

Manuscript version: Author's Accepted Manuscript

The version presented in WRAP is the author's accepted manuscript and may differ from the published version or Version of Record.

Persistent WRAP URL:

<http://wrap.warwick.ac.uk/138917>

How to cite:

Please refer to published version for the most recent bibliographic citation information. If a published version is known of, the repository item page linked to above, will contain details on accessing it.

Copyright and reuse:

The Warwick Research Archive Portal (WRAP) makes this work by researchers of the University of Warwick available open access under the following conditions.

Copyright © and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable the material made available in WRAP has been checked for eligibility before being made available.

Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Publisher's statement:

Please refer to the repository item page, publisher's statement section, for further information.

For more information, please contact the WRAP Team at: wrap@warwick.ac.uk.

Climate Change Litigation in the African System

Sam Adelman

Abstract:

Surprising few cases directly related to climate change have been litigated in African tribunals given the vulnerability of the 55 member states of the African Union to climatic harms. A majority of the litigation has focused upon environmental issues with climate-related aspects. Capacity constraints limit the potential for climate litigation, but cases are likely to increase as climate breakdown intensifies. This chapter analyses the cases that have been brought, including the landmark *actio popularis* brought by SERAC in 2001 on the right to a healthy environment in the African Charter on Human and Peoples' Rights. It considers directions for future litigation and draws conclusions about how this can be facilitated.

I. INTRODUCTION

Climate breakdown has led to a rapid increase in climate litigation around the world, but there have been few cases specifically related to global heating in Africa.¹ This is surprising in light of the continent's vulnerability to climatic harms due to relatively low levels of development, resilience, and adaptive capacities.² Between 75 and 250 million people on the continent are water stressed and yields in some countries from rain-fed agriculture are decreasing.³ The UN Environment Programme estimates that heating of 2°C will threaten more than half the continent's population with malnutrition. Even if this dangerous level is avoided, the continent will face annual adaptation costs of \$50 billion by 2050 and annual GDP losses equivalent to 2-4 per cent by 2040.⁴

Section 2 considers the classification of climate-related litigation and discusses the problems confronting litigants in many African countries. Section 3 examines avenues for litigation in the domestic, regional and international spheres. In section 4, I discuss cases that have been brought in Nigeria, Kenya, Uganda, and South Africa. In section 5, I suggest directions for future litigation in domestic tribunals and the African Court of Human and Peoples' Rights drawing on the example of the 2017 Advisory Opinion of the Inter-American Court of Human Rights (IACtHR)

¹ By January 2020, nearly 1500 cases had been filed in more than 30 countries <<http://climatecasechart.com/>>, accessed 3 May 2020. Global heating is a term that better reflects the continuous increase in average global temperature than global warming; see for example <<https://www.theguardian.com/environment/2018/dec/13/global-heating-more-accurate-to-describe-risks-to-planet-says-key-scientist>>, accessed 3 May 2020.

² Berhanu, Merertu, and Alemayehu Oljira Wolde, 'Review on Climate Change Impacts and its Adaptation strategies on Food Security in Sub-Saharan Africa' (2019) 19(3) *Agricultural Socio-Economics Journal* 145.

³ Mohapatra, Sabita, *Climate Change, New Security Challenges and the United Nations* (Routledge 2018) 44.

⁴ UNEP, 'Responding to climate change' <<https://www.unenvironment.org/regions/africa/regional-initiatives/responding-climate-change>>, accessed 2 March 2020.

on the environment and human rights.⁵ Section 6 draws conclusions about climate litigation in Africa to date.⁶

Climate litigation in the global South is less common, more low key and has attracted less attention than in the North.⁷ There is some debate in the literature about the definition of climate litigation.⁸ There are divergent views about what constitutes a climate change case. Markell and Ruhl define climate litigation as federal, state, tribal or local administrative or judicial litigation in which litigant filings or tribunal decisions directly and expressly raise an issue of fact or law relating to the causes or impacts of climate change.⁹ Peel and Osofsky define it as cases that have climate change at their core and raise climate-specific arguments or judicial analysis referring to climate change.¹⁰ They distinguish between core and peripheral cases and note that a significant number of cases ‘reflect a “peripheral” focus on climate change rather than having the issue at the “core” of the litigation’.¹¹ They identify five core cases in Africa, three from South Africa.¹²

Setzer and Benjamin identify five climate litigation cases in Africa whereas Peel and Lin discern six.¹³ Peel and Lin use five criteria: the identity of the plaintiffs and defendants; whether climate change was a core or peripheral issue; the nature of the claim, e.g. environmental impact assessments, public trust, rights violations, etc.; whether the Paris Agreement or implementing legislation was relied upon in the claim or decision; and whether NGOs were involved.¹⁴

In Africa, development has generally taken precedence over environmental concerns even though it is clear that climate breakdown leads to underdevelopment and impoverishment.¹⁵ Global

⁵ Organization of American States (OAS), *American Convention on Human Rights*, (Pact of San Jose), Costa Rica, 22 November 1969; Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights* (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁶ Joana Setzer and Rebecca Byrnes, *Global trends in climate change litigation: 2019 snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2019).

⁷ Jacqueline Peel and Jolene Lin, ‘Transnational Climate Litigation: The Contribution of the Global South’ (2019) 113(4) *American Journal of International Law* 679; Joana Setzer and Lisa Benjamin, ‘Climate litigation in the Global South: constraints and innovations’ (2020) 9(1) *Transnational Environmental Law* 77.

⁸ On the criteria that qualify cases as climate-related, see Joana Setzer and Lisa Vanhala, ‘Climate change litigation: A review of research on courts and litigants in climate governance’ (2019) 10(3) *Wiley Interdisciplinary Reviews: Climate Change* 580.

⁹ David Markell and J.B. Ruhl, ‘An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?’ (2012) 64(1) *Florida Law Review* 5, 21.

¹⁰ Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP 2015); Peel and Lin (n 7).

¹¹ Peel and Lin (n 7) 692.

¹² *Ibid.*, 704.

¹³ Setzer and Benjamin (n 7); Peel and Lin (n 7).

¹⁴ Peel and Lin (n 7) 702.

¹⁵ Werner Scholtz, ‘Human rights and the environment in the African Union context’ in Anna Grear and Louis Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015), 415. However, Frans Viljoen argues that the African human rights framework is designed to reconcile the tension between environmental rights and the

heating tends to have less salience in public discourse and government policy although this may change as climatic harms such as droughts, desertification and flooding intensify. Setzer and Benjamin note that litigation in many Southern countries focuses upon development-related environmental threats such as hazardous waste and safe drinking water rather than directly upon global heating.¹⁶ Likewise, Peel and Lin observe that climate change matters are more likely to be ‘packaged up with a range of other issues, such as [...] pollution, land-use and forestry, natural resource conservation, disaster risk management, implementation of planning frameworks or environmental justice and rights claims’.¹⁷ Litigation is more likely to address localised environmental issues which may have climate-related elements than climate change *per se*.

The legacies of colonialism in legal systems in many sub-Saharan countries states are relatively underdeveloped with weak legislative frameworks and civil society organisations.¹⁸ Litigants face other obstacles, including lack of financial resources and expertise and, as elsewhere, standing, jurisdictions, costs, causation, and enforceability.¹⁹ In Ghana, for example, national climate strategy and policy do not create legally enforceable commitments. There is no legislation or regulations on climate change. In addition to overcoming hurdles of standing, litigation in Ghana is notoriously slow, litigants must rely on private funding in the absence of legal aid, which may make cases unaffordable.²⁰ In the few environmental cases that have been filed, civil society organisations have focused upon on environmental issues such as pollution from extractive industries.

[P]otential climate litigation is likely to be subsumed within wider issues of environmental protection, land-use, or natural resource conservation, with climate impacts a secondary consideration. [This] is perhaps a more practical way of tackling climate change concerns within the existing legal and political situation [...] and reinforcing the need for climate governance to be part of, rather than separate from, broader global environmental governance. This strategy, however, risks weakening any efforts to develop a body of climate change litigation.²¹

right to development and that it is ‘more favourable to the individual, and more restrictive to the developmentalist state’ (Frans Viljoen, *Human Rights Law in Africa* (OUP 2012), 272.

¹⁶ Joana Setzer and Lisa Benjamin. ‘Climate litigation in the Global South: constraints and innovations’ (2020) 9(1) *Transnational Environmental Law*, 77, 81.

¹⁷ Peel and Lin (n 7) 694.

¹⁸ Makau Mutua, ‘Africa and the Rule of Law’ (2016) 23 *SUR-International Journal on Human Rights* 159.

¹⁹ International Bar Association. *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change: An International Bar Association Climate Change Justice and Human Rights Task Force Report* (IBA 2020), Ch. III. The model statute provides a template for limiting litigation costs. It can be used by environmental activists to pressurise governments to legislate.

²⁰ Erinosh, Bolanle, ‘Climate Change Litigation in Ghana: An Analysis of the Role of Courts in Enforcing Climate Change Law’, (2020) 114 *American Journal of International Law Unbound* 51.

²¹ *Ibid.* 53.

II. DOMESTIC, REGIONAL AND INTERNATIONAL JURISDICTION

A. Domestic

The obvious place for litigants to seek relief for climatic harms is in domestic courts. In Africa, the ability to litigate is constrained by significant capacity constraints in many countries.²² These include weak legislative and regulatory frameworks, poor governance and enforcement mechanisms, limited access to financial, legal and technical resources, and the absence of strong human rights protections. In the global South, plaintiffs ‘are more likely to use litigation to compel governments to enforce existing policies for mitigation and adaptation, attempting to overcome implementation constraints’.²³

Because the window to prevent the catastrophic consequences of global temperature increasing by more than 1.5 degrees Celsius is rapidly closing, climate litigation must perform a dual role. First, it provides litigants with a means of redress for specific rights violations and climatic harms. Second, it is also an avenue for climate justice through strategic cases which ‘aim to influence public and private climate accountability. These cases tend to be high-profile, as parties seek to leverage the litigation to instigate broader policy debates and change’.²⁴ Landmark cases such as *Ashgar Leghari* and *Urgenda* have addressed human rights violations or sought to compel governments to adhere to their commitments under the Paris Agreement.²⁵ The first judgment against a carbon major in a strategic case will signal a substantial breakthrough.

B. Regional

At the regional level, the main instrument on which future climate litigation might be based is the African Charter of Human and Peoples’ Rights, which was adopted in 1981.²⁶ This paved the way of the creation in 1987 of the African Commission on Human and Peoples’ Rights (ACHPR) to monitor implementation of the Charter (also known as the Banjul Charter).²⁷ Monitoring was

²² Setzer and Benjamin (n 16).

²³ Setzer and Benjamin (n 16) 3. Victory over a carbon major for climatic harms from the extraction and emission of fossil fuels is the Holy Grail of climate litigation but is more likely to occur in a Northern jurisdiction.

²⁴ Setzer and Brynes (n 6) 2.

²⁵ *Ashgar Leghari v Federation of Pakistan* [2015] W.P. No. 25501/201, Lahore High Court, 4 April 2015; *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* (case number 19/00135, 20 December 2019), Netherlands Supreme Court. On these cases, see also the Chapters by Bersha Ohredar and Christine Bakker in this volume.

²⁶ *African Charter on Human and Peoples’ Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

²⁷ The ACHPR is a quasi-judicial body for promoting and protecting human rights throughout the African continent. It came into force on 21 October 1986. The Commission interprets the African Charter and considers individual complaints of the violations of the Charter.

enhanced by the establishment of the African Court on Human and Peoples' Rights (ACtHPR) in 2004.²⁸ Complainants must exhaust domestic remedies before approaching either institution. Unlike the ACHPR, the Court has the power to issue binding decisions and, potentially significant for climate litigation, NGOs have standing to bring cases before it. The ACtHPR has received a handful of environmental cases since 2005 but none specifically on global heating.

Article 3 of the 1998 Protocol gives the ACtHPR jurisdiction to issue advisory opinions on 'any legal matter relating to the Charter or other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission'. In contrast, the IACtHR and the European Court of Human Rights may only consider violations of the regional instruments they oversee. This gives the ACtHPR substantial scope for action to issue an advisory opinion or adjudicate a contentious case on global heating – a situation that has not yet been faced with.

Applications to the Court may be made by the African Commission or other African intergovernmental organizations, by states involved in complaints before the ACHPR, and by states whose citizen's human rights are violated. Other state parties to the Protocol with an interest in a case may be permitted by the Court to join proceedings. In addition, applications may be lodged directly by individuals and NGOs with Observer Status before the African Commission, but only against states which have accepted the competence of the Court under Article 5(3) of the Protocol.

Future climate litigants in Africa might include individuals and communities displaced by climate breakdown under Article 20(3) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).²⁹ Women have the right to a healthy and sustainable environment under the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa as well as the environmental right in the Charter itself. The African Convention on the Conservation of Nature and Natural Resources and the African Charter on the Welfare of the Child (ACWC) might also provide a basis for litigation.³⁰

²⁸ The ACtHPR was established under the 1998 Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 (hereafter: 'the 1998 Protocol'). The ACtHPR hears cases from the 30 African Union (AU) member states that have ratified the Protocol.

²⁹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention, 2009); African Convention on the Conservation of Nature and Natural Resources (Algiers Charter), adopted 15 September 1968, entered into force 16 June 1969. The Kampala Convention links migration to the adverse effects of climate change and article 20(3) allows complaints by internally displaced persons to the ACHPR and the ACtHPR, but this has not yet occurred in relation to global heating.

³⁰ The ACWC does not contain an environmental right but Article 1 provides that 'Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health'. The provisions of article 2 pertaining to

Other avenues for potential litigants seeking climate justice are the ECOWAS Court of Justice and East African Court of Justice, which were initially created as economic courts but have acquired extensive human rights jurisdiction—the former through an explicit mandate, the latter through expansive interpretation of its mandate.³¹ Neither court requires the exhaustion of local remedies.

C. *International*

Two trends stand out in recent landmark climate cases: attempts to enforce the Paris Agreement and rights-based petitions. Both were prominent in *Urgenda*, the Court of Appeal's ruling in January 2020 that plans for a third runway at Heathrow airport are illegal, and the *Thabametsi* case in South Africa.³² Human rights were also a central to the plaintiff's argument in *Ashgar Leghari*.³³

Human rights arguably enjoy greater legitimacy than legislation because they highlight the individual impacts of climatic harms in the Anthropocene. Rights-based litigation tends to be retrospective but successful cases may deter future violations. Peel and Osofsky identify a discernible 'rights turn in climate litigation',³⁴ and courts appear willing to recognise the right to a healthy environment—for example in the 2017 Advisory Opinion of the IACtHR.³⁵ Liability for

adequate nutrition and safe drinking water might form the basis for a complaint or communication to the Committee of Experts, which may be submitted by individuals, groups, and non-governmental organizations recognised by member states, the AU or an international body. States are excluded from this process.

³¹ Nkiruka Chidia Maduekwe, 'The East African Court of Justice and a human rights approach to climate change', 2 October 2018 <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=9060a02f-a66a-4b0c-bcd9-29b4ccd923ae>>, accessed 2 May 2020. Supplementary Protocol A/SP.1/01/05 of 19 January 2005 gives the ECOWAS Court similar powers to the ACtHPR. In 2005, Supplementary Protocol A/SP1/01/05 gave the ECOWAS Court broad human rights jurisdiction. Judges in the East African Court of Justice and the Tribunal of the Southern African Development Community have unilaterally asserted their authority to adjudicate human rights claims. See Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice', (2013) 107(4) *American Journal of International Law* 737.

³² R (On The Application Of Plan B Earth) (Claimant) v Secretary Of State For Transport (Defendant) & (1) Heathrow Airport Ltd (2) Arora Holdings Ltd (Interested Parties) & WWF-UK (Intervener), Case Nos: C1/2019/1053, C1/2019/1056 and C1/2019/1145; *Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others*, Case No. 65662/16, High Court, Order of 8 Mar. 2017. See Jean-Claude Ashukem, 'Setting the Scene for Climate Change Litigation in South Africa: *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] ZAGPPHC 58 (2017) 65662/16' (2017) 13 *Law, Environment and Development Journal* 35; Tracy-Lynn Humby, 'The Thabametsi Case: Case No 65662/16 *Earthlife Africa Johannesburg v Minister of Environmental Affairs*', (2018) 30 *Journal of Environmental Law* 145; see also the Chapter by Humby in this volume.

³³ *Ashgar Leghari* (n 24). The plaintiff contended that climate change seriously threatens fundamental rights in the Pakistan's 1973 Constitution, including the rights to life, dignity of person and privacy of home, and the right to property.

³⁴ Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Litigation?' (2018) 7(1) *Transnational Environmental Law* 37.

³⁵ Inter-American Court of Human Rights, Environment and Human Rights, Advisory Opinion OC-23/17, 15 November 2017, Requested by the Republic of Colombia.

On environmental rights see David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (University of British Columbia Press 2011) and John H. Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018).

greenhouse gas emissions and other climatic harms is not addressed by international human rights law, but the Philippines Human Rights Commission has ruled that major fossil fuel companies have a moral obligation to respect human rights.³⁶

The climate regime is also weak on human rights. The preamble to the Paris Agreement contains the sole reference to human rights in a multilateral environmental agreement to date. It requires parties to:

respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

Inclusion of human rights in the operative part of the Paris Agreement—which was resisted mainly by developed countries—would have facilitated climate litigation, but rights-based litigation is proving to be a productive strategy in landmark cases such as *Urgenda* and *Ashgar Leghari*.³⁷

Individual petitions to international human rights bodies specifically on global heating are rare. The first climate cases before international human rights bodies were brought in 2019 and 2020.³⁸ In September 2019, 16 youths, including one from South Africa, submitted a complaint about climate change with the United Nations Committee on the Rights of the Child, but no case has emerged in Africa.³⁹

Every country in the African Union (AU) recognises the right to a healthy environment through the Charter, its constitution or in legislation.⁴⁰ A singular advantage of the African system is that the environmental right in article 24 of the Charter is collective.

³⁶ In December 2019, the Commission on Human Rights of the Philippines announced that 47 carbon majors, the world's biggest polluters, could be held liable for their contributions to global heating <<http://chr.gov.ph/nicc-2/>>, accessed 12 April 2020.

³⁷ Sam Adelman, 'Human Rights in the Paris Agreement: Too Little, too Late?' (2018) *Transnational Environmental Law* 7(1) (special issue on A Rights-Based Approach to Climate Change: Reflections on the Paris Agreement), 17-36.

³⁸ The Inter-American Commission on Human Rights is the only regional body to have received an individual petition: the 2005 Inuit petition <http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf>, accessed 3 May 2020.

³⁹ *Sacchi et al. v Argentina et al.* <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Not-available_petition-1.pdf>, accessed 10 May 2020. The other case involved a claim for asylum due to climate displacement: UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 7 January 2020.

⁴⁰ Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties: Africa Region, UNGA A/HRC/43/53/Annex IV, 14 February 2020.

III. CLIMATE-RELATED LITIGATION IN AFRICA

A. Rights-based Litigation

The African Charter was the first international treaty to recognise a collective right to a healthy environment. Article 24 states: ‘All peoples shall have the right to a general satisfactory environment favourable to their development’. Peoples are not defined, but ACtHPR jurisprudence suggests that sub-state communities such as ethnic groups are bearers of the right along with individuals and the wider public.⁴¹ The African Commission has argued that the right to a satisfactory environment is important for safety, quality of life, and to promote development.⁴² Provisions similar to article 24 have been included in several African constitutions since 1986, e.g. Benin, Cameroon, the Democratic Republic of Congo, and South Africa.

In 2001, the ACHPR became the first international human rights body to address the right to a healthy environment in the SERAC Communication.⁴³ The Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights brought an *actio popularis* against Nigeria’s military government and Shell alleging widespread environmental contamination from oil spills and gas flaring. The plaintiffs alleged that the resulting health problems of the Ogoni people in the Niger Delta violated their right to health, to the free disposal of their wealth and resources, and their right to a healthy environment.⁴⁴ The ACHPR identified ‘four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights’, and adumbrated the obligations that arise from article 24.⁴⁵ The Commission found that the Nigerian government ‘did not live up to the minimum expectations of the African Charter’ in failing to prevent pollution, regulate the oil companies; to hold them accountable for these violations; to ‘take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources’; or to require and publicise ‘environmental and social impact studies prior to any major industrial development.’⁴⁶

⁴¹ *African Commission on Human and Peoples’ Rights v The Republic of Kenya*, Application no. 006/2012, African Commission on Human and Peoples’ Rights, 15 March 2013, para. 197. Morné van der Linde and 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’ (2003) 3 *African Human Rights Law Journal* 167, 174.

⁴² *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Comm No 155/96 (ACHPR 2001), para. 51.

⁴³ *SERAC v Nigeria* (n 42).

⁴⁴ Articles 16, 21 and 24 in the African Charter.

⁴⁵ *SERAC v Nigeria* (n 42), para 44.

⁴⁶ *SERAC v Nigeria* (n 42), paras. 52, 53, 68.

The ACHPR has subsequently issued several resolutions on climate change, but the SERAC case is the only legal action it has taken in relation to climate change to date.⁴⁷

In 2009, the ACHPR urged member states to ensure human rights safeguards are included in legal texts on climate change as preventive preventive measures against forced relocation, unfair dispossession of property, and loss of livelihoods. The Commission called for special protection for vulnerable groups such as children, women, the elderly, indigenous communities and victims of natural disasters to be included in any international agreement or instruments on climate change. The ACHPR decided to carry out a study on the impact of climate change on human rights in Africa.

Resolution 271 in 2014, requested the the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa to undertake an in-depth study on the impact of climate change on human rights in Africa. This call was repeated in 2016 in Resolution 342 on Climate Change and Human Rights in Africa, which also encouraged comprehensive climate action to ensure the human rights of Africans are safeguarded to the greatest extent possible, with special protections for vulnerable groups.

In 2019, in Resolution 417, the ACHPR called upon AU members ‘to ensure that contingency plans and emergency measures are put in place to increase the level of preparedness for an increase in extreme weather events and unstable weather patterns as the consequences of climate change intensify’; to fully integrate climate change and human rights protections into their development plans; to strengthen regional cooperation on adaptation, mitigation and responses to climatic harms; and called upon the AU to declare 2021 the African Union Year on Climate Change.

Peel and Lin identify rights-based arguments in five of the six cases filed or adjudicated in Africa (one in Nigeria and Uganda, three in South Africa).⁴⁸ These cases are also based upon other legal provisions such as the requirement for environmental impact assessments (EIAs) discussed in the following section.

B. Environmental Impact Assessments

⁴⁷ Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa-ACHPR/Res.153(XLVI)2009; Resolution on Climate Change in Africa - ACHPR/Res.271(LV)2014; 342 Resolution on Climate Change and Human Rights in Africa - ACHPR/Res.342(LVIII)2016; Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change-ACHPR/Res. 417 (LXIV)2019.

⁴⁸ Peel and Lin (n 7) 706.

1. Nigeria

In Peel and Lin's classification, five of the six climate-related cases in Africa have relied upon legislation requiring environmental impact assessments.⁴⁹

The first challenge to a government's failure to properly implement an environmental impact assessment came in 2005. Jonah Gbemre, representing the Iwherekan community in the Niger Delta filed suit against the Nigerian government and Shell for serious environmental harms from 'massive, relentless and continuous gas flaring'.⁵⁰ The federal court ruled that the flaring is a gross violation the fundamental rights to life and dignity of the human person in sections 33(1) and 34(1) of the Constitution and articles 4, 16 and 24 of the African Charter, and that article 24 logically includes the right to a 'poison-free, pollution-free and healthy environment'. This violation was due in part to the failure to carry out a compulsory EIA under the Environmental Impact Assessment Act of Nigeria (No 86 of 1992). The federal court relied upon the environmental right in the African Charter in holding that:

The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment [...] imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.⁵¹

Kotzé and du Plessis regard the *Gbemre* case as 'a victory for the interpretation and application of environmental rights' despite the absence of a right to a healthy environment in Nigeria's Constitution but fifteen years on from the decision, the case remains on appeal and gas flaring continues.⁵²

2. Kenya

In *Save Lamu*, local and foreign NGOs and members of the Lamu community challenged the granting of an EIA license for the Lamu Coal-fired Power Plant, which would have been the first

⁴⁹ The exception is *Mbabazi* (n 59).

⁵⁰ *Gbemre v Shell Petroleum Development Company of Nigeria Ltd. and Others* (FHC/B/CS/53/05). Peel and Lin (n 5) classify the case as peripheral because climate change did not feature in the pleadings or the court's decision.

⁵¹ *SERAC v. Nigeria* (n 42), para. 52.

⁵² Louis Kotzé and Anel du Plessis (2019) 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent', *Journal of Environmental Law and Litigation*. ISSN 1049-0280, 25 <<http://eprints.lincoln.ac.uk/36688/>> accessed 16 December 2019.

coal-fired power station in East Africa.⁵³ The National Environmental Tribunal set aside the license because the National Environmental Management Authority had violated the National Environmental (Impact Assessment) Audit Regulations of 2003 by granting it without adequate public participation. The tribunal found the Amu Power Company's Environmental and Social Impact Assessment to be incomplete and scientifically insufficient because it failed to consider the Climate Change Act of 2016. The tribunal ordered a new assessment, but the case rumbles on in a succession of appeals.⁵⁴

3. *South Africa*

Most EIA-related litigation has occurred in South Africa and are discussed in Humby's chapter in this volume.⁵⁵ In 2017, the Earthlife NGO successfully challenged the approval of a license for a coal-fired power plant based on a flawed EIA.⁵⁶ The decision is notable for the court's ruling that South Africa's commitments under the Paris Agreement to be relevant consideration for the environmental review of a coal-fired power plant. This case inspired similar cases involving EIAs.⁵⁷ The potential of cross-pollination is demonstrated by an Indonesian case closely modelled on *Thabametsi*.⁵⁸

C. *Public Trust*

1. *Uganda*

⁵³ *Save Lamu et al. v National Environmental Management Authority and Amu Power Co. Ltd.* (Tribunal Appeal No. Net 196 of 2016).

⁵⁴ *Save Lamu & 5 others v National Environmental Management Authority (Nema) & another* [2019] eKLR, Appeal No. 3 of 2018, rejected on 24 January 2019 <<http://kenyalaw.org/caselaw/cases/view/167761>>, accessed 15 January 2020.

⁵⁵ The South African cases are discussed in that chapter at the editors' request.

⁵⁶ *Earthlife Africa Johannesburg v. Minister of Environmental Affairs & Others*, Case No. 65662/16, High Court, Order of 8 Mar. 2017. Tracy-Lynn Humby, 'The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs', (2018) 30 *Journal of Environmental Law* 145.

⁵⁷ *Kbanyisa Thermal Power Station RF (Pty) Ltd, and Others (Case No. 61561/17)*; Trustees for the Time Being of the GroundWork Trust v Minister of Environmental Affairs, KiPower (Pty) Ltd, and Others (Case no. 54087/17). See also the Constitutional Court decision on coal mining in a strategic water zone in *Mpumalanga: Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* (50779/2017) [2018] ZAGPPHC 807; [2019] 1 All SA 491 (GP) (8 November 2018).

⁵⁸ *Greenpeace Indonesia and Others v Bali Provincial Governor*, 2/G/LH/2018/PTUN.DPS (Denpasar Admin. Ct., Jan. 24, 2018). On South-South cooperation, see Peel and Lin (n 7) 705.

Another example of cross-pollination is the 2012 case filed by the Greenwatch NGO against the Uganda government on behalf of four local youth.⁵⁹ The case also demonstrates the importance of legal and financial support from the global North.

The plaintiffs argued that the government is a public trustee of the country's natural resources, including its atmosphere, and is obliged to protect them on behalf of current and future generations. Under article 39 of the Constitution, 'Every Ugandan has a right to a clean and healthy environment'. Article 237(2)(b) states that national or local government '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'.⁶⁰ The plaintiffs argued that the government was violating its obligations under the UNFCCC and the Kyoto protocol, which 'require parties to put in place powerful and legally binding measures to curtail climate change'.⁶¹ The plaintiffs contended that the government's duties include sustainable use of natural resources to 'ensure that the atmosphere is free from pollution for the present and future generations'; and to uphold the 'right to a clean and healthy environment'. They requested a declaration that government is violating its public trust duty and an order compelling it to provide accurate information on national greenhouse gas emissions and a clear mitigation plan. In a preliminary hearing, the High Court ordered the parties to undertake a 90-day mediation process that failed to resolve the matter. The court held a hearing in May 2019 to enable the young plaintiffs to present evidence of the government's failure to take adequate mitigation and adaptation measures to protect young people and future generations but has taken no further action.

Since the case was brought, the Ugandan government has issued new climate change policy and published a draft bill that falls short on adaptation measures to mitigate water and food shortages, ill health and mass migration.⁶²

D. Duty of Vigilance

⁵⁹ *Mbabazi and Others v The Attorney General and National Environmental Management Authority* (Civil Suit No. 283 of 2012). The litigation was supported by Our Children's Trust, the NGO that brought the *Juliana* case in Oregon that was dismissed by the Ninth Circuit Appeal Court in January 2020: US Court of Appeals for the Ninth Circuit, No. 18-36082, D.C. No. 6:15-cv-01517AA, Opinion, 17 January 2020.

⁶⁰ See Samuel Varvastian, 'A Natural Resource Beyond the Sky: Invoking the Public Trust Doctrine to Protect the Atmosphere from Greenhouse Gas Emissions' in Helle Tegner Anker and Birgitte Egelund Olsen (eds), *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (Intersentia 2018).

⁶¹ *Mbabazi* (n 59) para. 5(h).

⁶² The Uganda National Climate Change Policy was published 2015 <<https://www.mwe.go.ug/sites/default/files/library/National%20Climate%20Change%20Policy%20April%202015%20final.pdf>>, accessed 20 June 2020. See also the National Environment Act, Act 5 of 2019.

Uganda also features in *Friends of the Earth et al. v. Total*, a case initiated in France in January 2020. It is the first case under the corporate duty of vigilance law passed in 2017 that creates a binding obligation on parent companies to identify and prevent adverse human rights and environmental impacts resulting from their activities, companies they control, and subcontractors and suppliers with which they have established commercial relationships.⁶³

Six NGOs (four Ugandan, two French) and several Ugandan farmers are suing Total for failing to adequately assess the threats to human rights and the environment from the Tilenga oil megaproject in Uganda and Tanzania.⁶⁴ It is estimated that the project could displace 50000 farmers. The claim focuses on human rights and environmental pollution, but also alleges that the project's vigilance plan does not properly consider the greenhouse gas emissions likely to result from the project.⁶⁵

The significance of the case is twofold. First, it may make European multinationals more accountable to local communities and reshape the way they do business in the global South. Second, it demonstrates the potential for cooperation between litigants in the global North and South despite the setback in January 2020, when the Nanterre High Court of Justice ruled that the case must be pursued in a commercial court.⁶⁶

IV. FUTURE DIRECTIONS

A. Litigation Based on Climate Change Legislation

Climate change legislation in a growing number of countries provides possibilities for future litigation in Africa.⁶⁷ The climate-related aspects of *Thabametsi*, *Gbembre* and *Mbabaꝓi* flowed from legislation on EIAs, energy resources, environmental problems such as pollution, and human rights law.⁶⁸ This suggests that the absence of climate change statutes is not an insuperable barrier

⁶³ See the chapter on Climate Litigation in France by Marta Torres-Schaub in this volume. Discussions about similar legislation are taking place in the United Kingdom, the Netherlands, Germany, Finland, Switzerland and the European Commission.

⁶⁴ The Ugandan NGOs are Friends of the Earth Uganda and NAVODA (Natural Resources, Environmental and Biodiversity Conserving Organization). Total, Tullow Oil, and the China National Offshore Oil Corporation planned to drill more than 400 wells in six oil fields and construct a 900-mile pipeline to Tanzania.

⁶⁵ In September 2019, Total SA suspended the proposed \$3.5 billion crude export pipeline from Uganda to Tanzania after the collapse of a deal to buy a stake in Tullow Oil Plc's oil fields in Uganda. <<https://www.bloomberg.com/news/articles/2019-09-04/total-suspends-planned-3-5-billion-uganda-tanzania-oil-pipe>>, accessed 15 January 2020.

⁶⁶ Tribunal Judiciaire de Nanterre, Ordonnance de Refere Redue Le 30 30 Janvier 2020, N° R.G.: 19/02833 - N° Portalis DB3R-W-B7D-VIPX <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200130_NA_judgment-1.pdf>, accessed 20 Jun3 2020.

⁶⁷ Climate Change Laws of the World <<http://www.lse.ac.uk/GranthamInstitute/research-theme/governance-and-legislation/>>, accessed 12 May 2020.

⁶⁸ Kotzé and du Plessis (n 52) 31.

to successful litigation. It also demonstrates that other bodies of law such as administrative law provide a wedge to enable litigants to introduce climate-related arguments to extend the scope of EIAs. Tort law is the basis of a substantial number of climate cases around the world. Nevertheless, litigation is facilitated by legislation that incorporates the Paris Agreement such as Kenya's Climate Change Act 11 of 2016 and South Africa's pending act. As Lord Carnwath has pointed out:

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.⁶⁹

None of the 34 cases in the global South classified by Peel and Lin as climate-related involved climate change legislation.⁷⁰

Legislation incorporating the Paris Agreement gives litigants the possibility to hold governments to account for adaptation, mitigation policies and sustainable development policies, rights violations, and a just transition. The hybrid nature of the Agreement, which contains top-down and bottom up elements, makes it possible for litigants to highlight disparities between a state's emissions and the targets in articles 2 and 4 of the accord or lack of ambition in its non-binding Nationally Determined Contribution. *Urgenda* and the Heathrow decision suggest that courts may be willing to assess states' emissions obligations on a proportionate basis.⁷¹

B. *Advisory Opinions*

In addition to domestic litigation, Colombia's request for an advisory opinion on human rights and the environment from the Inter-American Court of Human Rights provides an example that might be followed in Africa.⁷² When domestic remedies are exhausted or unavailable, an organisation with standing might seek an advisory opinion from the ACtHPR, which has advisory jurisdiction under article 4(1) of the 1998 Protocol.⁷³ This is likely to be a civil society institution

⁶⁹ Lord Carnwath JSC, 'Climate Change Adjudication After Paris: A Reflection' (2016) 28(1) *Journal of Environmental Law* 5, 9.

⁷⁰ Peel and Lin (n 7) 708. Kenya's Climate Change Act of 2016 was referred to in the *Save Lamu* case discussed below.

⁷¹ *Urgenda* (n 25); *Heathrow* (n 32).

⁷² Inter-American Court Of Human Rights, Advisory Opinion on the Environment and Human Rights, Oc-23/17 of 15 November 2017, Requested by the Republic of Colombia.

⁷³ Advisory opinions can be requested by member states, the AU or any of its organs, any African organisation recognised by the African Union. In 2017, the ACtHPR narrowed standing in deciding that that recognition of NGOs by the AU is through the granting of Observer Status or the signing of a Memorandum of Understanding with the

because AU member states have been relatively reluctant to seek advisory opinions and no individual petition has been decided.⁷⁴ Plaintiffs would have to overcome hurdles such as standing and exhaust domestic remedies. But the impact of a positive advisory opinion could be substantial and reflect the willingness of courts in other jurisdictions to respond favourably to coherent legal arguments that reflect growing public alarm about the climate emergency. By September 2019, the ACtHPR had finalised twelve advisory opinions and one was pending.⁷⁵ In contrast, the Inter-American Court, handed down ten advisory opinions before adopting its first decision in a contentious case.⁷⁶ Another difference is that the IACtHR has the competence to give an opinion about the compatibility of a state's domestic laws with the treaties within its jurisdiction.

Consideration has long been given by small island states in the Pacific to seeking an advisory opinion from the International Court of Justice on state obligations in relation to climate change. Advisory opinions avoid the need for individuals to seek redress (which is costly) and the political backlash that may result from contentious litigation between states.⁷⁷ Wewerinke-Singh and Salili argue that even though such opinions are not binding, they have the potential to clarify the rights and obligations of states, improve the negotiating hands of climate-vulnerable states in the UNFCCC, influence other areas of international law such as international trade law and investment arbitration, and empower citizens, local governments and non-governmental organisations in holding recalcitrant states to account before regional and domestic courts.⁷⁸

The merits of a case in contentious proceedings can be considered by the (ACtHPR) through direct access by litigants or indirect access via the African Commission.⁷⁹ The Court can issue an opinion on any matter relating to the Charter or other relevant human rights instruments at the

NGO. App 001/2013 *Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP) (Advisory Opinion)*, 26 May 2017, para. 64). As a result, NGOs paradoxically have broader standing in contentious matters for which they only require recognition by the Commission.

⁷⁴ The Court can deliver advisory opinions on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social, and Cultural Council, the Financial Institutions, or any other organ of the African Union as authorised by the Assembly. By 2019, the Court's advisory jurisdiction had been requested thirteen times.

⁷⁵ ACHPR <<http://www.african-court.org/en/index.php/cases/2016-10-17-16-19-35#statistical-summary>>, accessed 2 May 2020.

⁷⁶ Christiane Lucena Carneiro, 'The Inter-American Human Rights System' in Gordon DiGiacomo and Susan Kang (eds) *The Institutions of Human Rights: Developments and Practices* (University of Toronto Press 2019) 212.

⁷⁷ Cecilia M. Bailliet, 'The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion', (2018) 15(1) *The Brazilian Journal of International Law* 255, 276.

⁷⁸ Margaretha Wewerinke-Singh and Diana Hinge Salili, 'Between negotiations and litigation: Vanuatu's perspective on loss and damage from climate change' (2019) 1 *Climate Policy* 8; DOI: 10.1080/14693062.2019.1623166. See also Daniel Bodanksy, 'The role of the international court of justice in addressing climate change: Some preliminary reflections' (2017) 49 *Arizona State Law Journal*, 659.

⁷⁹ The Court began functioning in 2006. Its capacity to deliver binding decisions complements the quasi-judicial mandate of the African Commission.

request of a Member State of the African Union, any of the organs of the AU, or any African organisation recognised by the AU provided that the matter is not related to a matter being examined by the Commission.⁸⁰

An advantage of advisory opinions is their non-contentious nature in that they do not involve proceedings against member states but rather an application to the Court to clarify a matter of law or to establish its position on a particular matter. AU members have indicated a strong preference for diplomatic rather than legal solutions.

The issue for which an advisory opinion is sought will be important, both to increase the likelihood that the ACtHPR will accept it and to achieve the broadest possible impact across the continent. Article 24 provides a collective right to a healthy environment, and the obligation to act jointly or collectively, which is explicit in relation to the right to development in the African Charter, may enable litigants to argue that states have positive extraterritorial obligations toward African peoples.⁸¹ The SERAC strategy—which surprisingly has not been repeated—focused on a particular environmental problem and suggests that pollution amounting to ecocide might form the basis for a petition. This might be linked to deforestation or the compatibility of ecologically unsustainable extractive development with the conception of sustainable development in *Agenda 2063: The Africa We Want*.⁸² Adopted in 2015, the Agenda outlines the AU's 50-year development strategy and its aspiration for 'A prosperous Africa based on inclusive growth and sustainable development'. Africa is expected to achieve 'environmentally sustainable and climate resilient economies and communities' by 2063. A request for an advisory opinion might also rely upon the Revised African Convention on the Conservation of Nature and Natural Resources, which reaffirms the responsibility of state parties 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction'.⁸³ States should use environment and natural resources in a 'sustainable manner with the aim to satisfy human needs according to the carrying capacity of the environment'.⁸⁴

⁸⁰ The ACtHPR handed down its first decision on an environmental matter in 2017 in *African Commission on Human and Peoples' Rights v Republic of Kenya*, No. 006/2012, Decision, African Court on Human and Peoples' Rights, 216 (May 26, 2017). See Lilian Chenwi, 'The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System' in John H. Knox and Ramin Pejani (eds) *The Human Right to a Healthy Environment* (CUP 2018).

⁸¹ Scholtz (n 13) 404.

⁸² *Agenda 2063: The Africa We Want* (African Union Commission 2015).

⁸³ Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A/CONF.48/14/Rev.1, Principle 21; Rio Declaration on Environment and Development (A/CONF.151/26, vol. I), Principle 2.

⁸⁴ Preamble to the Revised African Convention on the Conservation of Nature and Natural Resources.

In March 2016, Colombia requested an Advisory Opinion from the IACtHR on the application of the American Convention on Human Rights to severe degradation of the human and marine environment of the Wider Caribbean Region from the acts or omissions of Caribbean states through major new infrastructure projects.⁸⁵ The IACtHR held that the right to a healthy environment is a right in itself, that a wide range of human rights are threatened by environmental degradation, and that state parties have obligations to respect and guarantee the rights in the American Convention, including undertaking EIAs when there is a risk of significant damage to the environment. The Court invoked international environmental law principles such as the precautionary principle and the duty to cooperate in good faith that have rarely been effective. Campbell-Durufflé and Atapattu argue that the Advisory Opinion has significant implications in relation to enforceability, causality, and extraterritoriality, and opens the possibility that the negative impacts of environmental degradation on economic, social, and cultural rights are justiciable in and of themselves.⁸⁶ They maintain that the Opinion makes it possible to invoke human rights obligations:

before climate-change-induced harms have materialized, as well as subsequently, thereby shifting the focus from establishing causation between the actions or omissions of states and climate harms to whether states have contributed to the *risk* that such harm will occur.⁸⁷

There is no obvious impediment to a similar request to the ACtHPR.

The existence of the right to a healthy environment in domestic constitutions offers another avenue for a test case. A favourable decision from the South African Constitutional Court on the balance between the right to a healthy environment and what constitutes sustainable development would be a significant strategic victory. Article 24 states:

Everyone has the right –

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and

⁸⁵ Inter-American Court of Human Rights, *Advisory Opinion oc-23/17 Requested by the Republic of Colombia, 'Environment and Human Rights'*, 15 November 2017.

⁸⁶ Christopher Campbell-Durufflé and Sumudu Atapattu, 'The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law' (2018) 8(3-4) *Climate Law* 321.

⁸⁷ *Ibid.* 333; emphasis in original.

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

V. CONCLUSION

To date, most of the cases discussed in this chapter have been brought on environmental problems that are climate-related to varying degrees. Given the thin dividing line between environmental and climate issues, we can expect this to continue, but climate breakdown is likely to increase the number of cases with a greater climatic component.

Several conclusions can be drawn from this brief survey of climate litigation in Africa. First, climate litigation in Africa is limited by capacity constraints. Constitutional rights provisions, regional instruments such as the African Charter and international human rights and climate law facilitate litigation, but domestic climate change legislation offers the most immediate basis for climate litigation.

Second, strategic cases are likely to have an influence beyond the jurisdiction in which they are brought. Peel and Lin suggest that most Southern litigants seek to compel governments to translate adaptation and mitigation policies into action or to avoid environmental harms. Most cases reflect the linkage between greenhouse gas emissions and chronic environmental pollution problems.⁸⁸ Thus, while most cases are likely to focus upon localised environmental issues such as EIAs, the degree to which they are based upon human rights claims and government commitments under the Paris Agreement, the greater will be their impact—as *Urgenda* and the Heathrow litigation demonstrate. The growing number of cases involving youth and intergenerational justice suggest that this might be a particularly productive path to follow.⁸⁹ Decisions in Southern tribunals are less likely to be regarded as landmarks even though their impact across the global South may be. Litigants in one country adapt litigation strategies: for example, the *Mbabaḻi* case draws on the public trust doctrine used in the *Juliana* case in Oregon and is available in Southern jurisdictions such as India, Pakistan and South Africa.⁹⁰ A positive advisory opinion from the ACtHPR along the lines of that by the IACtHR that adumbrates state obligations to protect human rights and promote ecologically sustainable development may have a significant impact throughout the AU.

⁸⁸ Peel and Lin (n 7) 714, 716.

⁸⁹ West Coast Environmental Law <<https://www.wcel.org/blog/youth-are-leading-climate-movement-in-court-and-streets>>, accessed 10 May 2020.

⁹⁰ *Mbabaḻi* (n 59). *Juliana v United States* 217 F Supp 3d 1224 (D. Or. 2016). See also Climate Litigation in the United States by Michael Gerrard in this volume.

Third, the involvement of NGOs such as SERAC, Earthlife and Greenwatch and environmental lawyers is an important way of overcoming capacity constraints.⁹¹ *SERAC*, the South African EIA cases, *Mbabazi* and the *Total* case were brought by individual litigants or communities in conjunction with local or international NGOs as co-litigants or *amici curiae*. Fifty per cent of climate cases in the global South fall in this category.⁹²

Fourth, as public alarm about global heating increases, it is important to take advantage of the apparent willingness of courts in different jurisdictions to hand down favourable decisions when presented with innovative, well-crafted legal arguments. With time running out, now is the time to litigate, even at the risk of failure. The history of climate litigation suggests that cases are unlikely to succeed in the first instance but that success or failure in one country provides lessons for litigation strategies elsewhere.

Fifth, North-South cooperation can play a significant role. All the African cases have been against governments alone or together with companies such as Shell, but the case against Total SA indicates the potential for litigation directly against corporations. The *Total* case shows the potential for Southern involvement in Northern cases and vice versa. Other examples are the *Mbabazi* case and the so-called Peoples' Climate Case filed with the European General Court in 2018 on behalf of families and youths from Europe, Kenya and Fiji.⁹³ This has benefits for both sides including the transfer of knowledge, expertise and financial resources to Southern actors and moral legitimacy and positive media exposure public awareness-raising for Northern organisations.⁹⁴

Such partnering is strategic: Global South advocates benefit from the expertise and financial resources of Global North organizations, while the inclusion of Southern advocates' local knowledge and the stories of Global South plaintiffs may lend greater moral legitimacy to the claims advanced in court, as well as in accompanying media and public awareness-raising campaigns.⁹⁵

⁹¹ NGO activities are restricted by legislation in many low and middle-income countries: UNEP, *Environmental Rule of Law: First Global Report* (UN Environment Programme 2019).

⁹² J Peel and Lin (n 7) 710.

⁹³ *Case T-330/18 Carvalho & Others v European Parliament and Council*, Order of the European General Court, May 8, 2019. The court denied the applicants' standing to bring the case. In July 2019, the applicants' appealed to the European Court of Justice. See also *Climate Litigation before European Courts* by Marc Willers in this volume.

⁹⁴ Peel and Lin (n 7).

⁹⁵ *Ibid.* 684.

South-South cross-pollination and solidarity is important because developing countries face similar problems. The *Thabametsi* and *Greenpeace Indonesia* litigation demonstrates the potential for litigants to learn from each other.

Former NASA climate scientist James Hansen has called for a wave of litigation to address the failure of the Paris Agreement, which he describes as ‘eyewash’ because it fails to price the social cost of carbon. Hansen believes national legislation is doomed to fail because governments are too beholden to lobbyists.⁹⁶ Since the time is running out to prevent global temperature from increasing by more than 1.5°C above preindustrial levels and catastrophic global heating and because litigation is a lengthy process, all avenues at all levels in all places must be urgently considered.⁹⁷

⁹⁶ Jonathan Watts, “‘We should be on the offensive’ – James Hansen calls for wave of climate lawsuits”, *The Guardian*, 17 November 2017 <<https://www.theguardian.com/environment/2017/nov/17/we-should-be-on-the-offensive-james-hansen-calls-for-wave-of-climate-lawsuits>>, accessed 12 May 2020.

⁹⁷ IPCC, *Global Warming of 1.5°C. An IPCC Special Report* (IPCC 2018).