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## HUMAN RIGHTS APPROACH TO CLIMATE JUSTICE IN AFRICA: EXPERIENCES FROM OTHER JURISDICTIONS

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### Abstract

Climate change has several negative impacts on fundamental rights. It is also an issue of fairness and disproportionality in its effects on the well-being of communities, individuals, governments, and the relationship between states. For such populations, climate justice is required through a 'rights-based approach' that galvanises climate actions. Also, this is no less important in addressing the far-reaching impacts of climate change and its adverse effects, through adaptation and mitigation. Environmental advocates and scholars in other regions have explored, and continue to explore, litigation based on the human rights-based approach as a tool to galvanise climate change justice. An essential aspect of the approach across all levels is the need to safeguard human rights. This chapter analyses the intersections of climate change and human rights and whether climate justice can be achieved through a human rights-based approach. It highlights how climate litigation practices from other jurisdictions may inform a rights-based approach as a tool for climate justice in climate change actions in Africa.

**Key words:** *climate change; climate justice; climate litigation; human rights*

## 1 Introduction

Notwithstanding a brief decline in carbon dioxide emissions caused by restrictions on movement due to the COVID-19 pandemic, the United Nations (UN) Environment Programme's 2020 Emissions Gap Report states that global emissions still fall short of the Paris Agreement goals of limiting global warming to well below 2°C and pursuing 1,5°C.<sup>1</sup> The Report further notes that emissions are heading towards a temperature rise of 3°C during this century.<sup>2</sup> The adverse effects of climate change undoubtedly

1 UNEP et al 'Emission Report Gap 2020', <https://www.unep.org/emissions-gap-report-2020> (accessed 3 March 2021); also see M Allen et al 'Framing and context' in V Masson-Delmotte et al (eds) *Global warming of 1.5°C* IPCC Special Report on the impacts of global warming of 1,5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate, <https://www.ipcc.ch/sr15/> (accessed 2 March 2021).

2 As above.

will affect human activities and, by extension, the fundamental human rights of the members of every society, including their rights to life, self-determination, development, decent living, access to housing, and the right to a safe environment.<sup>3</sup> The need to safeguard these and other rights affected by climate change was noted in the Preamble to the Paris Agreement. Specifically, the Paris Agreement noted the need to safeguard the rights of people, especially ‘minorities and vulnerable groups through the concept of climate justice’.<sup>4</sup>

In line with the above, the United Nations High Commissioner for Human Rights (UNHCHR) asserts the necessity of safeguarding the ‘fundamental rights to freedom, equality, and adequate conditions of life within an environment of such quality that permits a life of dignity and well-being’.<sup>5</sup> Thus, this chapter seeks to analyse the intersections of climate change, human rights and climate action through climate litigation. It highlights how climate change adversely affects human rights, on the one hand, and, on the other, how human rights can be employed as a tool to combat the adverse effects of climate change, particularly the utility of climate litigation in Africa, drawing experiences from other jurisdictions.<sup>6</sup> Litigation is one of the strategies used in other jurisdictions to ensure that government, government agencies and multinational companies develop and implement effective mitigation and adaptation measures, thereby using the courts to push for concrete action.

3 Report of the Office of the High Commissioner for Human Rights (OHCHR) to the 21st Conference of Parties (COP 21) to the United Nations Framework Convention on Climate Change (November 2015), <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx> (accessed 3 March 2021).

4 Preamble to the Paris Agreement FCCC/CP/2015/10/Add.1 Dec. 1/CP.21, <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> (accessed 3 March 2021).

5 A/HRC/10/61 Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights on 15 January 2009, <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx> (accessed 3 March 2021).

6 A 2017 UNEP report suggests that climate change litigation will appear with increasing frequency in the Global South. In many instances, this growth may owe simply to the steady proliferation of laws and financial resources focused on mitigation, adaptation, and sustainable development more generally. See United Nations Environment Programme ‘The status of climate change litigation: A global review’, <http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Env-CC-Litigation.pdf> (accessed 3 March 2021).

## **2 The intersections of climate change, human rights and climate justice**

Climate action stems from an obligation on countries to take necessary steps to mitigate, adapt and reduce resilience to climate change within their jurisdictions. These climate obligations stem from accession to international obligations, such as the United Nations Framework Convention on Climate Change (UNFCCC) and its various Protocols, the Paris Agreement, and international instruments safeguarding human rights, especially the rights to life, property and a safe environment. At the national and sub-national levels there are bill of rights or constitutional provisions safeguarding human rights, legislation, regulations and various frameworks on climate change adaptation and mitigation.

The UN through its Office of the High Commissioner for Human Rights and other mechanisms highlights the links and key impacts of climate change, directly and indirectly, on an array of internationally-guaranteed human rights and have advocated a human rights-based approach to climate change.<sup>7</sup> More recently a report by the UN Special Rapporteur on Human Rights and the Environment highlights the links and key impacts that climate change has on internationally-guaranteed human rights and the need for a human rights-based approach to climate change.<sup>8</sup> Also, the Preamble to the Paris Agreement<sup>9</sup> acknowledges that

climate change is a common concern of humankind. Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with

7 See UN Office of the High Commissioner 'Key messages on human rights and climate change', [https://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages\\_on\\_HR\\_CC.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf) (accessed 3 March 2021); UN Office of the High Commissioner 'Open letter from the United Nations High Commissioner for Human Rights on integrating human rights in climate action', <https://www.ohchr.org/Documents/Issues/ClimateChange/OpenLetterHC21Nov2018.pdf> (accessed 3 March 2021); Human Rights Council Resolution 10/4 Human Rights and Climate Change, [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_4.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf) (accessed 3 March 2021); and UNFCCC Decision 1/CP.16, <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> ((accessed 3 March 2021).

8 'Safe climate: A report of the Special Rapporteur on Human Rights and the Environment' A / 74/161, <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pdf> (accessed 3 March 2021).

9 The Paris Agreement was adopted as a decision of the Conference of the Parties to the UNFCCC, and its text is included as an annex to that decision. Conference of the Parties, Draft decision \_/CP.21, Adoption of the Paris Agreement 20, UN Doc FCCC/CP/2015/L.9/Rev.1.

disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.<sup>10</sup>

Climate change, in addition to other actions, requires a rights-based approach. A significant role of human rights regarding climate change is to safeguard those subject to various degrees of vulnerabilities. However, in addition to this, it must be noted that the human rights-based approach provides a viable avenue to foster government accountability and provides a clear line of action concerning climate change mitigation and adaptation. It further provides frontiers for international cooperation on climate change action and prevents discrimination and inequality, either among nations or concerning groups of vulnerable people within individual states. Furthermore, it sets a 'core minimum' standard for individual states and the international community to tackle issues of climate change.<sup>11</sup>

To this end, climate action in each state must be situated in the context of the protection and safeguarding of human rights.<sup>12</sup> Thus, climate action must be guided by the principles of human rights,<sup>13</sup> including the assurance of justice<sup>14</sup> and dignity of the vulnerable members of society. In seeking to situate climate change in the human rights context, Sachs notes that in the course of the Rio Conference, climate change was recognised as being a matter of intergenerational equity.<sup>15</sup> Sachs further argues that in placing the 'polluter-pays principle' within climate change governance, a duty is imposed on high emitters not only to offer compensation but to take obligatory steps to prevent further 'violations of economic, social and cultural rights by adequate protective measures'.<sup>16</sup> This argument is based on the premise that the impacts of climate change are likely to aggravate the living conditions of people, who have contributed little or nothing to historical greenhouse gas emissions, to the extent that their basic rights are jeopardised.<sup>17</sup> It can be deduced from his arguments that the duty

10 See Preamble para 6 Paris Agreement.

11 S McInerney-Lankford et al *Human rights and climate change: A review of the international legal dimensions* (2011) 29.

12 W Adger et al *Adapting to climate change: Thresholds, values, governance* (2009) 9.

13 This is as contained in the constitutions of individual countries and international instruments such as the UN Charter on Human Rights.

14 Each country has a duty to ensure that its courts and other institutions are properly empowered to safeguard and ensure social justice, environmental justice and equity in all matters.

15 W Sachs 'Climate change and human rights' (2008) 51 *Development* 346.

16 Sachs (n 15) 354-359.

17 As above.

to safeguard human rights concerning climate change impacts falls on countries with high greenhouse gas (GHG) emissions, the countries to which those most adversely affected belong, as well as the international community.<sup>18</sup> His position is in line with that of Khan who argues that climate change action is a global public good from which no state or individual should be excluded. Reversing the argument, they point out that both climate change mitigation and adaptation should be applied in sustaining the norms of 'human rights, the right to development and the no-harm rule'.<sup>19</sup>

In further highlighting the relevance of human rights in climate action, it is argued that due to the impacts of climate change on social, economic, cultural and developmental aspects of people's lives, it is essential that there should be some form of redistribution of resources to ensure climate justice.<sup>20</sup> Human rights help to ensure the appropriate placing of obligations and responsibilities to engender justice. Such obligations and duties include the government's duty to safeguard the environment in line with the people's rights to environmental well-being.<sup>21</sup> Specifically, the right to environmental well-being can be invoked to ensure that individual states act on the mitigation of climate change, given that climate change could lead to coastal inundation, desertification and other issues of land degradation.<sup>22</sup> In turn, state action on climate change is encouraged

18 This is in line with the tenets of the UNFCCC. Specifically, the Convention in its Preamble asserts that the current and historic increase in GHG emissions was a result of activities in developed countries. In line with the observation in its Preamble, art 3 of the Convention highlights the need for nations to act based on the principle of common but differentiated responsibilities and capabilities of individual nations.

19 M Khan 'Climate change, adaptation and international relations theory' in G Sosa-Nunez & E Atkins (eds) *Environment, climate change and international relations* (2016) 21.

20 E Sussman et al 'Climate change adaptation: Fostering progress through law and regulations' (2010) 18 *New York University Law School Environmental Law Journal* 60.

21 This right is couched in different ways depending on individual countries. In the South African Bill of Rights, sec 24 guarantees citizens' rights to environmental safety and well-being. Nigeria, sec 16 of the 1999 Constitution recognises a government obligation to safeguard the environment. However, this obligation is not couched as a right, but rather as an objective that may direct government policies.

22 There are several climate litigation cases in which the right to environmental well-being or the right to a safe environment has been relied upon to make the government live up to this obligation. See UNEP and Sabin Centre for Climate Change Law 'Global Climate Litigation Report: 2020 status review', <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> (accessed 3 March 2021). In this regard, cognisance should be taken of the elements of the concept of 'well-being' and how this translates into government obligations. A Nellerand & R Neller 'Environment well-being and human well-being' in R Elliot (ed) *Institutional issues involving ethics and justice 2* describe human well-being as entailing access to 'clean air, a safe and adequate water supply, adequate nutrition and shelter

and fostered by collective regional and transnational climate change governance.

## 2.1 Regional considerations of human rights in climate change action

In recognising the need to take proactive steps to safeguard the rights of people in relation to climate change and its impacts, the African Commission on Human and Peoples' Rights (African Commission) has passed three Resolutions.<sup>23</sup> Specifically, Resolution 342 states the position of the African Union (AU) on human rights and climate change, which position is premised on the African Charter on Human and Peoples' Rights (African Charter) and the UNFCCC. The position of the AU on climate change and human rights reaffirms the need to take cognisance of the rights of Africans to be protected, including the right to economic, social and cultural development, and the right to a meaningful life in a safe environment.<sup>24</sup> Further, the AU affirms the provision of the UNFCCC on the need to safeguard the climate system for present and future generations, thereby taking into consideration inter- and intra-generational equity in climate change action.<sup>25</sup> In a more recent Resolution the AU went a step further by taking cognisance of the rights of internally-displaced persons affected as a result of climate change. It urged member states to take steps to safeguard the rights and provide humanitarian protection for those affected by the adverse effects of climate change, especially the particularly vulnerable.<sup>26</sup> Most importantly, Resolution 417 requires that member

and a global ecosystem that will continue to provide these services'; J Summerset al 'A review of the elements of human well-being with an emphasis on the contribution of ecosystem services' (2012) 40 *Ambio* 327 define well-being as entailing 'basic human needs, economic needs, environmental needs, and subjective happiness'. In an unpublished work, Knight & Tsuchiya describe human well-being as entailing variables such as contained in the Human Development Index (HDI). Eg, in the case of Nigeria these indicators of the HDI include health, environmental sustainability, inequality, human security, socio-economic sustainability, and so forth. See Nigeria – Human development indicators, <http://hdr.undp.org/en/countries/profiles/NGA> (accessed 3 March 2021).

23 Resolution ACHPR/Res 153(XLVI)09: Resolution on Climate Change and Human Rights and the Need to Study its Impacts in Africa adopted at its 46th session in 2009; ACHPR/Res 271 (2016): Resolution on Climate Change in Africa adopted at its 55th ordinary session in 2014; and ACHPR/Res 342(LVIII)2016: Resolution on Climate Change and Human Rights in Africa; ACHPR/Res 417 (LXIV) 2019: Resolution on the Human Rights Impacts of Extreme Weather in Eastern and Southern Africa due to Climate Change.

24 Arts 22, 24 & 45 African Charter.

25 The Preamble and art 3, para 1 of the United Nations Framework Convention on Climate Change.

26 Para 4 ACHPR/Res 417 (LXIV) 2019 (n 23).

states ‘fully integrate climate change considerations and the human and peoples’ rights consequences into their broader development plans’.<sup>27</sup>

## 2.2 Specific climate change impacts and human rights issues

The human rights that are most affected by climate change include the rights to life, self-determination, development, food, health, water and sanitation, housing, education and the rights of future generations to a safe and sustainable environment.<sup>28</sup> In relation to land and access to land, climate change would lead to further scarcity of land due to challenges such as migration, loss of land as a result of flooding, coastal erosion, desertification, and so forth. For instance, many indigenous groups would be faced with the reality of having to migrate from their ancestral homes due to the impacts of climate change.<sup>29</sup> Climate action also raises human rights issues of land tenure security, especially as it relates to access to housing and access to land for agriculture, particularly in the case of women who are often deprived of such access based on their gender. Research reveals that women and children form a large percentage of the most vulnerable in society,<sup>30</sup> who often bear the brunt of social instabilities and scarcity of resources. In most developing countries most women continue to struggle with issues such as access to housing and land tenure security. Many of these women earn less than their male counterparts and often play multiple roles of being the breadwinner and caregiver in their homes.<sup>31</sup> These issues render them particularly vulnerable to the adverse socio-economic impacts of climate change. It becomes essential that gender rights be given due consideration in climate change action/governance as a core aspect of human rights.

27 Para 9 ACHPR/Res 417 (LXIV) 2019.

28 Office of the High Commissioner for Human Rights ‘Understanding human rights and climate change’, <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> (accessed 3 May 2021).

29 A case to note here is that of the Ilaje people of Ondo State who over years have endured coastal inundations in their communities. Many have been forced to migrate and many more have lost their sources of livelihood.

30 C Nellemann et al (eds) *Women at the frontline of climate change: Gender risks and hopes. A rapid response assessment* United Nations Environment Programme (2011) 6-7.

31 Research reveals that one in four or between 25% and 30% of households in Africa are headed by females. See A Milazzo & D van de Walle *Women left behind? Poverty and headship in Africa (English)* (2015) Policy Research Working Paper WPS 7331 Washington DC: World Bank Group, <http://documents.worldbank.org/curated/en/277221468189851163/Women-left-behind-poverty-and-headship-in-Africa> (accessed 3 March 2021); World Bank ‘Poverty is falling faster for female-headed households in Africa’, <https://blogs.worldbank.org/africacan/poverty-is-falling-faster-for-female-headed-households-in-africa> (accessed 5 May 2021).



The above-highlighted issues make it imperative for action to tackle the environmental and developmental challenges occasioned by climate change, which further deepen pre-existing social inequalities. While various avenues exist to address social inequalities and injustices, a rights-based approach to climate change has become necessary due to the great divide between those who have contributed most to climate change and those who bear the most adverse consequences.<sup>32</sup> Climate justice provides an effective tool to address the highlighted and other injustices and inequalities occasioned by the adverse effects of climate change. The principles of climate justice drawn up by the Mary Robison Foundation and the Bali Principles of Climate Justice are based mainly on human rights principles.<sup>33</sup> These principles of climate justice, as do other principles, emphasise the respect and protection of human rights of all persons, especially those most affected by the adverse effects of climate change. The following part discusses environmental justice and the role it has played in engendering climate justice as a tool to ensuring the protection of human rights in relation to climate change.

### 2.3 Fostering climate justice through a human rights-based approach

Environmental justice as a precursor to climate justice and link to a human rights-based approach has its roots in the fight against social inequalities and injustices that were escalated by unfavourable environmental conditions experienced by the poor and vulnerable members of society.<sup>34</sup> Such deprived communities or sectors of society are more exposed to environmental pollution and bear the brunt of various forms of environmental degradation, affecting the quality of life and their dignity as human beings. To this end, environmental justice has been argued as being more human than nature based.<sup>35</sup>

32 International Bar Association 'Achieving justice and human rights in an era of climate disruption', [https://www.lagbd.org/index.php/Achieving\\_Justice\\_and\\_Human\\_Rights\\_in\\_an\\_Era\\_of\\_Climate\\_Disruption\\_\(int\)](https://www.lagbd.org/index.php/Achieving_Justice_and_Human_Rights_in_an_Era_of_Climate_Disruption_(int)) (accessed 5 May 2021). See also C Okereke 'Climate justice and the international regime' (2010) 1 *Wiley Interdisciplinary Reviews: Climate Change* 462; C Okereke & P Coventry 'Climate justice and the international regime: Before, during, and after Paris' (2016) 7 *Wiley Interdisciplinary Reviews: Climate Change* 834.

33 The Bali Principles of Climate Justice were developed at the final preparatory negotiations for the Earth Summit in Bali in June 2002, <https://corpwatch.org/article/bali-principles-climate-justice> (accessed 19 June 2021); Mary Robinson Foundation 'Principles of climate justice', [www.mrfcj.org](http://www.mrfcj.org) (accessed 19 June 2021).

34 S Harlan et al *Climate justice and inequalities* (2015) 135.

35 D Schlosberg *Defining environmental justice: Theories, movements, and nature* (2007) 6.



Environmental justice is driven by the need for a qualitative environment for all,<sup>36</sup> the fair protection of the environment to remove any inequities in the distribution of 'environmental amenities',<sup>37</sup> and the equal fulfilment of environmental obligations towards all members of society.<sup>38</sup> Based on the fact that poorer members of society mostly experience environmental injustices, environmental justice is aimed at correcting the 'inequitable distribution of environmental risks and governmental protection',<sup>39</sup> as well as ensuring the equitable distribution of all environmental costs and benefits. Hence, in so far as climate justice addresses issues of disproportionality, inequity in the causation of and remedy to climate change, it relates to environmental justice. Since environmental justice relates to issues of human rights, the safeguarding of access to resources and infrastructure, distributive inequities, and public participation,<sup>40</sup> it is not surprising that its frontiers continue to expand and have expanded to accommodate human rights in climate change action.<sup>41</sup> To this end, Taylor et al argue the need for environmental justice in the adaptation to climate change to ensure that no group of people are unfairly exposed to adverse impacts.<sup>42</sup>

Given the above background, the rights-based approach aims to tackle the inequalities caused by climate change and address the 'disproportionate impact on the poorest and least responsible'.<sup>43</sup> Harlan et al note that climate change is a justice issue for several reasons. They argue, first, that climate

36 R Holifield 'Defining environmental justice and environmental racism' (2001) 22 *Urban Geography* 81.

37 H Pearsall & J Pierce 'Urban sustainability and environmental justice: Evaluating the linkages in public planning/policy discourse' (2010) 15 *Local Environment* 570.

38 Para 27 of the Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action states that equitable human settlements are those in which all people, without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, have equal access to housing, infrastructure, health services, adequate food and water, education and open spaces, [http://www.unhabitat.org/declarations/habitat\\_agenda.htm](http://www.unhabitat.org/declarations/habitat_agenda.htm) (accessed 5 May 2021).

39 D Schlosberg & LB Collins 'From environmental to climate justice: Climate change and the discourse of environmental justice' (2014) 5 *Wiley Interdisciplinary Reviews: Climate Change* 359.

40 As above.

41 According to Schlosberg, environmental justice bridges a number of issues, thereby linking various problems relating to individuals, groups and entire societies. He notes that the 'broad, plural, and inclusive discourse' made it successful. See Schlosberg (n 35) 6.

42 A Taylor et al 'Urban adaptation' in L Kotze et al (eds) *Climate law and governance for low carbon development in South Africa* (2016) 11-17.

43 International Bar Association (n 32) 45.

change is driven by overconsumption, which is closely linked to social inequalities; second, that the impacts of climate change differ based on the economic well-being of individuals, communities and states; and, third, that policies on climate change action do not sufficiently take cognisance of the poor and vulnerable in society.<sup>44</sup>

In line with bridging the inequality gap, climate justice seeks to integrate human rights and equity considerations into climate change action at various levels of governance.<sup>45</sup> Skillington affirms this point by juxtaposing Rawls's theory of justice to climate justice, arguing that decent societies<sup>46</sup> have an obligation to assist other societies that may require help in 'overcoming unfavourable conditions'.<sup>47</sup> Following this standpoint, climate justice iterates the dignity of the human person in line with various international instruments and domestic laws that safeguard human rights. Further, it is argued that climate justice seeks to interrogate how the rights of the vulnerable are affected by climate change and to protect these rights from further violation. In advancing his argument for a human rights-based approach to climate justice, Skillington restates the Mary Robinson principles of climate justice on (i) respecting people's rights to participate in decision-making processes on issues that deeply affect their lives and those of their children; (ii) addressing the root causes of poverty and suffering; (iii) emphasising the equal dignity and worth of all people through the promotion of tolerance, inclusion, non-discrimination and social justice; and (iv) holding all development actors accountable for respecting, protecting, and fulfilling human rights.<sup>48</sup>

The Mary Robinson principles serve to emphasise the need for justice to ensure equity and fairness in climate change. This is particularly necessary as the adverse effects of climate change have been found to portend developmental challenges for a large percentage of the world's population, as most developing countries will face environmental and developmental challenges due to climate change impacts.<sup>49</sup> As far back as 2011, these adverse effects had been found to hamper the delivery of the Millennium Development Goals (MDGs).<sup>50</sup> In the same vein, these impacts remain a

44 S Harlan et al 'Climate justice and inequality' in R Dunlap & R Brulle (eds) *Climate change and society: Sociological perspectives* (2015) 127.

45 International Bar Association (n 32) 45.

46 T Skillington *Climate justice and human rights* (2016) 45.

47 As above.

48 Skillington (n 46) 45.

49 C Field (ed) *Managing the risks of extreme events and disasters to advance climate change adaptation: Special report of the Intergovernmental Panel on Climate Change* (2012) 32.

50 S McInerney-Lankford et al *Human rights and climate change: A review of the international legal dimensions* (2011) 1.

bane to the actualisation of the Sustainable Development Goals (SDGs) and are counter-productive for development in most countries.<sup>51</sup>

As a consequence of the adverse effects on sustainable development, the negative impacts of climate change ‘undermine the realisation of a range of internationally recognised human rights’.<sup>52</sup> World Bank studies show that the adverse effects of climate change threaten a range of rights, including the rights to life, food, adequate housing, water and health.<sup>53</sup> Further, the study notes that climate change affects not only substantive rights, but also militates against the progressive actualisation of other human rights, especially among more vulnerable states, communities and individual members of society.<sup>54</sup> Given the far-reaching effects of climate change on human lives and livelihoods, it has been argued that the first step in climate justice ought to be the enhancement and safeguarding of social, economic and environmental well-being.<sup>55</sup> Climate action through rights-based climate litigation is one of several strategies that can be used in achieving this purpose.

### 3 The utility of human rights-based climate litigation

Several UN and regional resolutions, comments and documents have settled the conceptual link between human rights and climate change.<sup>56</sup> These UN and other regional documents have argued that a human rights-based approach can have a significant impact on the international climate change response and galvanise action. Human rights provide an

51 ‘The future we want’ Outcome Document of the United Nations Conference on Sustainable Development (2012) 50, [www.sustainabledevelopment.un.org/futurewewant.html](http://www.sustainabledevelopment.un.org/futurewewant.html) (accessed 5 May 2021). See also L Kotze et al ‘Climate change law and governance in South Africa: Setting the scene’ in T Humby et al *Climate change: Law and governance in South Africa* (2016) 1-19.

52 McInerney-Lankford et al (n 50) 2.

53 McInerney-Lankford et al (n 50) 12.

54 McInerney-Lankford (n 50) 18.

55 N Stern *Stern review: The economics of climate change* (2006) 404 430.

56 See UN Human Rights Office of the High Commissioner ‘Key messages on human rights and climate change’, [https://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages\\_on\\_HR\\_CC.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf) (accessed 5 May 2021); UN Human Rights Office of the High Commissioner ‘Open letter from the United Nations High Commissioner for Human Rights on integrating human rights in climate action’, <https://www.ohchr.org/Documents/Issues/ClimateChange/OpenLetterHC21Nov2018.pdf> (accessed 5 May 2021); Human Rights Council Resolution 10/4: Human Rights and Climate Change, [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_4.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf) (accessed 5 May 2021); UNFCCC Decision 1/CP.16, <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> (accessed 5 May 2021).

accountability framework for damages related to climate change, highlight and concretise state obligations and introduce subjective rights to international climate law.<sup>57</sup> The human rights-based approach introduces a human dimension to international climate law. It allows courts to concretise principles,<sup>58</sup> obligations and responsibilities, such as whether a state's duty to reduce greenhouse gas emissions could be derived from human rights law, and how states could be held liable for the harmful consequences of anthropogenic climate change on the grounds of human rights law.

Relying on human rights law, the courts have asserted that governments have obligations to take climate change into consideration in governance at various levels. For instance, in 2020 a group of non-governmental organisations (NGOs) brought an action before the Inter-American Commission on Human Rights about the 'impacts of climate change on the human rights of indigenous peoples, women, children, and rural communities'.<sup>59</sup> The hearing highlights the fact that states in the region have an obligation to prevent actions that aggravate the impacts of climate change or hamper the enjoyment of human rights and freedoms.<sup>60</sup> A similar ongoing case is *Centre for Food and Adequate Living Rights & Others v Tanzania and Uganda*<sup>61</sup> before the East African Court of Justice, where the petitioners instituted an action against the governments of Tanzania

57 D Bodansky 'Climate change and human rights: Unpacking the issues' (2010) 38 *Georgia Journal of International and Comparative Law* 511; E Cameron 'Human rights and climate change: Moving from an intrinsic to an instrumental approach' (2010) 38 *Georgia Journal of International and Comparative Law* 673; F Knur 'The United Nations human rights-based approach to climate change – Introducing a human dimension to international climate law' in S von Schorlemer & S Maus (eds) *Climate change as a threat to peace: Impact on cultural heritage and cultural diversity* (2015).

58 According to the UN, the following are necessary elements of a human rights-based approach: assessment and analysis in order to identify human rights claims of rights holders and the corresponding human rights obligations of duty bearers as well as the immediate, underlying, and structural causes of the non-realisation of rights; programmes assess the capacity of rights holders to claim their rights and of duty bearers to fulfil their obligations; they then develop strategies to build these capacities; programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles; and programming is informed by the recommendations of international human rights bodies and mechanisms. See D Olawuyi 'Advancing climate justice in international law: An evaluation of the United Nations human rights-based approach' (2015) 11 *Florida A&M University Law Review* 103.

59 Hearing on climate change before the Inter-American Commission on Human Rights, [https://climate-laws.org/geographies/international/litigation\\_cases/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights](https://climate-laws.org/geographies/international/litigation_cases/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights) (accessed 19 June 2021).

60 As above.

61 [https://climate-laws.org/geographies/international/litigation\\_cases/center-for-food-and-adequate-living-rights-et-al-v-tanzania-and-uganda](https://climate-laws.org/geographies/international/litigation_cases/center-for-food-and-adequate-living-rights-et-al-v-tanzania-and-uganda) (accessed 19 June 2021).

and Uganda challenging the construction of the East African crude oil pipeline. According to the plaintiffs in the case, the governments of both countries did not give consideration to 'environmental, social, human rights, and climate impact assessments' in the signing of the agreements.<sup>62</sup> Climate litigation establishes a viable way of ensuring that human rights considerations are not ignored in climate action. It also provides an avenue to ensure that the government performs its obligations and responsibilities, including the duty of care to safeguard the right to life and other human rights while carrying out climate action.<sup>63</sup>

Environmental advocates, communities, NGOs, business entities and sub-national governments have turned to the courts via litigation as a strategy to highlight and compel action, seek mitigation and adaptation measures and seek relief. The reliefs sought include the enforcement of existing climate laws; the integration of climate action into existing environmental, energy and natural resources laws and strategy; clear definitions of fundamental climate rights and obligations; and compensation for climate harms. This advocacy has led to a body of legal precedents crystallising into an increasingly coherent field of environmental law. Climate litigation has been defined to include cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change, instituted before a range of administrative, judicial and other adjudicatory bodies.<sup>64</sup>

Climate litigation is gradually gaining popularity as one of the strategies to pressure governments, government agencies and policy makers to adopt more concerted efforts in response to climate change and for mitigation of and adaptation to climate change. According to a UNEP report, as of 1 July 2020 at least 1 550 climate change cases have been filed in 38 countries around the world.<sup>65</sup> The report states that the key trends

62 As above.

63 See the case of *Urgenda Foundation v State of The Netherlands*, [https://climate-laws.org/geographies/netherlands/litigation\\_cases/urgenda-foundation-v-state-of-the-netherlands](https://climate-laws.org/geographies/netherlands/litigation_cases/urgenda-foundation-v-state-of-the-netherlands) (accessed 19 June 2021). This case is considered later in the chapter.

64 Climate litigation cases raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts. These cases are typically identified with key words such as climate change, global warming, global change, greenhouse gas, GHGs, and sea level rise, but where cases actually raise issues of law or fact related to climate change but do not use these specific terms, they are also classified as climate litigation. See D Markell & JB Ruhl 'An empirical assessment of climate change in the courts: A new jurisprudence or business as usual?' (2012) 64 *Florida Law Review* 15 27; M Wilensky 'Climate change in the courts: An assessment of non-US climate litigation' (2015) 26 *Duke Environmental Law and Policy Forum* 131 134; United Nations Environment Programme (n 6).

65 There now is a rapid uptake of climate litigation as one of the strategic responses to

identified in those cases include an increase in the number of matters seeking to protect fundamental and human rights; challenging domestic enforcement and non-enforcement of climate-related laws; stopping fossil fuel extraction and use; pushing for corporate liability for climate harms; addressing failures to adapt and the impacts of adaptation measures; and those advocating increased climate disclosures.<sup>66</sup>

Several reasons may be adduced for the popularity of employing litigation as one of the strategies for addressing government action or inaction. These reasons include the growing urgency of the climate crisis;<sup>67</sup> a rise in sea level causing flooding and displacement of communities and small island nations; heat waves and temperature rise, climate change impacting on agricultural systems and food yields; the frequency of natural disasters; its threat to human health; longer-lasting and more severe droughts; and acidifying oceans. Additionally, the lackluster ambition of the nationally-determined contributions (NDCs) submitted by countries that are parties to the Paris Agreement,<sup>68</sup> and the inclusion of climate action as one of the 17 SDGs.<sup>69</sup>

The public trust doctrine is one of the main doctrines relied on by environmental advocates and litigants seeking redress in courts for climate action. The doctrine establishes a trustee relationship such that government holds and manages natural resources for the benefit of present and future generations.<sup>70</sup> The doctrine raises questions, including questions as to

galvanise climate action. In 2017 there were 884 climate change cases brought in 24 countries. In 2020 the number of cases has nearly doubled with at least 1 550 cases filed in 38 countries. See UNEP and Sabin Centre for Climate Change Law 'Global Climate Litigation Report: 2020 status review' (n 22).

66 As above.

67 See R Pachauri & L Meyer (eds) *Climate change 2014: Synthesis report. Contribution of working groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) 151.

68 See United Nations Environment Programme Emissions Gap Report 2020, <https://www.unenvironment.org/emissions-gap-report-2020> (accessed 19 June 2021); F Khan 'NDC score card: Measuring the Nationally Determined Contributions (NDCs) under the Paris Agreement' (2019) M-RCBG Associate Working Paper Series 123, [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/123\\_final.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/123_final.pdf) (accessed 19 June 2021); N Nhamo 'Auditing the adequacy of NDCs in addressing the climate action sustainable development goal' in G Nhamo et al (eds) *Scaling up SDGs implementation emerging cases from state, development and private sectors* (2020).

69 United Nations 'Transforming our world – The 2030 agenda for sustainable development'. Note that the SDGs also recognise climate change as a cross-cutting issue and that climate action also is a vital, cross-cutting element of many of the other SDGs.

70 See V Nanda & W Ris 'The public trust doctrine: A viable approach to international environmental protection' (1976) 5 *Ecology Law Quarterly* 291; R Sagarin &



an individual's fundamental rights, intergenerational equity, as well as concerns about the balance of powers among the judicial, legislative and executive branches or functions of governments.<sup>71</sup>

The international response to climate change, such as the UNFCCC, Kyoto Protocol and, more recently, the Paris Agreement, provides a catalogue of national commitments toward averting average global warming above 1,5°C. Although the various climate change treaties by their terms do not provide litigants with a cause of action or impose enforceable limits on member countries' national emissions, they can be said to be of persuasive effect, and they make it possible to question the action or inaction of their governments, demand environmental responsibility from corporate entities and other private parties in light of these climate change commitments. In addition, several countries have climate legislation, regulations or policies that place implicit obligations on governments, policy makers and sometimes the private sector.<sup>72</sup>

Climate change advocates have begun to make use of these codifications to support their arguments about the adequacy or inadequacy of efforts by national governments to protect individual rights impacted by climate change. This is so especially because climate change policies have often set targets based on political feasibility rather than the consensus scientific understanding of what is required to stabilise the climate at an acceptable level. Apart from challenging government action or inaction using specific climate change legislation, if it exists, environmental advocates challenge action or inaction using constitutional and statutory provisions not specific to climate change.

### **3.1 Key trends in climate litigation**

The key trends in climate litigation cases include the reliance on and linkage of climate action to fundamental human rights to compel climate action. The fallout from this pushback from environmental advocates and

M Turnipseed 'The public trust doctrine: Where ecology meets natural resources management' (2012) 37 *Annual Review of Environment and Resources* 473; M Blumm & R Guthrie 'Internationalising the public trust doctrine: Natural law and constitutional and statutory approaches to fulfilling the Saxion vision' (2011-2012) 45 *University of California Davis Law Review* 741; A Blackmore 'The application of and the prospects for the public trust doctrine in South Africa: A brief overview' (2018) 18 *South African Law Journal* 631.

71 United Nations Environment Programme 'The status of climate change litigation: A global review' (2017) (n 6).

72 There currently are about 2 122 climate laws and policies globally, <https://climate-laws.org/> (accessed 19 June 2021).



judicial activism includes accountability demands by citizens on climate change issues; the challenge of non-enforcement of domestic climate-related laws and policies; and a greater demand for climate disclosures by corporate bodies. The UNEP Report identifies trends or types of climate litigation that are grouped, as discussed below.<sup>73</sup>

### 3.1.1 Cases seeking to compel governments to implement legislative and policy commitments

These cases seek to hold governments to their legislative and policy commitments and compel governments to accelerate their efforts to implement emission-reduction targets such as those in their NDCs.<sup>74</sup> In the case of *Urgenda Foundation v The State of The Netherlands*<sup>75</sup> the Urgenda Foundation and 900 Dutch citizens sued the Dutch government, alleging that the government's recent revision of GHG emission reduction goals amounted to a violation of its constitutionally-imposed duty of care. The Netherlands Supreme Court held that the state had a duty to protect its citizens from 'dangerous climate change' in accordance with its obligations under the European Convention on Human Rights (European Convention). The Court also relied on article 21 of the Dutch Constitution<sup>76</sup> and the European Union (EU) emission reduction targets. In agreeing with the plaintiffs, the Court ordered the Dutch state to limit GHG emissions to 25 per cent below 1990 levels by 2020, finding the government's existing pledge to reduce emissions by 17 per cent insufficient to meet the state's fair contribution toward the goal, codified in the Paris Agreement.<sup>77</sup>

In the case *Friends of the Irish Environment CLG v Government of Ireland* (known as *Climate Case Ireland*),<sup>78</sup> the Irish Supreme Court held that the Irish government's National Mitigation Plan was defective and ordered the

73 Note that a comprehensive categorisation of the recurring legal issues in climate litigation is difficult because of the diversity of the world's legal systems, which take varied approaches to the interconnected substantive areas of law that constitute climate change law.

74 *Urgenda Foundation v The State of The Netherlands* Supreme Court of The Netherlands Case 19/00135 (20 December 2019); also see *Leghari v Pakistan* (2015) WP 25501/2015 (Supplemental Decision).

75 [2015] HAZA C/09/00456689.

76 Note that the Court cited art 21 of the Dutch Constitution without directly applying its provisions. Art 21 of the Dutch Constitution states that '[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment'. See Constitution of the Kingdom of The Netherlands.

77 United Nations Environment Programme 'The status of climate change litigation: A global review' (n 6).

78 [2020] IESC.

government to produce a more ambitious strategy. The National Mitigation Plan failed to specify how it is proposed to achieve Ireland's transition to 'a low carbon climate-resilient and environmentally sustainable economy by the end of 2050'. Further to the national transition objective, as required by the Climate Action and Low Carbon Development Act (2015 Climate Change Act), rights protected by the European Convention on Human Rights and the Irish Constitution, the Court held that the government must create a new, more ambitious National Mitigation Plan that complies with Ireland's national and international climate obligations.<sup>79</sup> The *Urgenda* case and *Climate Case Ireland* so far are the only cases in the world, but definitely will not be the last, in which the highest national court of law has required a government to revise its national climate policy to make it more ambitious in light of its legal obligations under national laws and its international commitments, such as those found in climate change agreements and human rights guaranteed under domestic and international law. This case exemplifies the application of the principles of climate justice and human rights-based approach. As seen above, the courts relied on the European Convention and the constitutional duty to take care in environmental issues, including climate change.

### **3.1.2 Cases seeking to demonstrate the adequacy or otherwise of national greenhouse gas emission goals**

In the case of *Leghari v Pakistan*<sup>80</sup> the petitioner, a citizen of Pakistan, filed public interest litigation to challenge the inaction and delay on the part of the federal government and the government of Punjab to address the challenges and vulnerabilities associated with climate change. The petition stated that despite the National Climate Change Policy, 2012 and the Framework for Implementation of Climate Change Policy (2014-2030) (Framework) there was no progress with regard to the implementation of the action plans and priority areas identified. On 4 September 2015 the Court, citing domestic and international legal principles, determined that the delay and lethargy of the state in implementing the Framework violated the fundamental rights of citizens, including the right to life, the

79 *Climate Case Ireland*, summary, <https://www.climatecaseireland.ie/amidst-a-climate-and-biodiversity-crisis-hope-emerges-friends-of-the-irish-environment-win-historic-climate-case-ireland-in-the-irish-supreme-court/> (accessed 19 June 2021); 'Global Climate Litigation Report: 2020 status review', <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> (accessed 19 June 2021).

80 (2015) WP 25501/2015 (Supplemental Decision). See judgments including supplemental judgment at 'Climate change litigation databases', <http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/?cn-reloaded=1> (accessed 19 June 2021).

right to human dignity, the right to property and the right to information, as provided for under articles 9, 14, 23 and 19A of the Constitution.

The Court held that the constitutional values of political, economic and social justice provided the necessary judicial toolkit to address and monitor the government's response to climate change. As a remedy, the Court directed several government ministries to each nominate a climate change focal person to help ensure the implementation of the Framework and present a list of action points. The Court took steps to actualise its directive by creating a Climate Change Commission, composed of representatives of key ministries, NGOs and technical experts, to monitor the government's progress. It later issued a supplemental decision naming 21 individuals to the Commission and vesting it with various powers.<sup>81</sup>

In the same vein, in the case of *Family Farmers and Greenpeace Germany v Germany*<sup>82</sup> a German court held that the government's climate policy was judicially reviewable and must not be so inadequate as to fail to protect fundamental rights such as the rights to life and property. However, the Court held that the government's failure to adhere to a cabinet decision to reduce greenhouse gas emissions by 40 per cent by 2020 was not legally enforceable.<sup>83</sup>

There are new trends of cases that question whether governments violate a duty of care to prevent dangerous climate change by failing to attach stringent climate conditions to its coronavirus bailout package granted to companies. In the case of *Greenpeace Netherlands v State of The Netherlands*,<sup>84</sup> a case filed in October 2020, amid the coronavirus pandemic, Greenpeace Netherlands challenged the Dutch government's bailout package for the airline KLM alleging that it violated the state's duty of care to prevent the high risk of dangerous climate change. The plaintiffs cited the European Convention on Human Rights and the Paris Agreement as establishing that duty of care and the Dutch Supreme Court's *Urgenda* decision as affirming the duty of care. The plaintiffs alleged that by failing

81 As above.

82 (2018) 00271/17/R/SP.

83 In December 2014 the German cabinet set a goal of reducing national greenhouse gas emissions by 40% compared to 1990 levels by the end of 2020 (Climate Protection Plan). According to the government's 2018 official climate protection report, however, the government will likely only achieve a reduction of 32% from 1990 levels by the end of 2020. In October 2018 three German families and Greenpeace Germany filed suit in the Administrative Court of Berlin seeking to compel the German government to adhere to the 40% reduction goal.

84 'Climate change litigation databases', <http://climatecasechart.com/non-us-case/greenpeace-netherlands-v-state-of-the-netherlands/> (accessed 19 June 2021).

to attach binding climate conditions to the €3,4 billion bailout package, the government violated human rights. Greenpeace sought a court order either prohibiting the state from providing financial support or conditioning such support on KLM setting a cap on carbon dioxide emissions by the airline. The Hague District Court judge rejected Greenpeace's claim on the grounds that the state does not have a legally-enforceable obligation to attach climate conditions to the bailout package. According to the Court, the executive has a high discretion in responding to the coronavirus crisis. Such discretion should not be interfered with, except when a positive legal right has been violated. The judge further held that the Paris Agreement and other international climate treaties did not commit parties to reduce emissions from cross-border aviation.

### 3.1.3 *Cases seeking to connect harms to emitters share in global climate change causation*

Another interesting trend in climate litigation is the question of the liability of the greenhouse gas emitter for harms arising in different jurisdictions from the warming effects of climate change.<sup>85</sup> In *Lliuya v RWE AG*<sup>86</sup> Saul Lliuya, a Peruvian farmer, filed suit in a German court against a German utility company. Lliuya sought damages to offset the costs of protecting his town from melting glaciers, for which he alleged RWE was partly responsible. The case was initially dismissed for several reasons, including that the plaintiff had asked the Court to determine RWE's precise annual contribution to global emissions rather than submitting an estimate, and that no causal chain could be established linking the plaintiff's injury and RWE's emissions. However, the Appeal Court reversed this decision. The case currently is at the evidentiary stage, collecting evidence on, among other issues, the extent of GHG emissions released by the defendant and on how those emissions contribute to the warming of the atmosphere.<sup>87</sup>

In *Smith v Fronterra Co-Operative Group Limited*<sup>88</sup> the plaintiff sued several major greenhouse gas-emitting facilities in New Zealand, alleging that their emissions amounted to a public nuisance, negligence, and breached an inchoate duty to cease contributing to climate change. The High Court of New Zealand dismissed the first two claims, but not the third. The Court determined that Smith's negligence claim had to fail as he failed to show that the defendants owed him a duty of care, and he could not demonstrate public nuisance because the damage claimed was neither

85 See *Lliuya v RWE AG*, Az 2 O 285/15 Essen Regional Court [2015].

86 As above.

87 *Lliuya* (n 85).

88 [2020] NZHC 419.

particular to him nor the direct consequence of the defendants' actions. However, the Court upheld the third cause of action, which alleged that the defendants had a duty to cease contributing to climate change. The Court found that there were challenges for Smith in persuading the Court that this new duty should be recognised but determined that the relevant issues should be explored at a trial. The Court explained that it was possible to modify the special damage rule in public nuisance and that 'climate change science will lead to an increased ability to model the possible effects of emissions'. However, the Court warned that it would likely be unable to provide the injunctive relief that Smith sought, which would require a 'bespoke emission reduction scheme'.<sup>89</sup>

### ***3.1.4 Cases seeking to bring global climate change concerns to bear on local action***

The case of *Plan B Earth & Others v Secretary of State*<sup>90</sup> is an action by Friends of the Earth and Plan B Earth, a British non-profit organisation, against the Secretary of State for Transport alleging inadequate consideration of climate change impacts regarding the expansion of Heathrow International Airport. The claimants argued that the Secretary's national policy statement supporting the expansion of Heathrow Airport (Airport National Policy Statement) violated the Planning Act 2008 and the Human Rights Act 1998. The case went before the High Court of Justice Queen's Bench Division Administrative Court and the Court of Appeal.<sup>91</sup> On appeal to the UK Supreme Court, the Court overturned the Appellate Court's decision, allowing the approval process for a third runway at Heathrow International Airport to move forward, because the government sufficiently considered climate impacts and duly considered the country's commitment to meeting the Paris Agreement goals.<sup>92</sup>

This part shows the clear application of the principles of climate justice in litigation, as development actors were made liable for the activities leading to contributions to GHG emissions and climate change. Also, the cases analysed upheld the human rights of citizens to live in a safe

89 *Smith v Fronterra Co-Operative Group Limited* (n 82); see also 'Climate change litigation databases', <http://climatecasechart.com/non-us-case/smith-v-fronterra-co-operative-group-limited/> (accessed 19 June 2021).

90 [2020] EWCA Civ 214.

91 The Appellate Court previously ruled that the government acted unlawfully by approving the expansion without considering the country's commitment to meeting the Paris Agreement goals, <http://climatecasechart.com/non-us-case/plan-b-earth-v-secretary-of-state-for-transport/> (accessed 19 June 2021).

92 As above.

environment, and emphasised the duty of care owed by the government and industry players to take care to mitigate and adapt to climate change.

## **4 Lessons on the rights-based approach to climate litigation**

Climate litigation heralds advancements in climate change governance,<sup>93</sup> as it avails the judiciary the opportunity to contribute to or redirect climate action at the national and sub-national levels. It provides an opportunity for the judiciary to re-interpret existing legislation in light of climate change realities.<sup>94</sup> Ultimately, the lesson from climate litigation is that it pushes the frontiers of conversations on the obligation to take necessary action to mitigate and adapt to climate change. Environmental and, particularly, climate-related litigation is essential as it serves the purpose of compelling governments to implement policies and even encourage the enforcement of those policies.<sup>95</sup>

Africa is one of the regions severely affected by climate change. However, the continent has not yet seen any significant growth in climate litigation.<sup>96</sup> This could be attributed to the complexity of the judicial processes in developing countries, such as judicial independence and access to courts; the onerous evidential burden and standard of proof required from litigants; the complexity of environmental issues and the fact that those who bear the brunt of environmental degradation are local communities that lack capacity, are poor and most vulnerable; the largely technical and scientific nature of the evidence and the high cost of gathering evidence, which sometimes not only is exclusively within the knowledge of the defendants but also in their custody; and the difficulty of proving causation.<sup>97</sup> Although climate litigation has not featured prominently in the African judicial landscape, there is an emerging trend and an uptake of climate litigation as a strategy and tool to galvanise climate action.

93 J Peel & J Lin 'Transnational climate litigation: The contribution of the Global South' (2019) 113 *American Journal of International Law* 696.

94 J Setzer & L Benjamin 'Climate change litigation in the Global South: Filling in gaps' (2020) 114 *American Journal of International Law* 59.

95 J Setzer & R Byrnes 'Global trends in climate change litigation: 2020 snapshot' (2020) *Grantham Research Institute for Climate Change and Environment, London School of Economics* 12.

96 L Kotzé & 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.

97 See Kotzé and Du Plessis (n 96); O Nsikan-Abasi 'Burden of proof: Real burden in environmental litigation for the Niger-Delta of Nigeria' (2020) 35 *Journal of Environmental Law and Litigation* 194.

Of the four key trends in climate litigation analysed above, it seems that the trend of climate litigation emerging in Africa are cases seeking to compel governments to implement their legislative and policy commitments. In the South African case *Earthlife Africa Johannesburg & Another v Minister of Energy & Others*<sup>98</sup> the Court held that climate change assessment was essential and would be relevant in other activities where climate change impacts are a consideration. In the Kenyan case of *Save Lamu & Others v National Environmental Management Authority and Amu Power Co Ltd*<sup>99</sup> the Court was asked to consider whether a coal company's environmental impact assessment adequately considered climate change and other factors. The tribunal found that the Amu Power Company's environmental and social impact assessment was incomplete and scientifically insufficient in violation of the regulations. Applying the precautionary principle, the tribunal found one of the insufficiencies of the assessment was the inadequate consideration of climate change and the Climate Change Act of 2016. The Ugandan case of *Nisi Mbabazi & Others v The Attorney General and The National Environment Management Authority*<sup>100</sup> relied on the Public Trust Doctrine as a tool for challenging the government's inactivity concerning climate change. Also, the courts have invoked inalienable human rights such as the right to life and dignity of the human person as guaranteed by national constitutions and reinforced by international and regional human rights instruments. In the Nigerian case of *Jonah Gbemre v Shell Petroleum Development Company of Nigeria Ltd & Others* the Court held that the flaring of associated gas in the course of the defendant's oil exploration activities in the applicants' community was a gross violation of their fundamental right to life, including a to a healthy environment, and dignity of human person as enshrined in the Constitution of Nigeria.<sup>101</sup>

98 [2017] ZAWCHC. See also *SDCEA & Groundwork v Minister of Forestry, Fisheries, and the Environment*. This case was filed in 2021 and remains pending before the Court. The plaintiffs allege that the environmental impact assessment of the project included an inadequate assessment of its climate impacts; *Trustees for the Time Being of GroundWork v Minister of Environmental Affairs, ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd & Others* [2020] ZAWT 1

99 Tribunal Appeal Net 196 of 2016. Note that Kenya has climate change legislation. See Kenya's Climate Change Act 11 of 2016.

100 Suit 283 of 2012. After a preliminary hearing, the High Court ordered the parties to undertake a 90-day mediation process. There has been no further action and the decision of the Court remains pending.

101 Suit FHC/B/CS/53/05. See also *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Okpabi & Others v Royal Dutch Shell Plc (RDS) & Another* [2021] UKSC 3.



## **5 Conclusion**

Climate justice is imperative in the discussion around actions to address adverse effects of climate change on populations in Africa. Such climate actions stem from expectations and commitments required of states to take necessary steps to mitigate, adapt and build resilience to climate change. The core focus of this chapter is how this can be achieved through the agency of litigation. As has been shown, the notion of environmental justice can inform climate justice and link to a human rights-based approach with a range of utility in addressing impact of climate change on vulnerable populations. As has been illustrated, this is inherent in a range of cases trending on climate litigation, including cases seeking to compel governments to implement legislative and policy commitments. The chapter identifies five trends or types of climate litigation; cases seeking to demonstrate the adequacy or otherwise of national GHG emission goals; cases seeking to connect harms suffered by vulnerable communities to emitters responsible for a share in global climate change causation; and cases seeking to bring global climate change concerns to bear on local action. While climate change litigation is scanty in Africa, experiences from other jurisdictions may help in pushing and shaping its evolution, in particular in pressuring states to take necessary actions to mitigate and adapt to climate change, thereby enhancing climate justice of vulnerable populations in Africa.