

# PUTTING AFRICA ON THE STAND: A BIRD'S EYE VIEW OF CLIMATE CHANGE LITIGATION ON THE CONTINENT

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*Although climate change litigation is rapidly increasing worldwide, and despite Africa being one region 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 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 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 emerging the world over, including a brief assessment of the climate change conflicts usually litigated, and the challenges and benefits associated with this specialized form of litigation. The Article then discusses the unique nature of climate change impacts in Africa and assesses how this could shape the 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.*

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## I. INTRODUCTION

Climate change litigation is a relatively recent addition to the broader portfolio of environmental judicial dispute resolution. However, it is a valuable 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 that also boasts the highest number of climate change cases.<sup>2</sup> Outside of the United States, the bulk of climate change litigation is 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*<sup>4</sup> and its recent appeal, decided in the Netherlands.<sup>5</sup> By comparison, fewer (although often ground-breaking)<sup>6</sup> cases have been litigated in developing countries such as India, Micronesia, Philippines, Brazil, Colombia, Ecuador, and Pakistan.<sup>7</sup> Lagging substantially behind these and other regions in the world is Africa, which 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

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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 (William C. G. Burns & Hari M. Osofsky eds., 2009); see also Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 *WIREs CLIMATE CHANGE* 1, 1 (May/June 2019).

<sup>2</sup> See generally Michael B. Gerrard & Meredith Wilensky, *The Role of the National Courts in GHG Emissions Reductions*, in *CLIMATE CHANGE LAW: VOLUME I* 359, 359–71 (Daniel A. Farber & Marjan Peeters eds., 2016). See also Julia Schatz, *Climate Change Litigation in Canada and the USA*, 18 *REV. EUR., COMP. INT’L ENVTL. L.* 129, 129 (2009); Joana Setzer & Rebecca Byrnes, *GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2019 SNAPSHOT*, 1 (July 2019), <https://perma.cc/QNV8-HSLB>.

<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, 151 (2015).

<sup>4</sup> C/09/456689, DH, Judgment, 4.83 (Hague D. Ct., June 24, 2015) (The Hague District Court found that the state has a duty to embark on climate change mitigation measures “[d]ue to the severity of the consequences of climate change and the great risk of hazardous climate change occurring”).

<sup>5</sup> *State of the Netherlands v. Urgenda Found.*, 200.178.245/01, Ruling (Hague Ct. of Appeal, Oct. 9, 2018).

<sup>6</sup> See generally Ashgar Leghari v. Federation of Pakistan, W.P. No. 25501/2015, Climate Change Order, (Lahore High Court, Sept. 4, 2015).

<sup>7</sup> See *Non-U.S. Jurisdiction*, SABIN CTR. FOR CLIMATE CHANGE L., <https://perma.cc/CQE8-9FCB> (last visited Mar. 12, 2020).

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. This void is especially stark when 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>8</sup>

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. The lack of the rule of law, judicial independence, and access to courts have led to numerous and legitimate concerns in some African countries; however, many litigants and domestic courts in Africa have been innovatively engaging with broader environmental and related socio-economic disputes over the years—at times, with trailblazing and precedent-setting effect.<sup>9</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, a regional right to a healthy environment and related rights in the African Charter on Human and Peoples’ Rights of 1981 (ACHPR).<sup>10</sup> According to the Communication, the military

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<sup>8</sup> Setzer & Vanhala, *supra* note 1, at 5. However, there are examples suggesting that more focused scholarship is emerging. See, e.g., Jean Claude N. Ashukem, *Setting the Scene for Climate Change Litigation in South Africa: Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others*, 13 L. ENVTL & DEV. J. 37, 37 (2017); Tracy-Lynn Humby, *The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs*, 30 J. ENVTL L. 145, 146 (2018); Jaap Spier, *Legal Strategies to Come to Grips with Climate Change*, in CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE, VOLUME 1: LEGAL RESPONSES AND GLOBAL RESPONSIBILITY 125 (Oliver C. Ruppel et al. eds., 2013).

<sup>9</sup> See Louis J. Kotzé & Alexander Paterson, THE ROLE OF JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 451 (Louis J. Kotzé & Alexander Paterson eds., 2009).

<sup>10</sup> Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria, Communication 155/96, African Commission on Human & Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 52 (May 27, 2002) [hereinafter Afr. Comm’n H.P.R. 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. 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 consequent 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 ACHPR ultimately found that the Nigerian government had failed to uphold the many human rights duties it derives from the ACHPR. See 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, 93–115 (Stephen J. Turner et al. eds., 2019).

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).<sup>11</sup> A significant hallmark of the Communication is the ACommHPR's elaboration of a range of qualitative standards of human rights obligations 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 fulfill these rights".<sup>12</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 based on the judiciary's creative engagement with environmental and related socio-economic rights issues.<sup>13</sup>

Civil society activism in some African countries is also increasingly 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>14</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 Petroleum Company in the SERAC Communication.<sup>15</sup> Given this trend, and considering that civil society actors often champion climate change conflicts and their litigation, one would have expected a much higher incidence of and frequency in climate change litigation on the African continent.

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>16</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 be litigated in court,

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<sup>11</sup> Morné van der Linde & Lirette 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 AFR. HUM. RTS. L. J. 167, 177 (2003).

<sup>12</sup> Afr. Comm'n H.P.R. 155/96 (2002), ¶ 44.

<sup>13</sup> See Louis J. Kotzé & Anél du Plessis, *Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa*, 3 J. CT. INNOVATION 157, 157 (2010); see generally 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 L. DEMOCRACY & DEV. 1, 1 (2015).

<sup>14</sup> See generally Thomas Princen & Matthias Finger, *Introduction*, in ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL (1994) (referencing the many publications in this respect).

<sup>15</sup> Van der Linde & Louw, *supra* note 11, at 168, 177.

<sup>16</sup> Paul Collier et al., *Climate Change and Africa*, 24 OXFORD REV. ECON. POL'Y 337, 337 (2008).

will emerge much more frequently than is the case. In response to climate change on the continent, a considerable number of African countries has ratified the Paris Climate Agreement,<sup>17</sup> and numerous African countries have developed environmental and climate change policies and laws,<sup>18</sup> suggesting that at least some public and private sector legal obligations do exist regarding climate change. As is the case elsewhere around the globe, it is highly unlikely these obligations are always diligently observed in their entirety by everyone, everywhere, thus presumably providing the legal foundation, including 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 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. We instead aim 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 in Part II, immediately below, is set against a characterization of current trends in and forms of climate change litigation emerging the world over. Part II also includes a brief assessment of the climate change conflicts usually litigated, and the challenges and advantages associated with this specialized form of litigation.

Part III of this Article then discusses the unique nature of climate change impacts in Africa and assesses how this may shape the litigable climate change conflicts that might arise on the continent.

Part IV analyzes in some detail three climate cases in South Africa, Nigeria, and Uganda. Absent generally accepted criteria that determine what a climate change case is, we focus on the three cases included in the authoritative Sabin Center for Climate Change Law database and that have been recognized in the literature as climate change cases.<sup>19</sup> This includes two cases already decided: in South Africa, *Earthlife Africa Johannesburg v. Minister of Environmental Affairs* (hereinafter *Thabametsi*);<sup>20</sup> and in Nigeria, *Gbemre v. Shell Petroleum Development Co. Nigeria Ltd.* (hereinafter *Gbemre*).<sup>21</sup> In Uganda, the case of *Mbabazi v. The Attorney General & National Environmental Management Authority* (hereinafter *Mbabazi*)<sup>22</sup> is still in its preparatory phase, and

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<sup>17</sup> *List of Parties that Signed the Paris Agreement on 22 April*, U.N. <https://perma.cc/5UK5-9JMK> (last visited Mar. 18, 2020).

<sup>18</sup> MICHAL NACHMANY ET AL., *THE GLOBE CLIMATE LEGISLATION STUDY: A REVIEW OF CLIMATE CHANGE LEGISLATION IN 66 COUNTRIES* (4th ed. 2014).

<sup>19</sup> See SABIN CTR. FOR CLIMATE CHANGE L., *supra* note 7.

<sup>20</sup> Unreported Case No. 65662/16 [Gauteng High Ct. Pretoria] Mar. 8, 2017, (S. Afr.) [hereinafter *Thabametsi*].

<sup>21</sup> Suit No. FHC/CS/B/153/2005 [Federal High Court of Nigeria] Nov. 14, 2005, (Nigeria) [hereinafter *Gbemre*].

<sup>22</sup> Civil Suit No. 283 of 2012 [High Court of Uganda Holden at Kampala] Aug. 28, 2015 (Uganda) [hereinafter *Mbabazi*].

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 emerging elsewhere in the world.<sup>23</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>24</sup> Therefore, despite it not having been heard yet, we provide brief thoughts on *Mbabazi* 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 if these are evident, Part V concludes the discussion by employing 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 II. In the final instance, the discussion critically reflects on the state of and prospects for climate change litigation on the continent.

## II. LITIGATING CLIMATE CHANGE: A SYNOPSIS

The legal dimensions of climate change took shape in the 1990s with the worldwide, if not universal, adoption of the United Nations Framework Convention on Climate Change in 1992 (UNFCCC),<sup>25</sup> and in 1997, the Kyoto Protocol.<sup>26</sup> The adoption of the Paris Climate Agreement<sup>27</sup> in 2015 further solidified the central role of law in global climate mitigation, adaptation, and resilience governance. In that same year, climate change emerged as one of seventeen 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>28</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

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<sup>23</sup> See generally *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020). Regrettably, on January 17, 2020, the United States Court of Appeals for the Ninth Circuit quashed the case by ruling that the plaintiffs did not have the necessary standing.

<sup>24</sup> Setzer & Vanhala, *supra* note 1, at 12.

<sup>25</sup> United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

<sup>26</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.

<sup>27</sup> Paris Agreement to the United Nations Framework Convention on Climate Change [UNFCCC], Dec. 12, 2015, T.I.A.S. No. 16-1104.

<sup>28</sup> For a broader discussion of environmental and related climate matters and the SDGs, see generally, SUSTAINABLE DEVELOPMENT GOALS: LAW, THEORY AND IMPLEMENTATION (Duncan French & Louis J. Kotzé eds., 2018).

Union, to more rhetorically ambitious but non-committal and far less impactful policy statements and strategic guidelines, such as in the African Union.<sup>29</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>30</sup> “the volume of legislation, private standard setting, judicial decisions and legal scholarship has now become almost overwhelming.”<sup>31</sup> Collectively, this burgeoning transnational normative climate change framework has recognized new rights and created new private and public actor duties for governing climate change within and beyond state borders. Where rights and duties are created—especially in a relatively novel regulatory domain such as climate change—the resolution of legal disputes arising from applying laws, and the enforcement of rights and duties emanating from them, are certain 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>32</sup> including its myriad societal impacts, is set to cause a wide range of complex disputes, many that will ultimately 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>33</sup>

To define the scope, Peel says climate change litigation seeks “redress for damage arising from human activities said to be causing global

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<sup>29</sup> See Daniel M. Pallangyo & Werner Scholtz, *Africa and Climate Change: Legal Perspectives from the AU*, in REGIONAL ENVIRONMENTAL LAW: TRANSREGIONAL COMPARATIVE LESSONS IN PURSUIT OF SUSTAINABLE DEVELOPMENT 51, 51–71 (Werner Scholtz & Jonathan Verschuuren eds., 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, 338, 338–62 (Werner Scholtz & Jonathan Verschuuren eds., 2015).

<sup>30</sup> NACHMANY ET AL., *supra* note 18.

<sup>31</sup> Daniel A. Farber & Marjan Peeters, *Introduction to Volume 1*, in CLIMATE CHANGE LAW: VOLUME I, at 1 (Daniel A. Farber & Marjan Peeters eds., 2016).

<sup>32</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>33</sup> Elizabeth Fisher & Eloise Scotford, *Climate Change Adjudication: The Need to Foster Legal Capacity: An Editorial Comment*, 28 J. ENVTL. L., 2016, at 3–4.

climate change[.]”<sup>34</sup> We agree, in part, with such a characterization and would caution against broadening the climate change litigation subject matter too much; for example, one that would 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—accordingly, 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 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 the consequences of climate change providing the legal means, properly backed by judicial authority, to deter actions and inaction that could lead to damage, and 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, climate change litigation could 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 focused view of climate change litigation is contextualized further by the many types of conflicts that arise from climate change concerns susceptible to litigation. These concern 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 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>35</sup> Where climate laws do exist, climate change litigation usually focuses on challenging the validity of these laws and their interpretation, application, and enforcement.<sup>36</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>37</sup> while forcing legislators and policymakers through a

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<sup>34</sup> Jacqueline Peel, *The Role of Climate Change Litigation in Australia's Response to Global Warming*, 24 ENVTL. PLAN. & L.J. 90, 91 (2007).

<sup>35</sup> David Browne, *Causation and Damages in Climate Litigation: Evaluating the Role of Human Rights Law*, 6 IRISH Y.B. INT'L L., 2011, at 49, 51 (2011).

<sup>36</sup> UNEP, *The Status of Climate Change Litigation: A Global Review* 4, 6 (2017).

<sup>37</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 Stern, *State Action as Political Voice in Climate Change Policy: A Case Study of the Minnesota Environmental Cost Valuation Regulation*,

process of judicial oversight to be more ambitious and thorough in their approaches to climate change, and thus, all at once, endeavoring to fill governance gaps.<sup>38</sup> To this end, climate change litigation is an essential mechanism in what has been termed “climate change lawfare,”<sup>39</sup> 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>40</sup> Importantly, all of the foregoing were underlying motivations for litigation in the three African cases, as we shall see below.

Relatedly, following the failure of some governments to implement the international climate law regime, and their reluctance to develop domestic legal responses that act in tandem with this regime, various state and non-state actors increasingly turn to the judiciary for solutions to address global climate change:<sup>41</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>42</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 “glocalization,”<sup>43</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>44</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 available to them and through which they could instigate regulatory

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in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 31, 46–47 (William C.G. Burns & Hari M. Osofsky eds., 2009).

<sup>38</sup> UNEP, *supra* note 36, at 6.

<sup>39</sup> Siri Gloppen & Asuncion Lera St. Claire, *Climate Change Lawfare*, 79 SOCIAL RES. 899, 899 (2012) (internal quotation marks omitted).

<sup>40</sup> *Id.* at 907.

<sup>41</sup> Burns & Osofsky, *supra* note 1, at 20.

<sup>42</sup> Lord Carnwath JSC, *Climate Change Adjudication After Paris: A Reflection*, 28 J. ENVTL. L. 5, 9 (2016).

<sup>43</sup> See, e.g., Zygmunt Bauman, *On Glocalization: Or Globalization for Some, Localization for Some Others*, 54 THESIS ELEVEN 37, 37–49 (1998).

<sup>44</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, 72–98 (William C.G. Burns & Hari M. Osofsky eds., 2009).

change in a bottom-up way.<sup>45</sup> At the same time, being part of the *trias politica*, courts are often well-positioned to remind the other two branches of government (i.e., the executive and legislative authorities) of their international climate law obligations or 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.

Besides formally providing non-governmental actors the opportunity to have a say in, and, we hope, a meaningful impact on, climate change governance in a country, climate change litigation also fulfills a valuable informal socio-legal role, notably if courts provide an independent, non-political public forum to voice concerns and to have claims heard and determined<sup>46</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 to 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>47</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>48</sup> The courts are often the only available institutional means through which civil society may influence climate change governance. Unsurprisingly, in all three cases we analyze below, the applicants were concerned civil society actors (also acting on behalf of others unable to represent themselves).

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<sup>45</sup> Helmut Philipp 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 (Duncan French & Louis J. Kotzé eds., 2018).

<sup>46</sup> Brian J. Preston, *The Contribution of the Courts in Tackling Climate Change*, 28 J. ENVTL. L. 11, 12 (2016).

<sup>47</sup> Hari M. Osofsky, *Conclusion: Adjudicating Climate Change Across Scales*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 375, 383 (William C.G. Burns & Hari M. Osofsky eds., 2009).

<sup>48</sup> Jean Claude N. Ashukem, *A Rights-Based Approach to Foreign Agro-Investment Governance in Cameroon, Uganda and South Africa* (2016) (LLD thesis, North-West University); Caiphos B. 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).

Climate change litigation could take many forms depending, among others, on the legal system where it occurs, on the particular conflict, on the parties, and on whether it is a federal or a unitary state where the case is heard. For example, in the United States, litigation encompasses federal statutory and constitutional claims, state law claims, and usually consists of common law tortious actions where claimants sue based on negligence or nuisance.<sup>49</sup> Such actions often extend beyond private persons *inter partes* to the state, where some argue that the state has written or unwritten duties to protect its citizens.<sup>50</sup> In other instances, litigation could be based on environmental, administrative, or procedural law actions focusing on environmental impact assessments (EIAs), permitting, or planning laws.<sup>51</sup>

More recently, however, climate change and litigation have become central concerns in the human rights paradigm. In 2008, the United Nations Human Rights Council recognized that “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>52</sup> It is, therefore, no surprise that in some parts of the world—notably in countries of the Global South where courts often rely directly on bills of rights—climate change litigation frequently involves a rights-based approach and manifests as constitutional claims.<sup>53</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 significant contributors to climate change,<sup>54</sup> a rights-based approach is increasingly seen as providing several benefits. This is especially so if climate change litigation framed in the language of rights “could offer minimum rights thresholds and strengthen the adaptive and preventive mechanisms available, particularly for those who are more vulnerable and marginalised.”<sup>55</sup> Human rights can also “invoke a sense of profundity

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<sup>49</sup> SABIN CTR. FOR CLIMATE CHANGE LAW, *U.S. Climate Change Litigation*, CLIMATE CASE CHART, <https://perma.cc/6R9Y-JHJJ> (last visited July 15, 2020).

<sup>50</sup> See, e.g., Kale Williams, ‘Climate Change Kids’ Bring State Lawsuit to Oregon Supreme Court, OREGONIAN (Nov. 13, 2019), <https://perma.cc/L38C-FGTY>.

<sup>51</sup> An approach followed to a significant extent in Australia in the context of EIA approvals for new coal mines. See Lesley K. McAllister, *Litigating Climate Change at the Coal Mine*, in CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 48, 48–71 (William C.G. Burns & Hari M. Osofsky eds., 2009).

<sup>52</sup> Human Rights Council Res. 7/23, U.N. Doc. (2008), <https://perma.cc/CM4A-W73C>.

<sup>53</sup> See, e.g., *Ashgar Leghari*, W.P. No. 25501/2015, Climate Change Order, (Lahore High Court, Sept. 4, 2015). See also Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT’L ENVTL L., Dec. 2017, at 1.

<sup>54</sup> Marilyn Averill, *Linking Climate Litigation and Human Rights*, 18 REV. EUR., COMP. INT’L ENVTL L. 139, 141 (2009).

<sup>55</sup> Browne, *supra* note 35, at 49.

and moral weight that comports with the enormity and gravity of the climate change problem.”<sup>56</sup>

As a matter of corrective justice, climate change litigation could also 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: “Climate 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>57</sup> Both of these approaches were evident in *Thabametsi* and *Gbemre*.<sup>58</sup>

Although not an issue in our present case analysis, private citizens also might 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 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>59</sup>

Litigating on the back of the property rights-based public trust doctrine in climate cases is also an emerging trend wherein claimants can argue that certain natural resources belong to the public and should be protected by the state against the impacts of climate change.<sup>60</sup> Atmospheric or climate trust litigation, as categorized in the United States, applies 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.<sup>61</sup> Where they do not, they could be forced to do so through litigious means and the

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<sup>56</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 173, 174 (William C.G. Burns & Hari M. Osofsky eds., 2009).

<sup>57</sup> BUS. & HUMAN RIGHTS RES. CTR., TURNING UP THE HEAT: CORPORATE LEGAL ACCOUNTABILITY FOR CLIMATE CHANGE 4 (2018).

<sup>58</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 1 (Gauteng High Ct. Pretoria, Mar. 8, 2017); *Gbemre*, Suit No. FHC/CS/B/153/2005 at ¶¶ 1–2 [Federal High Court of Nigeria] Nov. 14, 2005 (Nigeria).

<sup>59</sup> See generally Jeffrey W. Stempel, *Insurance and Climate Change Litigation*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 230, 230–51 (William C.G. Burns & Hari M. Osofsky eds., 2009).

<sup>60</sup> Anél du Plessis, *Climate Change, Public Trusteeship and the Tomorrows of the Unborn*, 31 S. AFR. J. HUM. RTS. 269, 269 (2015).

<sup>61</sup> See Ipshita Mukherjee, *Atmospheric Trust Litigation—Paving the Way for a Fossil-Fuel Free World*, STANFORD LAW SCH. BLOG (July 5, 2017), <https://perma.cc/FWC9-P5WR> (“Atmospheric Trust Litigation is a macro-approach that considers the atmosphere to be held in trust for the public.”).

authority of the courts;<sup>62</sup> with the courts well-positioned, given the *trias politica* doctrine and their powers of judicial oversight “to define these duties by tying them directly to scientists’ concrete prescription for carbon reduction.”<sup>63</sup> The *Mbabazi* case we discuss below is likely to be based largely on this climate trust litigation approach, and it might well closely resemble the *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>64</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 drawbacks and difficulties associated with climate change litigation. As Browne points out, because of the multi-faceted, diffuse multi-scalar impacts of climate change, identifying appropriate plaintiffs and defendants and a proper judicial forum could be a complicated matter.<sup>65</sup> So, too, is that climate change damage is realized over very different time and spatial scales, rendering it an inter-generational concern unrestricted by geographical borders. With specific reference to 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 recognise 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>66</sup>

Relatedly, establishing proximate causation is a significant hurdle in the face of scientific uncertainty, and allocating culpability to actors for historic or non-point contributions to climate change.<sup>67</sup> Finally, in

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<sup>62</sup> For example, a Pennsylvania Supreme Court decision relied on the public trust doctrine to hold a law promoting fracking to violate a state constitutional right to a healthful environment for present and future generations. *Robinson Township v. Commonwealth*, 83 A.3d 901, 957, 959 (2013) (“Within the public trust paradigm . . . the beneficiaries of the trust are ‘all the people’ of Pennsylvania, including generations yet to come.”).

<sup>63</sup> Mary Christina Wood, *Atmospheric Trust Litigation*, in *ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES* 99, 109–10 (William C.G. Burns & Hari M. Osofsky eds., 2009).

<sup>64</sup> See generally William C.G. Burns & Hari M. Osofsky, *supra* note 1, at 1 (discussing how climate change litigation has transformed into a major force in transnational regulatory governance of greenhouse gas emission).

<sup>65</sup> Browne, *supra* note 35, at 52.

<sup>66</sup> Benjamin J. Richardson, *Doing Time—The Temporalities of Environmental Law*, in *ENVIRONMENTAL LAW AND GOVERNANCE FOR THE ANTHROPOCENE* 56 (Louis J. Kotzé ed., 2017).

<sup>67</sup> See Hari M. Osofsky, *The Intersection of Scale, Science, and Law in Massachusetts v. EPA*, in *ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES* 129, 136–37 (William C.G. Burns & Hari M. Osofsky eds., 2009).

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>68</sup> Throughout the discussion below, we highlight some of these challenges where they are apparent in the three African cases.

### III. LITIGABLE CLIMATE CHANGE CONFLICTS IN AFRICA

The context within which litigable climate change conflicts arise in Africa is multifaceted, with several issues usually associated with climate conflicts 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 on Climate Change (IPCC) in its Fifth Assessment Report.<sup>69</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.<sup>70</sup> We explore below some 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,<sup>71</sup> especially coal and oil, which are significant contributors to climate change. African governments and energy corporations are determined to exploit these resources in the name of economic progress, by allowing these resources to be exploited by foreign governments and multinational corporations in exchange for money, development aid, and other incentives.<sup>72</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>73</sup> a consideration that

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<sup>68</sup> See Giulio Corsi, *A Bottom-Up Approach to Climate Governance: The New Wave of Climate Change Litigation*, 57 INITIATIVE CLIMATE CHANGE POL'Y GOVERNANCE (ICCG) 2–3 (Oct. 2017).

<sup>69</sup> Isabelle Niang et al., *Africa*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, PART B: REGIONAL ASPECTS, WORKING GROUP II CONTRIBUTION TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1199, 1237–38 (Vicente R. Barros et al. eds., 2014).

<sup>70</sup> *Id.*

<sup>71</sup> PATRICK BOND, LOOTING AFRICA: THE ECONOMICS OF EXPLOITATION 58 (2006).

<sup>72</sup> See *id.* at 75–76.

<sup>73</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.”

suggests Africa plays a critical role in the global carbon cycle.<sup>74</sup> The continued use of fossil fuels to drive unsustainable socio-economic development is likely to cause 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.<sup>75</sup> 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 been exposed by the ACommHPR in the SERAC Communication, mentioned above,<sup>76</sup> and they are glaringly evident in *Gbemre*, as we discuss below.<sup>77</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 utilizing an almost exclusive reliance on carbon-intensive fossil fuel resources, notably oil and coal.<sup>78</sup> While there are tentative efforts to expand the renewable energy sector, especially in South Africa through solar power projects, the abundant availability of cheap coal and oil remains a significant consideration in, and a key driver of, energy security promotion policies developing power generation infrastructure.<sup>79</sup> Despite scientific evidence confirming the devastating climate impacts of fossil fuel-based power generation, especially in developing countries often unable to implement the best available (but often prohibitively) expensive power generation technologies with the least climate impacts,<sup>80</sup> African governments, like other governments in the Global South, generally take a short-term view,<sup>81</sup> as evidenced by their enthusiastic support of expanding the fossil fuel-based energy sector across the continent.<sup>82</sup> As a case in point, the South African government's unequivocal support to construct a coal-fired power station, despite damning evidence of its predicted climate and broader environmental impacts, was at the heart of the *Thabametsi* dispute.<sup>83</sup>

The growing phenomenon of land-grabbing (a result of the convergence between the global food, energy, financial, and climate

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Christopher A. Williams et al., *Africa and the Global Carbon Cycle*, 2 CARBON BALANCE MGMT., Mar. 2007, at 1, 10.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 9.

<sup>76</sup> Afr. Comm'n H.P.R. 155/96 (2002), ¶¶ 1–2.

<sup>77</sup> *Gbemre*, [2005] Suit No. FHC/CS/B/153/2005, ¶¶ 7–14 [Federal High Court of Nigeria] Nov. 14, 2005, (Nigeria).

<sup>78</sup> Anna Pegels, *Renewable Energy in South Africa: Potentials, Barriers and Options for Support*, 38 ENERGY POL'Y 4945, 4947 (2010); *Nigeria's Coal Deposits Identified*, AFR. BUS. INSIGHT (Jul. 2, 2010), <https://perma.cc/8ATK-3RCL>.

<sup>79</sup> See Pegels, *supra* note 78, at 4948.

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

<sup>81</sup> See James P. Dorian, Herman T. Franssen & Dale R. Simbeck, *Global Challenges in Energy*, 34 ENERGY POL'Y 1984, 1985 (2006).

<sup>82</sup> *Id.*

<sup>83</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 1 (Gauteng High Ct. Pretoria, Mar. 8 2017).

crises)<sup>84</sup> is another related concern, where Africans are dispossessed of their land for expanding climate change-related activities by foreign countries and multinational corporations on the continent.<sup>85</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 forced (ironically, through their obligations emanating from the prevailing international climate law regime) to diversify their energy mix away from dirty carbon resources.<sup>86</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 contributing to environmental destruction in developing countries, while relocating responsibility for their actions, and the associated conflicts that might arise from these actions, to a continent far removed from their back yards.<sup>87</sup> This expansion 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>88</sup> Another concern is the deliberate displacement (and often killing) of people living in areas rich in fossil fuels that both governments and petroleum corporations aim to develop.<sup>89</sup> In the SERAC Communication, for example, it was alleged that the Nigerian Government-Shell Petroleum Consortium (the same entity also the respondent in *Gbemre*), “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”<sup>90</sup> and, more worryingly, that “Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes”<sup>91</sup> in the oil-rich area while “unarmed villagers running from the troops were shot from behind.”<sup>92</sup>

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<sup>84</sup> Saturnino M. Borrás et al., *Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction*, 38 J. PEASANT STUD. 209, 209 (2011).

<sup>85</sup> Ruth Hall, *Land Grabbing in Southern Africa: The Many Faces of the Investor Rush*, 38 REV. AFR. POL. ECON. 193, 193 (2011). For a list of foreign private and government investors in developing countries, see Joachim von Braun & Ruth Meinzen-Dick, “*Land Grabbing*” by Foreign Investors in Developing Countries: Risks and Opportunities, 13 INT’L FOOD POL’Y RES. INST. (IFPRI) POL’Y BRIEF (Apr. 2009), <https://perma.cc/D8HJ-AWUS>.

<sup>86</sup> Yi Yang et al., *Replacing Gasoline with Corn Ethanol Results in Significant Environmental Problem-Shifting*, 46 ENVTL. SCI. TECH. 3671, 3671 (2012); Ashlie Delshad et al., *Public Attitudes Toward Political and Technological Options for Biofuels*, 38 ENERGY POL’Y 3414, 3415 (2010).

<sup>87</sup> Ashukem, *supra* note 48, at 87–88.

<sup>88</sup> Jonathan Verschuuren, *The Paris Agreement on Climate Change: Agriculture and Food Security*, 7 EUR. J. RISK REG. 54, 55 (2016).

<sup>89</sup> See *African Development Report 2012: Towards Green Growth in Africa*, AFR. DEV. BANK GROUP 81 (2013).

<sup>90</sup> Afr. Comm’n H.P.R. 155/96 (2002), ¶ 2.

<sup>91</sup> *Id.* ¶ 7.

<sup>92</sup> *Id.* ¶ 8.

Such practices especially affect ethnic minorities, indigenous people, and other vulnerable groups such as women and children.<sup>93</sup> These groups depend closely on natural resources and will probably suffer most from the impacts of climate change, and the exploitative practices occasioned by opportunistic and predatory government and corporate practices, including those practices related to agriculture, land-grabbing, and forced removals.<sup>94</sup> Litigable climate conflicts might well arise in the foregoing context between, for example, dispossessed landowners, farmers, governments, and corporations.

While not a consideration in the three African cases we investigate below, besides 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 for financial remuneration as a *quid pro quo*.<sup>95</sup> For example, in the infamous 2006 Trafigura incident, a ship chartered by the Singaporean-based oil and commodity shipping company, Trafigura Beheer BV, offloaded toxic waste in the Ivory Coast city of Abidjan against payment to a local waste handling company.<sup>96</sup> The incident, wherein several people died because of exposure to the toxic waste and thousands of others were seriously injured,<sup>97</sup> 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-based 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 vulnerable rural people in Africa, do not often have the capacity to effectively adapt to or tolerate erratic climatic and environmental conditions and disruptions because of climate change.<sup>98</sup> In the face of increased and highly unpredictable floods in some parts of the continent,<sup>99</sup> severe droughts in others,<sup>100</sup> and increased incidence of climate-related diseases that threaten livestock

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<sup>93</sup> Browne, *supra* note 35, at 50.

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., Liesbeth 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. L. 283, 284–85 (2008).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 284.

<sup>98</sup> See generally Niang et al., *supra* note 69, at 1199–1265.

<sup>99</sup> *Id.* at 1211.

<sup>100</sup> *Id.*

and human health and well-being,<sup>101</sup> there is a real possibility of litigable conflicts arising between people (and countries) over dwindling resources.<sup>102</sup> Predominantly nestled in, and emerging from, the human rights paradigm, such conflicts can also arise between people and their governments, most notably where governments are constitutionally or statutorily obliged to provide food, water, and shelter to people, but do not do so.<sup>103</sup> As we show below, these are considerations present in the *Mbabazi* case.

The devastating drought in Cape Town in recent years is another example.<sup>104</sup> It is possible that conflicts over the constitutionally-entrenched rights of access to sufficient water and adequate housing, that have been litigated in the South African Constitutional Court,<sup>105</sup> might flare up again and find their way back to court. So, too, is the real possibility of ethnic conflicts that might arise because of climate-induced migration and competition for food, water, shelter, and other scarce socio-economic opportunities.<sup>106</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 across the country, suggest a possible escalation in litigable conflicts because of increased competition among expanding populations (also because of climate-induced migration and internal displacement) over dwindling socio-economic resources quantitatively and qualitatively affected upon by climate change.<sup>107</sup>

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<sup>101</sup> *Id.* at 1221.

<sup>102</sup> See GWYNNE DYER, CLIMATE WARS 19–20 (2008) (“Africa is the continent that takes the worst hit from climate change in almost every scenario . . . . In sub-Saharan Africa, ‘hundreds of millions of already vulnerable persons will be exposed to intensified threat of death by disease, malnutrition and strife.’ The primary cause will be long-term drought, but the weakness of the infrastructure in most African countries will lead to a proliferation of failed states that exacerbates all the problems[.]”).

<sup>103</sup> See Inga Winkler, *Judicial Enforcement of the Human Right to Water—Case Law from South Africa, Argentina and India*, L., SOC. JUST. & GLOBAL DEV., Oct. 2008, at 1, 1.

<sup>104</sup> Vanessa Casado Perez, *Specialization Trend: Water Courts*, 49 ENVTL. L. 587, 622 (2019); Craig Welch, *Why Cape Town is Running Out of Water, and Who’s Next*, NAT’L GEOGRAPHIC (Mar. 5, 2018), <https://perma.cc/VR84-FGGV>.

<sup>105</sup> S. AFR. CONST., 1996 §§ 26–27. See, e.g., *Mazibuko and Others v. City of Johannesburg*, 2009 (3) BCLR 239 (CC); *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169. For a discussion, see Kotzé & Du Plessis, *supra* note 13 (reviewing the role of South African courts with respect to environmental governance).

<sup>106</sup> Oksana Yakushko, *Xenophobia: Understanding the Roots and Consequences of Negative Attitudes Toward Immigrants*, 37 COUNSELING PSYCHOLOGIST 36, 37 (2009).

<sup>107</sup> Caiphaz B. Soyapi & Louis J. Kotzé, *Environmental Justice and Slow Violence: Marikana and the Post-Apartheid South African Mining Industry in Context*, 49 VERFASSUNG UND RECHT IN ÜBERSEE 393, 394, 409 n. 106, 410 (2016) (Ger.); Sumudu Atapattu, *Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?*, 20 COLO. J. INT’L ENVTL. L. & POL’Y 35, 37–38, 42, 61 (2008).

Briefly, 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 arise in Africa, are also unique to a developing country context, especially in the sense they are closely intertwined with concerns arising from the “environmentalism of the poor” paradigm;<sup>108</sup> a paradigm that centers on social justice, survival, and the preservation of livelihoods and indigenous worldviews, including claims to recognition and participation that build upon 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>109</sup> To this end, litigable climate conflicts in Africa might 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 this might render climate change litigation in Africa a complex, and possibly unique, matter.

#### IV. COUNTRY ANALYSIS

It has been suggested, above, that the African Union substantially lags behind its regional counterparts in developing and enforcing a comprehensive, effective regional climate law and governance framework.<sup>110</sup> 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,<sup>111</sup> which promoted a common African position on, and highlighted continent-wide concerns about, the impacts of climate change.<sup>112</sup> In 2014, the African Union adopted its Strategy on Climate Change, meant to serve as “strategic guidance”<sup>113</sup> to enable African countries to “effectively address climate change challenges.”<sup>114</sup> This non-binding strategy notes that climate change

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<sup>108</sup> ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2 (2011).

<sup>109</sup> Joan Martinez-Alier, *The Environmentalism of the Poor*, 54 GEOFORUM 239, 240 (2014).

<sup>110</sup> See *supra* note 29 and accompanying text.

<sup>111</sup> *Nairobi Declaration on the African Process for Combating Climate Change*, ALLAFRICA (May 29, 2009), <https://perma.cc/TAM2-KPCB>.

<sup>112</sup> See also Lesley Masters, *Sustaining the African Common Position on Climate Change: International Organisations, Africa and COP17*, 18 S. AFR. J. INT’L. AFF. 257, 258–59 (2011).

<sup>113</sup> AFRICAN UNION, AMCEN-15-REF-11, AFRICAN STRATEGY ON CLIMATE CHANGE 3 (2014), <https://perma.cc/PC97-J8A8>.

<sup>114</sup> *Id.*

“could lead to insecurity and conflicts undermining peace in Africa[,]”<sup>115</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.

At a sub-regional level, in terms of instruments such as the Southern African Sub-Regional Framework of Climate Change Programmes of 2010<sup>116</sup> and the East African Community Climate Change Policy of 2010,<sup>117</sup> it cannot be said that African countries derive any regionally-binding obligations to take concrete measures to reduce greenhouse gases, or to develop and adopt 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. At most, these non-binding frameworks serve as suggestive roadmaps for the domestic development of climate policies, laws, and institutions. Much of what is happening domestically is on the back of African states’ own initiatives and in the light of the international law framework or domestic constitutional, administrative, and environmental laws. To this end, South Africa, Uganda, and Nigeria are signatories to the Paris Climate Agreement, which has been ratified and entered into force in all three countries.<sup>118</sup> These countries have elaborate constitutional and environmental law provisions, as well as national climate change policies.<sup>119</sup> With South Africa expected to adopt its first framework climate change statute in 2020,<sup>120</sup> none has a specific designated climate change act yet. The climate disputes litigated arose from within their non-binding climate policy frameworks and the more general constitutional, environmental, and procedural law regimes, as we shall see below.

### A. South Africa

While Africa’s contribution to global greenhouse gas emissions remains comparatively negligible, South Africa is an exception.<sup>121</sup> As

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<sup>115</sup> *Id.* at 55.

<sup>116</sup> SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, SOUTHERN AFRICA SUB-REGIONAL FRAMEWORK OF CLIMATE CHANGE PROGRAMMES (2010), <https://perma.cc/A2HT-LW2G>.

<sup>117</sup> EAST AFRICAN COMMUNITY, EAC CLIMATE CHANGE POLICY (2010), <https://perma.cc/3FCK-GSGK>.

<sup>118</sup> *Status of Treaties: Paris Agreement*, UNITED NATIONS, <https://perma.cc/QVV5-9JC4> (last visited Mar. 18, 2020).

<sup>119</sup> See UGANDA NATIONAL CLIMATE CHANGE POLICY (2015), <https://perma.cc/KLR3-NN3D>; NATIONAL ADAPTATION STRATEGY AND PLAN OF ACTION ON CLIMATE CHANGE FOR NIGERIA (2011), <https://perma.cc/J99B-XKEU>; DEPARTMENT OF ENVIRONMENTAL AFFAIRS, SOUTH AFRICA, NATIONAL CLIMATE CHANGE RESPONSE WHITE PAPER (2011), <https://perma.cc/Y6ZF-2UH6>.

<sup>120</sup> Climate Change Bill 2018, GN 580 of GG 41689 (08 June 2018) [hereinafter *Climate Change Bill*], <https://perma.cc/HL6M-7TQX>; Bekezela Phakathi, *SA to Finalize Climate Change Bill Soon*, *Ramaphosa*, BUSINESSDAY (Feb. 13, 2020), <https://perma.cc/DN4W-VG7D>.

<sup>121</sup> See, e.g., USAID, GREENHOUSE GAS EMISSIONS IN SOUTH AFRICA (July 2016), <https://perma.cc/XA6X-EUBJ> (indicating that South Africa’s 2012 greenhouse gas emis-

Africa's most developed economy and industrialized nation, South Africa has one of the highest greenhouse gas contributions among developing countries worldwide.<sup>122</sup> Despite its level of economic development and relatively strong industrial performance, endemic corruption, high poverty levels, and weak socio-economic systems in several urban and rural areas threaten the resilience and adaptive capacity of many people.<sup>123</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.<sup>124</sup> 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>125</sup> While it has a comprehensive environmental governance framework statute, in the National Environmental Management Act 107 of 1998 (NEMA) that provides for elaborate EIA procedures, public trusteeship, and numerous sectoral environmental laws that operate under the NEMA framework,<sup>126</sup> to date, it has only issued a consolidated climate change policy—the National Climate Change Response White Paper of 2011 (Climate Change White Paper),<sup>127</sup> and, more recently, the Climate Change Bill of 2018.<sup>128</sup> 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 based sources of energy and increased generation of energy from fossil

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sions were equivalent to 464 million metric tons of carbon dioxide equivalent, or 0.97% of the world's total equivalent emissions for that year).

<sup>122</sup> *Id.*

<sup>123</sup> Palesa Mogano & Ngoako Mokoele, *South African Climate Change Adaptation Politics: Urban Governance Prospects*, 11 INT'L J. SOC. SCI. & HUMAN. STUD. 68, 80 (2019).

<sup>124</sup> Louis J. Kotzé & Anél du Plessis, *Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa*, 3 J. CT. INNOVATION 157, 157–59, 163–64.

<sup>125</sup> S. AFR. CONST., 1996, § 24 states:

Everyone has the right — (a) to an environment that is not harmful to their health or wellbeing; 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>126</sup> For a comprehensive discussion, see generally JAN GLAZEWSKI, ENVIRONMENTAL LAW IN SOUTH AFRICA (3d ed. 2013).

<sup>127</sup> DEP'T OF ENVTL. AFFAIRS, NATIONAL CLIMATE CHANGE RESPONSE: WHITE PAPER, <https://perma.cc/HGD5-6Y29>; See also TRACY HUMBY ET AL., CLIMATE CHANGE LAW AND GOVERNANCE IN SOUTH AFRICA (2016).

<sup>128</sup> Climate Change Bill, 2018 GN 580 of GG 41689 (June 8, 2018).

fuels.”<sup>129</sup> For its part, 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>130</sup>

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.<sup>131</sup> While the details of these provisions are expected to change in finalizing the Bill, once adopted as law by Parliament, it might 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 March 8, 2017 in a lengthy, highly detailed, comprehensively reasoned, and at times, complex and technical decision.<sup>132</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.<sup>133</sup> Not part of the scandal-ridden national energy provider Eskom, which has been implicated in systemic corruption under the previous Zuma administration,<sup>134</sup> the power station would be funded and operated by an independent power producer (IPP).<sup>135</sup> The Minister of Environmental Affairs, the Chief Director of the national environmental authority and the IPP acted as respondents.<sup>136</sup> The applicant, Earthlife Africa (ELA), is an influential environmental NGO that, in 2005, successfully challenged the government’s decision in another energy-related matter to build a pebble bed modular nuclear reactor close to Cape Town.<sup>137</sup> In the present case, ELA believed that coal-fired power stations were “an

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<sup>129</sup> Michael Kidd & Ed Couzens, *Climate Change Responses in South Africa*, in CLIMATE CHANGE AND THE LAW 619, 620 (Erkki J. Hollo et al. eds., 2013).

<sup>130</sup> Climate Change Bill, 2018 GN 580 of GG 41689 (June 8, 2018), at ch. 1, § 2(b).

<sup>131</sup> *Id.* at ch. 1, § 2.

<sup>132</sup> *Thabametsi*, Unreported Case No. 65662/16 (Gauteng High Court Pretoria, Mar. 8, 2017); see also Humby, *supra* note 8, at 145.

<sup>133</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 1.

<sup>134</sup> Philippe Alfroy, *Eskom: The Power Giant at the Core of S. Africa’s State Rot*, CITIZEN (Feb. 4, 2018), <https://perma.cc/X7FG-XJTY>.

<sup>135</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 23.

<sup>136</sup> *Id.* ¶ 2.

<sup>137</sup> *Earthlife Afr. (Cape Town) v. Dir.-Gen.: Dep’t of Env’tl. Affairs & Tourism*, (7653/03) [2005] ZAWCHC 7, ¶ 14.

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>138</sup>

Before 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 NEMA and its EIA Regulations.<sup>139</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 considerations be part of the general EIA process. After 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[.]”<sup>140</sup> and which stated that the “climate change impacts are expected to be relatively small and low[.]”<sup>141</sup> the environmental authority granted the authorization in March 2015.<sup>142</sup> In May of that year, focusing primarily on administrative and procedural considerations, ELA lodged an appeal with the Minister of Environmental Affairs to set aside the decision to grant the authorization.<sup>143</sup> Among other issues, the appeal rested upon the assertion that EIAs for coal-fired power stations must “as a matter of policy . . . include climate change considerations in full[.]”<sup>144</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 authorisation” and that the environmental authority “was required to take into account the GHG emissions and climate change impacts of the project.”<sup>145</sup> Accordingly, she amended the authorization by inserting a condition that a CCIA must be undertaken before 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 for 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 authorisation.”<sup>146</sup> In January 2017, the CCIA was concluded and published for public comment.<sup>147</sup> The

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<sup>138</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 23.

<sup>139</sup> See generally Environmental Impact Assessment Regulations 2014, GN R.982 of GG 38282 (4 Dec. 2014) [hereinafter EIA Regulations].

<sup>140</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 42.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* ¶ 39.

<sup>143</sup> *Id.* ¶ 2.

<sup>144</sup> *Id.* ¶ 55.

<sup>145</sup> *Id.* ¶ 65.

<sup>146</sup> *Id.* ¶ 104.

<sup>147</sup> *Id.* ¶ 75.

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 it characterized as “very large by international standards[.]”<sup>148</sup> It further highlighted several technological limitations in the design of the power station and that it could not make use of carbon capture and storage.<sup>149</sup>

Contending it was “unlawful, irrational and unreasonable” for the environmental authority and the Minister to have granted the environmental authorization absent a proper CCIA in the first place,<sup>150</sup> ELA launched judicial review proceedings against both the environmental authority’s initial authorization decision and the Minister’s appeal decision.<sup>151</sup> 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”<sup>152</sup> that were made when the authorization was approved, which indicates that the Chief-Director “failed to apply his mind.”<sup>153</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>154</sup> Nevertheless, the court held that a more proportional remedy would not be a potentially far-reaching one that set aside the initial authorization, but, a less intrusive one that ordered the Minister to constitute the appeal process afresh, during which, new information emerging from the CCIA had also to be considered.<sup>155</sup>

On January 30, 2018, the Minister published her reconsideration of the appeal, noting at the outset her “dissatisfaction with the [*Thabametsi*] judgment[.]”<sup>156</sup> Among other matters, having considered 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 issued to the power station.<sup>157</sup> In justifying her decision, she noted that operating the power station

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<sup>148</sup> *Id.* ¶ 47.

<sup>149</sup> *Id.* ¶ 48.

<sup>150</sup> *Id.* ¶ 10.

<sup>151</sup> *Id.* ¶ 2.

<sup>152</sup> *Id.* ¶ 101.

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

<sup>154</sup> *Id.* ¶ 107.

<sup>155</sup> *Id.* ¶ 121.

<sup>156</sup> 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, LSA 142346, Appeal Decision, ¶ 2.4, (Minister of Env’tl. Affairs, Jan. 30, 2018) [hereinafter Appeal Decision].

<sup>157</sup> *Id.* ¶ 3.2.

would cause “significant GHG emissions and [would] therefore have climate change impacts[,]”<sup>158</sup> but that numerous mitigation measures had been put in place.<sup>159</sup> The “significant risk relating to GHG emissions could be very high. . . . [W]ater scarcity risks [were] high” and the high risk of GHG emissions “imply[ed] a high social cost.”<sup>160</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>161</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),<sup>162</sup> a non-binding “planning tool,”<sup>163</sup> and strategic policy guideline document for the promotion of energy security, which she noted “does not prohibit the establishment of new coal-fired power stations[,]”<sup>164</sup> but rather, “permits that 6.3 GW of new generation capacity may be derived from coal.”<sup>165</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>166</sup>

What this means 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 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: if the national *environmental* authority of South Africa has its way, the promotion of carbon-intensive development in the country will prevail, even in the face of severe climate change threats independently confirmed by a CCIA.<sup>167</sup> Clearly, this is a worrying state of affairs from a climate protection viewpoint that is likely to augment pressure on civil society and the courts in their efforts to ensure that the government properly considers not only economic, but also social and ecological issues and

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<sup>158</sup> *Id.* ¶ 4.1.

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

<sup>160</sup> *Id.* ¶ 4.4.

<sup>161</sup> *Id.* ¶ 4.5.

<sup>162</sup> *Id.* ¶ 4.6.

<sup>163</sup> *Id.* ¶ 4.7.

<sup>164</sup> *Id.* ¶ 4.10.

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

<sup>166</sup> *Id.* ¶ 4.9.

<sup>167</sup> Kidd & Couzens, *supra* note 129, at 638.

interests, when it makes decisions related to promoting energy security that may have severe climate-related impacts.

In a letter dated February 7, 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 they considered her decision “unlawful” and that they intended to “institute review proceedings [against her decision] in terms of the Promotion of Administrative Justice Act, 2000 (PAJA).”<sup>168</sup> At the time of writing, these review proceedings have not yet commenced. CER specifically avers that the manner in which the Minister decided, by relying only on energy policies, is contentious, and perhaps she disregarded the court’s finding in *Thabametsi* that “[p]olicy instruments developed by the Department of Energy cannot alter the requirements of environmental legislation for relevant climate change factors to be considered.”<sup>169</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 that Eskom is delivering excess electricity capacity and does not need a new power station.<sup>170</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>171</sup> by section 8 of the Act which states:

- (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—*

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<sup>168</sup> Letter from the Centre for Envntl. Rights, to Edna Molewa, Minister of Envntl. Affairs, S. Afr., (Feb. 7, 2018) <https://perma.cc/Z2MT-MHRV>.

<sup>169</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 96 (Gauteng High Court Pretoria, 8 Mar. 2017); see Letter from the Centre for Envntl. Rights, to the Portfolio Comm. on Envntl. Affairs ¶ ¶ 15.2, 17 (Feb. 16, 2018), <https://perma.cc/S3XF-FBDN>.

<sup>170</sup> Letter from the Centre for Envntl. Rights, to the Portfolio Comm. on Envntl. Affairs, *supra* note 169, ¶ 15.3; see also *Eskom is Now Delivering Excess Electricity Capacity to Power SA’s Economic Growth*, ESKOM (Jan. 24, 2017), <https://perma.cc/93RE-3K8E> (“Eskom currently has a surplus of 5 600MW at peak, due to improved plant performance and new additional capacity that can meet any increase in demand until 2021.”).

<sup>171</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 117.

- (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>172</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 authorise the project.”<sup>173</sup> However, because of the principles of severance and proportionality, the court believed it was not required to declare the whole of the administrative authorization decision invalid, but only the objectionable part, reasoning that “such a remedy in the circumstances of this case might be disproportionate.”<sup>174</sup> Was the court being too cautious out of fear of engaging in judicial overreach, possibly breaching the sacred lines of the separation of powers? 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 a maturing constitutional democracy such as South Africa, 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, there was sufficient evidence of the likely grave impacts of the power station on people, their rights, the climate, and the environment (evidence acknowledged throughout by the court and by the government) for the court to justify 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 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 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.

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<sup>172</sup> Promotion of Administrative Justice Act 3 of 2000 § 8 (S. Afr.) (emphasis added).

<sup>173</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 117.

<sup>174</sup> *See id.* ¶ 119.

With that said, in a recent analysis, Humby lauded the *Thabametsi* judgment's "meaningful contribution"<sup>175</sup> to climate change governance in South Africa, noting specifically that "[t]he 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>176</sup> We agree. The court's innovative reliance on the precautionary principle to justify that climate change must be part of the EIA process is especially noteworthy.<sup>177</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.<sup>178</sup> In a passage worth quoting in full, the court believed:

Section 24 [the constitutional right to a 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 [to] 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>179</sup>

The court also demonstrated its appreciation that climate change is a global concern governed not only by domestic policies and laws, but also, importantly, by an international law framework which creates far-ranging obligations, offers best practices, and which can neither be

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<sup>175</sup> Humby, *supra* note 8, at 145, 155.

<sup>176</sup> *Id.* at 149.

<sup>177</sup> The Court stated:

The 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*, Unreported Case No. 65662/16, ¶ 78.

<sup>178</sup> *Id.* ¶ 81–82.

<sup>179</sup> *Id.* ¶ 82.

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>180</sup>

While it must still consider amending the current EIA Regulations to explicitly include CCIAs, the government published and refined a set of National Greenhouse Gas Emission Reporting Regulations in April 2017.<sup>181</sup> In addition, the national Carbon Tax Act was assented to by the President in May 2019 and commenced on June 1, 2019.<sup>182</sup> The Department of Environmental Affairs also recently published the Draft National Climate Change Adaptation Strategy, which outlines a common vision of climate change adaptation and climate resilience for the country, and priority areas for achieving this vision.<sup>183</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 could further solidify the legislative foundation upon which future climate conflicts might be litigated by claimants and adjudicated by the courts.

### B. Nigeria

Nigeria is Africa's most populous state and one of its most industrialized countries.<sup>184</sup> The majority of the population, however, lives in abject poverty and collectively, this "puts increasingly severe demands upon the natural environment, the institutional structures

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<sup>180</sup> *Id.* ¶ 83.

<sup>181</sup> National Greenhouse Gas Emission Reporting Regulations, GN 275 of GG 40762 (Apr. 3, 2017); 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, GN 71 of GG 42203 (Feb. 1, 2019).

<sup>182</sup> National Carbon Tax Act 15 of 2019 §§ 2, 16 (S. Afr.). 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* 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, GN 686 of GG 42472 (May 22, 2019).

<sup>183</sup> Draft National Climate Change Adaptation Strategy, GN 644 of GG 42446 (May 6, 2019).

<sup>184</sup> Andrew Mwaniki, *The 10 Most Populated Countries in Africa*, WORLDATLAS, <https://perma.cc/W5ZP-29BL> (last updated Apr. 10, 2018); *see* Yemi Kale, *Step Change*, ECONOMIST (Apr. 12, 2014) <https://perma.cc/42A4-DR4F> (discussing Nigeria's 2014 "leap-frog" to largest gross domestic product (GDP) in Africa).

and the resources available to manage them.”<sup>185</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>186</sup> National law vests the exclusive right to the exploration and extraction of natural resources in the Nigerian federal government,<sup>187</sup> 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<sup>188</sup>—the very same private-public venture also at the heart of the SERAC dispute referred to earlier.<sup>189</sup> Since the 1950s, when oil was discovered in the area, oil production activities have caused immense damage to the environment because of oil spills and outdated waste disposal techniques; 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 gases.”<sup>190</sup> Gas flaring, a significant contributor to climate change, has been the preferred means of disposing associated (waste) gas by various petroleum and production companies in the Niger Delta for the past five decades.<sup>191</sup> While the climate-related 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>192</sup>

Nigeria’s principal environmental law is the National Environmental Standards and Regulations Enforcement Agency

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<sup>185</sup> Andrew Onwuemele, *Cities in the Flood: Vulnerability and Disaster Risk Management: Evidence from Ibadan, Nigeria*, in *URBAN AREAS AND GLOBAL CLIMATE CHANGE* 277, 280 (William G. Holt ed., 2012).

<sup>186</sup> See generally Augustine Okhobo Dokpesi, *Oil Curse and the Nigerian Development Dilemma*, in *CONTEMPORARY DEVELOPMENT ISSUES IN NIGERIA* 151, 157–61 (A.O. Olutayo et al. eds., 2015).

<sup>187</sup> *Id.* at 157–58.

<sup>188</sup> *Timeline: Shell’s Operations in Nigeria*, REUTERS (Sep. 23, 2018), <https://perma.cc/52P6-LQZD>.

<sup>189</sup> See *supra*, note 15 and accompanying text.

<sup>190</sup> Sinden, *supra* note 56, at 176.

<sup>191</sup> Aniefiok E. Ite and Udo J. Ibok, *Gas Flaring and Venting Associated with Petroleum Exploration and Production in the Nigeria’s Niger Delta*, 1 *AM. J. ENVTL. PROT.*, 70, 70 (2013).

<sup>192</sup> Godwin Etta Odok, *Climate Change and Social Processes in Rural Nigeria*, in *CONTEMPORARY DEVELOPMENT ISSUES IN NIGERIA* 188, 195–96 (A.O. Olutayo et al. eds., 2015); see also BNRCC, *NATIONAL ADAPTATION STRATEGY AND PLAN OF ACTION ON CLIMATE CHANGE FOR NIGERIA* 1–25 (Nov. 2011), <https://perma.cc/4PVF-VJYA>.

(Establishment) Act, 2007 (NESREA),<sup>193</sup> which is complemented by the Environmental Impact Assessment Act, 2004 (EIA Act).<sup>194</sup> The environmental agency established in terms of part 1 of the NESREA is empowered to enforce compliance with environmental regulations and standards.<sup>195</sup> The lack of implementation and the inadequacy of environmental law enforcement efforts are, however, major continuing concerns.<sup>196</sup> Unlike its South African counterpart, the Constitution of Nigeria of 1999 does *not* provide for a right to a healthy environment.<sup>197</sup> The article 24 environmental right in the African Charter is, instead, incorporated in Nigerian law by its inclusion in the African Charter on Human and Peoples' Rights Procedure Rules (Ratification and Enforcement) Act, 2004 (ACHPR Ratification and Enforcement Act),<sup>198</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<sup>199</sup> and the Intended Nationally Determined Contribution (INDC), 2015.<sup>200</sup>

Unsurprisingly, perhaps, the claims at the heart of the 2005 *Gbemre* dispute<sup>201</sup> are based on virtually the same issues that caused the claims in the SERAC Communication of 2001, as we have noted earlier. The Shell Petroleum Development Company of 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 called "massive, relentless and continuous gas flaring"<sup>202</sup> in the Iwherekan Community. These entities have been flaring gas for years without adequately considering the health, environmental, and other related consequences of this practice, while mainly concentrating on commercial interests and maximizing profit, at times without valid

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<sup>193</sup> National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (2007) (Nigeria) [hereinafter NESREA].

<sup>194</sup> Environmental Impact Assessment Act (2004) Cap. (E12), Vol. 6 (Nigeria) [hereinafter EIA Act].

<sup>195</sup> NESREA, § 2.

<sup>196</sup> UNEP, ENVIRONMENTAL ASSESSMENT OF Ogoniland 9 (2011), <https://perma.cc/36J2-A98E>; 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, 183 (2014).

<sup>197</sup> CONSTITUTION OF NIGERIA (1999), § 20.

<sup>198</sup> African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (2004) Cap. (A9), Vol. 1 (Nigeria).

<sup>199</sup> BNRCC, *supra* note 192.

<sup>200</sup> FED. MINISTRY OF ENV'T, ABUJA, NIGERIA'S INTENDED NATIONALLY DETERMINED CONTRIBUTION (2015), <https://perma.cc/WC9B-3PFE>.

<sup>201</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, at 4 (Federal High Court of Nigeria, Nov. 14, 2005).

<sup>202</sup> *Id.*

authorizations (or ministerial gas flaring certificates), as required in the terms of the Associated Gas Re-injection Act, 2004.<sup>203</sup>

Against this background, the applicant, 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 ACHPR Ratification and Enforcement Act.<sup>204</sup> Gbemre commenced court proceedings in his own name, and on behalf of the Iwherekan Community<sup>205</sup> in the Delta State of Nigeria against SPDC, the NNPC, and the Attorney General of the Federation.<sup>206</sup> The applicant sought five different remedies (four declarations and one judicial order) based on 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, and a range of Nigerian environmental laws.<sup>207</sup> 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>208</sup> The court was requested to issue a declaration that: 1) the constitutional rights to life and dignity of the human person, as reinforced by the ACHPR Ratification and Enforcement Act,<sup>209</sup> included the right to a clean, poison-free, pollution-free, and healthy environment; 2) the actions of the SPDC and the NNPC in continuing to flare gas in their oil exploration and production activities near the Iwherekan Community violated community members’ right to life (including the right to a healthy environment) and their right to human dignity;<sup>210</sup> 3) the failure of the SPDC and the NNPC to carry out an EIA where the Iwherekan Community lived to determine the effects of the gas flaring activities violated section 2(2) of the EIA Act,<sup>211</sup> while such a failure, at once, also contributed to several human rights violations;<sup>212</sup> and 4) sections 3(2)(a) and (b) of the Associated Gas Re-injection Act<sup>213</sup>

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<sup>203</sup> Associated Gas Re-injection Act (2004) Cap. (A25), § 1 (Nigeria); *Gbemre*, Suit No. FHC/CS/B/153/2005, at 4.

<sup>204</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, 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 id.* at 26.

<sup>205</sup> The Court requested an initial “copious unwieldy list of members” to be withdrawn from the case. *Id.* at 1.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 2.

<sup>208</sup> *Id.* at 2–6.

<sup>209</sup> CONSTITUTION OF NIGERIA (1999), §§ 33(1), 34(1); African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act (1990) Cap. (A9) art. 4, 16, 24.

<sup>210</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, at 2.

<sup>211</sup> EIA Act (2004) Cap. (E12), Vol. 6 (Nigeria)

<sup>212</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, at 2.

<sup>213</sup> Associated Gas Re-injection Act (2004) Cap. (A25), § 3(2) (Nigeria). 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 Standard 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 pay-

and section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations<sup>214</sup> that permit gas flaring contradict the protection of human rights and is, consequently, unconstitutional.<sup>215</sup> The applicant also requested an order of “Perpetual Injunction” restraining the SPDC and the NNPC and their agents, employees, and contractors from future gas flaring where the Iwherekan Community lived.<sup>216</sup>

Particularly relevant to the present inquiry is the applicant’s assertion that the gas flaring

gives rise to . . . [p]oisons and pollutes the environment as it leads to the emission of carbon dioxide, the main greenhouse gas; . . . [c]ontributes to adverse climate change as it emits carbon dioxide and methane which causes warming of the environment, [and also] pollutes . . . food and water[;] . . . [and] [r]educes crop production and adversely impacts on their food security.<sup>217</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>218</sup> Clearly a predominantly rights-oriented case, the plea before the court was that the rights to life and dignity entrenched in sections 33(1) and 34(1) of the Nigerian Constitution include “the right to a clean, poison-free and pollution-free air and healthy environment” conducive to human habitation, development, and enjoyment of life.<sup>219</sup> The applicant argued that these rights had been, and continued to be, violated and threatened by ongoing gas flaring activities in his community.<sup>220</sup>

The respondents filed two separate counter-affidavits.<sup>221</sup> They challenged the *locus standi* of the applicant on procedural grounds, stating that the applicant (interchangeably called “the plaintiff” in the judgment) was not authorized to represent the Iwherekan Community.<sup>222</sup> They further countered 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 standards have no ruinous or adverse consequences

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ment of royalties to the Nigerian government by companies engaged in the production of oil.

<sup>214</sup> Associated Gas Re-injection (Continued Flaring of Gas) Regulations (1984) Cap. (A25), § 1 (Nigeria).

<sup>215</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, at 2.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 4–5.

<sup>218</sup> *Id.* at 5.

<sup>219</sup> *Id.* at 1, 6.

<sup>220</sup> *Id.* at 6.

<sup>221</sup> *Id.* at 14.

<sup>222</sup> *Id.*

to either health or lives[.]”<sup>223</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>224</sup> The respondents further countered that when they commenced their operations in the area thirty-seven years previously, an EIA was not a legal requirement and there had been no oil and gas development in the area where the community lived which required an EIA.<sup>225</sup> The respondents also alleged that, although 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>226</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>227</sup> and that “their operations [had] in no way affected the fundamental rights of the Applicant as alleged and that these oil and gas exploration activities [were] carried out in compliance with good oilfield practice and as permitted by the Laws of the Federal Republic of Nigeria.”<sup>228</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>229</sup> Justice Nwokorie ruled on November 30, 2005, that “there must be an end to litigation, especially in this kind of specialized proceedings[.]”<sup>230</sup> The court concluded that the rights to life and human dignity “inevitably includes the right to [a] clean poison-free, pollution-free and healthy environment,”<sup>231</sup> and that the gas flaring in the oil exploration and production activities amounted to a gross violation of these rights, to which failing to carry out a compulsory EIA in terms of the EIA Act of Nigeria had contributed.<sup>232</sup> The court also confirmed that the relevant sections of the Association Gas Re-injection Act and Regulations were unconstitutional, null, and void based on their being inconsistent with the rights to life and human dignity, and the environmental and other rights in the ACHPR Ratification and Enforcement Act.<sup>233</sup> The court issued a restraining order prohibiting the SPDC and the NNPC from any further gas flaring in the applicant’s community<sup>234</sup> and ordered the Attorney-General of the Federation and

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<sup>223</sup> *Id.* at 14–15.

<sup>224</sup> *Id.* at 16.

<sup>225</sup> *Id.* at 15.

<sup>226</sup> *Id.* at 14–15.

<sup>227</sup> *Id.* at 17.

<sup>228</sup> *Id.* at 15.

<sup>229</sup> *Id.* at 29.

<sup>230</sup> *Id.* at 28.

<sup>231</sup> *Id.* at 30.

<sup>232</sup> *Id.* at 30–31.

<sup>233</sup> *Id.* at 31.

<sup>234</sup> *Id.*

Ministry of Justice to commence legislative procedures to amend the relevant sections of the Gas Re-injection law to align these with the Constitution.<sup>235</sup> Notably, the court also considered section 7 of the Niger Delta Development Commission (Establishment) Act, 2004,<sup>236</sup> clarifying that it is the responsibility of the Commission to “[t]ackle environmental problems that arise from the exploration of oil mineral in the Niger-Delta area and advise [sic] the Federal Government and the member-states *on the prevention and control of oil spillages, gas flaring and environmental pollution.*”<sup>237</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.<sup>238</sup> But 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 that causes climate change and contradicts minimum constitutional human rights standards as a result.<sup>239</sup> Similar to the ACommHPR in its SERAC Communication, the court assumed a critical stance toward the socio-ecologically destructive activities of the government-owned energy company. The court 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 indicate the urgency it attached to resolving this conflict, to recognizing the imbalance of power and resources among the litigants, and to providing appropriate remedies to the applicant sooner, rather than later.

The *Gbemre* case is, first, a victory for the interpretation and application of environmental rights. The court stated, unequivocally, that continuing to flare gas in the respondents’ oil exploration and production activities in the applicant’s community violates the community’s “fundamental rights to life (including [a] healthy environment) and dignity of [the] human person.”<sup>240</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>241</sup> or from affording significant

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<sup>235</sup> *Id.*

<sup>236</sup> Niger Delta Development Commission (Establishment) Act (2004) Cap. (N86) (Nigeria).

<sup>237</sup> *Id.* at 13 (emphasis added).

<sup>238</sup> *Id.* at 4.

<sup>239</sup> *Id.* at 30–31.

<sup>240</sup> *Id.* at 30.

<sup>241</sup> *Id.* at 31.

weight to the statutory environmental right in article 24 of the ACHPR Ratification and Enforcement Act.<sup>242</sup>

The willingness of the court to find provisions of the Gas Re-injection Act unconstitutional<sup>243</sup> 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>244</sup> In fact, the court went so far as to order an "immediate"<sup>245</sup> stop to gas flaring, while finding it meaningful to state that the absence of an EIA contravened Nigerian law, which contributed to violating the applicants' rights to life and dignity and the right to a general satisfactory environment favorable to their development.<sup>246</sup> 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.<sup>247</sup>

While the *Gbemre* case's relevance to human rights and broader environmental constitutionalism 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 seemed to only have mentioned in passing that gas flaring "[c]ontributes to adverse climate change as it emits carbon dioxide and methane which causes warming of the environment, [and] pollutes . . . food and water."<sup>248</sup> The applicant also urged the court to "hold that Gas Flaring has contributed to global warming of the Environment and depletion of the OZONE [sic] Layer."<sup>249</sup> Yet, 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 with no detailed reference or

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> The court ordered the Attorney-General of the Federation and Ministry of Justice to immediately set into 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 there under to *quickly bring them in line* with the provisions of Chapter 4 of the Constitution . . . .

*Id.* (emphasis added).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 30–31.

<sup>247</sup> *Id.* at 31.

<sup>248</sup> *Id.* at 5.

<sup>249</sup> *Id.* at 23.

explicit link to climate change. Had it more explicitly engaged with climate change, this might not have changed its finding and order, but the court could have 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>250</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, based on 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 toward 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.

### C. Uganda

Uganda is a landlocked East African country<sup>251</sup> and, in contrast to its tumultuous colonial and post-colonial past, it is now relatively politically stable.<sup>252</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>253</sup> The Ugandan economy is industry- and agriculture-based, with many people depending on rural subsistence farming.<sup>254</sup> The country is self-sufficient in producing food, but access to food is unevenly distributed among the population.<sup>255</sup> Unsurprisingly, many of the reported impacts of climate change in the

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<sup>250</sup> This is despite the fact that literature on the topic abounds. See Ite & Ibok, *supra* note 191, at 74; Elisha Jasper Dung et al., *The Effects of Gas Flaring on Crops in the Niger Delta, Nigeria*, 73 GEOJOURNAL 297, 298 (2008) (“Several studies and reports have documented the effects of gas flaring around the world and particularly in Nigeria. These include its contribution to [the] greenhouse effect and climate change, environmental degradation[,] and other researchers have suggested it could pose human health hazards.”).

<sup>251</sup> *Uganda*, COMMONWEALTH, <https://perma.cc/22E3-W73P> (last visited Mar. 18, 2020).

<sup>252</sup> *Uganda: History*, COMMONWEALTH, <https://perma.cc/33LJ-R98A> (last visited Mar. 18, 2020).

<sup>253</sup> COMMONWEALTH, *supra* note 251.

<sup>254</sup> *Uganda: Economy*, COMMONWEALTH, <https://perma.cc/LM5M-GHQS> (last visited May 17, 2020).

<sup>255</sup> INT’L LABOUR ORG. & UGANDA BUREAU OF STATISTICS, THE NATIONAL LABOUR FORCE AND CHILD ACTIVITIES SURVEY 2011/2012: CHILD LABOUR REPORT 2 (2013).

country are agriculture-related. They include changes in rainfall patterns, prolonged droughts, increasingly prevalent diseases (like malaria in areas previously mosquito free), loss of soil fertility because of heavy rains, and an increased frequency in floods.<sup>256</sup> The overall impact of climate change in Uganda has been described as increasing poverty, famine, and food insecurity, with 90% of the country's natural disasters attributed to weather and climatic factors.<sup>257</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>258</sup> According to the Ugandan environmental authorities, while accurate data on pollution levels is 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>259</sup> The transport sector is reported to account for 75% of greenhouse gas emissions in the country, a contribution set to rise as considerably more vehicles are expected to enter the transport sector in the near future.<sup>260</sup>

Uganda's first climate case was expected to commence toward the latter part of 2018, but at the time of writing, it is still pending. The *Mbabazi* case<sup>261</sup> is markedly different from its *Thabametsi* and *Gbemre* counterparts. It is unique in the sense that the plaintiffs are four minors, represented "through their next friend" (*prochein ami*) and an NGO.<sup>262</sup> 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.<sup>263</sup> Fairly closely resembling atmospheric trust litigation, as 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 the transport industry, oil extraction, gas flaring, or power generation that could cause climate change.

The judicial process commenced as far back as 2012, with an amendment to the identified defendants in 2015.<sup>264</sup> The papers

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<sup>256</sup> REPUBLIC OF UGANDA, NATIONAL STATE OF THE ENVIRONMENT REPORT FOR UGANDA 19 (2014), <https://perma.cc/Q9TW-8RLX>.

<sup>257</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. *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 73.

<sup>260</sup> *Id.*

<sup>261</sup> *Mbabazi*, Civil Suit No. 283 of 2012 (High Court of Uganda Holden at Kampala, Aug. 28, 2015) (Uganda).

<sup>262</sup> *Id.* ¶ 1.

<sup>263</sup> *Id.* ¶ 5.

<sup>264</sup> See *Mbabazi*, Civil Suit No. 283 of 2012 (High Court of Uganda Holden at Kampala, Sep. 20, 2012) (Uganda); *Mbabazi*, Civil Suit No. 283 of 2012 (High Court of Uganda Holden at Kampala, Aug. 28, 2015) (Uganda) (Initially only the Attorney General was cited as

(including the so-called “Plaint” and “Summary of Evidence”) that were filed by the plaintiffs are publicly available,<sup>265</sup> and they set out the main arguments and law based on which the court must adjudicate the dispute. While we cannot analyze the case due to its not yet having commenced, we provide a synopsis of the main issues raised in the preliminary papers while we attempt to foreshadow some climate-change-related issues that might arise during adjudication, including some of the unique features of this case already apparent.

The case is an “urgent matter”<sup>266</sup> brought against the Attorney General of Uganda and the National Environment Management Authority in terms of articles 39, 50, and 237 of the Constitution of the Republic of Uganda, 1995 and sections 2, 3, 71, and 106 of the National Environmental Act (NEA).<sup>267</sup> Under article 39 of the Constitution, “[e]very Ugandan has a right to a clean and healthy environment[.]”<sup>268</sup> while article 50 provides for *locus standi* measures.<sup>269</sup> 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[.]”<sup>270</sup> The NEA is an extensive environmental framework law, comprised of 108 sections and three schedules.<sup>271</sup> 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 issue an environmental restoration order, and the status and relevance of international environmental law in Uganda.<sup>272</sup>

The plaintiffs’ plea is not entirely coherent, nor is it backed by sound 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 nestled in its public trusteeship duties to scientific evidence of a changing climate 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

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the defendant. The National Environmental Management Authority of Uganda was added in 2015.).

<sup>265</sup> See *Mbabazi v. The Attorney General & National Environmental Management Authority*, SABIN CENTRE FOR CLIMATE CHANGE LAW, <https://perma.cc/QW6W-SEUC> (last visited Mar. 18, 2020).

<sup>266</sup> *Mbabazi*, Civil Suit No. 283 of 2012, ¶ 14.

<sup>267</sup> *Id.* ¶ 4.

<sup>268</sup> CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, ch. 4, art. 39.

<sup>269</sup> *Id.* at ch. 4, art. 50.

<sup>270</sup> *Id.* at ch. 15, art. 237, § 2(b).

<sup>271</sup> See National Environmental Act, Cap. 153 (1995) (Uganda).

<sup>272</sup> *Id.* §§ 2, 3, 71, and 106, respectively.

storms, droughts, landslides, and attendant harm to infrastructure),<sup>273</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>274</sup> The plaintiffs see the government's inaction as flying in the face of its obligations and dictates derived from international law,<sup>275</sup> and domestic laws and policies,<sup>276</sup> while the government is said to be ignoring clear messages on climate change and its impacts emerging from "researchers and policy makers."<sup>277</sup>

Based on 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:

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

That 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.<sup>278</sup>

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, act 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>279</sup> To this end, they argue there are several climate-related duties on the government, including: 1) the duty to maintain natural resources and to ensure their sustainable use on behalf of all

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<sup>273</sup> In this regard, the plaintiffs cite and have annexed reports of a number of events published in the media in 2010 and 2011. *See Mbabazi*, Civil Suit No. 283 of 2012, ¶ 10 (High Court of Uganda Holden at Kampala, Aug. 28, 2015) (Uganda).

<sup>274</sup> *Id.* ¶¶ 7–12.

<sup>275</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. *Id.* ¶ 5(h).

<sup>276</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. *Id.* ¶¶ 4, 5.

<sup>277</sup> *Id.* ¶ 7; *see also id.* ¶¶ 5–6.

<sup>278</sup> *Id.* ¶¶ 7–9.

<sup>279</sup> CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, ch. 15, art. 237, sec. 2(b).

Ugandans;<sup>280</sup> 2) the duty to “ensure that the atmosphere is free from pollution for the present and future generations[;]”<sup>281</sup> and 3) the duty to “uphold the citizens right to a clean and healthy environment[.]”<sup>282</sup> Failure to execute these duties means “the plaintiffs have suffered, will continue to suffer and are likely to suffer more harm in [the] future.”<sup>283</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 *Plaint* (such as flooding, drought, and landslides),<sup>284</sup> the claim that constitutional rights have been violated,<sup>285</sup> or the specific orders sought from the court.<sup>286</sup>

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.<sup>287</sup> They seek from the court (and we quote in full):

- 1) An order directing the Minister responsible for environment[al affairs] to implement measures that will reduce the impact of climate change.
- 2) An order directing the Minister responsible for environment[al 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.
- 3) An order directing the Minister responsible to take measures to protect the plaintiffs and the children of Uganda from effects of climate change and specifically extreme climatic conditions such as floods.
- 4) An order directing government to implement international conventions, treaties and protocols on climate change.
- 5) 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.
- 6) 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[.]

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<sup>280</sup> *Mbabazi*, Civil Suit No. 283 of 2012, ¶ 12(b).

<sup>281</sup> *Id.* ¶ 12(d).

<sup>282</sup> *Id.* ¶ 12(d)–(f).

<sup>283</sup> *Id.* ¶ 12(f).

<sup>284</sup> *Id.* ¶ 12(g).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* ¶ 15.

<sup>287</sup> *Id.*

- 7) An order directing government to compensate victims of climate change and to take appropriate measures to curtail and prevent re-occurrence.<sup>288</sup>

Plainly reading 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 a comprehensive and detailed climate change regulatory response, which does not exist in Uganda.<sup>289</sup> In essence, the Ugandan judiciary is asked to step-in to compel the executive and legislature to fulfill their governance tasks as far as climate change is concerned.<sup>290</sup> In addition, if the plaintiffs have their way in court, the Ugandan government should be subject to almost open-ended accountability and liability for the present and future impacts of climate change generally on people and on the environment.<sup>291</sup> Ground-breaking as such an order would be for climate change governance and justice in Uganda and elsewhere, a court likely would not grant such an order (and even where it does so, that a developing country government would unconditionally follow it or be actually able to follow it in full), especially if it observed 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 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, judicially, a causal link between activities 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 diminished in instances where this is impossible or unlikely.<sup>292</sup> 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 by the plaintiffs, and insufficient legal support in assisting to frame the issues, the claims and remedies, and to base these on sound legal arguments. While the matters 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 meaningful application of the law, are all wanting, at present. To this end, the available court papers accentuate the

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Juliana*, 217 F. Supp. 3d. 1224, 1268 (D. Or. 2016).

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>293</sup> The Complaint and the Summary of Evidence suggest that the case will have a strong constitutional law flair and this matter will be adjudicated referring to the notions of public trusteeship and intergenerational justice, and 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 to consult these precedents to guide this litigation moving forward.<sup>294</sup>

## V. 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 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.<sup>295</sup> 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 with derivative and generic laws and rights, such as statutory EIA laws, energy laws, and environmental and associated human rights law.<sup>296</sup> This suggests that the absence of specific climate change laws in African countries should not necessarily be an insurmountable impediment to climate change

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<sup>293</sup> *Mbabazi*, Civil Suit No. 283 of 2012, Summary of Evidence.

<sup>294</sup> In *Juliana*, 217 F. Supp. 3d. at 1233, for example, a case brought in 2015 by youth plaintiffs against the U.S. government in the U.S. District Court for the District of Oregon. Recently, in the South African case of Mining & Environmental Justice Community Network of South Africa v. Minister of Environmental Affairs (50779/2017) [2018] ZAGPPHC 807, ¶ 11.11 (Nov. 8, 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 making 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.

<sup>295</sup> Humby, *supra* note 8, at 145; *Gbemre*, Suit No. FHC/CS/B/153/2005, at 2 (Federal High Court of Nigeria, Nov. 14, 2005); *Mbabazi*, Civil Suit No. 283 of 2012.

<sup>296</sup> Humby, *supra* note 8, at 146; *Gbemre*, Suit No. FHC/CS/B/153/2005, at 3; *Mbabazi*, Civil Suit No. 283 of 2012.

litigation, since those who seek to litigate based on climate change considerations could use incidental laws (and perhaps even effectively, if the outcomes of *Thabametsi* and *Gbemre* are anything to go by). Having said that, it might also be beneficial if African states commenced adopting explicit climate-change laws (as Kenya did in 2016 and South Africa is expected to do in the near future),<sup>297</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>298</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 constructing 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 develop climate change policies and, more important, legislate climate change, it is likely that the trend, profile, 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 support 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 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>299</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*.

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<sup>297</sup> See generally The Climate Change Act 11 (2016) (Kenya).

<sup>298</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* 1, 5 (Lesley Masters & Lyndsey Duff eds., 2011).

<sup>299</sup> On the interplay between environmental law and these pluralistic legal systems in general, see *THE BALANCING OF INTERESTS IN ENVIRONMENTAL LAW IN AFRICA*, at xix (Michael Faure & Willemien du Plessis eds., 2011).

Third, with all three cases involving organs of state as the respondents or defendants, it would seem 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 because of the government-corporate hybrid nature of the SPDC and the NNPC, and this court did not shy away from finding against this joint venture.<sup>300</sup> Regrettably, the court did not elaborate the non-state, corporate obligations and implications of its order. While 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, are often the main culprits causing climate change-related impacts and damage. In addition to suggesting that courts could be more adventurous in casting the liability net wider, 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 arguing 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>301</sup> Until climate related human rights obligations are actually enforced against corporations—a development in which courts could play an 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.<sup>302</sup> Mirroring trends in other Global South countries, the human rights approach to climate change litigation especially seems in vogue in Africa, with all three cases having drawn to a greater or lesser extent on this approach.<sup>303</sup> While South Africa and Uganda have constitutionally protected rights to a healthy environment,<sup>304</sup> the Nigerian court would enforce an environmental right as drawn from regional African human rights law.<sup>305</sup> Considering that all three claims were brought against governments, it would seem that, in line with

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<sup>300</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, at 31.

<sup>301</sup> UNHRC, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5 (Apr. 7, 2008).

<sup>302</sup> See *Gbemre*, Suit No. FHC/CS/B/153/2005, at 2; *Thabametsi*, Unreported Case No. 65662/16, ¶ 54 (Gauteng High Court Pretoria, 8 Mar. 2017); *Mbabazi*, Civil Suit No. 283 of 2012, ¶ 4.

<sup>303</sup> See *Gbemre*, Suit No. FHC/CS/B/153/2005, at 2; *Thabametsi*, Unreported Case No. 65662/16, ¶ 54; *Mbabazi*, Civil Suit No. 283 of 2012, ¶ 4.

<sup>304</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 81; see CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, art. 39.

<sup>305</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, at 30.

trends in other countries of the Global South, such as Pakistan,<sup>306</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 directed at the state.<sup>307</sup> 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 likely to continue. To this end, if *Gbemre* and *Thabametsi* are anything to go by, African courts could 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 human rights and climate laws are set to influence climate change litigation in African countries,<sup>308</sup> especially where courts may 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 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.<sup>309</sup>

Fifth, while the rights-based approach was featured in all three cases, the far more administratively oriented, proceduralist, tick box-like EIA process also featured prominently in *Thabametsi* and *Gbemre*.<sup>310</sup> The appeal of ELA in *Thabametsi* was that, as a matter of law and policy, EIAs for coal-fired power stations must also include climate change considerations in full and the consideration of extensive CCiAs,<sup>311</sup> while in *Gbemre* it was argued that failing to carry out an EIA for gas flaring contravened EIA laws.<sup>312</sup> EIA, in this context, is generally understood to give effect to both the precautionary and preventive principles and is more specifically defined as:

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<sup>306</sup> *Ashgar Leghari*, W.P. No. 25501/2015, Climate Change Order, (Lahore High Court, Sept. 4, 2015).

<sup>307</sup> See *Gbemre*, Suit No. FHC/CS/B/153/2005; *Thabametsi*, Unreported Case No. 65662/16; *Mbabazi*, Civil Suit No. 283 of 2012. All three claims were directed at the state, among other parties.

<sup>308</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 at [179] (N.Z.) (dismissing a petition for review, in part on the finding that international treaty obligations are not binding on New Zealand).

<sup>309</sup> See, e.g., Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Nov. 4, 2019), <https://perma.cc/8NRT-PP7H>; Umair Irfan, *The US, Japan, and Australia Let the Whole World Down at the UN Climate Talks*, VOX (Dec. 18, 2019), <https://perma.cc/TTG4-KNBA>.

<sup>310</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, at 2; *Thabametsi*, Unreported Case No. 65662/16, ¶¶ 4, 5.

<sup>311</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 4.

<sup>312</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, at 3.

[T]he 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.<sup>313</sup>

It would seem that tried and trusted environmental governance instruments, such as EIA, remain a popular remedy to foresee at least some of the deleterious environmental impacts and harms that may manifest now and in the future as a result of carbon-intensive activities. In *Thabametsi*, the court ruled that the 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.<sup>314</sup> In *Gbemre*, the point of the need for an EIA, or retrospective application of EIA law, became moot 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.<sup>315</sup> Yet, considering the overall thrust of the court's decision, it presumably would not have hesitated also to require an EIA, or even a CCIA, to be conducted if it had to.

The *Thabametsi* court should be lauded for its broad construal of "environmental impact" also to include climate impacts that specifically require assessment with a CCIA, a procedure still not explicitly required in terms of South African law.<sup>316</sup> 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 so that it also encapsulates climate change concerns, is both novel and most probably required by courts (and litigating parties) in the future, where explicit climate laws and policies do not exist or where they do not explicitly require EIAs or CCIA's. With that said, current critique also cautions against the effectiveness of EIA, which critique by implication also extends to CCIA's; novel and innovative as these instruments may be.<sup>317</sup> EIA is a useful 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

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<sup>313</sup> Stephen Jay et al., *Environmental Impact Assessment: Retrospect and Prospect*, 27 ENVTL. IMPACT ASSESSMENT REV. 287, 287–88 (2007).

<sup>314</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 107.

<sup>315</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, at 29, 30.

<sup>316</sup> See generally National Environmental Management Act 107 of 1998 (S. Afr.).

<sup>317</sup> See generally 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 J. ENVTL. ASSESSMENT POL'Y & MGMT., Dec. 2012, at 1, 33.

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>318</sup> As a case in point, even though a CCIA was eventually conducted in *Thabametsi* because of the court’s intervention, and despite the CCIA’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 CCIA.<sup>319</sup> In fact, she seemed to have ticked the legally-required EIA box and then justified building the power station based on non-binding pro-growth energy security policies.<sup>320</sup> Given the limitations of proceduralism, we suggest that it would be unwise to predominantly rely on EIA or CCIA as the silver bullet for all climate change impacts.

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 state or its German equivalent, *Rechtsstaat*) the outcome and impact of climate change litigation.<sup>321</sup> The *Thabametsi* and *Gbemre* courts were both 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 toward *lacunae* in the EIA regime,<sup>322</sup> for example, but 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 rule. The *Gbemre* court followed an altogether more deliberately intrusive approach by finding the authorization of gas flaring under certain circumstances, in terms of legislation, to be unconstitutional.<sup>323</sup> 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; 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 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 that of other regions.”<sup>324</sup> The most recent

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<sup>318</sup> *Id.* at 3.

<sup>319</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶ 114.

<sup>320</sup> Appeal Decision, LSA 142346 (Minister of Environmental Affairs, Jan. 30, 2018), ¶ 4.9.

<sup>321</sup> Wood, *supra* note 63, at 37–40.

<sup>322</sup> *Thabametsi*, Unreported Case No. 65662/16, ¶¶ 84, 85, 87, 88.

<sup>323</sup> *Gbemre*, Suit No. FHC/CS/B/153/2005, at 30 (Federal High Court of Nigeria, Nov. 14, 2005).

<sup>324</sup> Collier, Conway & Venables, *supra* note 16, at 337.

IPCC Special Report, *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>325</sup> Predictably, these impacts emerge because 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>326</sup> This is vividly explicated by the Minister of Environmental Affairs’ decision in *Thabametsi* 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.<sup>327</sup> It is within this context that the phenomenon of climate change, and the continuing need for economic development, remain contentious issues. It is the many tensions that arise from this dilemma that will likely fuel climate conflicts on the continent, some of which must be resolved through litigation. Climate change litigation in Africa has commenced, however tentatively, and we predict that it might become more frequent as people increasingly realize that the socio-ecological impacts of climate change can be influenced by courts in alternative—and potentially, far more effective—sustainable ways.

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<sup>325</sup> IPCC, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C, at 10 (2018), <https://perma.cc/8L5S-4JYA>.

<sup>326</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 61, 66 (Lesley Masters & Lyndsey Duff eds., 2011).

<sup>327</sup> Appeal Decision, LSA 142346 (Minister of Environmental Affairs, Jan. 30, 2018), ¶¶ 4.8, 4.9.