Authority* (2019), <http://climatecasechart.com/non-us-case/mbabazi-et-al-v-attorney-general-et-al/>.

<sup>184</sup> *Mbabazi*, *supra* note 20, at para. 14.

Constitution of the Republic of Uganda, 1995 and sections 2, 3, 71 and 106 of the National Environmental Act (NEA).<sup>185</sup> Under article 39 of the Constitution ‘[E]very Ugandan has a right to a clean and healthy environment’, while article 50 provides for *locus standi* measures. Article 237(2)(b) incorporates the notion of public trusteeship, stating that ‘the Government or a local government as determined by Parliament by law, shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens’. The NEA is an extensive environmental framework law, comprising of 108 sections and three schedules. The provisions cited in support of the plaintiffs’ case are all relevant to climate change; they deal with the statutory principles of environmental management, the rights and duties in relation to a decent environment, the authority of the courts to order an environmental restoration order, and the status and relevance of international environmental law in Uganda.<sup>186</sup>

The plaintiffs’ plea in this case is not entirely coherent, nor is it backed by scientific authority or sufficient detail to support a clear case for causality and harm. No attempt is made, for example, to tie the Ugandan government’s climate-related duties in terms of its fiduciary role that is nestled in its public trusteeship duties to scientific evidence of a changing climate that is impacting on people and the environment. Yet the claim of the plaintiffs is clear, albeit broadly formulated: Uganda experiences some of the impacts of climate change (by way of violent storms, droughts, landslides and attendant harm to infrastructure),<sup>187</sup> and the government as the public trustee is failing existing and future generations by not implementing measures to reduce the impact of climate change.<sup>188</sup> The plaintiffs see the government’s inaction as flying in the face of its obligations and dictates derived from international law,<sup>189</sup> and domestic laws and policies,<sup>190</sup> while the government is said to be ignoring clear messages on climate change and its impacts emerging from ‘researchers and policy makers’.<sup>191</sup>

On the basis of the available court papers, it is also not clear what type of climate response measures the Ugandan government must take or should have taken. The following is stated in rather vague and generalized terms:<sup>192</sup>

The government has not implemented any of the major adaptation measures proposed and suggested by researchers and policy makers.

The government inaction is unsustainable and is causing a lot of harm and suffering to the people of Uganda and the situation will be worse in future putting the lives of the plaintiffs at peril through no fault of their own.

At the trial the plaintiffs shall aver, contend and prove that government inaction on climate change is responsible for loss of life, property, livelihoods and social and political discontent.

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<sup>185</sup> National Environmental Act Cap. 153.

<sup>186</sup> Sections 2, 3, 71 and 237 of the NEA respectively.

<sup>187</sup> In this regard, the plaintiffs cite and have annexed reports of a number of events published in the media in 2010 and 2011.

<sup>188</sup> *Mbabazi*, *supra* note 20, at paras. 7-12.

<sup>189</sup> Mention is made of the fact that Uganda is a signatory to the UNFCCC and that it is a party to the Kyoto Protocol, for example. The specific international law obligations of the Ugandan government are not stated. See *Mbabazi*, *supra* note 20, at para. 5.

<sup>190</sup> Mention is made of the Constitution of Uganda and the NEA alongside information taken from Uganda’s State of Environment Report 2004/2005 and other unspecified government publications. See *Mbabazi*, *supra* note 20, at paras. 4 and 5.

<sup>191</sup> *Mbabazi*, *supra* note 20, at para. 7. Also see paras. 5-6.

<sup>192</sup> *Id.* at paras. 7-9.

Instead of building a case around the specifics of activities, causal links, impacts and harm, the plaintiffs state their claims in rather abstract, broad-brush generalized terms, while relying on a mix of legal sources and policies to substantiate their submission that the government does not currently, but ought to, take action against climate change. Their intention to couch this case in human rights terms is evident from the fact that they primarily rely on the constitutional right to a healthy environment and the constitutional duty of the government to act as the public trustee.<sup>193</sup> To this end they argue that there are several climate-related duties on government, including: i) the duty to maintain natural resources and to ensure their sustainable use on behalf of all Ugandans; ii) the duty to ‘ensure that the atmosphere is free from pollution for the present and future generations’; and iii) the duty to ‘uphold the citizens [sic] right to a clean and healthy environment’.<sup>194</sup> Failure to execute these duties means ‘the plaintiffs have suffered, will continue to suffer and are likely to suffer more harm in future’.<sup>195</sup> In setting out these duties, no distinction is made between matters of climate mitigation and adaptation and no direct or consistent correlations are drawn between the different climatic events listed in the Complaint (such as flooding, drought, and landslides), the claim that constitutional rights have been violated,<sup>196</sup> or the specific orders sought from the court.

The plaintiffs’ prayers are instead many, non-specific, wide in scope and diverse, ranging from issues of climate mitigation, adaptation and adaptive capacity to matters of air pollution, compliance with international law and compensation for harm. They seek from the court (and we quote in full):<sup>197</sup>

- a) An order directing the Minister responsible for environment[al affairs] to implement measures that will reduce the impact of climate change.
- b) An order directing the Minister responsible for environmental affairs to conduct an updated carbon accounting [process] and develop a climate change mitigation (reforestation/emissions reduction) plan in accordance with the best available science, to reduce the impact of climate change.
- c) An order directing the Minister responsible to take measures to protect the plaintiffs and the children of Uganda from the effects of climate change and specifically extreme climatic conditions such as floods.
- d) An order directing government to implement international conventions, treaties and protocols on climate change.
- e) A declaration that the government holds in trust for the people of Uganda [including] present and future generations, all shared resources set out in Article 237 of the Constitution including the atmosphere.
- f) A declaration that government's failure to prevent and or curtail atmospheric pollution is a violation of the plaintiffs' right to a clean and healthy environment ...
- g) An order directing government to compensate the victims of climate change and to take appropriate measures to curtail and prevent re-occurrence.

A plain reading of these prayers offers at least two insights for now. First, the plaintiffs seem to seek judicial relief aimed at directing government to develop and implement an *entire* climate change regulatory response, which presently does not exist in Uganda. In essence, the Ugandan judiciary is asked to step in to compel the executive and legislature to fulfil their governance tasks as far as climate change is concerned. In addition, if the plaintiffs have their way in court, the Ugandan government should be subject to almost open-ended accountability

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<sup>193</sup> Constitution of Uganda, sec. 237(2)(b).

<sup>194</sup> *Mbabazi*, *supra* note 20, at paras. 12(d)-(f).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at para. 12(g).

<sup>197</sup> *Id.* at para. 15.

and liability for the present and future impacts of climate change generally on people and on the environment. Ground-breaking as such an order would be for climate change governance and justice in Uganda and elsewhere, it is unlikely that a court would grant such an order (and even where it does so, that a government would unconditionally (be able to) observe it), especially if it were to observe the *trias politica* doctrine and the potential political and economic impacts of such a far-reaching decision on any government. Courts that strive to avoid being seen as abusing their judicial powers might not be open to granting blanket relief, but they might very well be willing to offer specific remedies targeted at addressing specific injuries that have been proven. We therefore believe that the plaintiffs should be more specific in crafting their plea for relief in this instance.

Second, as a general rule it is difficult to establish juridically a causal link between activities that are alleged to cause climate change and an actually changed or changing climate, while the potential for success in climate change litigation on the plaintiffs' part is decidedly diminished in instances where this is impossible or unlikely. The prayers cited above are so wide and virtually all-encompassing that it would arguably require considerable effort and evidentiary proof to convince a court that the government has been neglecting its duties in this respect. Moreover, the vague framing of the prayers might signal a lack of information on or knowledge of climate change law, policy and science on the part of the plaintiffs, as well as insufficient legal support in assisting to frame the issues, the claims and remedies, and to base these on sound legal arguments. While the matters that have been raised by the plaintiffs and the relief sought by them seem highly relevant as far as climate change is concerned, a sound juridical basis, properly supported arguments backed by sound evidence and authority, and a thoroughly meaningful application of the law are all wanting at present. To this end, the available court papers accentuate the importance of well-drafted complaints, careful legal footwork in terms of matters of cause, effect and harm, and the meaningful use of sound climate change science, data and information.

It remains to be seen how this matter will play out in the Ugandan High Court. We suspect that much will depend on the veracity of the defendants' counter arguments on the one hand, and on the other, the plaintiffs' evidence to show that 'government inaction on climate change is responsible for loss of life, property, livelihoods and social and political discontent'.<sup>198</sup> The Plea and the Summary of Evidence suggest that the case will have a strong constitutional law flair and that this matter will be adjudicated with reference to the notions of public trusteeship and intergenerational justice as well as human rights. Cases such as *Juliana* and *Urgenda* have an orientation more or less similar to that of *Mbabazi*, and it might be useful for the Ugandan High Court and the litigating parties if they were to consult these precedents in order to guide this litigation going forward.<sup>199</sup>

## 5 Conclusion

In addition to our findings above, we conclude our discussion here with a few additional observations. First, the *Thabametsi* and *Gbemre* judgments and the pending case of *Mbabazi* confirm the existence of a very thin line between *environmental* juridical dispute resolution

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<sup>198</sup> *Mbabazi*, *supra* note 20, Summary of Evidence.

<sup>199</sup> In *Juliana v. United States*, *supra* note 21, for example, a case brought in 2015 by youth plaintiffs against the US government in the US District Court for the District of Oregon. Recently, in the South African case of *Mining and Environmental Justice Community Network of South Africa and Others v. Minister of Environmental Affairs and Others* (50779/2017) [2018] ZAGPPHC 807 (8 November 2018) the court also pronounced that a failure on the part of the South African government to take into account international environmental law duties when taking decisions on mining in protected environments, may result in a failure on the part of the state to act as trustee of the environment for the benefit of present and future generations. See para. 11.11.

and *climate change* litigation. None of the cases discussed were based on ‘pure’ climate change laws, policies or claims, although all three were to a greater or lesser extent framed in terms of climate change conflicts. This is partly because none of the three countries have any elaborate climate change laws (yet), with South Africa and Nigeria the only countries boasting climate change policies. Climate-related claims in all three cases were instead supported by means of derivative and generic laws and rights such as statutory EIA laws, energy laws and environmental and associated human rights law. This suggests that the absence of specific climate change laws in African countries should not necessarily be an insurmountable impediment to climate change litigation, since those who seek to litigate on the basis of climate change considerations could use incidental laws (and perhaps even very effectively, if the outcomes of *Thabametsi* and *Gbemre* are anything to go by). Having said that, it might also be beneficial if African states were to commence adopting explicit climate-change laws (as Kenya did in 2016 and South Africa is expected to do in the near future),<sup>200</sup> which could usefully foreground the biophysical elements of climate action on the continent, while entrenching climate change concerns far more prominently in the public and broader governance domains.<sup>201</sup> The creation of climate laws could also have practical benefits. It is, for example, quite possible that if South Africa had a climate law demanding that decisions related to the construction of coal-fired power stations also include climate concerns at the core of initiating such decisions, or that CCAs also be conducted as part of the EIA process, the Minister might not have been in a position to confirm the existing authorization by relying solely on energy security policies. Arguably, as African countries gradually start to develop climate change policies and more importantly, legislate climate change, it is likely that the trend, profile and nature, scope and reach of climate change litigation on the continent will also change.

Second, we have indicated earlier that climate change litigation, novel and potentially significant as it may be, is also beset with several challenges. In the African context a major challenge seems to be a lack of sufficient legal counsel and associated legal aid, as suggested by *Mbabazi*'s sometimes incoherent legal arguments and ambitious but juridically and scientifically unsupported prayers. It is quite possible that access to scientifically sound data and information on climate change and laws and policies surrounding it may be restricted in some parts of the continent. Relatedly, although not at issue in any of the three cases we have analyzed, the identification of relevant legal authority and sources of law, especially in the highly specialized area of climate change, may be affected by African countries' unique hybrid and pluralistic legal systems, which are often based on long-standing indigenous laws that regulate complex matters such as property law regimes, land tenure systems, rights in common property and shared natural resources.<sup>202</sup> These uniquely African approaches to natural resource law and governance that are also prevalent in other countries of the Global South, might not always be seen to be compatible with or supportive of the highly technical Northern-centric climate law paradigm, and *vice versa*.

Third, with all three cases involving organs of state as the respondents or defendants, it would seem that there is not yet an appetite for climate change-related claims directed solely at the private sector. In *Gbemre* corporate and government interests were evidently conflated as a result of the government-corporate hybrid nature of the SPDC and the NNPC, and the court in question did not shy away from finding against this joint venture. Regrettably, the court did not elaborate the non-state, corporate obligations and implications of its order. While

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<sup>200</sup> See Kenya's Climate Change Act 11 of 2016.

<sup>201</sup> See also Romy Chevallier, *Political Barriers to Climate Change Adaptation Implementation in SADC*, in OVERCOMING BARRIERS TO CLIMATE CHANGE ADAPTATION IMPLEMENTATION IN SOUTHERN AFRICA 5 (2011).

<sup>202</sup> On the interplay between environmental law and these pluralistic legal systems in general, see Michael Faure & Willemien du Plessis eds., *THE BALANCING OF INTERESTS IN ENVIRONMENTAL LAW* (2012).

it did not hesitate to deliver a finding that has specific and admittedly far-reaching implications for government, it remains unclear what the exact associated corporate liability and obligations are for non-state actors which, like Shell Nigeria in this instance, are often the main culprits causing climate change-related impacts and damage. In addition to suggesting that courts could be more adventurous in casting wider the liability net, this also points to the worrying consideration that many human rights obligations are still not enforceable against corporations when they cause environmental harm, despite legal developments auguring support for a gradual change of the law in this respect. The latter is evidenced by the Ruggie Framework of 2008, which outlines possible duties on businesses to protect and respect human rights and to remedy human rights abuses.<sup>203</sup> Until such time as climate related human rights obligations are actually enforced against corporations, a development in which courts could play a decidedly important role, the rights based-approach, potentially powerful as it may be, will have little effect against powerful and deeply vested corporate interests, their resulting climate change activities, and the associated impacts.

Fourth, it is fairly clear that the plaintiffs in all three cases seemed to prefer holding governments to account based on their (constitutionally derived) fiduciary, human rights and public trust obligations. Mirroring trends in other Global South countries, the human rights approach to climate change litigation especially seems to be in vogue in Africa, with all three cases having drawn to a greater or lesser extent on this approach. While South Africa and Uganda have constitutionally protected rights to a healthy environment, the Nigerian court was willing to enforce an environmental right as drawn from African regional human rights law. Considering that in all three instances claims were brought against governments, it would seem that, in line with trends in other countries of the Global South such as Pakistan,<sup>204</sup> climate change adjudication relates to the fight for the recognition and protection of African people's human rights, with the obligations these rights impose squarely being directed at the state. Reliance on human rights suggests that matters of climate adaptation and human vulnerability, especially those relating to vulnerable indigenous communities, are major concerns in Africa. Rights-related matters such as human health, well-being, dignity, threats to basic livelihoods, development and the full enjoyment of life remain at the forefront of concerns in the African climate change litigation arena, a trend which is likely to continue. To this end, if *Gbemre* and *Thabametsi* are anything to go by, African courts could even be more open to embracing the possibility of looking directly at climate and related human rights obligations flowing from international and African regional law. As such it is possible that international climate and human rights law is set to influence climate change litigation in African countries,<sup>205</sup> especially where courts are allowed to look to international law for judicial support and direction where domestic legal frameworks are lacking. Such a potential receptivity to and support of international human rights and climate laws must be encouraged at a time when some of the most influential global state actors, such as the United States and Australia, are turning their backs on binding international climate law obligations.

Fifth, while the rights-based approach featured in all three cases, the far more administratively oriented, proceduralist, tick box-like EIA process also featured prominently in *Thabametsi* and *Gbemre*. The appeal of ELA in the *Thabametsi* case was that, as a matter of law and policy, EIAs for coal-fired power stations must also include climate change considerations in full, and/or the consideration of extensive CCIAs, while in *Gbemre* it was argued that the failure to carry out an EIA for gas flaring contravened EIA laws. EIA in this

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<sup>203</sup> UNHRC, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5 (2008).

<sup>204</sup> *Ashgar Leghari*, *supra* note 5.

<sup>205</sup> Compare for example with the facts and applicable law in the recent New Zealand High Court case of *Thompson v. Minister of Climate Change Issues* [2017] NZHC 733.



context is generally understood to give effect to both the precautionary and preventive principles and is more specifically defined as:<sup>206</sup>

The evaluation of the effects likely to arise from a major project (or other action) significantly affecting the environment. It is a systematic process for considering possible impacts prior to a decision being taken on whether or not a proposal should be given approval to proceed. EIA requires, *inter alia*, the publication of an EIA report describing the likely significant impacts in detail. Consultation and public participation are integral to this evaluation. EIA is thus an anticipatory, participatory environmental management tool.

It would seem that tried and trusted environmental governance instruments such as EIA remain a popular remedy to try and foresee at least some of the deleterious environmental impacts and harms that may manifest now and in future as a result of carbon-intensive activities. In *Thabametsi*, the court ruled that government failed to apply its mind during the EIA and authorization stage, and that as part of the EIA process a CCIA needed to be conducted. In *Gbemre*, the point of the need for an EIA, or retrospective application of EIA law, became mute with the court's order that gas flaring be ceased, and the law be amended with speed to bring it in line with the Nigerian Constitution. Yet, considering the overall thrust of this court's decision, it probably would presumably not have hesitated also to require an EIA, or even a CCIA, to be conducted. The court in *Thabametsi* should be lauded for its broad construal of 'environmental impact' also to include climate impacts that specifically require assessment by means of a CCIA, a procedure that is still not explicitly required in terms of South African law. In doing so, the court was willing and able to innovatively venture beyond legislative limitations by deriving the existence of such an obligation from the more general EIA legal framework. While the court, arguably correctly so, stopped far short of stepping in as legislature to change the EIA law itself, such a creative interpretation and application of the law in a way that also encapsulates climate change concerns is both novel and most probably what would be required by courts (and litigating parties) in future where explicit climate laws and policies do not exist or where they do not explicitly require EIAs or CCIAs. That said, current critique also cautions against the effectiveness of EIA, which critique by implication also extends to CCIAs; novel and innovative as the latter may be.<sup>207</sup> EIA is a mere decision-making tool that feeds into but does not necessarily always determine the outcome of executive decisions: '[a]t the project level, the effectiveness of EIA is claimed to depend to a large extent on the actors involved, their interests and power positions, and the extent to which the most powerful decision-makers are open to environmental values and to revising their original plans'.<sup>208</sup> As a case in point, even though a CIAA was eventually conducted in *Thabametsi* as a result of the court's intervention, and despite the CIAA's evidence of potentially far-reaching climate change impacts resulting from the proposed power station, the Minister authorized the activity with little regard to the findings and recommendations of the CIAA. In fact, she seemed to have ticked the legally required EIA box and then proceeded to justify building the power station based on non-binding pro-growth energy security policies. Given the limitations of proceduralism, we suggest that it would be unwise to predominantly rely on EIA or CIAA as the silver bullet for all climate change impacts emanating from industry.

Finally, the concept of *trias politica* and its implied notion of judicial restraint observably influences, justifiably so in the context of the rule of law and the notion of the constitutional

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<sup>206</sup> Stephen Jay et al., *Environmental Impact Assessment: Retrospect and Prospect*, 27 EIA REVIEW 287, 287-8 (2007).

<sup>207</sup> *Id.* at 287-300; Jos Arts et al., *The Effectiveness of EIA as an Instrument for Environmental Governance: Reflecting on 25 Years of EIA Practice in the Netherlands and the UK*, 14 JEAPM 1 (2012).

<sup>208</sup> Arts et al., *supra* note 207, at 3.

state or *Rechtsstaat*, the outcome and impact of climate change litigation. The courts in *Thabametsi* and *Gbemre* were willing to criticize the legislative and executive authorities for their failures in ensuring proper climate governance and to issue remedial measures to address these failures. In *Thabametsi*, the court pointed towards *lacunae* in the EIA regime, for example, but it arguably could have issued a more effective remedy that would have compelled the executive authority to change its initial authorization decision, while not infringing the separation of powers. The court in *Gbemre* followed an altogether more deliberately intrusive approach by finding the authorization of gas flaring under certain circumstances in terms of legislation to be unconstitutional. As a general observation, due to the limitations created by the separation of powers, the judiciary will often be reactive in how it rules on matters of climate change, while courts might not want to reform and are not always allowed (or even necessarily equipped) to reform the law or to make or change executive decisions related to everyday governance. They can, however, be bold in their pursuit of corrective justice in the face of climate change; an exciting possibility which in future might significantly bear on and influence modes and degrees of judicial oversight and judicial creativity.

The impacts of climate change in Africa and on its people are numerous, diverse and distinctive, with the region expected 'to be affected more severely than other regions'.<sup>209</sup> The most recent IPCC Special Report titled *Global Warming of 1.5°C* confirms that Africa remains among the regions of the world projected to suffer most from the impacts of climate change while being the least able to adapt to its impacts and to bolster the resilience of its people and natural resource-based support systems.<sup>210</sup> Predictably, these impacts emerge as a result of the ever-present binary inherent in the human development dilemma: the need for economic growth to improve resilience and adaptive capacity vis-à-vis the need to halt economic growth to limit environmental harm and to mitigate climate change. The pro-growth agenda on the African continent, as is the case elsewhere in the world, predominantly focuses on 'maximising the value of economic, environmental and social resources within a neo-liberal approach'.<sup>211</sup> This is vividly explicated by the Minister of Environmental Affairs' decision in the *Thabametsi* case to solely rely on energy security policies that promote economic growth instead of also considering climate and environmental protection policies as she was constitutionally and statutorily obliged to do in the first place. It is within this context that the phenomenon of climate change and the continuing need for economic development remain contentious issues and it is the many tensions that arise from this dilemma that will likely fuel climate conflicts on the continent, some of which will have to be resolved through litigation. Climate change litigation in Africa has already commenced, however tentatively, and we predict that it might become more frequent in future as people increasingly realize that the socio-ecological impacts of climate change can be influenced by courts in alternative, potentially far more effective, and sustainable ways.

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<sup>209</sup> Collier, Conway and Venables, *supra* note 14, at 337.

<sup>210</sup> Intergovernmental Panel on Climate Change, *Special Report on 'Global Warming of 1.5°C'* (2018), [https://www.ipcc.ch/pdf/special-reports/sr15/sr15\\_headline\\_statements.pdf](https://www.ipcc.ch/pdf/special-reports/sr15/sr15_headline_statements.pdf).

<sup>211</sup> Harvey Leck et al., *Social and Cultural Barriers to Adaptation Implementation: The Case of South Africa*, in OVERCOMING BARRIERS TO CLIMATE CHANGE ADAPTATION IMPLEMENTATION IN SOUTHERN AFRICA 66 (2011).