
The calm before the storm? Child rights climate change litigation in Africa

Benyam Dawit Mezmur

LLB LLM LLD

Eleanor Roosevelt Fellow, Human Rights Program, Harvard Law School; Professor of Law, Dullah Omar Institute for Constitutional Law, Governance, and Human Rights, University of the Western Cape

SUMMARY

Children, especially children in Africa, are disproportionately affected and their rights violated, as a result of the physical impacts of climate change. UNICEF has reported that 32 of the 45 countries identified globally in the Children's Climate Risk Index as the worst affected by climate change are in sub-Saharan Africa. Climate change threatens not only the immediate survival of children, but also their growth and development, as well as their ability to learn, play, and reach adulthood. Furthermore, the majority of Africa's children live in families and communities with little resilience to adapt to both climate-induced emergencies and slow-onset events. This as a backdrop, litigation is one important tool used, often as a measure of last resort, to address and expedite climate change action. The topic is of increasing interest regionally, and this article looks specifically at the convergence of child rights and climate change litigation in Africa. It is an attempt to respond to the question "what are the opportunities as well as challenges for current and future child rights-based climate change litigation in Africa"?

1 Introduction

It is increasingly difficult to ignore the transformational impact of climate change on numerous areas of public law and policy. These include human rights concerns such as the right to life, the right to the highest attainable standard of health, forced mass migration, conflict, the right to education, and the right to access remedies for violations.¹

Unfortunately, while the acknowledgement that climate change impacts cause human rights violations is starting to hold firm ground, there is still a reluctance to acknowledge the added value a human rights lens can bring to approaching and managing climate change. This reluctance can be seen in the negotiations leading to the finalisation of the Paris Climate Agreement – a process that relegated the reference to human rights only to the Preamble of the agreement.

1 See, for example, in general, Knox and Pejan, "Human rights principles, climate change and the rights of the child" (2015) in UNICEF *The challenges of climate change: Children on the front line* (2015).

Meanwhile children, especially children in Africa, are disproportionately affected and their rights are violated as a result of the impacts of climate change. UNICEF has reported that 32 of the 45 countries identified globally in the Children's Climate Risk Index as the worst affected by climate change are in sub-Saharan Africa.² About 490 million children under the age of 18 in these 35 African countries are at the highest risk of suffering the impact of climate change.³ Climate change threatens not only the immediate survival of children but also their growth and development, as well as their ability to learn, play, and even survive into adulthood. Furthermore, the majority of Africa's children live in families and communities with little resilience to adapt to climate-induced emergencies.

Litigation is an important tool, often as a measure of last resort, to address and expedite climate change action.⁴ The topic is of increasing interest. For example, in 2021 the *Carbon and Climate Law Review* had a special issue on climate change litigation in Africa based on manuscripts presented at a workshop in August 2020.⁵ The contributions included interesting topics such as: Leveraging existing approaches and tools to secure climate justice in Africa; Climate litigation as a tool for enforcing rights of nature and environmental rights by NGOs: Security for costs and costs limitations in Uganda; Xenophobia-Induced Disaster Displacement in Gauteng, South Africa: A Climate Change Litigation Perspective; and the Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight.⁶ The great majority of the articles do not view litigation from a human rights lens, even though they proffer useful principle-based and practical approaches that could come in handy for such kinds of litigations.

According to UNEP's Global Climate Litigation Report, while rights-based and constitutional claims are in the great minority of cases (around 100 of nearly 1,600 cases)⁷ there are multiple reasons why there is increasing interest in them. The main reported reason is that these types of cases "have an outsized impact on overall climate governance because

2 UNICEF *The climate crisis is a child rights crisis: Introducing the Children's Climate Risk Index* (2021) 79 <https://www.unicef.org/media/105376/file/UNICEF-climate-crisis-child-rights-crisis.pdf> (last accessed 2022-10-08)

3 Pandey "Climate Change: 490 million children in Africa most vulnerable" <https://www.downtoearth.org.in/news/africa/climate-change-490-million-children-in-africa-most-vulnerable-76595> (last accessed 2022-11-06).

4 Gupta "Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change" 2007 *Review of European, Comparative and International Law* 76–86; Oniemola "A Proposal for Transnational Litigation against Climate Change Violations in Africa" 2021 *Wisconsin International Law Journal* 303.

5 The articles are available at Lexxion: The Legal Publisher at <https://cclr.lexxion.eu/news/view/695> (last accessed 2022-11-14).

6 As above.

7 United Nations Environment Programme (UNEP) "Global Climate Litigation Report: 2020 Status Review" <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> (last accessed 2022-11-06).

they typically seek bold, conspicuous remedies”.⁸ Moreover, one of the perceived advantages of transnational accountability through human rights litigation is the kind of message it sends to States about exercising due diligence in respect of the extraterritorial activities of their entities and contribute towards the prevention of human rights violations.⁹

This article looks at child rights-based climate change litigation in Africa. It attempts to respond to the question “what are the opportunities as well as challenges for current and future child rights-based climate change litigations in Africa”? It first highlights some of the global as well as continental status of climate change litigation. The relevant regional human and child rights framework that is crucial for the topic gets broached. Subsequently, the article focuses on the domestic sphere and looks at the increasing examples of laws that hold promise for child rights-based climate change litigation in Africa. The following section, section 6, highlights some completed as well as ongoing case law that can shed some lessons for rights-based climate change litigation in Africa. Finally, the conclusion part is preceded by a brief look into developments outside of the African continent, that have a bearing on child rights-based climate change litigation in Africa.

2 Climate change litigation

Climate change litigation, which by definition is a claim “that expressly raise an issue of fact or law relating to the causes or impacts of climate change”,¹⁰ is on the rise. This should not come as a surprise. As the negative effects of climate change are felt and their impacts acknowledged throughout the world, the topic is also getting more political, legal, social, developmental, and diplomatic attention.

8 UNEP “Global Climate Litigation Report: 2020 Status Review” 2020 at 41–42 <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> (last accessed 2022-11-07). One of the added values of the human rights framework can be demonstrated by looking at gas flaring in Nigeria. Since 1979, paras 3–5 of the Associated Gas Reinjection Act of 1979 made it illegal to flare gas without a permit and those violators would be issued with a fine. As of 2022, reportedly several companies that are involved in gas flaring continue the practice and prefer to pay the fine, if and when issued. A human rights framework would make a strong case not only for accountability but also to make sure that the penalties imposed are commensurate with the gravity of the offence. See Oniemola 2021 *Wisconsin International Law Journal* 307.

9 Oniemola 2021 *Wisconsin International Law Journal* 301–330.

10 Burianski, Clarke, Kuhnle, Wackwitz “Climate change litigation in Africa: Current Status and Future Developments” 2021 <https://www.whitecase.com/publications/insight/africa-focus-autumn-2021/climate-change-litigation-africa> (last accessed 2022-11-06).

Some climate change litigation cases are aimed at increasing positive climate change action (also called “favourable cases”) while others are aimed at undermining (also called “hindering”) such action.¹¹ These two traits of climate change litigation are present in both routine and strategic cases.¹²

The majority of climate change litigations are based in the United States.¹³ In fact, as identified by the Sabin Center for Climate Change Law based at the Columbia Law School,¹⁴ out of the 1500 cases lodged in courts throughout the world between 2015 and 2022, around 75% of cases are based in the United States. The other 10% are based in Australia, followed by cases in New Zealand, and in the EU.¹⁵ However, the geographical expansion of cases is taking hold beyond these limited jurisdictions. In this respect, there are an increasing number of cases that are being lodged in the developing world. For example, there are recent climate change litigation cases in the Philippines, Colombia, Guyana,¹⁶

11 Setzer and Byrnes “Global Trends in Climate Change Litigation: 2019 Snapshot” 2019 (Policy Report) https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf (last accessed 2022-10-08).

12 As above.

13 See the various cases, Sabin Center for Climate Change Law <http://climatecasechart.com/us-climate-change-litigation/> (US cases) (last accessed 2022-11-08) and Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-climate-change-litigation/> (international cases) (last accessed 2022-11-08) – this amounts to 20-30 cases. A 2017 Report of UNEP “The Status of Climate Change Litigation: A Global Review” indicated 884 cases brought in 24 countries. Around 654 of these cases were brought in the US, while 230 cases in all other countries. This number had drastically changed by July 2020 to at least 1,550 climate change cases filed in 38 countries, again with the greatest majority (1200 cases) filed in the US and over 350 filed in all other countries combined. The substantive and procedural key trends of the cases at that stage included efforts to hold governments to their legislative and policy commitments; the use of the public trust doctrine to climate change; establishing failures to adapt as well as maladaptation impacts; and making the link between the extractive industry to climate change. See UNEP “The Status of Climate Change Litigation: A Global Review” 2017 at 4 and 14–23 <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y> (last accessed 2022-10-08); see also UNEP “Global Climate Litigation Report: 2020 Status review” 2020 at 4 <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> (last accessed 2022-11-06).

14 Sabin Center for Climate Change Law “U.S. Climate Change Litigation” <http://climatecasechart.com/us-climate-change-litigation/> (US cases) and Sabin Center for Climate Change Law “Global Climate Change Litigation” <http://climatecasechart.com/non-us-climate-change-litigation/> (international cases).

15 As above.

16 *Thomas & De Freitas v Guyana* (2021) (pending) which is a case challenging the Government’s approval of oil exploration to an ExxonMobil-led group on the basis that it violated the constitutional rights of the petitioners; see Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-case/thomas-de-freitas-v-guyana/> (last accessed 2022-11-06).

South Africa, Uganda, and Nigeria.¹⁷

While the majority of cases are against governments, more files are being lodged against companies. The former type of cases predominantly challenge the absence or inadequacy of governments' climate action plans – mostly in respect of mitigation but increasingly in respect of adaptation too. In respect of companies, claims for failure to incorporate climate risk in decision-making or failure to disclose climate risk to their beneficiaries are the basis upon which a significant number of these cases are brought.

The main basis for cases on which arguments are anchored and/or remedies are requested is also showing two interesting developments. Firstly, given the significant challenge faced in respect of causal link in climate change litigation, more cases are relying on advancements in “attribution science” – namely, in climate litigation, “the ‘act of regarding’ typically involves scientific examination and technical research to help participants better understand climate-related causations”¹⁸ the objective of which is “to produce clear evidence to facilitate attributing climate risks, damages, and potential liabilities”.¹⁹ Secondly, and of direct relevance to this article, is the development that human rights are playing an increasing role and finding “increasing resonance with judges in some strategic cases”²⁰ including in the developing world. For example, in Guyana, *Thomas & De Freitas v Guyana* (2021) (pending) challenges the Government’s approval of oil exploration to an ExxonMobil-led group on the basis that it violated the constitutional rights of the petitioners.²¹

17 Supra-national jurisdictions are also increasingly entertaining climate change litigation cases. These include those bodies that have the mandate to issue judgements (binding) and those that issue Views/Decisions (treaty bodies). In the former category are the Court of Justice of the European Union, the European Court of Human Rights, and the Inter-American Court on Human Rights, while in the latter category fall the Inter-American Commission on Human Rights, the United Nations (UN) Committee on the Rights of the Child, and the UN Human Rights Committee.

18 First Environment “The Role of Attribution Science in Climate Litigation” 2021 <https://firstenvironment.com/wp/blog/the-role-of-attribution-science-in-climate-litigation> (last accessed 2022-11-06).

19 See, e.g., Burger, Wentz and Horton “The Law and Science of Climate Change Litigation” <https://climate.law.columbia.edu/sites/default/files/content/docs/Executive%20Summary.Law%20and%20Science%20of%20Climate%20Change%20Attribution.pdf> (last accessed 2022-11-06); Smith, Otto and Wetzler “Guest post: How attribution can fill the evidence ‘gap’ in climate litigation” 2021 <https://www.carbonbrief.org/guest-post-how-attribution-can-fill-the-evidence-gap-in-climate-litigation/> (last accessed 2022-11-06); First Environment “The Role of Attribution Science in Climate Litigation” 2021 <https://firstenvironment.com/wp/blog/the-role-of-attribution-science-in-climate-litigation> (last accessed 2022-11-06).

20 Setzer and Byrnes (2019) 1.

21 This case is pending. See Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-case/thomas-de-freitas-v-guyana/> (last accessed 2022-10-08).

Therefore, some of the key global trends include more rights-based claims; addressing the (non) enforcement of climate change-related laws as well as policies; efforts to limit or ban the extraction of new fossil fuels from the ground; accountability for failure to adapt or maladaptation; accountability of the business sector including for greenwashing; as well as claims to increase disclosures especially in respect of emissions.²² There are already multiple examples of these trends on the African continent in the last couple of years, some of which have already led to litigation.

As has been the case at the international level, it is to be expected that domestic jurisdictions would be tempted to put climate action-related targets (on mitigation as well as adaptation) not necessarily to meet the demands of the scientific evidence head-on, but mostly based on what is politically feasible.²³ In the instances such targets are not commensurate to respond to the impacts of climate change the role that litigation can play is even more increased.

Part of the concern about rights-based climate change cases could be the extent to which African countries would be keen to implement them. After all there is no shortage of case law, including on environment related issues where plaintiffs received a favourable judgment from a court only to find out that the Government concerned has deployed lacklustre tactics not to implement or not to implement in full. Still, even in these circumstances, there is an argument that can be made about the added value of such cases. For example, some help to raise room for legislative as well as policy improvement or create the opportunity for the public to participate in the regulatory and governance process for climate change.²⁴

At the international level, the *Inuit* case²⁵ lends credence to the positive impacts of some cases despite the decision from the body adjudicating is either negative or the State or party against whom a

22 See, in general, UNEP “Global Climate Litigation Report: A 2020 Global Review” (2020).

23 UNEP “Global Climate Change Litigation: A Global Review” (2017) 4.

24 See Etemire “The Future of Climate Change Litigation in Nigeria: *COPW v NNPC* in the Spotlight” 2021 *Climate Change Litigation Review* 159 citing Preston “The Influence of Climate Change Litigation on Governments and the Private Sector” 2007 http://www.lec.justice.nsw.gov.au/agbbasev7wr/_assefs/lec/m4203011721754/preston_influence%20of%20climate%20change%20litigation.pdf and Blomquist “Comparative Climate Change Torts” 2012 *Valparaiso University Law Review* 1054-1075.

25 Sabin Center for Climate Change Law *Petition To The Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States* (2005) and the Inter-American Commission’s on Human Rights rejection of the petition (2006) <https://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/#:~:text=Summary%3A,omissions%20of%20the%20United%20States.>

decision has been made does not implement the decision in part or in full. In the Inuit case, a petition was made to the Inter-American Commission on Human Rights seeking relief for alleged violations as a result of the emissions by the United States. The complainant, Sheila Watt-Cloutier who was the chairperson of the Inuit Circumpolar Conference, filed the case asking the Commission to request the US, among others, to take into account the impacts of GHG emissions on the Arctic in its activities to assess government measures on the climate, and also adopt mandatory measures to limit its emissions.²⁶ In the instances where emission reductions are not possible, the request indicated that the US Government should provide assistance to the complainants in respect of adaptation.²⁷

Initially, the IACHR declined to process the petition by saying that “[s]pecifically, the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American declaration”.²⁸ But subsequently, it granted a special hearing, still leading to a negative outcome for the complainants. However, the case set the groundwork for the IACHR to adopt Advisory Opinions on human rights in the context of climate change, and also assisted the development of subsequent (ground-breaking) jurisprudence.²⁹

3 The regional rights framework relevant for climate change litigation

There are several regional instruments that are central to rights-based climate change litigation in Africa.³⁰ The African Charter on Human and Peoples’ Rights (ACHPR) is the continent’s primary human rights

26 As above.

27 As above.

28 Letter from Inter-American Commission on Human Rights addressed to the complainant Ms Sheila Watt-Cloutier dated 16 November 2006, see Sabin Center for Climate Change Law http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf (last accessed 2022-11-07).

29 See Inter-American Court of Human Rights “Advisory opinion environment and human rights” (2017) OC-23/17, official Summary https://www.cor.teidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf (last accessed 2022-11-07). See Milnes and Feria-Tinta “The rise of environmental law in international dispute resolution: Inter-American Court of Human Rights issues landmark advisory opinion on environment and human rights” 2018 <https://www.ejiltalk.org/the-rise-of-environmental-law-in-international-dispute-resolution-inter-american-court-of-human-rights-issues-landmark-advisory-opinion-on-environment-and-human-rights/> (last accessed 2022-11-07).

30 There are other regional legal instruments that have significant resonance for climate change issues. These include the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), the African Convention on the Conservation of Nature and Natural Resources (revised version), and the Bamako

instrument, having been ratified by all African countries with the exception of Morocco. The ACHPR is the first international treaty to recognise the right of peoples to “a general satisfactory environment favourable to their development”.³¹ Not only does this provision recognise a satisfactory environment as a human right, but it also makes the link between the right and its importance for economic, social and cultural development.

In its work, the monitoring body of the ACHPR, the African Commission on Human and Peoples’ Rights (African Commission), clearly demonstrates an appreciation of the impact of climate change on indigenous people and other vulnerable groups. The African Commission, proceeding on the basis of its mandate under article 45(1)(b),³² has adopted resolutions on thematic issues that include the topic of climate change and human rights.³³ For example, it has entertained climate-related petitions alleging violations of the right of all peoples to an environment favourable to their development and of the right to the highest attainable standard of health.³⁴ The Commission has used articles 22 and 24 of the Charter and called upon the AU Assembly to pay attention to “special measures of protection for vulnerable groups such as children;”³⁵ to guarantee the inclusion in climate change negotiations of requirements such as “free, prior and informed consent;”³⁶ and to ensure “...preventive measures against forced relocation, unfair dispossession of properties, loss of livelihoods and similar human rights violations”.³⁷

The Commission has also recommended that a study be carried out on climate change and human rights in Africa.³⁸

Some of the jurisprudence of the Commission, for example the *SERAC* case where the Ogoni peoples right to health, and right to a generally satisfactory environment favourable to development were found to have been violated as a result of fossil fuel operations is noteworthy.

Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste within Africa (Bamako Convention).

31 Art 24.

32 The Commission’s mandate is to “formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African governments may base their legislation.”

33 See Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, ACHPR/Res.153, 25 November 2009; and Resolution on Climate Change in Africa, ACHPR/Res.271, 12 May 2014.

34 Some of these cases are discussed in the sections below.

35 Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, ACHPR/Res.153, 25 November 2009, para 2.

36 Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, ACHPR/Res.153, 25 November 2009, para 1.

37 As above.

38 Resolution on Climate Change in Africa, ACHPR/Res.271, 12 May 2014.

The African Charter on the Rights and Welfare of the Child (ACRWC or the “African Children’s Charter”) which has been ratified by 49 African countries is central to litigation. The ACRWC has minimal reservations by states,³⁹ most of which would not affect key children’s rights relevant in the context of climate change. Moreover, given that article 1(3) of the ACRWC underscores the “more conducive environment” clause, not only are the remaining six AU Member States that have not yet ratified the Charter bound by other relevant instruments such as the Convention on the Rights of the Child (CRC), but all the other State Parties to the Charter would also have an obligation in respect of higher standards that may be contained in other instruments to which they are bound.⁴⁰ The ACRWC’s four cardinal principles – non-discrimination; the right to life, survival and development; making children’s best interests the primary consideration; and giving children’s voices due consideration – play a critical role in addressing the rights of the child and climate change. The ACRWC enunciates a strong position on African values, tradition and culture. In recognition of the contribution of many African cultures, values and traditions, the ACRWC provides that “[t]he education of the child shall be directed to ... the preservation and strengthening of positive African morals, traditional values and cultures”.⁴¹

Unfortunately, the ACRWC, which draws on both the ACHPR and CRC, did not follow the precedent of the former and included an explicit right to a healthy environment. As a result, a child’s right specifically to a healthy environment is not explicitly provided for,⁴² albeit that the ACRWC requires “the development of respect for the environment and natural resources” through education.⁴³ However, since the concept of “greening other provisions” entails not only that the Charter’s four cardinal principles could easily be interpreted to protect children’s right to a healthy environment, but that other provisions – such as those on education, health, and an adequate standard of living – could benefit from such an approach too, is a *co* (not sure what this is supposed to say). Also, the 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol), which is applicable to girls too, recognises the right of women to “a healthy and sustainable environment”.⁴⁴ Last but not least, the CRC, which has been ratified by all African countries, underscores the need to take measures

39 Only 4 States (Botswana, Egypt, Mauritania, and Sudan) entered reservations.

40 Art1(2) of the ACRWC.

41 Art 11(2)(c) of the ACRWC.

42 The right to a healthy environment is not explicitly recognised in any UN human rights treaty. Fortunately for children, the treaty that comes closest to such recognition is the CRC, under which states are asked to take “into consideration the dangers and risks of environmental pollution” with respect to providing nutritious food and clean drinking water in their efforts to uphold the right to the highest attainable standard of health.

43 Art 11 of the ACRWC.

44 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol).

to address “the dangers and risks of environmental pollution”.⁴⁵ As mentioned above, since the ACRWC highlights the importance of upholding the principle of the “most conducive environment”, the provisions of the African Charter, the Maputo Protocol and the CRC on the environment would have application in African countries. While the body that monitors the implementation of the ACRWC, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), has not yet dealt with communication that is on climate change, its generous standing rules, as well as a willingness to draw from the experiences of other similar bodies such as the African Commission and the CRC Committee, are good indications of its potential to contribute to rights-based climate change litigation.

4 Climate change litigation and domestic laws

As the experience from elsewhere shows, developments around domestic laws- constitutional provisions, child laws and climate change laws- are critical for the growth, success as well and trajectory of climate change-related litigation pertaining to the rights of the child in the context of climate change. In this regard, while constitutionalising the right to a healthy environment is more of the rule than the exception, with the more than one hundred national constitutions that contain a right to a healthy environment,⁴⁶ the rare finds are those constitutions that make explicit reference to climate change.

45 Art 24(2)(c).

46 There are no less than 42 African countries with constitutional provisions guaranteeing protection of the environment and/or have provisions for the right to a healthy environment namely Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Congo, Côte d’Ivoire, Egypt, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Somalia, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. For example, for South Africa, see S 24 of the 1996 Constitution, which provides as follows: “Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. For Mali, S 15 of its 1992 Constitution provides: “Every person has a right to a healthy environment. The protection and defence of the environment and the promotion of the quality of life are a duty for all and for the state.” In the DRC, see Section 46 of the 1992 Constitution of the DRC provides: “Every citizen shall have the right to a satisfactory and sustainable healthy environment, and shall have the duty to defend it. The state shall supervise the protection and the conservation of the environment”.

There are only 11 constitutions in the world that fulfil these criteria.⁴⁷ Four are in Africa namely Algeria (2020),⁴⁸ Côte d'Ivoire (2016),⁴⁹ Tunisia (2014),⁵⁰ and Zambia (2016).⁵¹ Most of the content of these provisions is general and is often not framed with a rights-based terminology or impose explicit duties on the State. But it still can offer a useful prospect in the context of litigation.

Very useful provisions on climate action are found in the Constitutions of Zambia where Article 257 of the former provides that “[t]he State shall, in the utilisation of natural resources and management of the environment ... establish and implement mechanisms that address climate change”.⁵² The Tunisian Constitution, in article 45, declares that “[t]he state guarantees the right to a healthy and balanced environment and the right to participate in the protection of the climate”. It is one of the few constitutions around the world⁵³ that explicitly deploys a rights language. The emphasis on the procedural right to participate in respect of the protection of the climate both in the Constitutions of Zambia and Tunisia can be a useful tool for the purpose of litigation for the instances where climate action-related measures do not take the views of children and affected communities at large.

There are also preambular paragraphs that mention the climate. The Constitution of Algeria espouses that “[t]he people remain concerned with environmental degradation and the negative effects of climate change, and they are eager to ensure protection of the natural environment and the rational use of natural resources in order to preserve them for future generations.”⁵⁴ In a similar vein, the Preamble of the Constitution of Côte d'Ivoire states, “We, the People of Côte d'Ivoire ... [e]xpress our commitment to ... contributing to climate protection and to maintaining a healthy environment for future

47 The London School of Economics and Political Science and Grantham Research Institute on Climate Change and the Environment “The 11 Nations Heralding a New Dawn of Climate Constitutionalism” 2021 <https://www.lse.ac.uk/granthaminstitute/news/the-11-nations-heralding-a-new-dawn-of-climate-constitutionalism/> (last accessed 2022-11-07). These constitutions, excluding those from Africa, are from Bolivia, Cuba, Dominican Republic, Ecuador, Thailand, Venezuela and Vietnam.

48 See Constitute “Constitution of Algeria” https://www.constituteproject.org/constitution/Algeria_2020?lang=en (last accessed 2022-11-07).

49 See Constitute “Constitution of Cote d'Ivoire” https://www.constituteproject.org/constitution/Cote_DIvoire_2016.pdf?lang=en (last accessed 2022-11-07).

50 See Constitute “Constitution of Tunisia” https://www.constituteproject.org/constitution/Tunisia_2014.pdf?lang=en (last accessed 2022-11-07).

51 See Constitute “Constitution of Zambia” https://www.constituteproject.org/constitution/Zambia_2016.pdf?lang=en (last accessed 2022-11-07).

52 This provision should be read along with several others, including arts 255 and 256 on the need to save energy and the obligation of people to cooperate to ensure a list of environmental protection actions.

53 Along with the Constitution of Venezuela.

54 Preamble of the 2020 Constitution.

generations ...”.⁵⁵ The extent to which Preambular paragraphs can be used to generate substantive rights for children in the context of climate change is questionable. However, the role that these provisions can play in interpretation in the context of “greening” several rights including those on health and life can be significant. Such a role can also positively contribute to litigation efforts.

Naturally, the next category of laws that could be used for child rights-based climate change litigation is child laws that have especially been adopted and/or amended in the last three decades after the adoption and coming into force of the CRC and the African Children’s Charter. Unfortunately, since climate change was not high on the political agenda and its links with human rights, let alone children’s rights, were not made at the time of the adoption of most of these laws, there is no example of a reference to climate change. This reality permeates not only in the laws of the small island states that are often prone to the impacts of the sudden onset of climate change but also in respect of child laws that have been adopted in the last five years. Be this as it may, the scarce references pertaining to the environment that are found in child laws in Africa – similar to the 1996 Child Law (as amended in 2008) of Egypt obliging the State to ensure the right of the child, to a healthy and clean environment⁵⁶ – can play a limited role in facilitating child focused climate change litigation.

However, the potential impact of climate change laws adopted on the continent, especially since the Paris Climate Agreement, on litigation, is not expected to be modest. This does not mean that these laws are available in abundance on the continent. A few examples include the National Climate Change Act (2021) of Uganda;⁵⁷ Nigeria’s Climate Change Act (2021); and the Climate Change Act 2020 (No. 11/2020) of Mauritius.⁵⁸ It is possible to add a few laws similar to the Government Decree No. 2018-263 to operationalise the implementation of the Paris Agreement of Tunisia (2018) – that are aimed enacting a State’s obligations under the Paris Agreement.

It is also notable that countries such as Nigeria and Uganda are jurisdictions that have already entertained climate change litigations, including those with a rights claim. As a result, the existence of these climate change laws is expected to further buttress the possibilities for

55 Preamble of the 2016 Constitution.

56 Article 7 bis of the 1996 Child Law (as amended in 2008) of Egypt.

57 Supplementing the National Environment Act of Uganda of 2019.

58 This trend is not peculiar to Africa as more countries in the world are adopting similar laws. More recent examples include the Climate Change Act 609/2015 of Finland; Framework Climate Law 98/2021 of Portugal; Law 2169/2021 Promoting Low-Carbon Development of Colombia; Environment Act 2021 of the United Kingdom; Climate Change Act 2021 of Fiji; Climate Action and Low Carbon Development Act 2015 of Ireland; CO2 Act (Act 641.71) of 2020 of Switzerland; Law 7/2021 on Climate Change and Energy Transition of Spain; Climate Act of the Netherlands (2019); and the Serbian Law on Climate Change of 2021.

child rights-based litigation. Tunisia, whose Constitution has already been highlighted above not only as one of the four on the continent, but the main one with rights-based reference to climate change, could be well complemented for litigation by its domestic law.

These legislative measures are significant, also given the relative staying power of laws, which can often withstand the risks of reversals of gains as a result of change of governments. Moreover, in recent years, a smaller number of African states – namely Mauritania and The Gambia – have become pioneers by incorporating their Nationally Determined Contributions (NDCs) in law.

It is also very likely that as the number of climate change policies on the continent increases, so will the climate change laws. Still, while policies on climate change can be crucial when climate change is seen from a human rights perspective, it is not off the mark to argue that their relevance for litigation will depend on the legal doctrines and culture of a particular country. There are some promising examples of litigation in which policies on climate change have been central. For instance, a case before the Ugandan High Court at Mbale highlights the links between climate change policies, including adaptation policies, and human rights obligations.⁵⁹ The trigger for the case was a landslide in 2019 in the Bududa District of Mount Elgon which reportedly killed more than 30 people – the case has been brought on behalf of 48 people directly impacted by the disaster, including as a result of the death of a loved one.⁶⁰

Key to the case is the allegation that the government failed to uphold its human rights obligations even though it adopted a national climate change policy;⁶¹ noticed the impact of climate change on landslides and has had a resettlement plan in place since 2010 for at-risk communities; has ratified the UNFCCC⁶² and Paris Climate Agreement;⁶³ and has incorporated human rights obligations in its Constitution and subsidiary legislation. The specific rights claim is that “by failing to act on the known landslide risks, the Ugandan Government has violated [the plaintiffs’] rights to life, property and the right to a clean and healthy

59 ClientEarth “Landslide Victims in Court against the Ugandan Government” <https://www.clientearth.org/latest/press-office/press/landslide-victims-in-court-against-the-ugandan-government/> (last accessed 2022-11-08).

60 Reliefweb “Over 30 People Feared Dead in Fresh Bududa Mudslide” 2019 <https://reliefweb.int/report/uganda/over-30-people-feared-dead-fresh-bududa-mudslide> (last accessed 2022-11-08); see also Reliefweb/IOM “The Impacts of Climate Change in Uganda” 2021 <https://reliefweb.int/report/uganda/impacts-climate-change-uganda> (last accessed 2022-09-13); International Federation of Red Cross and Red Crescent Societies “Uganda: Landslides Final Report” 2021 <https://reliefweb.int/report/uganda/uganda-landslides-final-report-dref-operation-mdrug043> (last accessed 2022-11-08).

61 National Climate Change Policy of Uganda.

62 Ratified on 8 September 1993.

63 Ratified on 21 September 2016.

environment”.⁶⁴ The current status of the case is unclear, and there are indications that it might have stalled.

Developments around access to information on the continent also hold promise for climate change litigation.⁶⁵ Access to information is critical for climate action- both for mitigation and adaptation- including in the context of litigation. It is almost settled that truthful information has the potential “to prevent, address, minimize, mitigate, repair, restore and compensate for the damage caused by climate change”.⁶⁶ In some countries the availability of such information, including scientific information, is a right contemplated in the Constitution as well as general law, including laws on climate change.⁶⁷ One of the potential limitations for climate change litigation in Africa could also be related to the restrictive access to information policy, legislation, and practice on the continent. After all, climate change litigation requires a significant amount of information, most of which is available within the executive branch of government or in companies. While the history of such laws is not old- as South Africa’s Promotion of Access to Information Act pioneered the way in the continent in the year 2000, and as of February 2016 it was reported “that almost half (45.5 %) of Africa countries are without serious plan on Freedom of Information laws”,⁶⁸ the numbers are increasing. In 2017 the number of countries with FOI in Africa had increased to 21,⁶⁹ and growing, further creating better opportunities for child rights-based climate change litigation.

Most of these discussions around legislative developments relevant for child rights-based climate change litigation are far from exhaustive. One can still investigate legislation such as on legal aid and civil society engagement space to elucidate more on the foreseeable trajectory. Still, these discussions point firmly in one direction – that an increase both in

64 ClientEarth 2021.

65 From 2004 to 2014, the number of countries with freedom of information legislation in Africa increased from four to fourteen. These include Sierra Leone, Niger, Tunisia, Angola, Côte d’Ivoire, Ethiopia, Guinea, Liberia, Nigeria, Rwanda, South Africa, Uganda, Zimbabwe; see Odinkalu and Kadiri “Making progress on freedom of information in Africa” <https://www.justiceinitiative.org/voices/making-progress-freedom-information-africa> (last accessed 2022-11-08).

66 Proquest “Climate change and access to information” <https://www.proquest.com/docview/2554317316?parentSessionId=16hDKlVfWOY7p016eWdt21z%2FhZnMwzHJATIXEY77yko%3D&pq-origsite=primo&accountid=11311> (last accessed 2022-11-08).

67 As above.

68 Asogwa and Ezema “Freedom of access to government information in Africa: trends, status and challenges” 2017 *Records Management Journal* 328; see generally African Freedom of Information Centre “State of right to information in Africa: citizens’ access to information. A Tool to Build Trust and Address Corruption” 2015 <http://africafoicentre.org/index.php/who-we-are/careers> (last accessed 2022-11-08).

69 Africa Freedom of Information Centre and Friedrich-Ebert-Stiftung “Right to Information in Africa: Manual for Civil Society” <https://library.fes.de/pdf-files/bueros/africa-media/14417.pdf> at 7 (last accessed 2022-11-08).

numbers but also quality of child rights-based litigation can be expected to grow fast soon. If there are some lessons that can be gleaned from the limited case law that can aid such growth will be the focus of the next section.

5 Deciphering some lessons from existing case law

In 2022, the reported number of climate change related cases in Africa has been recorded to be 14. These cases are in South Africa,⁷⁰ Kenya,⁷¹ Nigeria,⁷² Uganda,⁷³ and the East African Court of Justice⁷⁴ (against the governments of Uganda and Tanzania).⁷⁵ South Africa is responsible for the majority of these cases.⁷⁶ This, of course, is a small number, especially as compared to the number of climate change-related cases in other continents. Apart from the challenges posed by limited legal framework, and a domestic system that emphasises economic development over environmental protection, other reasons exist that have contributed to such a small number of climate change case laws.

In the context of Nigeria, for example, the main barriers to progress on litigation have been identified as strict standing rules, weak climate change rules and policy, as well as a non-accommodating judicial attitude “that has privileged the economy over the environment”.⁷⁷ Fortunately,

70 *EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others* (2016) Case no 65662/16; *Africa Climate Alliance et al v Minister of Mineral Resources & Energy et al* (#CancelCoal case) Case No 56907/21; *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* (2021, pending) Case No 3491/2021; *The City of Cape Town v National Energy Regulator of South Africa and Minister of Energy* (2017, pending) Case No 51765/17; *SDCEA & Groundwork v Minister of Forestry, Fisheries, and the Environment* (17554/2021) [2022] ZAGPPHC 741 (6 October 2022); *Trustees for the Time Being of the GroundWork Trust v Minister of Environmental Affairs, KiPower (Pty) Ltd* (2017, pending) Case No 54087/17; *Trustees for the Time Being of GroundWork v Minister of Environmental Affairs, ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd* (2017, pending) Case No 61561/17; and *Philippi Horticultural Area Food & Farming Campaign, et al v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape, et al* (2019) Case No 16779/17.

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

72 *Gbemre v Shell Petroleum Development Company of Nigeria Ltd* FHC/B/CS/153/05.

73 *Mbabazi v The Attorney General and National Environmental Management Authority* Civil Suit No 283 of 2012.

74 *Center for Food and Adequate Living Rights et al v Tanzania and Uganda* (2020, pending) Application No. 29 of 202.

75 For access to worldwide climate change jurisprudence see Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-jurisdiction/> (last accessed 2022-11-08).

76 9 of the 14 cases are from South Africa.

77 Etemire “The Future of Climate Change Litigation in Nigeria: *COPW v NNPC* in the Spotlight” 2021 *Climate Change Litigation Review* 160.

lately, standing rules are increasingly being relaxed and the attitude of the judiciary which previously was accused of prioritising the private sector and economic considerations over the environment seems to be changing. Etemire uses the *Centre for Oil Pollution Watch (COPW) v Nigerian National Petroleum Corporation (NNPC)*⁷⁸ case to substantiate this position.⁷⁹ In the case, it is alleged that the NNPC has failed to maintain properly its oil pipelines which have resulted in oil spillage in ACHA Community of Abia State of Nigeria which subsequently affected two streams and river that are the main sources of water to the community.⁸⁰ While both the trial court and subsequently the Appeal Court dismissed the application arguing that two lower courts rejected the claim stating that the complainant organisation lacked standing as it did not suffer “any injury at all, let alone any injury above every other member of the Acha community resulting from the alleged oil spillage”.⁸¹ But the Supreme Court disagreed and granted the appeal in favour of the appellant, and among other things indicated that the NGO had a standing; recognised the possibility of public interest litigation to address the barriers poor communities might face; acknowledged the increasing concern around climate change and the environment; and specifically reconfirmed that Article 24 of the African Charter on Human and Peoples’ Rights on the right to a general satisfactory environment favourable to their development” is justiciable before the courts in Nigeria.⁸²

There are no notable exceptions to this evolution in respect of cases brought in Africa.⁸³ For example, in South Africa, what was in contention in *EarthLife Africa Johannesburg v Minister of Environmental Affairs*⁸⁴ was whether the ministry’s Chief Director’s issuance of environmental authorisation for the construction of a 1,200 MW coal-fired power plant in Limpopo Province without a climate change impact assessment was valid. The complainants asserted that the Chief Director was “under an obligation to consider the climate change impacts of the proposed power station before granting authorisation”.⁸⁵

78 (2019) 15 *Nigeria Weekly Law Report* 1666. Details on the case, including a summary are available at Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-case/centre-for-oil-pollution-watch-copw-vs-nnpc-2018-supreme-court-of-nigeria/> (last accessed 2022-11-08).

79 Etemire 2021 *Climate Change Litigation Review* 165–169.

80 As above. It is also argued that the State failed to clean up or reinstate the Ineh/Aku streams/river after it contained spillage on the surface.

81 Summary of the case available at Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-case/centre-for-oil-pollution-watch-copw-vs-nnpc-2018-supreme-court-of-nigeria/> (last accessed (2022-11-08).

82 *COPW v NNPC* at paras 587 and 597–598.

83 The publicly available decisions on the interpretation of some of the legal provisions in domestic and international law fall within two categories: those that are brought on the basis of alleged procedural impropriety by the government that negatively affects the right to a clean and healthy environment (and contributes to climate change), and those that go directly to the substance of the right to an adequate environment.

84 (65662/16) [2017] ZAGPPHC 58.

85 *EarthLife v Minister* at para 7.

The Minister, in her appeal, conceded that the climate change impacts of the project were not “comprehensively assessed and/or considered.”⁸⁶ However, she upheld the authorisation by adding a condition that the “holder of this authorisation must undertake a climate change impact assessment prior to the commencement of the project”.⁸⁷ This did not satisfy the complainants, who contended that a climate change impact assessment is one of the relevant factors that the Chief Director should take into account before making a decision.⁸⁸ Apart from citing domestic law, they invoked “South Africa’s obligations under international climate change conventions,” including the Paris Agreement.⁸⁹

The judgement underscores the importance of the link between the point of contention – the need for a climate change impact assessment – and its implications for “rights in the Bill of Rights, including the fundamental justiciable environmental right in section 24 of the Constitution”.⁹⁰ On 19 November 2020, the High Court, pursuant to an agreement between the applicants and defendants, issued an order setting aside all governmental authorisation of the coal-fired power plant.⁹¹

In Kenya, the main point of contention in *Save Lamu et al v National Environmental Management Authority and Amu Power Co Ltd* was whether the National Environmental Management violated the Environmental Impact Assessment and Audit Regulations (“EIA Regulations”) when it granted an Environmental Impact Assessment Licence for the construction of the Lamu Coal-fired Power Plant. It was alleged that permission was granted without there having been proper and meaningful public participation by the parties affected. The National Environmental Tribunal of Kenya agreed with the complainants and revoked the issuance of the license. It reasoned that the environmental and social impact assessment conducted by the company was insufficient, and that, since it is a requirement of the new EIA

86 As above.

87 *EarthLife v Minister* at para 8.

88 According *EarthLife v Minister* at para 6 of the judgment, based on S 240 of the National Environmental Management Act 107 of 1998. The complainants asserted that “[a] climate change impact assessment in relation to the construction of a coal fire power station ordinarily would comprise an assessment of (i) the extent to which a proposed coal-fired power station will contribute to climate change over its lifetime, by quantifying its GHG emissions during construction, operation and decommissioning; (ii) the resilience of the coal-fired power station to climate change, taking into account how climate change will impact on its operation, through factors such as rising temperatures, diminishing water supply, and extreme weather patterns; and (iii) how these impacts may be avoided, mitigated, or remedied.”

89 See, e.g., para 35 of the *EarthLife v Minister* judgment.

90 As above.

91 A summary of the order is available at Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-case/4463/> (last accessed 2022-11-08).

Regulations, a new impact assessment had to include a “consideration of the Climate Change Act 2016, among other laws”.⁹²

A notable shift of special relevance for this article is the emergence of *rights-based claims* that allege violations of human rights by both governments and non-state actors. In *Gbemre v Shell Petroleum Development Company of Nigeria Ltd FHC/B/CS/53/05*, the applicant, Gbemre, a representative of the Niger Delta’s Iwherekan community, filed a suit against (i) the Nigerian government for its decades-long failure to stop Shell Petroleum’s gas-flaring activities, and (ii) Shell for engaging in massive gas-flaring in the community in the course of its exploration and production activities. The applicant argued that Shell had failed to consider the environmental impact of its activities on the community’s livelihood and survival and the contribution of these activities to the adverse, potentially life-threatening effects of climate change. The applicant claimed that the activities violated the community’s rights to life and human dignity guaranteed by sections 33 and 34 of the 1999 Nigerian Constitution and reinforced by Articles 4, 16, and 24 of the ACHPR (ratified and domesticated by Nigeria as Cap. A9, Laws of the Federation of Nigeria, 2004).

The Federal High Court held that these constitutionally guaranteed rights inevitably include the rights to a clean, poison- and pollution-free environment. It ruled that the actions of the respondents in allowing and continuing to flare gas in the applicant’s community were a violation of the latter’s fundamental rights to a clean, healthy environment. The Court further ruled that Shell’s failure to carry out an environmental impact assessment is a clear violation of the EIA Act and a violation of said rights. Shell was ordered to take immediate steps to stop gas-flaring. The Court also ordered the attorney-general to ensure speedy amendment of the Associated Gas Re-injection Act to align it with Nigeria’s human rights obligations under the Constitution and ACHPR. The Court made no award of damages, costs or compensation.⁹³

Kotze and Du Plessis argue that *Gbemre* is a victory for the interpretation and application of environmental rights. They argue that although the Nigerian Constitution does not provide for a right to a healthy environment, the Court did not shy away from linking the rights to life and dignity to environmental interests or from affording significant

92 A summary of *Save Lamu et al v National Environmental Management Authority and Amu Power Co Ltd* is available at Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-case/save-lamu-et-al-v-national-environmental-management-authority-and-amu-power-co-ltd/> (last accessed 2022-11-08).

93 A summary of *Gbemre v Shell Petroleum Development Company of Nigeria Ltd FHC/B/CS/53/05* is available at Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-case/gbemre-v-shell-petroleum-development-company-of-nigeria-ltd-et-al/> (last accessed 2022-11-08).

weight to the statutory environmental right in article 24 of the ACHPR.⁹⁴ Contrary to Kotze and Du Plessis, though, it is worth mentioning that the Nigerian Constitution does indeed provide for the right to environment in its fundamental objectives and directive principles of state policy, albeit that their interpretive value is often contested.

Two child-and-youth-led climate change suits have been filed on the continent, although they are yet to be decided. They are, in South Africa, the *Africa Climate Alliance et al v Minister of Mineral Resources & Energy et al* (#CancelCoal case) Case No 56907/21⁹⁵ and, in Uganda, *Mbabazi v The Attorney General and National Environmental Management Authority* Civil Suit No 283 of 2012.⁹⁶

In the South African case, the youth-led African Climate Alliance, together with two other environmental NGOs, has sued the Department of Energy and Mineral Resources in an action directly placing children's rights at issue. The case challenges the government's decision to generate some 1,500 MW of electricity from new coal-fired power stations between 2023 and 2027. The applicants seek declaratory orders to set this decision aside. The suit is premised on the protection and conservation of the environment, under section 24 of the Constitution, and on children's rights, under section 28.

In regard to the latter strand, the applicants argue that the decision to procure more coal-generated electricity violates the best interests principle, given that children are particularly vulnerable to the impacts of climate change. They argue that coal cannot be justified as a measure which is beneficial to present and future generations and make the case that there is no indication that children's voices and opinions were solicited before this decision was taken. By attacking the procedural impropriety of the decision, the applicants appear to rely on administrative principles that would seem to make for an easier case to argue, even though they invoke the substantive principle of children's rights. The applicants will rely on the affidavits of a number of children. The case is yet to be determined.

In the Ugandan case, the plaintiffs seek declaratory and injunctive relief on behalf of four Ugandan minors. They argue that article 237 of the Ugandan Constitution makes the Government of Uganda a public trustee of the nation's natural resources – including its atmosphere – and that articles 39 and 237 require the government to preserve those resources from degradation for present and future generations. Citing multiple examples of damage and loss of life resulting from extreme

94 Kotze and du Plessis "Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent" 2020 *Environmental Law* 50(3).

95 *Africa Climate Alliance et al v Minister of Mineral Resources & Energy et al* (#CancelCoal case) Case No 56907/21.

96 *Mbabazi v The Attorney General and National Environmental Management Authority* Civil Suit No 283 of 2012.

weather events, the plaintiffs allege that the government has breached its constitutional duty. In addition to asking the court to declare that the government is violating its public-trust duty by not addressing climate change and thereby failing to prevent present and future harms, the plaintiffs request several forms of injunctive relief, such as orders compelling the government to account accurately for nationwide GHG emissions and develop a plan to mitigate those emissions. After a preliminary hearing, the High Court ordered the parties to undertake a 90-day mediation process, but as of October 2017 it had taken no further action.⁹⁷ It is quite possible that the minor plaintiffs have all reached majority age today due to the inordinate delay in setting the case down for hearing.

One of the areas where litigation is expected to grow in the foreseeable future relates to “cases concerning persons displaced by climate change impacts”.⁹⁸ The issue around “climate refugees” is worth reflecting. First, there is no consensus around the definition of the very term “climate refugee” or “climate migrant”. There may be room for litigation to get clarity on the concept and test to see the applicability or otherwise of laws that are intended for refugee protection. Second, there is evidence that the majority of “climate refugees/migrants” often do not cross international borders and remain within their country of origin.⁹⁹ One of the main implications of this reality is the important role of legislation and policy on internally displaced persons.

It is possible to decipher a few points. First, it is not only climate change litigation, but also rights-based claims are on the rise. Secondly, these cases shed light on the fact that it is not only Governments but also private actors including companies that could be sued. Third, domestic provisions on the environment as well as on children’s rights, including constitutional provisions, and climate change policies (mostly based on the experience outside of the continent), are a significant anchor for successful litigation. Fourth, the role that civil society organisations play in this regard, especially in the instances where there is not adequate legal aid, is significant. Fifth, while child and youth activism around

97 Summary obtained from Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-case/mbabazi-et-al-v-attorney-general-et-al/> (last accessed 2022-11-08).

98 UNEP “Surge in Court Cases Over Climate Change Shows Increasing Role of Litigation in Addressing the Climate Crisis” 26 January 2021 <https://www.unep.org/news-and-stories/press-release/surge-court-cases-over-climate-change-shows-increasing-role> (last accessed 2022-10-08).

99 See UNHCR “Forced Displacement in the Context of Climate Change: Challenges for States Under International Law” (2009) submission to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention (AWG-LCA 6) para 4; Picchi “Climate Change and the Protection of Human Rights: The Issue of “Climate Refugees” 2016 *US China Law Review* 576 and 579; McAdam “Why a Climate Change Displacement Treaty Is Not the Answer” 2011 *International Journal of Refugee Law* 13; Wymann “Responses to Climate Migration” 2013 *Harvard Environmental Law Review* 196–200.

climate change is still in its infancy, it still has great potential to contribute to climate change claims. Sixth, since climate change claims are complex and information about emissions, loss and damage etc are often not publicly available, such cases are pursued better in the contexts where an effective access to information legislation exists. Seventh, such cases are a good platform to clarify complex State obligations such as accountability for extraterritorial activities. And finally, questions around standing, and periods of limitations that could serve as a barrier to access remedies by children in the context of climate change should be reviewed.

6 Developments outside the continent with potential impact on child rights climate change litigation in Africa

There are multiple developments outside of Africa that could have a direct and indirect impact on child rights climate change litigation on the continent. These include legislative and policy developments at the domestic level (especially in Europe); case laws both at the domestic and international levels; as well as increasingly available research and advocacy materials especially from influential organisations such as the IPCC and UNICEF.

The increasing recognition both in legislation as well as case law of the concept of “parent company liability” for human rights violations abroad is also expected to widen the opportunities for rights-based claims from the African continent. In this respect, *Okpabi and others v. Royal Dutch Shell*¹⁰⁰ as well as *Lliuya v. RWE AG* are exemplary. In the former which involves a claim by close to 40,000 Nigerian citizens in the Niger Delta, Royal Dutch Shell is accused, as a parent company, for alleged human rights and environmental law violations by its Nigerian subsidiary.¹⁰¹ While the merits of the case are not yet decided, the UK Supreme Court has shown openness to assess the extent to which the parent company may have exercised a duty of care.¹⁰² In the latter, the claim by a Peruvian farmer against a German-based company for GHG emissions allegedly having an impact in melting a glacier in his locality has shown the potential for German courts to accept jurisdiction against domestic corporations for alleged violations in distant places.¹⁰³

Moreover, at least two cases in France (*Friends of the Earth et al v Total*¹⁰⁴ and *Notre Affaire à Tous et al v Total*)¹⁰⁵ that rely on a 2017 legislation on the Law on the Duty of Vigilance that require French

100 *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3.

101 *Shell Petroleum Development Company of Nigeria Ltd* (SPDC).

102 Burianski, Clarke, Kuhnle, and Wackwitz (2021).

103 As above.

104 Decision of 30 January 2020 of the Nanterre High Court of Justice.

105 Filed on 28 January 2020.

companies to assess and prevent environmental and human rights violations abroad as result of their activities.¹⁰⁶ In the first case, while a group of NGOs alleged that Total was not complying with the Law of Vigilance in respect of assessing the human rights and environment impact of its projects in Uganda and Tanzania, the Nanterre High Court declared that it does not have the competence to adjudicate the case. Though a similar cause of action is invoked in the second case and asked the court to force Total to adopt a new vigilance plan to assess the company's contributions that could increase global warming beyond, the Court has decided that it is competent to entertain the case.¹⁰⁷

At the international level, while there are few cases, it is worth singling out the potential impact of the decision of the CRC Committee on the *Saachi* case in Africa.¹⁰⁸ Brought by 16 children including two from Nigeria and South Africa against 5 State Parties to the CRC – namely Argentina, Brazil, France, Germany and Turkey – the complainants main contention is that the five States have not made adequate GHG emission cuts which has led to a violation of multiple rights of the children.¹⁰⁹ The rights invoked include the right to life, the right to health, and the rights of indigenous children.¹¹⁰ The Committee was requested to find these States responsible for the violations of the mentioned rights; uphold children's rights in mitigation and adaptation-related measures; and strengthen their international cooperation for climate action.¹¹¹ While the case was ultimately dismissed for lack of exhaustion of local remedies,¹¹² significant pronouncements pertaining to jurisdiction and causation that will inevitably inform future litigations were made. These include the fact that “given its ability to regulate activities that are the

106 Burianski, Clarke, Kuhnle, Wackwitz (2021). See Metzger and Aidun “Major developments in international climate litigation in early 2020” <https://blogs.law.columbia.edu/climatechange/2020/03/12/major-developments-in-international-climate-litigation-in-early-2020/> (last accessed 2022-11-14).

107 As above.

108 UN Committee on the Rights of the Child *Saachi v Argentina et al* (CRC/C/88/D/104/2019) (2021). For commentaries on the case see Wewerinke-Singh “Between cross-border obligations and domestic remedies: the UN Committee on the Rights of the Child’s decision on *Sacchi v Argentina*” <https://www.childrensrighsobservatory.nl/case-notes/casenote2021-10> (last accessed 2022-11-14); and Nolan “Children’s Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Sacchi v Argentina*” <https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/> (last accessed 2022-11-14).

109 Para 3.8 of the Decision.

110 Paras 3.4–3.6 of the Decision.

111 Para 3.8 of the Decision.

112 Some commentators have suggested that the Committee’s suggestion that it would have exceeded the “limits of its legal powers” by agreeing to hear the complaints is questionable, especially for complainants whose home states, like the Marshall Islands, have had a negligible contribution to greenhouse gas emissions. The argument goes that expecting children who might permanently lose their homes to experiment with largely untested, complex and expensive transnational litigation strategies before bringing a complaint to the Committee might be too late. Wewerinke-Singh “Between

source of these emissions and to enforce such regulations, the State party has effective control over the emissions”;¹¹³ that even though the causes for climate change are collective, such situation “does not absolve the State party of its individual responsibility”;¹¹⁴ and that a foreseeable and “sufficient causal link had been established between the harm alleged by the 16 children and the acts or omissions of the five States for the purposes of establishing jurisdiction, and that the children had sufficiently justified that the harm that they had personally suffered was significant”.¹¹⁵ It should come across as no surprise if these elements are relied upon not only by national jurisdictions in Africa, but also by the regional treaty body the African Committee of Experts on the Rights and Welfare of the Child which has the explicit mandate “to draw inspiration from ... the Convention on the Rights of the Child”.¹¹⁶

cross-border obligations and domestic remedies: the UN Committee on the Rights of the Child’s decision on *Sacchi v Argentina*” <https://www.childrensrightsobservatory.nl/case-notes/casenote2021-10> (last accessed 2022-11-14). While there might be some sympathy for this argument, it does not appear to stand on principle. As Nolan put it, “there was simply no way of admitting these complaints without effectively gutting the OPIC.” Nolan “Children’s Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Sacchi v Argentina*” <https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/> (last accessed 2022-11-14).

113 Para 10.9 of the Decision. The general rule is that human rights obligations are territorial in nature, that is, they do not operate extraterritorially. Atappatu argues that environmental law has explicit extraterritorial application. See Atappatu *Human Rights Approaches to Climate Change: Challenges & Opportunities* (2018) 89. As an illustration, she cites Principle 21 of the Stockholm Declaration which imposes a responsibility on states to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. The Committee found that when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory when the state of origin exercises effective control over the sources of the emissions in question. As Burger, Wentz and Horton point out in “The Law and Science of Climate Change Attribution” 2020 *Columbia Journal of Environmental Law* 144: “[I]t is in the area of loss and damage where attribution science could potentially play the biggest role.” States have to determine (i) which countries have already suffered harmful impacts as a result of climate change and are almost certain to do so in future, and (ii) to what extent are other countries responsible for those impacts. This determination is complicated by the fact that there are often multiple drivers behind harmful impacts linked to climate change. Nonetheless, this issue was not addressed substantively by the Committee but it is one that will inevitably feature before an international remedial mechanism in the near future.

114 Para 10.10 of the Decision.

115 See UN Treaty Bodies News Release “UN Child Rights Committee rules that countries bear cross-border responsibility for harmful impact of climate change” (2021-07-10) as well as para 10.14 of the Decision.

116 Art 46 of the African Children’s Charter.

The latest IPCC Report¹¹⁷ underscored that “[c]limate-related litigation, for example by governments, private sector, civil society and individuals is growing, ... and in some cases, has influenced the outcome and ambition of climate governance”.¹¹⁸ The Report is also alive to the fact that the majority of these cases are in the developed world, “with a much smaller number in some developing countries”.¹¹⁹ This observation, including the acknowledgement that while litigation is influencing climate action, its use for such end is too limited in the developing world could help to spur additional interest.

UNICEF too has increasingly produced material that are of significant value for advocacy and litigation. For example, in August 2021 UNICEF launched a ground breaking report on its Children’s Climate Risk Index which reportedly “provides the first comprehensive view of children’s exposure and vulnerability to the impacts of climate change”.¹²⁰ In an unusual but highly commendable fashion, the executive summary of the Report has been made available beyond the common English and French versions including Hausa, Swahili, and Arabic.¹²¹ This should not be surprising- given that 25 of the 33 countries that have been ranked as “extremely high risk” for children are in Africa.¹²² This is probably the first time that such scientific evidence focussing specifically on children has underscored the disproportionate effect of climate change on children in Africa.

117 Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change “Intergovernmental Panel on Climate Change ‘Climate Change 2022: Mitigation of climate change’ 2022 https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_FullReport.pdf SPM-59 (last accessed 2022-11-14).

118 As above.

119 As above.

120 See UNICEF “The Climate Crisis is a Child Rights Crisis: Introducing the Children’s Climate Risk Index” 2021 <https://data.unicef.org/resources/childrens-climate-risk-index-report/> (last accessed 2022-11-14).

121 As above.

122 These countries are Central African Republic, Chad, Nigeria, Guinea, Guinea-Bissau, Somalia, Niger, South Sudan, Democratic Republic of Congo, Angola, Cameroon, Madagascar, Mozambique, Benin, Burkina Faso, Ethiopia, Sudan, Togo, Cote d’Ivoire, Equatorial Guinea, Liberia, Senegal, Sierra Leone, Malia, and Eritrea. See UNICEF “The Climate Crisis is a Child Rights Crisis” 2021 at 120 <https://www.unicef.org/media/105376/file/UNICEF-climate-crisis-child-rights-crisis.pdf> (last accessed 2022-11-14). The Foreword to the study, by Fridays for Future, highlights the injustice this number represents. At 4-5 it underscores that “[a]nd yet these countries are among those least responsible for creating the problem, with the 33 extremely high-risk countries collectively emitting just 9 per cent of global CO₂ emissions. In contrast, the 10 highest emitting countries collectively account for nearly 70 per cent of global emissions. Only one of these countries is ranked as extremely high-risk in the index”.

7 Concluding remarks

There are at least three other elements that need further scrutiny and research to assess their potential impact on the growing child rights-based climate change litigation on the African continent. These are the availability of increased funding for (rights-based) climate change litigation, civil-society activism, and the share-holder activism. As Rumble and Gilder indicate, availability of increased funding for climate change litigation is one of the “drivers that has propelled the spate of cases”.¹²³ While it is difficult to predict if such funding would increase for the purposes of rights-based, let alone child-rights based litigation, such orientation would probably take place organically mainly as a result of two factors – first, contrary to some other jurisdictions, for example in China where courts are filling legislative gaps in situations where climate change law policy is not detailed, courts in Africa have shown that the growth in constitutional protections for environmental rights has led to rights based climate change litigation;¹²⁴ second, in this regard, the recognition to the right to the environment in article 24 of the African Charter serves as a welcome room for some judicial activism to resolve cases based on a rights basis.

In respect of CSO activism, despite a reduced engagement space dwindling in some African countries,¹²⁵ the fact that most cases to date have been brought by CSOs is probably bound to continue or even expand. On share-holders activism, the limited data from South Africa, where advocacy led to shareholder resolutions¹²⁶ forcing an assessment of exposure of a bank’s climate related risks in lending and investments, and public disclosure of information in lending and investments in fossil fuel, suggests a potential growth and impact in the foreseeable future.¹²⁷

123 Rumble and Gilder (2021) 2. See “Climate Change Litigation on the African Continent” 2021 at 5 https://www.kas.de/documents/282730/0/Climate_Litigation_Africa.pdf/1450e939-d100-a70e-8a9d-315161f96024?version=1.0&t=1624360880407 (last accessed 2022-11-14).

124 See Setzer and Benjamin “Climate Change Litigation in the Global South: Filling in Gaps” 2020 *AJIL Unbound* 56; see too Knox and Voigt “Introduction to the Symposium on Jaqueline Peel and Jolene Lin, ‘Transnational Climate Litigation’: The Contribution of the Global South” 2020 *AJIL Unbound* 35.

125 For example, in Egypt, Eritrea, Rwanda, Burundi, Sudan and Zimbabwe. Positive developments include the lifting of most restrictions on CSOs in Ethiopia beginning in 2018. See for example German Institute for Global and Area Studies (GIGA) “Shrinking Civil Space in Africa: When Governments Crack Down on Civil Society” 2018 <https://www.giga-hamburg.de/en/publications/giga-focus/shrinking-civic-space-africa-governments-crack-civil-society> (last accessed 2022-11-14) showing some of the trajectories in restrictions from 1994–2016.

126 For more details, see for e.g., Just Share <https://justshare.org.za/> (last accessed 2022-11-14) which is a “non-profit shareholder activism organisation using responsible investment and sustainable finance to drive urgent action to combat climate change and reduce inequality”.

127 Rumble and Gilder (2021) 6.

At the regional level, there are already concrete measures that are being undertaken that will aid in clarifying the procedural as well as substantive obligations of States in respect of climate change and children's rights. The ACERWC has an active Working Group on the topic which is currently overseeing a continental study. Given the impact of climate change on the rights of the child in Africa, and developments within the African Commission and the CRC Committee, it probably will not be long before the ACERWC is seized with a climate change case.

At the national level, the proliferation of climate change laws and policies is bound to grow. In fact, as the implementation of the Paris Climate Agreement gets closer to 2024, the year in which, as part of the enhanced transparency framework (ETF), all countries who have ratified the Paris Agreement will follow a single, universal transparency process,¹²⁸ including reporting and technical review of progress or the lack thereof, African countries will probably accelerate their legislative and policy efforts. This will likely empower individuals, including children, and open more avenues for accountability through rights-based litigation.

The predictions made in 2017 about increases in climate change related litigation in the global South were anchored on three key factors – the “steady proliferation of laws and financial resources” on climate action; increased know how around litigation and availability of lawyers to take cases; and developments around the implementation of the Paris Climate Agreement.¹²⁹ As demonstrated above, in Africa these predictions are increasingly coming to pass, and will probably continue to grow even more in the foreseeable future. In this respect, as rights-based climate change litigation grows, so will its child-rights aspects.

128 UNFCCC “Introduction to Transparency” <https://unfccc.int/Transparency> (last accessed 2022-11-14).

129 UNEP “The Status of Climate Change Litigation: A Global Review” 2017 at 25–26 <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y> (last accessed 2022-09-10).