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Africa, Climate Justice and the Role of the Courts

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This volume is a collection of scholarly reflections on the theme of climate litigation in Africa. The book spans a range of approaches and jurisdictions and aims to be a relevant yet lasting volume of reflective contributions both in relation to transnational, regional and local climate litigation scholarship, but also to our understanding of the plural nature of climate justice and climate governance in Africa.

In developing this project we have delved into, and supported, the creation of a body of rich, complex and interesting work.[1] The range of insights, perspectives and analyses has much to offer on its own terms. The richness of this scholarship emerges to some extent from its truly global nature; as our authors work within the diversity of a global field, as well as learning from and citing the works of other African scholars. But why does pursuing

[1] This includes the contributions in this volume, the special issue edited by two of us, see from K Bouwer and T-L Field, 'Editorial: The Emergence of Climate Litigation in Africa' (2021) 15 *Carbon & Climate Law Review* 123; J Lin and DA Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020). Also see J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *American Journal of International Law* 679; J Setzer and L Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 *Transnational Environmental Law* 77; PK Oniemola, 'A Proposal for Transnational Litigation against Climate Change Violations in Africa' (2020) 38 *Wisconsin International Law Journal* 301; M Murcott and E Webster, 'Litigation and Regulatory Governance in the Age of the Anthropocene: The Case of Fracking in the Karoo' (2020) 11 *Transnational Legal Theory* 144; LJ Kotzé and A du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent' (2020) 50 *Environmental Law* 615.

and asserting an African identity of climate litigation matter? The answer to this question lies in an understanding of what it means to pursue a 'global' endeavour, but also in an understanding of the dignity of African scholars, practitioners and activists in the face of the climate crisis.

As the study of climate change litigation continues to emerge as a scholarly field, the conversation about the characteristics of litigation in Global South countries is still nascent. The meaning and identity of climate litigation, and the scholarly response to it, are mostly shaped around the priorities and pressures of Global North countries. This is understandable, to some extent. Much (but by no means all) of the activity in the courts in the Global North was and is brought in response to a deficit in mitigation ambition of historically high-emitting states, and the contribution of corporations registered in those states.[2] We are of course not suggesting that mitigating climate change is something that Global South countries should not care about; African countries share the goals and objectives of Paris Agreement with other nation states. However, the mitigation obligations they bear do not carry the same urgency or moral weight. Core to this is the question of what constitutes a 'fair share' to the global goals of climate action, and the question of whether most African countries may already be doing enough in terms of climate change mitigation. In some instances – such as disputes arising in connection with new coal extraction or production, which have additional implications for local pollution – climate action can seem at face value to be targeted at mitigation ambition even though the legal bases for such actions, and the complexities underlying them, are distinct. Simultaneously, many African states carry the burden of adapting to climate change and seeking a just transition to a low carbon economy, with limited resources and other pressures. Therefore, the issues in Global South, and certainly most African countries, are not the same as in historically high-emitting states in the Global North. The meaning of climate justice, and what might be done to pursue it in this context, is distinct.

For this and other reasons, as activity in the courts increases globally, African climate jurisprudence has been slow to emerge. This however does not mean that African countries are 'lagging behind' the rest of the world when it comes to climate action,[3] but rather that African climate

[2] Global adaptation cases are still significantly underrepresented, see J Setzer and C Higham, 'Global Trends in Climate Change Litigation: 2021 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, 2021, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf, accessed 10 July 2021, 17.

[3] As suggested in the otherwise very helpful Kotzé and du Plessis (n 1).

action – including litigation – has been slow to be recognized,[4] and is not well understood. Our research, and the research of the contributors to this book, shows a complex and diverse range of mobilization strategies, employed in diverse contexts and for different purposes. In some respects, the strategies used by litigators do – at face value – fit easily with the global model of climate litigation. But this does not entail an adoption of strategies that have succeeded elsewhere. Rather, the model of successful litigation in the African context demonstrates a willingness of climate activists and litigators to make use of their own plural legal opportunities, and to craft campaigns that work given the demands posed by climate change in the African context.

In addition, the slightly distorted nature of the 'global' field means that in many respects some African climate jurisprudence has not been framed or recognized as such. In this connection, the editors reject the notion that Africa is in any way behind, and take the view that the status of climate litigation will reflect what is needed and relevant, but that this requires analysis. Some of the chapters in this volume highlight disputes or engagements where climate change issues are implicit or peripheral, but have not been mapped or framed as climate cases. To some extent, this matters less to the litigants if they have achieved their desired outcome; it does, however, matter to us as scholars if we wish properly to understand the field. It also matters when it comes to the development of strategy for future and ongoing actions, as we discuss further below.

The writing and analysis in this book will support an understanding of the plural but also distinctive nature of a 'climate case' – and how and why the pursuit of justice may not culminate in a climate case – in the African context.[5] This is not a story of a few cases mimicking other strategies that have worked elsewhere. It is a story of – to some extent – constrained legal opportunities being put to work where they are most effective, by those with the expertise to know how.

Structure of book and contributions

The book is in three parts. The first part includes the introductory chapters, which outline how climate litigation in Africa is distinct. This includes several chapters that explore African climate litigation from various

[4] See the chapters by T-L Field and DA Owona Mbarga in this volume, as well as HI Majamba, 'Emerging Trends in Addressing Climate Change through Litigation in Tanzania' (2023) 18 *Utafiti* 1.

[5] This builds on and is complemented by the work done by ourselves and others previously – see n 1.

perspectives and based on different definitions, including doctrinal analyses of common and civil law countries, and an overview of existing litigation and activism strategies.

After this introductory chapter, Tracy-Lynn Field engages with the methodological and conceptual approaches that could be used to identify climate change cases decided in African courts, positing an approach based on climate risk with reference to the findings of climate science on the key climate risks in Africa. The value of a climate risk approach is demonstrated through a discussion of three 'drought litigation' cases from South Africa. In chapter 3, Ademola Jegede explores the tension between doctrinal potential and practical realities. He argues that due regard by a state to its obligation to protect human rights may help address procedural hurdles and thereby advance climate litigation for success in African countries. He highlights the need for reform that addresses legal obstacles to climate litigation. Chapter 4, by Nicole Loser, offers a series of case studies of climate litigation in South Africa, highlighting the importance of fundamental rights protection, and tensions between climate commitments and government energy policy. She outlines the strategies that have been used to target projects that would undermine South Africa's climate commitments. Owona Mbarga Daniel Armel's chapter examines the need and possibilities for climate litigation in Cameroon, a (mostly) civil law country. He demonstrates diverse and experienced civil society engagement with climate change issues in Cameroon, which, he argues, is more effective for preservation of resources needed for climate action – specifically forests – showing ways to achieve climate justice that are not limited to litigation.

Part 2 focuses entirely on human rights approaches. This is of particular relevance given the significance of human rights in shaping African legal systems. The chapters map across a range of jurisdictions and levels of law. The first three chapters in this part focus on African regional law. Elsabé Boshoff, in chapter 6, draws on African human rights norms, and substantive rights protection by regional human rights instruments, as well as the procedural considerations of climate litigation before human rights bodies. She provides a comprehensive overview of the opportunities and challenges of litigating climate change in the African human rights system. In chapter 7, Judge John Mativo highlights the growing implications of the climate crisis for displacement, illustrating that while not unique to African countries, the capacity of many states to adapt intensifies this risk. This means that the extent of displacement in African countries is particularly high. Simultaneously, the African regional system is alone in providing express legal recognition (potentially) to climate displaced persons, through the Kampala Convention, and extensive protection based on this. Judge Mativo highlights how a human rights-based approach to refugee protection could ensure better protection for climate refugees on the continent. In chapter 8, Fiona Batt highlights the

value and vulnerability of the Meteorological Traditional Knowledge (MTK) of indigenous peoples; the value includes the capacity and willingness of indigenous peoples to interpret and respond to changing weather patterns. However, using MTK could make it vulnerable to appropriation and misuse. Batt demonstrates how MTK could be protected, both through international instruments, but also how human rights-based climate litigation through the African regional system have created powerful precedents that protect the cultural rights of indigenous peoples.[6]

Chapter 9, by Pia Rebelo and Xavier Rebelo, explores the role of human rights in climate litigation both globally and in other African countries, before analysing how the expansive horizontal interpretation of human rights in the South African Constitution creates unique potential for climate change litigation against private actors. They argue that the substantive protections afforded by the protection of the right to environment have not as yet been fully utilized, and demonstrate how effective this could be in holding private actors to account for climate harms. In chapter 10, Sanita van Wyk explores the influence of human rights protections and international law obligations on climate change, in the jurisprudence of the Dutch and South African courts. Using a comparative methodology, she highlights the difference in strategies and priorities in the two jurisdictions that, on opposite sides of the globe, share legal roots (South African law being derived, to some extent, from Roman Dutch law). She argues that, despite their different strategies, a study of the cases reveals 'two roads to the same destination', namely the mitigation of climate change.

The third part of the book considers various approaches related to justice, equity and activism. In chapter 11, Eghosa Ekhator and Edward Okumagba illustrate the synergies between environmental justice and climate justice in relation to litigation against fossil fuel companies in Nigeria. They provide an incisive contextual analysis of climate justice in this context, and – mapping across the dimensions of climate justice – demonstrate how litigation against multinationals in the Nigerian courts might yet tend towards climate justice. Riyadh Fakhri and Youness Lazrak Hassouni, in contrast, demonstrate that in Morocco the legislative and institutional framework for the governance of climate change – including the integration of climate change adaptation – is well-developed across a number of sectors, including energy, air pollution and the protection of water resources. However, the formal ambition is not matched by measures taken for implementation, and the judiciary – despite

[6] Although not explored at length in the book, Batt also works within the ambit of what has been identified as a 'new knowledge frontier', the rise in the study of litigation seeking to ensure a just transition – see Savaresi *et al*, 'Just Transition Litigation: A New Knowledge Frontier.' Working paper available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4561679.

being proactive in relation to discrete environmental and climate change disputes – have not exercised their power to accelerate implementation. In chapter 13, Pedi Obani examines the contingent and gendered nature of legal opportunities in climate litigation in South Africa and Nigeria, asking serious critical questions of how inclusive the litigation in the most-represented states in this context, truly are. Finally, Bright Nkrumah, in chapter 14, looks to the future by examining the principle of intergenerational equity. Mapping across African and international case law, he examines the extent to which this principle is embedded in constitutional protections, and has already featured directly and indirectly in the decisions of African courts.

Themes and reflections

This volume has two overarching themes. The first theme is that the African climate litigation must be informed by African priorities and values, and serve the purposes and needs of African peoples. From this perspective, what a climate case looks like will to some extent be informed by what necessary or desirable climate action looks like in the African context. As we highlight above, while many priorities are shared between all nations, the relative importance or urgency of them may not be the same in different context. But this does raise questions as to the relevance of 'global' strategies and what is needed locally to address the impacts of a changing climate.

The second theme relates to the tensions between global and local strategies, as well as those between barriers and opportunities both in doctrine and in practice. Most of the chapters in this book lie within this matrix of tension. The opportunities created by pluralist legal systems – particularly with entrenched human rights protection – runs parallel with constraints on standing, rules about costs or other disincentives. Also, as Obani argues in her chapter, there is some contingency in these legal opportunities, including patterns of exclusion that result in some marginalized groups being under-represented. These pressures are amplified by the global or transnational nature of the problem, which frequently means that the defendant is abroad, and out of reach due to legal or practical constraints.[7] This is associated, to some extent, with the question of why some more obvious mitigation ambition cases might not be brought.[8]

None of our contributions seek to map the field or really speak expressly to questions about how many climate cases there are in any particular

[7] Bouwer and Field (n 1), 125.

[8] Kotzé and du Plessis (n 1); S Adelman, 'Climate Change Litigation in the African System' in I Alogna, C Bakker and J-P Gauci (eds), *Climate Change Litigation: Global Perspective* (Brill 2021).

African country or the continent at large. In general, the project of mapping and tracking climate cases is useful and necessary,[9] but this is difficult to do comprehensively without an understanding of what African climate jurisprudence is. This is a task that will need to be undertaken by African scholars and activists as the field develops. It might be more interesting at this stage to ask what climate cases look like in different contexts and, more importantly, what they might hope to achieve in their own context. In this vein, Field argues that the key criteria underlying the selection of climate change cases in conventional climate litigation scholarship – climate visibility and centrality – underlie the claim that most climate cases are mitigation-related. She argues for developing a parallel archive of cases and associated scholarship that places climate risk at the centre, although what counts as climate risk will vary, spatially and temporally – even across the African continent.

This returns us again and again to definitional questions. The book does not set a definition of climate litigation, and some of our authors have either defined or clearly conceptualized climate litigation in this context in the more conventional frame, which makes sense in many ways. But as one of us has argued elsewhere:

> Climate litigation [in this context] 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. 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 worth studying. This broader approach is necessary for a proper understanding of climate litigation in ... Africa. But in addition to understanding the breadth of the field, the reasons why this broader analysis is necessary requires contextual reflection, including how legal rules fit with climate with climate change and how this 'threat multiplier' is reconciled with other challenges.[10]

Ekhator and Okumagba employ this broader definition or methodology in their work to explore how broadly defined climate litigation that targets environmental pollution can tend towards climate justice. Field's

[9] In general, climate litigation databases seek to 'catch' cases brought strategically that directly seek to improve climate action through some means, see Setzer and Higham (n 2), 13–14. This in itself is a task involving increasing challenges.

[10] K Bouwer, 'The Influence of Human Rights on Climate Litigation in Africa' (2022) 13 *Journal of Human Rights and Environment* 157, 158–9.

contribution examines these definition issues as tied to litigation priorities, raising the question of what should be the focal point for climate action on adaptation, and which methodological and conceptual approaches will assist in identifying African case law in this regard.

As highlighted above, the question is also what, in the African context, we might want climate litigation to achieve, which depends on broader questions about responsibility, relative contribution and what sustainable development looks like in the context of climate change on the African continent. African states have, with a few exceptions, made a negligible contribution to climate change. As Boshoff explains in her chapter, this could be one reason why fewer cases are brought at the regional level, and – as is a general theme in the book – why what can be called 'systemic'[11] mitigation cases have not made much of an appearance. In her chapter, Van Wyk also emphasizes the mitigation obligations that African states have adopted at the international level, how these differ to European countries, emphasizing that the pressure to mitigate is not as intense. While neither of these statements are particularly contentious in themselves, questions about responsibility, contribution and sustainable development would determine what was an appropriate or relevant target for litigation. For instance, as is clear from Nicole Loser's chapter, the case for discontinuing the use of coal in South Africa is pretty incontrovertible – but the case for discontinuing the use of fossil fuels in all states and (as Loser herself acknowledges) without viable alternatives is less clearcut.

Loser's chapter also makes very clear that the case against coal in the South African context is, but is not only, about the need to reduce greenhouse gas emissions. South Africa's reliance on coal has also caused localized air pollution, and stands to exacerbate existing vulnerabilities in the water-scarce country. The theme of vulnerabilities and the need for adaptation where possible runs through several of the chapters. Authors focus on the potential or greater scope for litigation arising in the context of climate vulnerabilities, including forests (Owona Mbarga) and water (Fakhri and Lazrak Hassouni). They also highlight how the complexities in the field and the limited scope of what could be achieved with litigation relative to its costs perhaps explain why there is a sense that there is less to do in this context. Applying a risk-based approach to the definition of climate litigation, Field's chapter incorporates a unique discussion of 'drought litigation' cases in South Africa. Boshoff's chapter also reminds us of the possibilities for systemic adaptation litigation, including before monitoring bodies of the regional system.

[11] See O Kelleher, 'A Critical Appraisal of Friends of the Irish Environment v Government of Ireland' (2021) 30 *Review of European, Comparative & International Environmental Law* 138.

What does emerge clearly from a number of the chapters, however, is an imaginative range of potential strategies that are being or could be deployed against corporate actors for their role in – and potentially against states for their complicity in – causing or contributing to the impacts of climate change on the continent. Again, Boshoff explains how the framing of rights protections at the regional level creates avenues both for state liability for complicity, as well as direct human rights responsibilities of corporations. Rebelo and Rebelo explore how the unique and radical interpretation of the horizontal application of human rights in South Africa could open up avenues towards litigation against the directors of high-emitting corporate bodies for their role in climate change. Ekhator and Okumagba demonstrate how the sustained legal response to multinational energy companies in Nigeria could advance climate justice. It should not be forgotten that, in many of the disputes where the defendants are government ministers or state parties, frequently the substance and outcome of the litigation does affect powerful – frequently transnational – corporate interests.[12]

A question that we discussed a great deal between ourselves as editors was the role and relevance of global strategies on climate litigation to the development of strategy in African countries. As we highlight above, climate litigation certainly is a global movement, but one in which the needs, priorities and context of many Global South countries are still in danger of being marginalized. This connects, to some extent, with the definitional issues we point to above and, similarly, how each author took a slightly different perspective to the role and relevance of the climate litigation movement as a whole. In general, we would suggest that global strategies are interesting and will remain influential, particularly as the climate litigation movement continues to be global and also as African scholars remain curious about the legal systems beyond their borders. For instance, in their chapters, Rebelo and Rebelo, and Van Wyk, explore how human rights have been used in climate cases in European countries. Their respective analyses inform but also illustrate the unique potential of the South African Constitution, and how judges use this in an ongoing project of legal transformation. Owona Mbarga looks to climate jurisprudence from Europe and other African countries, contrasting this both with legal constraints and contextual differences in Cameroon. Nkrumah and Judge Mativo both illustrate how international human rights protections can shape African climate change jurisprudence, but also how local or regional jurisprudence have developed their own norms based on African values. Also, each chapter demonstrates a strong

[12] See Murcott and Webster (n 1). Also see S Bogojević and M Zou, 'Making Infrastructure "Visible" in Environmental Law: The Belt and Road Initiative and Climate Change Friction' (2021) 10 *Transnational Environmental Law* 35.

home-grown element, with scholars arguing that existing jurisprudence may be useful in crafting remedies – or understanding the implications of existing litigation as suggested in several chapters – that are context-specific. It goes without saying that existing knowledge and expertise on the ground has contributed to the success of many of the extant cases and, as Loser suggests, could also lend norms and strategies to other countries both in Africa and globally. Many of our chapters also discuss the strong cultures of legal activism that have developed in response to social and environmental issues more generally.

This is linked to another theme that emerges in many chapters, which is the connection between legal actions and activism, whether by pressure groups or formalized civil society organizations or non-governmental organizations (NGOs). Activists on the ground understand the potential and limits of the tools available to them, and we acknowledge that they would know best when other forms of advocacy or participation would better serve their purposes. In general, we find that many of our authors demonstrate a more sophisticated understanding of the interwoven nature of activism with the legal process than appears in much of the global legal scholarship on climate litigation. In other contexts, participation through NGOs or civil society organizations can strengthen the legitimacy of legal claims brought in response to community concerns.[13] Batt's highly original chapter illustrates how forms of adjudication in climate disputes (broadly defined) can also feature as sites of protection of indigenous peoples' Traditional Knowledge. In Loser's chapter, she explains that individual climate cases in the South African context frequently form part of ongoing campaigns targeted at defendant groups, and that this ongoing activism can reinforce and support the outcomes of individual cases.

In Owona Mbarga's work, he illustrates how evolved and experienced civil society practice to some extent replaces the need for litigation, in a context where access to courts is constrained but other forms of legal and political engagement are well-developed. There is also a strong understanding of how climate litigation as part of climate governance forms part of an overall legal framework[14] – as demonstrated by Fakhri and Lazrak Hassouni. They discuss how the effectiveness of climate legislation and the institutions created through it can provide effective and comprehensive governance solutions, to some extent supplanting the need for direct action through the courts.

[13] This is also illustrated with the 'litigation plus' approach discussed by EMA Okoth and MO Odaga, 'Leveraging Existing Approaches and Tools to Secure Climate Justice in Africa' (2021) 15 *Carbon & Climate Law Review* 129.

[14] E Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA' (2013) 35 *Law & Policy* 236, 242.

The question of when and how access to courts might arise is complex and varied. In some instances, either procedural rules or other considerations, including the risks of unfavourable costs orders, do represent practical barriers, as explored by Jegede.[15] However, the story emerging from the book is that there is significant untapped potential in terms of the use of the substantive law in strategic litigation. As Boshoff argues, the

> regional norms in general open pathways to, rather than hinder, climate litigation in the region, through providing for justiciable socio-economic rights and collective rights, strong obligations on duty bearers to respect, protect, promote and fulfil rights, strong norms for the protection of child rights and the possibility of individual (corporate) duties.

She, as well as Judge Mativo, highlight the under-utilized provisions that protect persons against climate-induced displacement in the African context, including through the Kampala Convention.[16] Similarly, the analysis by Rebelo and Rebelo reveals the unique potential for innovative litigation targeting corporate actors using human rights. But as much as developments in the substantive law create opportunities for litigation, some of our authors also acknowledge that they preclude the need for litigation. For instance, Fakhri and Lazrak Hassouni explain that, in Morocco, the legislature has moved forward in the legalization of climate change responses, much faster than the judiciary. This argument resonates with Jegede's position that states' duty to 'protect' rights entails the formulation of appropriate legislation that can remove barriers and aid the accountability of all actors involved in climate change and climate response measures.

Finally, the role and purpose of the science on climate change is a fundamental part of any study about climate change and the courts. In many cases, scientific proof connecting human activity to climate change or determining contribution share is fundamental for the success of climate cases. Many of our chapters demonstrate how scientific evidence has been or could be used to establish the necessary elements of an action. For instance, Van Wyk demonstrates how courts do or could use scientific evidence

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[15] Also explored in SAK Mwesigwa and PD 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) 2 *Carbon & Climate Law Review* 139.

[16] As one of us has argued elsewhere, the Kampala Convention may apply territorially and extraterritorially to protect human rights in the context of climate induced displacement: see AO Jegede, 'Rights Away From Home: Climate-Induced Displacement of Indigenous Peoples and the Extraterritorial Application of the Kampala Convention' (2016) 16 *African Human Rights Law Journal* 58–82.

to determine how much mitigation action is necessary for a state (in her chapter, the Netherlands or South Africa) to meet its emissions reductions obligations. But in this volume, the role and relevance of scientific evidence in climate change extends beyond its use as evidence in proceedings. Batt's chapter extols the value of 'other' forms of knowledge, but explains how Meteorological Traditional Knowledge of indigenous peoples should be protected if it is to be used in devising solutions to climate change. Field argues that climate science is foundational (but not exhaustive) for determining climate risk on the continent and in particular regions. As explained above, if the definitional boundaries around climate litigation are more porous in this plural space, using scientific evidence about the effects of climate change to determine sites of African climate cases presents another basis on which to use science to help us understand how the courts are responding to climate change.

In conclusion, we return to the observations we made at the beginning of the chapter. In this volume we see a picture of carefully targeted public interest litigation, embedded in grassroots campaigns that clearly make the connections between climate and environmental justice. We see a story of untapped potential arising from legal systems which are both highly plural and have a mandate to transform the law, to target corporation that drain Africa's resources, while moving the wealth this generates offshore. We also see, in some contexts, a picture of careful and responsible climate action and activism, that supplants the need to appeal to the courts. Yet we also note, as identified by several of our authors, that there is more contentious activity in Africa than has been recognized, and that this highlights the need for closer attention to how the local (and regional) courts are engaging with climate change issues, whether explicit or implicit. How can we understand the picture of climate litigation in the African context? To some extent, this work has just begun.

PART I

Legal Tools, Opportunities and Barriers