The Influence of Human Rights on Climate Litigation in Africa

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It could be expected that human rights would be a particular feature of climate litigation in African countries, not least because African regional and domestic legal systems feature extensive human rights protection, including of social and environmental rights. However, in practice, public law challenges mostly relating to environmental impact assessment have dominated climate litigation on the continent. This raises questions as to whether human rights arguments have been and are likely to be used in climate litigation in African regional and domestic courts, and if so how. This article examines these issues in three ways. First, it analyses the implications of cases grounded in human rights that engage with climate change issues and argues that these should be read as African climate cases. Second, it conducts a prospects analysis for social rights litigation in the context of climate change, arguing that existing jurisprudence in some jurisdictions may preclude such climate-focused social rights litigation. Third, the article analyses some administrative law cases, highlighting the layers of influence that human rights protection have on decision-making and outcomes. The core argument is that human rights protections and human rights-based strategies have fundamentally shaped African climate litigation, and will continue to do so.

Keywords: climate litigation, climate change, Africa, human rights

1. INTRODUCTION

This article examines how human rights arguments have been and might be used in climate litigation on the African continent. I examine how domestic and regional courts and tribunals interpret the relationship between human rights, climate change and development; how development rights are protected through climate litigation; and how human rights have influenced climate litigation. This human rights climate litigation has increasing relevance and visibility because of the increasing recognition of linkages between climate change and human rights, including in the Preamble to the Paris Agreement,[1] as well as in the mushrooming use of human rights arguments in climate advocacy and litigation.[2] In climate litigation, the 'turn' to human rights arguments includes assertions that defendants' activities constitute rights violations, and increasing reliance by courts on human rights as interpretive tools to shape legal duties.[3] Human rights approaches highlight the impacts of climate change on the rights to life, health, food, water and housing. [4]

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[1] John H Knox, 'Bringing Human Rights to Bear on Climate Change' (2019) 9 Climate Law 165; Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Kindle e-book, Routledge 2015), Chapter One; Annalisa Savaresi and Joanne Scott, 'Implementing the Paris Agreement: Lessons from the Global Human Rights Regime' (2019) 9 Climate Law 159; Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67 International & Comparative Law Quarterly 759.

[2] Due to the publication context of the article, I assume the reader has good knowledge of this, and shall not provide a detailed overview of the literature. Please see the articles in this issue, and J Setzer and LC Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* e580, 10 - 11; J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37.

[3] Peel and Osofsky (n 2), 42. [Also see Annalisa Savaresi and Joana Setzer 'This Issue'.]

[4] UNHRC "Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights" A/HRC/10/61 15 January 2009. These are the rights identified as

Africa has a distinctive and progressive regional human rights architecture, and many African countries have young constitutions, which protect economic, social and cultural rights (ESCR).[5] In theory, human rights protections provide a framework within which the detrimental impacts of climate change — for example on food and water security — can be directly adjudicated.[6] It has been argued that such protections, along with the experience of civil society activists and litigators in environmental justice litigation and judges proactive in structural reform, opens the 'Southern route' to climate litigation.[7]

At present, only a handful of cases are classified as 'climate litigation' in Africa,[8] and there are very few instances of climate litigation in Africa where both climate change and human rights are centrally featured.[9] But, in thinking about climate litigation in the African context, it is necessary to adopt a much broader understanding of what is included in the scope of climate litigation. Climate litigation can be understood as adjudicative activity that raises legal questions relating to climate change mitigation or adaptation or engages with some aspect of climate law or policy, whether or not these aspects are central to — or even peripheral to — the litigation.[10] Adopting this broader understanding creates the space to read litigation in which climate issues are not front and centre or the main priority as nonetheless addressing climate related concerns. This broader approach is necessary for a proper understanding of climate litigation in the Global South,[11] including Africa.[12] But in addition to understanding the breadth of the field, the reasons why this broader analysis is necessary requires contextual reflection, [13] including how legal rules fit with climate change, and how it reconciles this 'threat multiplier' with other challenges.[14]

In this article I consider a small selection of relevant African case law that is either grounded in human rights, or where human rights arguments were used in the interpretation of other legal duties.[15] Some are overtly climate change cases; some — I argue — can be read as climate change cases. In so doing, I focus on two overlapping climate and development problems. The first problem is how to ensure adaptation to climate change in the context of limited economic resources. This engages questions about socio-economic rights, including the right to water, which has particular relevance in several of the cases I discuss. The second problem is the need to achieve development and poverty alleviation while minimising the risks and harms associated with fossil fuel production. The nexus between these potentially competing

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affected by the OHCR as well as self-determination.

[5] DM Chirwa and L Chenwi, 'The Protection of Economic, Social and Cultural Rights in Africa' in DM Chirwa and L Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press 2016), 8-10.

[6] Boyle (n 1), 765.

[7] César Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 AJIL Unbound 40, 41.

[8] Headcounts are not that helpful, as the tally varies depending on methodological approaches to what is included: see Sam Adelman, 'Climate Change Litigation in the African System' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci, (eds.), *Climate Change Litigation: Global Perspective* (Brill, 2021)

[9] As per the framing used by Savaresi and Setzer (n 3). At present, this probably only includes *Ghemre*, discussed below, and the pending cases discussed at the beginning of Section 3.2.

[10] Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 Journal of Environmental Law 483.

[11] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 American Journal of International Law 679.

[12] Kim Bouwer and Tracy-Lynn Field, 'Editorial: The Emergence of Climate Litigation in Africa' 15 CCLR 123. Also see Tamara Morganthau and Nikki Reisch, 'Litigating the Frontlines: Why African Community Rights Cases Are Climate Change Cases' (2020) 25 UCLA Journal of International Law and Foreign Affairs 85.

[13] I am less concerned with questions of effectiveness – questions of compliance and enforcement do not encapsulate the sole purpose for these cases, see James Thuo Gathii, 'Introduction: The Performance of Africa's International Courts' in James Thuo Gathii (ed), *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (Oxford University Press 2020).

[14] Bouwer and Field (n 12).

[15] Peel and Osofsky (n 2).

priorities are tested in the context of challenges to carbon intensive infrastructure or pollution caused by fossil fuel production.[16] I argue that human rights play a significant role in the strategies and outcomes of African climate cases. I make this argument by examining how domestic and regional courts and tribunals have understood the relationship between human rights, climate change and development; how development rights are protected through climate litigation; and how human rights have influenced climate litigation.

The article is structured as follows. Section 2 provides a brief overview of the protection of human rights in the African regional system and the potential for human rights-based approaches to climate litigation in Africa. I also briefly discuss how these rights should be interpreted in context. Section 3 discusses African climate cases that allege human rights violations. Here, I address the prospects of social rights litigation in particular. In section 4, I explain the influence of human rights on public law challenges to fossil fuel infrastructure. This is followed by a short conclusion.

2. CLIMATE CHANGE, HUMAN RIGHTS AND DEVELOPMENT IN THE AFRICAN SYSTEM

The African Charter on Human and Peoples Rights (the Banjul Charter)[17] established a regional human rights system with wide-ranging protection of economic, social and cultural rights (ESCR), a degree of protection unique to Africa.[18] A small number of such rights are explicitly protected.[19] However, an increasing number of rights have been found to be implicit in existing rights — for instance, the right to water (and sanitation) has been found to be implicit in the rights to life, dignity, work, food, health, economic, social and cultural development, and a satisfactory environment.[20]

The African Commission (the 'Commission') has been slow to flesh out the normative content of the ESCR. [21] It has read ESCR rights as being progressively realisable within the

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[16] B Erinosho, 'Climate Change Litigation in Ghana: An Analysis of the Role of Courts in Enforcing Climate Change Law' (2020) 114 *AJIL Unbound* 51; J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *American Journal of International Law* 679.

[17] Adopted 27 June 1981, entered into force 21 October 1986, CAB/LEG/67/3 rev. 5, 1520 UNTS 217. This has near universal ratification on the African continent.

[18] See e.g. Lilian Chenwi, 'The African System' in Jackie Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2020), Section 2.

[19] See Frans Viljoen, 'Regional Institutional and Remedial Arrangements for the Judicial Enforcement of Economic, Social and Cultural Rights in Africa' in Danwood Mzikenge Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press 2016), 271.

[20] ACHPR, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (24 October 2011) <https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf> accessed 10 May 2021, para 87 (see also paras 88–93). ACHPR, 'Pretoria Declaration on Economic, Social and Cultural Rights in Africa' (2004) <https://www.achpr.org/legalinstruments/detail?id=35> accessed 10 May 2021 para 7 - implicit in the right to health; also see e.g. Free Legal Assistance Group and Ors v Zaire (1995) Communication No. 25/89, 47/90, 56/91, 100/93) [1995] ACHPR 9, para 47 - relationship between safe drinking water and the right to health. By comparison the right to clean drinking water is expressly protected under the right to food, in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 15. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa guarantees the right to safe drinking water under the right to an adequate standard of living, Article 20. Also see *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria* (Communication No. 155/96), discussed below.

[21] Manisuli Ssenyonjo, 'The Protection of Economic, Social and Cultural Rights under the African Charter' in Danwood Mzikenge Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa* (Cambridge University Press 2016).

context of existing resource limits,[22] establishing that any such limitations must be both proportionate 'to a legitimate need' and constitute as little restriction as possible.[23] Thus, while the African regional system could be the most protective of ESCR,[24] allowance needs to be made for practical or resource constraints.[25] For instance, the interpretive guidance issued by the Commission on the right to water entitles everyone to 'an adequate and continuous supply'[26] of safe and affordable water.[27]

Group or 'solidarity' rights are protected on an individual and collective basis by the African human rights system.[28] These include the right to freely dispose of wealth and natural resources,[29] the right to a healthy environment framed as the right of all peoples to a 'satisfactory environment favourable to their development',[30] and also the right to self-determination, which encompasses the right to development.[31] The protection of the right to a healthy environment is necessary for economic, social and cultural development as well as for the realisation of other human rights in Africa.[32] As Addaney et al explain, environmental rights 'overlap all three generations of rights, and so represent, by their nature, cross-cutting rights'.[33]

Accordingly, three key principles guide states in relation to their obligations: the right 'to a satisfactory environment favourable to their development', the duty to ensure the enjoyment of the right to development, and the duty to ensure that development and environmental needs are met in a sustainable, fair and equitable manner.[34] But, while authoritative statements as to the underlying values and principles of the right to a healthy environment have been enunciated, its precise content and scope remains relatively incoherent.[35] This broad normative guidance is not the only means for protection of development rights in the Charter. Indeed, development goals frequently map onto (or can be read into) protected civil and political rights as well as ESCR rights.[36]

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22 ACHPR (n 20), para 13.

23 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 276/2003 (African Commission on Human and People's Rights), para 214.

24 Viljoen (n 39), 245

25 CO Odinkalu "Social, Economic and Cultural Rights in the African Charter" in MD Evans and R Murray (Eds) *The African Charter on Human and People's Rights* (Cambridge, 2002) 195 – 198 and Chenwi (n 18), 25?

26 ACHPR (n 20), para 89.

27 ibid, para 88. The minimum core obligations associated with the right include access to 'a minimum essential amount of water that is sufficient and safe for personal and domestic use', and that national plans and policies should be implemented accordingly. ibid, para 92.

28 For a discussion of the very particularly 'African' nature of collective rights, see DM Chirwa, 'Group Rights and the Protection of Economic, Social and Cultural Rights in Africa' in DM Chirwa and L Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press 2016).

29 Article 21. 'Systems of domination not only deny the moral worth of the repressed peoples but also exploit the resources of those peoples without their approval and without sharing the benefits thereof with them.' ibid, 226.

30 Article 24.

31 Article 20

32 Michael Addaney, Chantelle Gloria Moyo and Thabang Ramakhula, 'Human Rights, Regional Law and the Environment in Africa: Legal and Conceptual Foundations' in Michael Addaney and Ademola Oluborode Jegede (eds), *Human Rights and the Environment under African Union Law* (Palgrave Macmillan 2020), 5.

33 ibid, 8.

34 ibid, 11. These principles are derived from Article III of the Revised African Convention on the Conservation of Nature and Natural Resources (2003), and are helpful to understand the cross-cutting nature of these rights.

35 Mulesa Lumina, 'The Right to a Clean, Safe and Healthy Environment Under the African Human Rights System' in Michael Addaney and Ademola Oluborode Jegede (eds), *Human Rights and the Environment under African Union Law* (Palgrave Macmillan 2020).

36 Frans Viljoen, 'Preamble' in CC Ngang, SD Kamga and V Gumede (eds), *Perspectives on the right to development* (Pretoria University Law Press 2018).

Rights protection is afforded through the African Commission (the Commission), a quasi-judicial body with a mandate to promote and protect the rights in the Charter,[37] and (in theory) the African Court of Human and Peoples Rights (the Court).[38]

In addition to the Charter, AU member states provide domestic protections for human rights. Space precludes a full review of Africa's highly plural legal systems; accordingly, I will just highlight a few key points.[39] Many African countries have post-liberation constitutions with progressive bills of rights that enshrine protection for all generations of rights, and contain ESCR that are to be progressively realised.[40] Many constitutions of African countries expressly protect the right to a healthy environment. Some states enshrine some human rights as 'directive principles', which are not enforceable as fundamental rights.[41]

Now I turn to the context in which climate change human rights cases are decided. The resource and governance challenges that need to be faced in realising basic rights will come under further pressure with climate change. Because the priorities of countries in the Global North tend to dominate the multilateral conversation about climate change, it is worth setting out some thoughts to counter the impression that climate change is not a priority for African countries. For developing countries, climate change concerns need to be weighed in a complex matrix that includes considerations about development, adaptation and resilience, support and transition pathways.[42] While every party to the international climate regime shares in the global goal to increase adaptive capacity and increase resilience to the impacts of climatic harms[43] and to protect human rights, climate change impacts African countries in distinctive ways. Some of these impacts are global or transnational, moreover, including the growing challenge of displacement in the context of climate change.[44] In many respects both the causes of climate change, and of vulnerability to it, are a consequence of global relations.[45]

While the international climate regime recognises that 'developed' countries — which have a long history of profiting from fossil fuels — should take leadership regarding mitigation, the Paris Agreement reflects a shift in expectations regarding developing country parties

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[37] Articles 30 - 44

[38] Adopted 10 June 1998, entered into force 25 January 2004, OAU/LEG/EXP/AFCHPR/PROT (III). See F Viljoen, 'Regional Institutional and Remedial Arrangements for the Judicial Enforcement of Economic, Social and Cultural Rights in Africa' in DM Chirwa and L Chenwi (eds), The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives (Cambridge University Press 2016). For a full discussion of the caselaw see M Ssenyonjo, 'The Protection of Economic, Social and Cultural Rights under the African Charter' in DM Chirwa and L Chenwi (eds), The Protection of Economic, Social and Cultural Rights in Africa (Cambridge University Press 2016).

[39] For a fuller discussion of the institutional potential of multilevel climate litigation in Africa, see Adelman (n 9).

[41] For instance Nigeria, see Olaniyi Felix Olayinka, 'Implementing the Socio-Economic and Cultural Rights in Nigeria and South Africa: Justiciability of Economic Rights' (2019) 27 African Journal of International and Comparative Law 564.

[42] Eva Maria Anyango Okoth and Mark Odhiambo Odaga, 'Leveraging Existing Approaches and Tools to Secure Climate Justice in Africa' (2021) 15 CCLR 129.

[43] Article 7 Paris Agreement (FCCC/CP/2015/L9/Rev1).

[44] Persons displaced by disasters and slow onset events continue to move internally and cross borders in a quest for survival. For instance, a recent World Bank report estimates that 216mil people will be displaced due to climate change by 2050, including 19 million people in North Africa. A previous report had estimated that more than 80 million people could be displaced in sub-Saharan Africa in the same time period – see Viviane Clement, Kanta Kumari Rigaud, Alex de Sherbinin, Bryan Jones, Susana Adamo, Jacob Schewe, Nian Sadiq, Elham Shabahat, 'Groundswell Part 2: Acting on Internal Climate Migration' (2021) World Bank, Washington, DC https://openknowledge.worldbank.org/handle/10986/36248 accessed 20 September 2021.

[45] For this reason, climate litigation in developing countries will inevitably have transnational elements: see Peel and Lin (n 9). For a discussion of the potential sensitivities in transnational climate cases in the African context see Kim Bouwer, 'Substantial Justice?: Transnational Torts as Climate Litigation' (2021) 15 Carbon & Climate Law Review 188.

mitigation efforts.[46] All parties have committed to develop programmes to mitigate climate change,[47] but 'developing' countries under the climate regime do not all have immediate obligations to achieve absolute emissions cuts:[48] such countries have international obligations to 'continue enhancing' their mitigation efforts, with an expectation that they will move towards emissions cuts in time.[49] These efforts can be made with an expectation of support[50] consistent with principles of common but differentiated responsibilities and respective capacities,[51] and indeed many developing countries' mitigation actions are pledged conditionally on receipt of such support.[52] What is unclear, however, is the extent to which developing country parties will be held to the conditional commitments they have made if adequate support is not received.[53]

As is implied by the argument thus far, African countries face the challenge of addressing their adaptation and mitigation commitments alongside pursuing their development needs[54] with uncertain financial provision. These needs and uncertainties represent stressors or 'threat multipliers' of existing challenges.[55] Since development is hampered by climate change,[56] this further affects human rights. Meanwhile, traditional development pathways tend to result in increasing levels of emissions, and even though it may not be problematic (in terms of their contribution to the Paris goals) for some developing countries to increase emissions in the short term, continued investment in high carbon infrastructure can increase other development-related risks, in particular by creating stranded assets.[57] As a significant economic risk, stranded assets also challenge both development and human rights.[58] While the revenue generated by carbon-intensive development is seen as necessary to ensure an adequate standard of living and to fulfil socio-economic rights, development initiatives are thus also frequently associated with human rights violations, particularly of vulnerable groups.[59]

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[46] Olivia Woolley, 'Developing Countries Under the International Climate Change Regime: How Does the Paris Agreement Change Their Position?' [2016] Ethiopian Yearbook of International Law 179, Section 2 and 3.
[47] Article 4.1 (b) Paris Agreement.
[48] Woolley (n 46), 185.
[49] Article 4.4 Paris Agreement.
[50] Article 4.5 ibid.
[51] See generally Danwood Mzikenge Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press 2016).
[52] Pieter Pauw, Kennedy Mbeva and Harro van Asselt, 'Subtle Differentiation of Countries' Responsibilities under the Paris Agreement | Humanities and Social Sciences Communications' (2019) 5 Palgrave Communications.
[53] WP Pauw and others, 'Conditional Nationally Determined Contributions in the Paris Agreement: Foothold for Equity or Achilles Heel?' (2020) 20 Climate Policy 468, also Woolley (n 46).
[54] Harald Winkler and others, 'Reconsidering Development by Reflecting on Climate Change' (2015) 15 International Environmental Agreements: Politics, Law and Economics 369; Okoth and Odaga (n 42).
[55] UN Under-Secretary-General and UNEP Executive Director Achim Steiner at UN Security Council Debate on the impact of climate change on maintaining international peace and security, cited in Oliver C Ruppel, 'Climate Change Law and Policy Positions in the African Union and Related Developments in Selected African Countries', Climate Change: International Law and Global Governance (Nomos Verlagsgesellschaft mbH & Co KG 2013). In the aggregate, the particular stressors on the continent include Africa's geographic and social vulnerability to the impacts of climate change, including increased risk of drought, desertification, food instability, increased disease and consequential social unrest and migration; and low (or no) adaptive capacity. See I Niang et al: Africa. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 1199-1265; M Addaney, E Boshoff and B Olutola, 'The Climate Change and Human Rights Nexus in Africa' (2017) 9 *Amsterdam Law Forum* 5, 5-7.
[56] O Davidson and others, 'The Development and Climate Nexus: The Case of Sub-Saharan Africa' (2003) 3 *Climate Policy* S97.
[57] H Winkler and others, 'Reconsidering Development by Reflecting on Climate Change' (2015) 15 *International Environmental Agreements: Politics, Law and Economics* 369.
[58] Fatima Denton and others, 'Africa's Development in the Age of Stranded Assets' (UNU-INRA 2019) <https://collections.unu.edu/view/UNU:7674#viewMetadata> accessed 15 March 2021.
[59] PT Zeleza, 'The Conundrum of Human Rights and Development in Africa' in J Akokpari and DS Zimbler (eds), Africa's human rights architecture (Jacana Media 2008). For instance the Clean Development Mechanism had the

These complex priorities would benefit from strong regional leadership and guidance, but the African Commission's response has been somewhat lacking.[60] Agenda 2063, the roadmap for Africa's development until the middle of the century, recognises that Africa is 'disproportionately burdened' by the impacts of climate change, which it identifies as a priority area.[61] It highlights the need for climate resilience and disaster prevention and the need to move development trajectories to low carbon pathways by investing in renewable energy.[62] But Agenda 2063 does not provide an integrated policy approach to reconcile environmental and development challenges.[63]

After the Paris Agreement was signed, the Commission expressed a number of concerns with the increased levels of greenhouse gas emissions which would impact the lives of those living in countries in the Global South, and concerning the failure of developed countries to take the lead in mitigation. It noted that this '...seriously undermines the capacity of African governments to safeguard human rights in Africa…'.[64] Three resolutions addressing the human rights implications of climate change have been passed by the Commission in the last twelve years.[65] All note the importance of the need for sustainable development, the protection of Charter rights, and for greater reporting on the human rights impact of climate change. Yet the quality and rigour of these resolutions can be criticised, as can the failure to make use of available mechanisms and functions of the Commission.[66] Indeed, it is arguable that what is needed is an integrated law and policy framework that provides strong, regional leadership with respect to climate change. And, as Etemire argues, litigation alone is not adequate to fill this gap.[67] It does, nevertheless, play a role — and it is to this that I now turn.

3. HUMAN RIGHTS LITIGATION

3.1. Pollution cases

The regional, domestic and overseas courts have seen a decades-long campaign of litigation arising from the operations of fossil fuel companies such as Dutch Royal Shell in the Niger Delta. These cases are not the only environmental justice litigation on the continent that could be framed as 'climate litigation',[68] but provide valuable examples for examination because they

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dual purpose of assisting developing countries to develop sustainably and industrialised countries to reduce emissions. It was not particularly successful in either and was associated with human rights violations of project stakeholders.. See Damilola Olawuyi, The Human Rights-Based Approach to Carbon Finance (Cambridge University Press 2016), Chapters One and Two.

[60] Ademola Oluborode Jegede, 'Climate Change in the Work of the African Commission on Human and Peoples' Rights' (2017) 31 Speculum Juris 136.

[61] African Union, 'Framework Document: Agenda 2063 The Africa We Want' (2013), adopted in 2015, Chapter 5.

[62] Ibid.

[63] Uzuazo Etemire, 'Tackling Climate Change in Africa: Thoughts on African Union's Agenda 2063 and the Adequacy of the African Legal Regime' (2018) 4 NIALS Journal of Environmental Law 304.

[64] African Commission,342 Resolution on Climate Change and Human Rights in Africa - ACHPR/Res.342(LVIII)2016, Preamble

[65] African Commission, 153 Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI)09; African Commission 271 Resolution on Climate Change in Africa - ACHPR/Res.271(LV)2014; African Commission,342 Resolution on Climate Change and Human Rights in Africa - ACHPR/Res.342(LVIII)2016

[66] Jegede (n 60).

[67] Etemire (n 63).

[68] At the time of writing, pending cases in South Africa include: 1. The 'Deadly Air' campaign, groundWork Trust and another v Minister of Environmental Affairs ("the Deadly Air case") is brought seeking a declaratory order that the poor air quality in the Mpumulanga Highveld is a violation of the plaintiffs' rights under s24 of the South African Constitution.. A decision is waited from the High Court in Pretoria. A further, youth-based action is pending before the same court. In the CancelCoal campaign, the African Climate Alliance and others v Minister of Energy and another, the plaintiffs argue that the Government's plans to build 1 500 MW of new coal-fired power in

pertain to the activities of a fossil fuel company. In the vast majority of domestic cases in Nigeria relating to Shell the claimants brought proceedings in negligence, nuisance or breach of statutory duty in relation to the harm caused by the company: terrestrial and water pollution caused by oil spills; air pollution caused by gas flaring, etc.[69] These 'environmental pollution' cases are a significant feature of climate litigation in Nigeria, bearing directly on the operations of fossil fuel companies.[70]

Gbemre v Shell[71] was brought as a substantive human rights claim and is internationally recognised as a 'climate' case.[72] The claimants specifically identified the contribution gas flaring makes to climate change in their pleadings, and this is noted in the judgment.[73] The claimants sought declaratory relief and an injunction prohibiting the defendants' 'relentless and continuous'[74] gas flaring, which they argued violated their rights to life, health and a safe and healthy environment under the Nigerian Constitution and the African Charter.[75] The claimants also challenged the failure of Shell to conduct an environmental impact assessment. The Federal High Court of Nigeria in Benin interpreted the right to life in a broad way, finding that it includes the right to a healthy environment, and that the defendants' activities violated these rights.[76] The court ordered that the defendant cease gas flaring and conduct its activities in compliance with 'good oilfield practice'.[77] An appeal was anticipated but never materialised, and the decision remains unenforced.[78] Out of all the Nigerian Shell cases, only *Gbemre* explicitly mentions the defendants' contribution to global warming, yet all these proceedings can be read as climate cases because they raise issues about the conduct and activities of a major greenhouse gas emitter. It is quite arbitrary to classify *Gbemre* as a climate case, yet not other challenges arising from the activities of fossil fuel companies, given how incidental climate change was to the reasoning in *Gbemre*.

South Africa constitute a violation of s24. As outlined above, even though health and environmental considerations are front and centre in the pleadings, the focus on coal energy, and the argumentation and reliance on climate change commitments, makes the reading of these as climate change cases clear. For updates see cer.org.za.

[69] See e.g. Eloamaka Carol Okonkwo, 'Assessing the Role of the Courts in Enhancing Access to Environmental Justice in Oil Pollution Matters in Nigeria' (2020) 28 African Journal of International and Comparative Law 195; Megan S Chapman and Lawrence BB Dube, 'After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria' (Center for Environment, Human Rights and Development (CEHRD) 2015), from 25; Engobo Emeseh, 'Environmental Victims, Access to Justice and the Sustainable Development Goals' in Chile Eboe-Osuji and Engobo Emeseh (eds), *Nigerian Yearbook of International Law 2017* (Springer International Publishing 2018); I discuss transnational litigation against Shell in the English (and Dutch) courts in Bouwer (n 77).

[70] Bouwer (n 45); Uzuazo Etemire, 'Climate Change Litigation in Nigeria: Challenges and Opportunities' in Francesco Sindico and Makane Moise Mbengue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer International Publishing 2021).

[71] *Gbemre* (n 10).

[72] For instance, it appears in the databases that collate climate cases as the sole Nigerian climate case, see http://climatecasechart.com/climate-change-litigation/non-us-jurisdiction/nigeria/. Nigerian scholars typically include a range of actions against fossil fuel interests within the scope of climate litigation. See for instance Peter Kayode Oniemola, 'A Proposal for Transnational Litigation against Climate Change Violations in Africa' (2020) 38 Wisconsin International Law Journal 301; Etemire (n 70), and the discussion and sources in Bouwer (n 45).

[73] At p 5, p 15.

[74] *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others* (n 71), p 19.

[75] Although the environmental right has directive status, see Onyeka K Anaebo and Eghosa O Ekhator, 'Realising Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation' (2015) 17 Environmental Law Review 82.

[76] Kaniye SA Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited' (2007) 16 Review of European Community & International Environmental Law 312.

[77] *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others* (n 71), p 15.

[78] B Faturoti, G Agbaitoro and O Onya, 'Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v Shell PDC Nigeria Limited: Let the Plunder Continue?' (2019) 27 *African journal of International and Comparative Law* 225.

A few years prior to the domestic Nigerian case, the Commission had received a complaint against the Nigerian government for its role in condoning and indeed facilitating abuses associated with oil operations in the Niger Delta region. The landmark *Ogoniland* communication — also called *SERAC* (which stands for the 'Social and Economic Rights Action Centre') — is one of the most significant decisions of the Commission to date as it was one of the first cases in which the Commission sought to develop its jurisprudence on ESCR rights, including the right to a satisfactory environment 'favourable to their development'. [79] The Commission determined that the right to a clean and safe environment is essential for the quality of life and safety of an individual,[80] and that a state is required to take measures to prevent pollution and ecological degradation, to desist from threatening the health of its citizens, and not to adopt practices, policies or legal measures that violate their rights.[81] Although almost two decades have passed since the ruling no aspect of the order has been implemented.[82]

In *SERAC* the Commission ruled that the claimants had collectively suffered violations of their right to health (including the rights to water and food), and to a general satisfactory environment favourable to their development,[83] due to the government's failure to prevent pollution and ecological degradation, its failure to monitor oil activities and to involve local communities in decisions, and by its enabling of fossil fuel companies and their militias. The Commission also found a number of violations associated with the state's direct activities (including forced evictions, the destruction of food sources and enablement of oil company militias)[84] and a violation of the right to freely dispose of natural resources.[85] The Commission's ruling was based on the African Charter's express protection of the right of sovereignty over mineral and natural resources.[86] However, overall, the Commission's ruling did little to develop the substantive normative content of the relevant rights or to elaborate what might be required for the realisation and fulfilment of these rights, other than 'concerted action' from a relevant state.[87] Indeed, the harms were mostly direct violations, and also so egregious, that it was not necessary for the Commission to explore the dimensions of any of the affected rights in a more nuanced fashion.

In 2012, an NGO consortium brought a complaint to the Economic Community of West African States (ECOWAS) court. The *SERAP* litigation against Nigeria arose from the activities of fossil fuel multinationals and their subsidiaries in the Niger Delta in relation to oil spills, which the claimants alleged constituted a violation of their rights to health, to food and

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[79] *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (n 20).

[80] *ibid, 51.*

[81] ibid, para 52. The Commission ruled that the Ogoni had suffered violations of their right to health (Article 16) right to a general satisfactory environment favourable to their development (Article 24) due to the government's failure to prevent pollution and ecological degradation. It held further that the State's failure to monitor oil activities and involve local communities in decisions violated the right of the Ogoni people to freely dispose of their wealth and natural resources (Article 21). ibid, para 53.

[82] 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, from 180; Emeseh (n 66), 304. 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, from 180; Emeseh (n 69), 304.

[83] Article 24

[84] The direct evictions were found to be a violation of the right to housing (derived from the rights to property under Article 14, health under Article 16, and family under Article 18. The right to food which is implicit in the rights to life (Article 4), health (Article 16) and development (Article 22) was also found to be violated by the actions of the government acting with non-state actors in destroying and contaminating food sources.

[85] *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (n 20), from para 56. The reasoning is 'obscure', but the content of the right as it relates to consultation is developed further in later decisions, see Chirwa (n 28), from 144.

[86] Article 21(1) of the African Charter states: 'All peoples shall freely dispose of their wealth and natural resources.'

[87] *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (n 20), para 16.

water, to an adequate standard of living, to social and economic development, and to a healthy environment.[88] The claimants sought declaratory recognition of these violations; that the state be ordered to regulate the activities of the corporations; and compensation.[89] The ECOWAS court issued a brief and radical communication.[90] It acknowledged that in many circumstances the realisation of ESCR is subject to political considerations relating to resource allocation. However, the court insisted that such considerations were not relevant here, given that all the State was required to do to satisfy such rights was to 'exercise ... its authority to enforce the law that recognises such rights and prevent powerful entities from precluding the most vulnerable from enjoying the right'.[91] The ECOWAS court considered the environmental right and found that it gave rise to obligations of 'attitude' and 'result'.[92] It considered that whether the right to a healthy environment has been fulfilled could be ascertained 'by examining the state of the environment'.[93] The ECOWAS court found that Nigeria's failure to act in compliance with existing obligations to prevent damage to the environment and to hold the perpetrators accountable — a failure that meant that the perpetrators continued to operate with impunity — characterised the violation.[94] Nigeria was accordingly ordered to take effective measures to restore the environment, to take necessary measures to prevent the recurrence of harm and to take measures to hold the perpetrators accountable.[95] The *SERAP* order was never enforced.

As such, there is emerging human rights jurisprudence about violations of ESCR and solidarity rights,[96] establishing that a state's failure to protect communities from the conduct of fossil fuel companies in the context of their production activities constitutes a violation of protected human rights. It has been suggested by some scholars that environmental harm cases in African courts could indeed be a route to 'requiring cessation... of oil production' that is incompatible with global climate targets.[97] However, it is not obvious that these cases will support further arguments about the need to limit oil production. Furthermore, as Gathii argues, the rationales for litigating in African International courts can go beyond questions of compliance and enforcement:[98] that questions of achievement of climate objectives are not the only considerations relevant when assessing the effectiveness of litigation.

In *Ghemre* the Commission determined that the local oil company had 'the right to produce oil', and that the revenue from oil production was 'needed to fulfil the economic and social rights of Nigerians', although the Commission did state that care should be taken during such activities to not to violate rights in the process.[99] In *SERAC* and subsequent communications,[100] the Commission has read the environmental right primarily as being a safeguard against the state authorising investment that causes environmental destruction and affects peoples' wellbeing. As Chirwa explains, 'In all these communications the violations complained of related to the obligation of the state not to interfere with the exercise of a right. The exploration of natural resources in all subsequent communications was done without the

[88] The claimants relied on their Charter rights and corresponding rights under international law: *SERAP v Republic of Nigeria* (2012) ECW/CCJ/JUD/18/12 30 (ECOWAS), para 19.
[89] Ibid.
[90] Ibid.
[91] Ibid, para 32.
[92] Ibid, para 100
[93] Ibid, para 101
[94] Ibid, para 111
[95] Ibid, para 121.
[96] Ssenyonjo (n 21), 95 - 96 and generally.
[97] Morganthau and Reisch (n 12), 117 - 118. See my discussion in Bouwer (n 45), 201 - 2.
[98] Gathii (n 13).
[99] *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (n 20), para 54.
[100] In particular *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 23).

approval of and in disregard of the interests of the local population'.[101] Furthermore, all these strong jurisprudential statements have been accompanied by weak, unenforced or unenforceable remedies, a fact raising questions about what environmental-harm-as-climate cases can 'deliver' as useful outcomes for climate mitigation. On the one hand, one could argue that such cases lay the jurisprudential groundwork for more focused, human rights-based climate litigation targeting fossil fuel production in African states.[102] On the other hand, one could argue that such decisions are destined to do little more than make normative statements, because enforcement against fossil fuel companies remains politically unfeasible.

3.2. ESCR adaptation cases — pending cases and rethinking *Mazibuko*

Many African states have enacted framework laws that entrench broad ranging legal responses to climate change, particularly the need to improve adaptation responses.[103] Yet, it is possible that ESCRs will come to the fore again, given that the 'most straightforward application of [human] rights protection in a climate change context is likely to be to address governmental failures with respect to adaptation'.[104] As climate change increases pressure on basic resources such as food and water, governments will struggle to fulfil and protect these ESCR rights. However very little climate litigation, including in the global South, relates to adaptation.[105] This is surprising, because one would expect that this is where such litigation is most needed. Accordingly, in this section, I briefly explore this absence. I also discuss some pending cases that suggest that the adaptation litigation might expand and develop fairly quickly.

There are at least four kinds of potential climate adaptation human rights cases that could arise. First, claimants might argue that a state's failure to protect and respect rights by taking appropriate adaptation measures, has resulted in harm, which is a violation of fundamental rights.[106] Such proceedings are currently pending before the Ugandan High Court in the case of *Tsama* v. *Attorney General*.[107] In that case the claimants are seeking a declaration that their rights have been violated by government inaction in relation to the landslides in Baduda caused by previously unseasonably — now fairly regular — heavy rains.[108]

Second, claimants might allege that a state's failure to take adequate steps to address systemic climate risks constitutes a rights violation.[109] In another Ugandan case, *Mbabazi v Attorney General*,[110] the claimants allege that government inaction on mitigation and adaptation is responsible for loss of life and property, and causes social and political discontent due to

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[101] Chirwa (n 28), 229.
[102] Eghosa O Ekhator, 'Regulating the Activities of Oil Multinationals in Nigeria: A Case for Self-Regulation?' (2016) 60 Journal of African Law 1.
[103] O Rumble, 'Facilitating African Climate Change Adaptation Through Framework Laws' (2019) 13 Carbon & Climate Law Review 237.
[104] Peel and Osofsky (n 2), 25; Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 Transnational Environmental Law 77, 97 - 99.
[105] Peel and Lin (n 11), 14; also see Siri Gloppen and Catalina Vallejo, 'The Climate Crisis: Litigation and Economic, Social and Cultural Rights' in Jackie Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2020), Table 1.
[106] Atapattu (n 1), Chapter 4.
[107] *Tsama and others* v. *Attorney General and others*, cause number 024/2020. My thanks to Bernard Namanya for providing a copy of the pleadings.
[108] The claimants rely on their rights to life, property and a clean and healthy environment under Sections 26, 22 and 39 of the Constitution of the Republic of Uganda, 1995.
[109] As in *Ashgar Leghari v Federation of Pakistan* [2015].
[110] Cause number 282 of 2012, High Court of Uganda in Kampala. This case is persistently awaiting a hearing. For updates see https://www.ourchildrenstrust.org/uganda-active.

extreme weather and volatile food and fuel prices connected to climate change.[111] The claimants also rely on the right to a healthy environment.[112]

Third, claimants might use rights-based arguments to support domestic litigation in which climate change is incidental to — or almost invisible in — the actual pleadings, although climate change forms enough of a crucial background to the case that it is reasonable to say that this is happening 'in the context' of climate change.[113] This remains an under-examined area of jurisprudence in African climate literature, although it is anticipated that there will be litigation relating to issues such as land use and conflicts, migration or drought where these problems arise in the context of the climate crisis but which are resolved without explicit reference to it.[114] These cases require analysis as climate cases as they may be influence climate policy, including by undermining it.[115]

Fourth, claimants might argue that a state has failed to *fulfil* basic rights to a social good. Although climate change might not be explicitly mentioned it forms a crucial background to such cases if the impacts of climate change make it more difficult to fulfil social rights. As such, existing jurisprudence (including that of the South African Constitutional Court, which is authoritative across the continent) on the fulfilment of basic rights is worth examining, and sets the jurisprudential framework for litigation arising from failures in climate adaptation.

Even without climate considerations, the involvement of courts in deciding whether a state has adequately discharged its duties in the provision of social goods is contentious. Such questions require courts to decide quasi-political claims and therefore to stray into policy issues about resource use.[116] In general, cases that seek to challenge a state's failure to realise the rights of citizens call for careful analysis of the content of the relevant right, an evaluation of its non-derogable 'minimum core', as well as an assessment of the reasonableness of the state action taken to achieve that core.[117] The purpose of this approach is to afford a government sufficient elbow-room to make choices that give effect to the right, while stipulating how judicial intervention should appropriately be exercised.[118]

The South African Constitutional Court has declined to find immediate violations on the basis of a minimum core.[119] Instead the Constitutional Court formulated a reasonableness

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[111] The action is brought on the basis that the government of Uganda has a duty to ensure sustainable use of resources for present and future generations, as it holds the land and resources of Uganda in 'public trust' for its citizens. *Mbabazi* was one of the earliest Our Children's Trust cases, and as such is part of a 'full-scale, co-ordinated movement, with multiple suits pending and others teed up' in different fora' - Michael C Blumm and Mary Christina Wood, "'No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine' (2017) 67 American University Law Review 1.

[112] Paragraph Four of the Plaint specifies as follows: 'The plaintiffs bring this action under Articles 39, 150 and 237 of the Constitution, sections 2,3,71 and 106 of the National Environment Act on their own behalf and on behalf of all children of Uganda born and unborn and in public interest.

[113] Bouwer (n 10).

[114] Melanie Murcott and Emily Webster, 'Litigation and Regulatory Governance in the Age of the Anthropocene: The Case of Fracking in the Karoo' (2020) 11 Transnational Legal Theory 144; Jonathan Klaaren, 'Xenophobia-Induced Disaster Displacement in Gauteng, South Africa: A Climate Change Litigation Perspective' (2021) 15 Carbon and Climate Law Review 150; or in the context of India Birsha Ohdedar, 'This Issue'. At regional level, Morganthau and Reisch identify two further instances of community adjudication regarding natural resource use and land rights, by the African Commission as 'climate cases', on the basis that determinations are made about procedural rights that encourage participation. See Morganthau and Reisch (n 12).

[115] Bouwer (n 10).

[116] Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009).

[117] Joie Chowdhury, 'Unpacking the Minimum Core and Reasonableness Standards' in Jackie Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2020).

[118] Sandra Liebenberg, 'Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa' in Danwood Mzikenge Chirwa and Lilian Chenwi (eds), The Protection of Economic, Social and Cultural Rights in Africa (Cambridge University Press 2016), 315.

[119] Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC), [23] – [33].

approach in order to evaluate whether adequate steps have been taken towards the fulfilment of particular rights.[120] In *Mazibuko v Johannesburg*,[121] the Court dismissed a challenge that directly concerned (amongst other things) the sufficiency of water supply for poor city residents, and the legality of a metering programme that sought to restrict water consumption by low-income people,[122] in a city where 'access to ... basic services is still heavily conditioned on apartheid spatial geography'.[123] The Johannesburg City Council was deemed to have fulfilled their positive obligations under section 27 of the South African Constitution, which guarantees the right to water.[124] The court said: '…the right does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realize the achievement of the right of access to sufficient water, within available resources…' [125] The term 'available resources' is generally read to mean budgetary resources.[126] However, the demand management programme in Mazibuko was introduced in the context of a chronically water-stressed country,[127] and, accordingly 'availability' was read at least in part to refer to the availability of the natural resource, but where its provision was determined by cost-recovery and the availability of infrastructure, not by ecological limits.[128]

Scholars have argued that *Mazibuko* 'substantially narrowed the horizons of the possible' in ESCR litigation,[129] not least due to the way in which it narrowed the standard for 'progressive realisation' to a formalistic process requirement.[130] It would be a stretch to argue that *Mazibuko* is a climate case, but the decision does raise questions about how increasing resource pressures brought about by climate change would likely be resolved in the context of ESCR litigation.[131] If pressure on natural resources makes the fulfilment of certain rights even more difficult due to adaptation failures, there is no substantive 'minimum core' below which the provision of social good cannot fall.[132] In Africa, climate change is stressing the very resources required to protect ESCR rights on a continent on which the progressive realisation of these rights is already challenging. Adjudicating whether basic needs have been properly fulfilled is always a difficult exercise, but trying to make this determination in the context of climate change will turn an already indeterminate enquiry into a moving target with no end point in sight.

4. HUMAN RIGHTS INFLUENCE

A feature of the rights 'turn' in climate litigation is the use of human rights to interpret general

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[120] Liebenberg (n 118), 313.
[121] 2010 (4) SA 1 (CC)
[122] P Bond and J Dugard, 'The Case of Johannesburg Water: What Really Happened at the Pre-Paid "Parish Pump"' (2008) 12 Law, Democracy & Development 1, 4.
[123] Malcolm Langford, 'Introduction' in Malcolm Langford and others (eds), Socio-Economic Rights in South Africa (Cambridge University Press 2013), 10.
[124] Section 27(1)(b) and s27(2).
[125] [50], quoting Section 27(2).
[126] Liebenberg (n 118), 319.
[127] Louis J Kotzé, 'Phiri, the Plight of the Poor and the Perils of Climate Change: Time to Rethink Environmental and Socio-Economic Rights in South Africa?' (2010) 1 Journal of Human Rights and the Environment 135.
[128] Although the spectre of drought was clearly in the Court's mind, see Mazibuko (n 133), [3]
[129] Paul O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 The Modern Law Review 532, 550.
[130] Liebenberg (n 118), 317; O'Connell (n 129).
[131] Kotzé (n 127), 138.
[132] Prospects may be better in other jurisdictions, that are not bound to follow the South African jurisprudence. See Okoth and Odaga (n 54). Of course, factors such as costs penalties, and poor institutional enforcement, also constrain public interest litigation in other African countries. See examples in Samantha Atukunda K Mwesigwa and Peter Davis Mutesasira, 'Climate Litigation as a Tool for Enforcing Rights of Nature and Environmental Rights by NGOs: Security for Costs and Costs Limitations in Uganda' [2021] Carbon & Climate Law Review (CCLR) 139; Klaaren (n 114).

principles of law to require improved ambition on climate change.[133] It has been noted that 'tried and trusted environmental governance instruments such as environmental impact assessment (EIA) remain a popular way to foresee and address at least some of the deleterious environmental impacts and harms that might manifest now and in future as a result of carbon-intensive activities.'[134] However, many procedural environmental law protections are themselves derived from human-rights protections, while many enabling statutory provisions have been enacted to give effect to constitutional rights protections.

First, procedural environmental rights — including access to justice, participation and the right to environmental impact assessment —– are frequently associated with international environmental law. Indeed, an examination of these rights reveals that their *origins* lie in human rights protection.[135] The ultimate aim of such procedural rights is the fulfilment of the substantive right to a healthy environment.[136] These procedural rights are accordingly specifically focused on environmental protection and emphasise the potential role that can be played by human rights law in promoting appropriate procedures for development and environmental protection.[137]

Second, many domestic climate cases rely on statutory provisions which have been enacted to give effect to human rights in 'young' constitutions, particularly the right to a healthy environment.[138] In the South African cases discussed below, authorisations for environmentally destructive infrastructure were granted under the National Environmental Management Act (NEMA)[139] and associated EIA regulations, which were enacted to give effect to rights — including the right to a healthy environment — in the post-apartheid Constitution.[140] In these cases, the claimants were not seeking relief on the basis that a right had been violated, but rather that a public law or statutory duty should be interpreted in ways that are consistent with protected fundamental rights.

The first recognised instance of climate litigation in South Africa was *Earthlife Africa v Minister of Environmental Affairs*,[141] also called *Thabametsi* after the name of the proposed coal mine, the authorisation for which the litigation sought to challenge. In that case the claimants argued that the Minister had failed to comply with her statutory duties under the NEMA. The EIA that had been undertaken took insufficient account of climate emissions, localised air pollution or the impacts on water supply.[142] The claimants also argued that the minister's acceptance of the

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[133] Peel and Osofsky (n 2), 22-23.

[134] Louis J Kotzé and Anél du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent' (2020) 50 Environmental Law 615, 32 - 3.

[135] J Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (UN General Assembly 2018) A/HRC/37/59 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/29/PDF/G1801729.pdf?OpenElement> accessed 1 December 2020 characterizes procedural entitlements as part of the exercise of human rights, see e.g. para 1 and 3. The right to information is protected internationally under Article 19 of the UDHR and same of the ICCPR, and Article 9 of the ACHR, and right to participation under Article 21 of the UDHR and 25 of the ICCPR, and Article 13 of the ACHPR. Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1998), 70.

[136] See Emily Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart, 2020), Chapter Four

[137] Boyle (n 135), 61.

[138] Post-Constitutional legislative developments have opened routes to climate and environmental litigation in other African countries. See in relation to Kenya, Lydia Akinyi Omuko-Jung, 'The Evolving Locus Standi and Causation Requirements in Kenya: A Precautionary Turn for Climate Change Litigation?' (2021) 15 Carbon & Climate Law Review 171.

[139] Act 107 of 1998.

[140] Ibid, Preamble, Section 2.

[141] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) (8 March 2017).

[142] There is little scope for reasoned debate as to whether new coal infrastructure is a good investment, see Gregory

flawed EIA failed to comply with the Promotion of Administrative Justice Act (PAJA).[143]A superficial reading of the decision suggests that the human rights aspects of the case were relatively insignificant — the court deals with and disposes of the right to a healthy environment in two paragraphs.[144] However, this brevity does not reflect the fact that NEMA was enacted to give effect to this and to other socio-economic rights, and nor does it reflect the fact that the court relied on the right to a healthy environment in order to read a duty to conduct a climate change assessment into the relevant provisions of the NEMA and the EIA regulations. The effect of human rights-influenced interpretation in this case, therefore, was to shape the relevant public law and statutory duties on which the claimants relied.

Thabametsi (and other pending challenges relating to coal mines and power stations in South Africa) reflect anxieties about investments in new coal infrastructure. The need to protect fundamental resources that are essential for the realisation of right to development is a theme at the centre of the judgment. The assessment involved considered air quality and emissions, but also the effect that the mine would have on water supply. Thus, EIA was an effective way to protect resources that also map onto or are protected by ESCR or by developmental rights.[145]

The precedent set by *Thabametsi* decision has been relied upon in subsequent litigation by the same and other NGOs acting in consortium as part of a sustained campaign against South Africa's coal mining industry, the 'Life after Coal' campaign.[146] Litigation is embedded in sophisticated advocacy campaigns targeting the authorisation of specific coal projects, which might involve an administrative law challenge to the authorisation, other forms of adjudication or campaigning to seek to undermine the funding of such projects, and a challenge natural resource use authorisation.[147] An example is the challenge to the water use licence for the Khanyisa coal mine. The matter culminated in a successful appeal to the Water Tribunal.[148] The applicants relied on a number of grounds of appeal which included that the granting of the licence constituted a violation of rights to healthy environment, dignity and equality.[149], but the Appeal Tribunal made its decision on narrow procedural grounds relating to the need for participation in the climate change context.[150] Following *Thabametsi* the Tribunal found that water licensing authorities must consider the impacts of climate change when deciding whether or not to grant water use licences to coal-fired power stations. The Tribunal did note that water

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Ireland and Jesse Burton, *An assessment of new coal plants in South Africa's electricity future: the cost, emissions, and supply security implications of the coal IPP programme.* (2018) Energy Research Centre, University of Cape Town, South Africa.

[143] Act 3 of 2000. The PAJA was also enacted to give effect to Constitutional rights, specifically the right in s33 to just administrative action, see Preamble. See 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. The Minister extended authorisation despite the decision, and subsequent proceedings – Thabametsi II – were compromised after a campaign of attrition by the NGO consortium that brought the original proceedings. See CER, 'Celebrating a Major Climate Victory: Court Sets aside Approval for Thabametsi Coal Power Plant' (*Centre for Environmental Rights*, 1 December 2020) <https://cer.org.za/news/celebrating-a-major-climate-victory-court-sets-aside-approval-for-thabametsi-coal-power-plant> accessed 17 May 2021.

[144] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (n 141), [81] - [82].

[145] The pledge to leave no one behind: the International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development 2019, para 5.

[146] For updates see cer.org.za.

[147] For instance, the 'Mabola' campaign Thabametsi-style challenge succeeded in the High Court, but was appealed (unsuccessfully) all the way to the Constitutional Court: Mining and Environmental Justice Community Network of South Africa and others v Minister of Environmental Affairs [2019] 1 All SA 491 (GP) (8 November 2018). The judicial review application has been supplemented by a series of challenges to the issue of the water licence, land use designation, and most recently to the Constitutional Court for a mandatory order prohibiting mining activities from taking place while further challenge proceedings are underway. The number of separate proceedings are staggering: see https://cer.org.za/programmes/mining/litigation/mabola-protected-environment

[148] *The Trustees of the Groundwork Trust v Acting Director-General, Dept of Water and Sanitation* (2020) WT02/18/ MP (Water Tribunal)

[149] Sections 24, 10 and 9 of the Constitution.

[150] It was extremely reluctant to engage with human rights arguments (see paras 54 - 57) and would not find that climate change considerations should be taken into account in the issuance of all water licences (see paras 17 - 20).

scarcity would be one of the key climate change impacts in Southern Africa,[151] and as such the proposed mine should have considered questions about sustainable water use from a 'broader perspective', in terms of whether the licences granted were sustainable and beneficial in the public interest, taking into account the needs of future generations. The Tribunal found that had these factors been weighed up with the impacts of climate change in mind, the minister could not have concluded that the water use was sustainable.[152]

These cases illustrate the use of climate change and human rights arguments in a subtle but effective way. Reading these cases as simply being administrative law applications obscures the influence of human rights protection on the development of domestic law. Such a framing also overlooks the ways in which human rights protection has influenced the scope of the relevant duties. An alternative reading demonstrates the capacity of courts to develop the law to protect rights through administrative determinations. The point I am making is that the influence of human rights on these cases is not restricted to a court's use of human rights protections to interpret statutory duties. Instead, I am arguing that the nature of the legislative duties has itself also been strongly influenced by human rights protections.[153] These cases illustrate why, in South Africa, judicial review of administrative action is considered to be the most effective method to bring climate litigation and has 'been perceived as a means of adjudicating on climate change related impacts in the context of socio-economic development.' [154] This fact goes some way to explaining why EIA cases have predominated in African climate litigation.

To conclude this section, and to counterbalance the argument thus far presented, I briefly mention two other cases that incorporate similar argumentation: one in Kenya and another in South Africa. Climate change arguments were foregrounded in both these cases. In Kenya, *Save Lamu* is a tribunal application challenging an EIA supporting the construction of a coal fired power plant[155] in an ecologically sensitive area.[156] As in South Africa, the legislation under which the environmental impact assessment was conducted was enacted to give effect to human rights protections.[157] The tribunal relied on Kenyan and South African human rights jurisprudence to flesh out an understanding of participation that is flexible and ongoing.[158] Based

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[151] ibid, 81.

[152] ibid, para 82.

[153] This is not unique to South Africa. Human-rights based constitutions have significantly contributed to environmental protection in many African countries. See Desalegn Amsalu, 'Implementing Human-Rights-Related Environmental Obligations in Ethiopia' in Michael Addaney and Ademola Oluborode Jegede (eds), *Human Rights and the Environment under African Union Law* (Palgrave Macmillan 2020); Jean-Claude N Ashukem, 'Connecting Human Rights and the Environment in Cameroon: Successes, Limitations and Prospects' in Michael Addaney and Ademola Oluborode Jegede (eds), *Human Rights and the Environment under African Union Law* (Palgrave Macmillan 2020); Collins Odote, 'Human Rights-Based Approach to Environmental Protection: Kenyan, South African and Nigerian Constitutional Architecture and Experience' in Michael Addaney and Ademola Oluborode Jegede (eds), *Human Rights and the Environment under African Union Law* (Palgrave Macmillan 2020).

[154] Jean-Claude N 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 LEAD 35, 41.

[155] Also see Sanja Bogojevic and Mimi Zou, 'Making Infrastructure "Visible" in Environmental Law: The Belt and Road Initiative and Climate Change Friction' (2021) 10 Transnational Environmental Law 35, 49 - 53.

[156] Much of the discussion relates to the local ecological impacts – it was accepted that coal fired power remains a lawful option for Kenya at present – *Save Lamu et al v National Environmental Management Authority and Amu Power Co Ltd* Tribunal Appeal No. Net 196, para 19.

[157] Article 69 of the Constitution of Kenya requires the state to enact procedures for environmental protection, and this gave rise to Environmental (Impact Assessment and Audit) Regulations 2003 – a violation of both of which was alleged in the ground – see para 11a, 20 – 22.

[158] The Tribunal relied on Constitutional Petition No. 305 of 2012 Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others, in which the court established the minimum basis for public participation in Kenyan law, and also Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC), in which the South African Constitutional Court fleshed out a concept of

on this, the Tribunal found that the EIA process had not been conducted according to the law.[159]

In South Africa, the case of *Philippi Horticultural Area Food & Farming Campaign* illustrates the application of South African climate change jurisprudence beyond coal cases.[160] *Philippi* challenged a ministerial designation that re-zoned urban agricultural land close to the centre of Cape Town as suitable for development.[161] This re-zoning threatened a site of urban agriculture that supplies food and employment, and endangered the viability of a local aquifer that supplies the Philippi area and the Cape Flats with water. The applicants argued that duties under the NEMA had been breached, that the environmental impact assessment was flawed, and that the authorisation failed to take 'relevant considerations' into account, including the impacts of the proposed development on groundwater and the aquifer, food security, climate change, and the no-development alternative.[162] Confirming that the legislation was developed to give effect to human rights,[163] the court struck out the authorisations.[164]

The effectiveness of these cases indicates that these approaches will continue to dominant climate litigation in African countries, and that while these are procedural cases, they should not be dismissed as issuing unimaginative technical challenges. Nor should they be seen as proving human rights protections to be relatively ineffective in climate protections. As I have shown above, these cases demonstrate layers of human rights influence, both in shaping legislative protections, and also in the mandate that human rights provide to judges to re-interpret the same legislation to give effect to protected rights. I have also shown that these (human rights informed) procedural cases have proven remarkably effective in protecting and advancing resources which are both threatened by climate change and needed for development, specifically, water. Ironically, these technical cases may show greater promise in protecting developmental rights in the climate context than cases grounded in ESCR.

5. CONCLUSION

As I have suggested, arguments grounded in human rights are increasingly being used throughout Africa to challenge state policies on climate change, but the number of cases in which both climate change and human rights arguments are central is relatively small in global terms[165] Nevertheless, the use of human rights grounds and human rights arguments in climate litigation carries considerable normative force in Africa. In the regional courts, human rights arguments have been used to make strong statements as to the human rights implications of the activities of fossil fuel companies in African countries. Reading these cases as climate cases highlights the difficult and conflicting issues that present themselves in the African context: the need for environmental protection, difficulties regulating corporate multinationals, the dependence that poorly diversified economies have on these high-emitting industries, and just

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participatory rights using section 33 of the Constitution and the legislation that was enacted to give effect to it – e.g. per Chaskalson CJ at [107] – [119].

[159] *Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd* (n 156), para 50, 67.

[160] (16779/17) [2020] (3) SA 486 (WCC) (17 February 2020)

[161] There were two fairly complex disputes about the precise use and designation of the relevant land that do not need to be resolved for this article, see *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* (2020) (16779/17) [2020] (3) SA 486 (WCC), [25] - [55].

[162] ibid, [56].

[163] As well as PAJA – see ftn 320

[164] *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* (n 161), [142].

[165] Savaresi and Setzer (n 3).

how problematic and loaded international expectations that erode sovereignty in relation to natural resource extraction are.[166]

I have also argued that domestic climate litigation in Africa to date has been dominated by challenges to EIA processes using administrative and public law procedural arguments, and that perceiving these cases as being merely technical challenges overlooks the multi-layered influence that human rights protections have in shaping such legislation and adjudication. Human rights protections — and a general mandate to develop the law to ensure consistency with human rights principles — have enabled a courts and tribunals to reach decisions, that have been used to devastating effect by climate campaigners.

Climate change is a threat multiplier in Africa as elsewhere, but legal and ethical priorities on the continent in response to it are in some respects more difficult to resolve than in the global North. As climate litigation in Africa develops, the influence of Africa's extensive human rights protections will be seen as these conflicting priorities are tested in the jurisprudence of the national and regional courts.

[166] Also see my discussion of the transnational Delta cases in Bouwer (n 50).