Shaping Africa's Climate Action through Climate Litigation: An Impact Assessment

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Abstract

The academic literature scarcely covers court cases from the Global South on climate change. Hence, this paper examines the impact of existing climate litigation on shaping Africa's climate action and the role of courts in climate change jurisprudence on the continent. The paper determines that: NGOs are key actors in challenging state granted environmental authorisations of projects whose activities violate human rights, affect climate change, and contravene formal procedures. Courts are deciding that fossil fuel activities like gas flaring violate fundamental human rights and exacerbate climate change. They call for amending laws allowing for such activities to bring them in conformity with laws on the protection of fundamental human rights. In a balancing act of the socio-economic rights and environmental human rights violations courts acknowledge that fossil fuels form part of the energy mix of sources on account of existing government laws and policies aimed at addressing priorities like energy security and poverty alleviation, a context that should inform climate change action. The implication is that short of laws banning fossil fuel activities, these activities will continue under enabling laws thus limiting the extent of court's intervention in challenging climate change.

A. Introduction

In March 2019, Mozambique was ravaged by tropical cyclone Idai, one of the deadliest storms on record in the Southern Hemisphere leaving behind a trail of destruction.[1] Lasting from 4–16 March making it the longest-lived tropical system on record in the Mozambique Channel, Ida resulted in over 1200 fatalities in Mozambique, Zimbabwe, Malawi and Madagascar and at least US$2.2 billion in total damages in Mozambique alone.[2] Although too

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1 *Erik W. Kolstad*, 'Prediction and Precursors of Idai and 38 Other Tropical Cyclones and Storms in the Mozambique Channel' (2021) 147 *Quarterly Journal of the Royal Meteorological Society* 45, p. 46.

2 *Derek S. Arndt, Jessica Blunden and Robert J.H. Dunn*, 'State of the Climate in 2019' (2020) 101 *Bulletin of the American Meteorological Society* SI; World Meteorological Organization, 'The

simplistic to link any specific cyclone to climate change, rainfall associated with cyclones is more intense than it would be without human-induced climate change.[3] 15 percent of global weather-, climate- and water related catastrophes like floods, droughts, storms and landslides happen in Africa.[4] Developing countries are especially vulnerable to climate variability and change because of their low adaptive capacity; this has implications for food security as growing seasons shrink due to changing rainfall patterns as in sub-Saharan Africa.[5] Water and energy scarcities are likely to worsen due to climate change, alongside frequent extreme weather conditions affecting the adaptive capacity of African countries.[6]

Climate change litigation has emerged as an avenue to compel both state and non-state actors into meaningful climate action. Climate change litigation is "any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts."[7] This paper adopts a broader definition which refers to "any litigation motivated by a concern about climate change or climate change or climate change policy."[8] This definition ensured that litigation that is not primarily climate litigation, but which alludes to climate change and its impacts is also included. Climate change litigation against states serves to ensure that they are held to account for their domestic and international climate and climate-related commitments while that against non-state actors like fossil fuel companies targets their role in GHG emissions through their activities.[9]

Atlas of Mortality and Economic Losses from Weather, Climate and Water Extremes (1970–2019)' (World Meterological Organization 2021).

3 *Mat Hope*, 'Cyclones in Mozambique May Reveal Humanitarian Challenges of Responding to a New Climate Reality' (2019) 3 *The Lancet Planetary Health* 338, p. 339.

4 World Meteorological Organization (n 2), p. 22.

5 P*hilip K. Thornton and others*, 'Climate Variability and Vulnerability to Climate Change: A Review' (2014) 20 *Global Change Biology* 3313, p. 3318.

6 *Oli Brown, Anne Hammill and Robert McLeman*, 'Climate Change as the "New" Security Threat: Implications for Africa' (2007) 83 *International Affairs* 1141.

7 *David Markell and J.B. Ruhl*, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual' (2012) 64 *Florida Law Review* 15, p. 27.

8 Ibid., p. 26.

9 *Charles Beauregard and others*, 'Climate Justice and Rights-Based Litigation in a Post-Paris World' (2021) 21 *Climate Policy* 652; *Joyeeta Gupta*, 'Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change' (2007) 16 *Review of European Community & International Environmental Law* 76; *Ryan Gunderson and Claiton Fyock*, 'The Political Economy of Climate Change Litigation: Is There a Point to Suing Fossil Fuel Companies?' [2021] *New Political Economy* 1 https://doi.org/10.1080/13563467.2021.1967911 (accessed 24 August 2021).

The scholarship on court cases on climate change covers individual cases[10] and compares cases in different jurisdictions[11] but most papers focus on countries in the Global North[12] with few looking at specific cases in the Global South countries in Nigeria[13], South Africa[14], Kenya[15], and Uganda.[16] This paper builds on that scholarship by appraising developments in selected concluded and pending existing litigation. It covers the following question: What is the impact of existing climate litigation on shaping Africa's climate action and the role of courts in climate change jurisprudence on the continent? This paper reviews selected climate litigation in Africa based on court documents, judgements and literature that has discussed these cases, assessing them in terms of a) the parties; b) remedy requested; c) country and court; d) court's considerations and decision. Section 2 explains

10 J*aap Spier*, '"The 'Strongest' Climate Ruling Yet": The Dutch Supreme Court's Urgenda Judgment' (2020) 67 *Netherlands International Law Review* 319; *Victoria Adelmant*, *Philip Alston* and *Matthew Blainey*, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13 *Journal of Human Rights Practice* 1.

11 *Sam Adelman*, 'Climate Change Litigation in Africa: A Multi-Level Perspective' in *Ivano Alogna, Christine Bakker and Jean-Pierre Gauchi* (eds.), *Climate Change Litigation: Global Perspectives* (Leiden, Brill Nijhoff 2021); *Joana Setzer and Lisa Benjamin*, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9 *Transnational Environmental Law* 77; *Joana Setzer and Rebecca Byrnes*, 'Global Trends in Climate Change Litigation: 2020 Snapshot' (2020), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf (accessed 30 July 2021).

12 *Wolfgang Kahl and Marie-Christin Daebel*, 'Climate Change Litigation in Germany: An Overview of Politics, Legislation and Especially Jurisdiction Regarding Climate Protection and Climate Damages' (2019) 28 *European Energy and Environmental Law Review* 67; *Nicole Rogers*, 'If You Obey All The Rules You Miss All The Fun: Climate Change Litigation, Climate Change Activism and Lawfulness' (2015) 13 *New Zealand Journal of Public and International Law* 179; *Sabrina McCormick and others*, 'Strategies in and Outcomes of Climate Change Litigation in the United States' (2018) 8 *Nature Climate Change* 829.

13 *James R. May and Tiwajopelo Dayo*, 'Dignity and Environmental Justice in Nigeria: The Case of Gbemre v. Shell' (2019) 25 *Widener Law Review* 269.

14 J*ean-Claude N. Ashukem*, 'Setting the Scene for Climate Change Litigation in South Africa: Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others' (2017) 13 *Law, Environment and Development Journal* 35; *Marjoné van der Bank and Jaco Karsten*, 'Climate Change and South Africa: A Critical Analysis of the Earthlife Africa Johannesburg and Another v Minister of Energy and Others 65662/16 (2017) Case and the Drive for Concrete Climate Practices' (2020) 13 *Air, Soil and Water Research* 1.

15 *Geoffrey Omedo, Kariuki Muigua and Richard Mulva*, 'Financing Environmental Management in Kenya's Extractive Industry: The Place of the Polluter Pays Principle' (2019) 16 *Law, Environment and Development Journal* 1.

16 *Joe Oloka-Onyango*, 'Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View' (2015) 47 *George Washington International Law Review* 763; *Louis Kotzé and Anél Du Plessis*, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent.' (2019) 50 *University of Oregon's Journal of Environmental Law and Litigation* 615; *K. Bouwer and T. Field*, 'Editorial: The Emergence of Climate Litigation in Africa' (2021) 15 *Carbon & Climate Law Review* 123.

the cases, section 3 analyses them, section 4 analyses broader issues on Africa's climate litigation, followed by a conclusion in section 5.

B. Climate Litigation in Africa

I. The state of Africa's climate litigation

The rising trend of climate litigation has been aided by growing scholarly knowledge of the problem in the assessments of the Intergovernmental Panel on Climate Change (IPCC), the urgency of the problem, the way it affects human rights and by 'improvements in attribution science' that make it possible to determine anthropogenic influence on extreme weather events.[17] For instance, the IPCC notes the unprecedented rate of warming of the climate in at least the last 2000 years as a result of human influence which has also impacted weather and climate extremes like heatwaves, heavy precipitation, droughts and tropical cyclones in every region the world over.[18] In Africa's context, the IPCC expresses high confidence that "at 1.5°C global warming, heavy precipitation and associated flooding are projected to intensify and be more frequent in most regions in Africa and Asia".[19]

Domestic courts worldwide have adjudicated climate change cases through a human rights approach in urging ambitious action to reduce GHG emissions.[20] Climate cases had as of July 2021 reached over 1,800 up from about 1,650 as on November 2020 and 1,444 in February 2020, accounting for six continents and at least 36 countries, besides litigation before regional or international courts or commissions.[21] As at March 2022, these climate cases stand at 2,310 out of which the United States (US) accounts for 1703 cases, and the rest of the world 607 cases.[22] Africa has 14 cases in Kenya (1), Nigeria (1), Uganda (2), South Africa (9) and Uganda and Tanzania (1 joint case).[23] A chronological order following the year of filing is adopted for the cases considered with selection based on national and sub-regional representation, variety of actors and the court determining the case.

17 *Sophie Marjanac, Lindene Patton and James Thornton*, 'Acts of God, Human Infuence and Litigation' (2017) 10 *Nature Geoscience* 616, p. 618.

18 IPCC, 'Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, ' (2021). Cambridge University Press, pp. 6, 8.

19 Ibid., p. 24.

20 Setzer and Byrnes (n 12), p. 14.

21 *Elisa de Wit and Sonali Seneviratne*, 'Climate Change Litigation Update (December 2020)' (2020) https://www.nortonrosefulbright.com/en/knowledge/publications/0c9b154a/climate-change-litigation-update (accessed 3 March 2021).

22 'Climate Change Litigation Databases - Sabin Center for Climate Change Law' http://climatecasechart.com/climate-change-litigation/ (accessed 16 March 2022).

23 Ibid.

II. Africa and climate change: selected concluded litigation

The African continent is still lagging behind other Global South jurisdictions in terms of climate litigation cases and spread. For instance, Latin America has 51 climate litigation cases broken down as follows: Brazil (17), Argentina (10), Mexico (12), Colombia (7), Chile (3), Ecuador (1) and Peru (1).[24] South Africa's climate litigation progress has been aided by its litigation landscape favourable for public interest litigation in the form of: an independent judiciary; constitutional supremacy with all rights justiciable; vertical and horizontal application of the Constitution with obligations to the State as well as natural and legal persons; purposive interpretation of laws in courts taking into account the values of open and democratic society on the basis of human dignity, equality, and freedom; broad standing provisions that allow anyone acting in their own interest or on behalf of another person where there is an alleged constitutional right infringement or threat to; and favourable costs regime for constitutional matters that do not seek to punish an applicant who has lost against the state with each party to bear its own costs.[25] This landscape is complemented by rising public awareness including that of government departments at national, provincial and local levels in developing climate change strategies.[26]

In this section, we consider 6 cases as being representative of all countries in Africa with climate change litigation (Kenya, Nigeria, South Africa, Tanzania and Uganda) and as pointed out[27], South Africa has the most cases with the Sabin Center for Climate Change Litigation putting the number at nine all in the High Court.[28]

2005: Jonah Gbemre v. Shell Petroleum Development Company Nigeria Limited and Others (*Nigeria*)[29]

On July 29, 2005, the applicants Jonah Gbemre (for himself and in a representative capacity of other members, individuals and residents of the Iwherekan Community in Delta State of Nigeria) filed an application against the respondents: Shell Petroleum Development Company Limited (first respondent), Nigerian Petroleum Corporation (second respondent) (both engaged in the exploration and production of crude oil and other petroleum products

24 Ibid.

25 *Tracy-Lynn Field*, 'Climate Change Litigation in South Africa: Firmly Out of the Starting Blocks', *Climate Change Litigation: Global Perspectives* (Brill | Nijhoff 2021)., pp. 179–182.

26 *G. Ziervogel and others*, 'Climate Change Impacts and Adaptation in South Africa' (2014) 5 *WIREs Clim Change* 605, pp. 606, 611.

27 Section B.I. (the state of Africa's climate change litigation).

28 Sabin Center for Climate Change Law, 'South Africa - Climate Change Litigation' http://climatecasechart.com/climate-change-litigation/non-us-jurisdiction/south-africa/ (accessed 2 March 2022).

29 *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* [2005] AHRLR 151 (hereinafter '*Gbemre v Shell)*.

in Nigeria)[30] and the Attorney General of the Federation (third respondent). The applicants sought for the enforcement or securing the enforcement of their fundamental rights to life and dignity of human persons under the Constitution[31] and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act[32] of Nigeria's laws[33] as these were being violated by the respondents' continued gas flaring in the course of their exploration and production activities and also affected living a healthy life in a healthy environment.[34] Nigeria's Constitution does not provide for a right to a clean and healthy environment but contains a section on environmental objectives mandating the State to "protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria."[35] In this, the Constitution stops short of including a right to a clean and healthy environment as one of the human rights under chapter four for which one can seek redress before the High Court.[36] In the climate change context, it was argued that the country's gas flaring laws were inconsistent with the right to life and the dignity of humans and had given rise to poisoning and polluting the environment through the emission of Carbon dioxide (CO_2) which together with Methane, contributed to climate change that causes warming of the environment and thereby affects food and water supplies, although no evidence was provided on the extent of the contribution.[37]

The applicants asked for among others declarations that: the constitutionally guaranteed fundamental rights to life and dignity of humans included the right to a clean poison-free, pollution-free and healthy environment[38] which continued to be violated by the continued gas flaring in the course of exploration and production activities[39]; the provisions of the Associated Gas Re-injection Act[40] allowing for continued flaring was inconsistent with the applicants' right to life and dignity under the Constitution and the African Charter on Human Rights and that these provisions were thus unconstitutional, null and void[41]. Applicant sought an order of perpetual injunction restraining' the respondents from further flaring gas in the applicant's community.[42]

30 Ibid., para. 4.1.

31 Constitution of the Federal Republic of Nigeria, 1999., sections 33 and 34.

32 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria (LFN) 2004., articles 4, 16 and 24.

33 *Gbemre v Shell* (n 30)., para. 1.

34 Ibid., para. 3.c.

35 Constitution of the Federal Republic of Nigeria, 1999., section 20.

36 Ibid., section 46(1).

37 *Gbemre v Shell* (n 30), paras. 2.4, 4.7.

38 Ibid., para. 2.1.

39 Ibid., para. 2.2.

40 Associated Gas Re-injection Act, Cap A25, LFN 2004.

41 *Gbemre v Shell* (n 30)., para. 2.4.

42 Ibid., paras. 2.1 – 2.5.

The Court decided among others that the respondents' continued gas flaring in the applicant's community constituted a gross violation of their fundamental right to life and dignity as enshrined in Nigeria's Constitution and that these constitutionally guaranteed rights included the right to a clean, poison-free, pollution-free healthy environment.[43] This has been construed as holding that "climate change, like other environmental issues, may implicate human rights".[44] The Court did not specifically make any comment on climate change but it can be argued that in recognizing that the foregoing rights included a right to a clean and healthy environment and ordering the stopping of any further gas flaring in the applicant's community was an acknowledgment of their assertion that the activity contributed to adverse climate change through the emission of CO_2 and methane leading to the warming of the environment.[45] However, stopping gas flaring activities in one community while these can continue elsewhere contradicts the acknowledgment of the climate change argument because climate change effects have no geographical limitations and so the Court's decision can be construed as striking a balance between the protection of fundamental human rights and commercial interests.[46] The Attorney General was ordered to facilitate the speedy amendment of the Associated Gas Re-Injection Act and the Regulations[47] declared null and void, so that it conformed to the Constitution and especially the rights to life and dignity of human persons.[48] Gas flaring happens during exploration and production activities; hence they are protected under the foregoing law and the Courts are limited to ensuring that the provisions of gas flaring laws are consistent with the Constitution in not violating the fundamental human rights enshrined in it, even though the aim should be to end the practice.

2016: Save Lamu and Others v National Environmental Management Authority and Another (*Kenya*)[49]

On November 7, 2016, the appellants, Save Lamu (a community based organisation representing the interests of and welfare of Lamu) and five individuals filed an appeal before the Kenya National Environmental Tribunal ("Tribunal") at Nairobi against the National Environmental Management Authority (NEMA) and Amu Power Company Limited (Amu) – collectively "the respondents", in which they challenged NEMA's decision to issue an

43 Ibid., paras. 5.2 – 5.4.

44 S*ara C. Aminzadeh*, 'A Moral Imperative: The Human Rights Implications of Climate Change' (2007) 30 *Hastings International and Comparative Law Review* 231.

45 *Gbemre v Shell* (n 30)., para. 6.5.

46 Ibid., para. 4.5.

47 Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, S.I. 43 of 1984 LFN..

48 *Gbemre v Shell* (n 30)., para. 6.6.

49 *Save Lamu and Others v National Environmental Management Authority and Amu Power Co Ltd*., Tribunal Appeal Net 196 of 2016 [2019] eKLR (National Environmental Tribunal) (Decision of 26 June 2019) (Kenya), hereinafter '*Save Lamu v NEMA*'.

Environmental Impact Assessment (EIA) licence to Amu for construction of an intended 1050 MW coal-fired power plant in Lamu county.[50]

The appellants' arguments included: a poor analysis of alternatives and economic justification, and a failure to identify and analyse alternatives to the proposed project; insufficient public participation during the scoping process; an insufficient EIA study report with misrepresentations, inconsistencies and omissions underlay the decision; and that the project's impact on air quality with adverse effects on human health and biodiversity were unaccounted for.[51] Not only was the project inconsistent with Kenya's low carbon development commitments on account of its contribution to climate change, but the EIA licence lacked conditions for putting in place mitigation measures to address coal pollution resulting from coal handling and storage.[52] The appellants asked for setting aside the decision granting the EIA licence for the project and for an order for a fresh EIA study based on specific and current information involving all stakeholders.[53]

The Tribunal dismissed as incorrect the common perception (The Tribunal does not speak to the 'why' the perception exists but one gathers that whatever future development Kenya envisaged, it could not be tied to coal on account of its environmental impacts.) that coal power plant projects would always be rejected in Kenya as part of its development agenda, pointing to the country's changes in the energy law in the new 2019 Energy Act which provided for licensing requirements for coal projects.[54] Hence the Tribunal saw this and any other future challenges to coal projects as limited to compliance with the existing laws on licensing and not whether these projects should go ahead. It decided that the public participation undertaken prior to the grant of the EIA licence for the project was improper and ineffective as it contravened the law by disregarding views from the public and advice from experts on the project without justification for considering them.[55] The Tribunal further held that climate change issues were a pertinent component in such projects and required respondents to give it due consideration and comply with relevant laws including the 2016 Climate Change Act (CCA). It added that the omission to consider relevant provisions of the CCA was significant with the court applying the precautionary principle in stating that a lack of clarity on the consequences of certain aspects of the project made the provisions on climate change within the report incomplete and inadequate.[56]

50 Ibid., paras. 1–3.
51 Ibid., para. 4 a.-f.
52 Ibid., paras. 4 g., h.
53 Ibid., para. 3. a., b.
54 Ibid., para. 17.
55 Ibid., para. 65.
56 Ibid., paras. 138–139.

The Tribunal set aside the decision to issue the EIA licence for the project and further ordered for a fresh EIA study in accordance with the requirements of the EIA Regulations[57] on EIA studies to consider the CCA.[58] NEMA was directed to comply with regulations 17 and 21 of the EIA Regulations on public participation and submission of comments respectively. The Tribunal noted that extraordinary measures were necessary to ensure sufficient public access to information on a project it considered the first of its kind in Kenya and the East African region.[59] Following the decision, Kenya at the request of World Heritage Committee reported that all activities related to the proposed coal plant had been put on hold.[60]

2017: Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others (*South Africa*)[61]

Heard in March 2017, the applicant, a non-profit organisation majoring in mobilising civil society on environmental issues and with legal standing under South Africa's National Environment Management Act (NEMA)[62] applied for a review against the actions of respondents: Minister of Environmental Affairs (first respondent); the Chief Director: Integrated Environmental Authorisations, Department of Environmental Affairs (second respondent); the Director: Appeals and Legal Review, Department of Environmental Affairs (third respondent); Thabametsi Power Project (PTY) Ltd (fourth respondent); Thabametsi Power Company (PTY) Ltd (fifth respondent). The actions concerned the government's decision to build a 1200MW coal-fired power station in Limpopo Province to be built by the fifth respondent whose intended operation would be until at least 2061.[63] The Applicant argued that the climate change impacts of a proposed coal-fired power station were relevant factors incompletely investigated or considered for the third respondent to make a decision granting environmental authorisation, thereby contravening the NEMA.[64] Further, the Minister in upholding the foregoing decision by her administrative appeal decision of 7 March 2016, in the absence of a comprehensively assessed climate change impact assessment

57 Environmental (Impact Assessment and Audit) Regulations, 2003 [Revised 2012](Laws of Kenya).

58 *Save Lamu v NEMA* (n 50)., paras. 154–155.

59 Ibid., paras. 156–157.

60 Government of Kenya, 'State of Conservation Report 2020 Decision: 43 COM 7B.107' (2020) <https://afrique-orientale-australe.cirad.fr/en/afora-news/an-ambitious-partnership-for-kenyan-mangrove-forests> accessed 16 March 2022., paras 7 b) and 8.

61 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (2017) 2 All SA 519 (hereinafter '*Thabametsi'*.

62 NEMA No. 107 of 1998 (As amended by Act No. 62 of 2008) (South Africa)., sections 24(4)(v)(a) and 32(1) allow for review applications by an interested and affected party in its own interest, public interest, and environmental protection interest.

63 *Thabametsi* (n 62)., paras. 1–3.

64 Ibid., paras. 5,7; NEMA, section 24O (1).

(CCIA) acted unlawfully and undermined the purpose of the CCIA and the grant without a CCIA report meant that relevant considerations were overlooked.[65] CCIAs are provided for under section 24O(1)(b) of NEMA requiring the taking into account among others of GHG emissions and climate change impacts in a determination for the grant of an environmental authorisation, and the Environmental Impact Assessment Regulations 2010 on environmental impact assessment reports and their contents.[66] The applicant asked for the remission of the matter to the third respondent for reconsideration with a fresh decision on environmental authorisation after the completion of the final CCIA report.[67]

The Court held that the legislative and policy scheme and framework supported the conclusion that CCIA and mitigating measures were relevant factors in the environmental authorisation process whose consideration was best accomplished through a professionally researched climate change report, and that even in the absence of an express legal provision in the statute, there was a legal duty requiring consideration of climate change as a relevant factor in a CCIA.[68] Therefore, climate change impacts of coal-fired power stations were pertinent factors for consideration in terms of section 24O (especially section 24O(1)) of NEMA before granting environmental authorisation.[69] Similar to *Save Lamu v NEMA* the focus here is on compliance with existing law in ascertaining if all relevant considerations have been addressed prior to the grant of an environmental authorisation.

65 Ibid., paras. 7–9, 87.

66 Environmental Impact Assessment Regulations, GNR. 543, GC 33306, 18 June 2010 (South Africa)., Regulation 31(2).

67 *Thabametsi* (n 62)., para. 11.

68 Ibid., paras. 88, 91.

69 Ibid., section 24O(1) provides that in considering an application for an environmental authorisation, the decision makers (Minister, Minister of Minerals and Energy, MEC or competent authority) "must – (a) comply with this Act; (b) take into account all relevant factors, which may include – (i) any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused: (ii) measures that may be taken – (aa) to protect the environment from harm or as a result of the activity which is the subject of the application; and (bb) to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation; (iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted; (iv) where appropriate, any feasible and reasonable alternatives to the activity which is subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment; (v) any information and maps compiled in terms of section 24(3), including any prescribed environmental management frame-works, to the extent that such information, maps and frame-works are relevant to the application; (vii) information contained in the application form, reports, comments, representations and other documents submitted in terms of this Act to the Minister, Minster of Minerals and Energy, MEC or competent authority in connection with the application; (vii) any comments received from organs of state that jurisdiction over any aspect of the activity which is the subject of the application; and (vii) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application; and (c) take into account the comments of any organ of state charged with the administration of any law which relates to the activity in question."

The Court agreed that granting the authorisation without proper prior consideration of the climate change impacts of the coal-fired power station for the area and country as a whole was prejudicial. In fashioning a just and equitable remedy aimed at rectifying the administrative action to the extent of its inconsistency with the law, the Court concluded that the most appropriate remedy was setting aside the Minister's ruling on the fourth ground of appeal (which alleged that the Chief Director had failed to take into account the state's international obligations to mitigate and take positive steps against climate change) and remitting the matter of climate change impacts for reconsideration on the basis of the new evidence in the Climate Change report.[70] The appeal process and not the initial authorisation process had to be reconstituted with the environmental authorisation suspended pending the finalisation of the appeal.[71] The first respondent was ordered to reconsider the applicant's fourth ground of appeal in terms of section 43 NEMA, and specifically consideration of a CCIA report and comments on the same from interested and affected parties.[72]

2020: The City of Cape Town v National Energy Regulator of South Africa (NERSA) et al. (*South Africa*)[73]

This application by the City of Cape Town (Cape Town) as a local government against NERSA and Minister of Energy (MoE) sought an order declaring that a ministerial determination[74] was not a requirement for an independent power producer (IPP) to establish a new power plant and supply electricity to Cape Town.[75] It alternatively sought for the declaration of s 34 of the Electricity Regulations Act 4 of 2006 on the power of the Minister in relation to licensing new power plants unconstitutional and invalid in impermissibly encroaching on Cape Town's constitutional powers and functions as a local government (if the ministerial determination were to be considered by Court necessary).[76] Purchasing more renewable energy from IPPs would diversify its sources of electricity thereby promoting its security of supply and would be more environmentally friendly and cost effective as opposed to purchasing electricity from Eskom (a state owned company generating

70 Ibid., paras. 119, 121 and 53.

71 Ibid.

72 Ibid., para. 126; Section 43(1) NEMA provides that a person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister under NEMA or a specific environmental management Act; Section 43(6) NEMA provides that after considering such an appeal the Minister may confirm, set aside or vary the decision or may make any other appropriate decision.

73 *City of Cape Town v National Energy Regulator of South Africa et al. (51765/17)* [2020] ZAGPPHC 800, (hereinafter '*Cape Town v NERSA'*).

74 Ibid., para. 1 and Electricity Regulations Act 4 of 2006, s 34 (requires seeking consent from the MoE for such activity of securing electricity is concerned).

75 Ibid., para. 3.

76 Ibid.

approximately 95 percent and 45 percent of electricity used in South Africa and Africa respectively)[77] which represented 99.3 per cent of its electricity.[78]

While this application points to Cape Town's efforts to secure more renewable energy and thereby have less reliance on fossil fuel energy, it also highlights the need for the exhaustion of all available remedies before approaching the court, especially in disputes between organs of State (in this case Cape Town and the Minister).[79] The Court held that the dispute at hand was inter-governmental requiring the parties to cooperate to resolve it before turning to the court in accordance with the Constitution, failing which, any of the parties had the discretion to apply to Court for determination.[80]

III. Selected ongoing climate litigation

2012: Mbabazi et al. v Attorney General et al. (*Uganda*)[81]

In Uganda's first climate change case, the plaintiffs including four minors are suing through their next friend Kenneth Kakuru (not a party to the suit but an agent of court protecting the rights of the incompetent minors) on "their own behalf and on behalf of all children of Uganda born and unborn and in the public interest".[82] The plaintiffs allude to scientific reports warning of grave conditions on our planet and on future generations to come if climate change is not checked.[83] Failure to take urgent action they contend would affect present and future generations with the escalation of present climate patterns including prolonged droughts, floods, hurricanes and crop losses.[84] The vulnerability of poor countries like Uganda to climate change means that government inaction was unsustainable and causing harm and suffering to the Ugandan people now and well into the future through no fault of their own and that this inaction was responsible for the loss of life, property, livelihoods and social and political discontent.[85]

The plaintiffs improvised in using the public trust doctrine as it relates to natural resources that the government holds and maintains these on behalf of its citizens under

77 'Eskom - Department of Public Enterprises (DPE)', https://dpe.gov.za/state-owned-companies/eskom/ (accessed 11 June 2022)..

78 *Cape Town v NERSA* (n 73). Para. 1.

79 Ibid., para. 23.

80 Ibid., paras. 29, 44.3; s 41(3) Constitution of Republic of South Africa obligates State organs to make every reasonable effort to settle intergovernmental disputes by means of mechanisms and procedures provided for and for the exhaustion of all other remedies before approaching court to resolve the dispute.

81 *Mbabazi et al v Attorney General et al*., High Court Civil Suit No. 283 of 2012 (Amended Plaint filed August 28, 2015) (hereinafter '*Mbabazi v AG'*).

82 Ibid., para. 5.

83 Ibid., para. 6 a) and b).

84 Ibid., para. 6 c).

85 Ibid., paras. 6 g), 9 and 10.

the 1995 Constitution. They argued that it imposed a duty on the government to ensure that the atmosphere was free from pollution for present and future generations for which a declaration was sought.[86] They also asked for orders directing the defendants to: implement measures for the reduction of climate change impacts;[87] conduct an updated carbon accounting and to develop a climate change mitigation plan;[88] take measures to protect the plaintiffs and children of Uganda from climate change effects;[89] and the implementation of international climate change conventions, treaties, and protocols.[90] The Plaintiffs sought a declaration that the defendants' failure to prevent or curtail atmospheric pollution constituted a violation of the right to a clean and healthy environment enshrined in the 1995 Constitution (article 39)[91] and for an order directing the government to compensate victims of climate change and measures undertaken to prevent reoccurrence.[92]

This case is still pending hearing and it requires further amendment to accommodate Uganda's legal and policy developments relating to climate change. For instance, the case was filed partly under provisions of the then National Environment Act (UNEA)[93] that has since been replaced by the UNEA 2019[94] which affects the provisions under which the suit is brought[95]. Of great significance is the enactment of the National Climate Change Act 2021 (UNCCA) which gives the Climate Change Convention, the Kyoto Protocol and the Paris Agreement force of law in Uganda in addition to providing for climate change response measures.[96] The country's National Climate Change Policy 2015 (UNCCP 2015) under the theme 'transformation through climate change mitigation and adaptation' acknowledges the climate change problem and how addressing it at the earliest is key in propelling sustainable economic and social development with the aim of ensuring that all stakeholders address climate change impacts and their causes through appropriate measures, while promoting sustainable development and a green economy.[97] As to whether these developments go far enough in the context of the seriousness of climate change is left to the determination of the Court.

86 Ibid., para. 13 a), b), d), f) and g), prayer 5).

87 Ibid., prayer 1).

88 Ibid., prayer 2).

89 Ibid., prayer 3).

90 Ibid., prayer 4).

91 Ibid., prayer 6).

92 Ibid., prayer 7).

93 Chapter 153, Laws of Uganda 2000.

94 The National Environment Act, (Act 5 of 2019).

95 Ibid., section 2 (now 5) on principles of environmental management, section 71 (now 134) on issuance of environmental restoration order by court, and section 106 (now 150 and 151) on Conventions and treaties in the environment.

96 National Climate Change Act 2021., section 4 and Part II (climate change response measures).

97 Government of Uganda, 'Uganda National Climate Change Policy' (2015)., pp. vi, 13.

2020: Center for Food and Adequate Living Rights Limited (CEFROHT) et al. v Attorney General of the Republic of Tanzania et al. (*Tanzania and Uganda*)[98]

This regional case before the East African Court of Justice is important in the context of the discovery of commercially-viable oil deposits in Uganda's Albertine Graben region in 2006 and the implications for the local communities and the environment, and the general contribution to climate change.[99] The Governments of Tanzania and Uganda agreed to the construction of a 1443 km East African Crude Oil Pipeline (EACOP) to transport crude oil from Kabale in Uganda to Tanga in Tanzania and then onwards to the international market[100], and the case in general looks beyond the economic benefits and focuses on the project's negative implications on local habitats and biodiversity, the disruption of lives, livelihoods and culture of local people including displacement with a forecast made that "… environmental degradation and climate change is going to be inevitable in this region".[101] In the miscellaneous application, the applicants who are four NGOs incorporated under the respective national laws of Kenya, Tanzania and Uganda, member states of the East African Community which accords them standing under the Treaty for the Establishment of the East African Community (EAC Treaty),[102] are seeking for a temporary injunction stopping the construction of EACOP until the disposal of the main reference case, indirectly targeting Total E&P, a company which was tasked with constructing the pipeline.[103]

It is argued in the main Reference that the commissioning, signing and implementation by the respondents of the EACOP without adherence to the EAC law including the 2003 Treaty for the Sustainable Development of Lake Victoria Basin, 2006 Protocol on Environment and Natural Resources Management, 1992 Convention on Biological Diversity, 1992 Climate Change Convention, 1981 African Charter on Human and People's Rights and 1968 African Convention on Conservation of Natural Resources was "illegal, against environmental law protected internationally and regionally, against rule of law and good

98 *Center for Food and Adequate Living Rights Limited et al. v Attorney General of the Republic of Tanzania et al.,* Miscellaneous Application No 29 of 2020 (East African Court of Justice). ‚hereinafter '*EACOP Application'.*

99 *Tom Ogwang, Frank Vanclay and Arjan van den Assem*, 'Impacts of the Oil Boom on the Lives of People Living in the Albertine Graben Region of Uganda' (2018) 5 *Extractive Industries and Society* 98.

100 *Tom Ogwang and Frank Vanclay*, 'Cut-off and Forgotten?: Livelihood Disruption, Social Impacts and Food Insecurity Arising from the East African Crude Oil Pipeline' (2021) 74 *Energy Research and Social Science* 970, p. 973.

101 *Ogwang, Vanclay and van den Assem* (n 100), pp. 100-101.

102 EAC Treaty, article 30 allows for references to the Court by legal and natural persons resident in a partner state for determination on the legality of any Act, regulation, directive, decision or action of such state or institution of the EAC or action that is unlawful or an infringement on the EAC Treaty. Under article 27 EAC Treaty, the Court has jurisdiction over interpretation and application of the EAC Treaty but there is requirement for a protocol operationalising "such other original, appellate, human and other jurisdiction".

103 *EACOP Application* (n 99)., p. 2 (grounds 5, 7, 13, 14 and 16).

governance".[104] It seeks an order against Tanzania and Uganda to ensure that 'prior to any similar project' they conduct a climate change impact assessment (CCIA) and a human rights impacts assessment (HRIA) to gauge the impacts of such projects for the environment and the local populations; and a permanent injunction prohibiting the construction of the pipeline through protected spaces in Tanzania and Uganda.[105] Hearing the application commenced on March 2, 2022.[106]

This case is not seeking a stop to the construction of EACOP in the long run but rather a determination by the Court whether there were violations of EAC laws by the partner states falling within its mandate of ensuring that there is "adherence to the law in the interpretation and application of and compliance with this Treaty".[107] Should the court pronounce itself on making CCIA a requirement prior to approving such projects even in the absence of substantiation on the impacts of climate change in this case, the partner states and the Council are duty bound to take measures necessary for the implementation of the court's judgment.[108] Since the court's decisions take priority over those of national courts with regard to the interpretation and application of the EAC Treaty[109] an order for a CCIA would prevent a duplicity of suits and costs in national courts on a matter that concerns all partner states notwithstanding the absence of climate change laws besides contributing to climate change jurisprudence in the EAC by a top judicial body. The case also demonstrates a joining of hands for climate action with plaintiffs from different jurisdictions of the EAC – Center for Food and Adequate Living Rights Limited (Uganda), Africa Institute for Energy Governance Limited (Uganda), Natural Justice Kenya, and Center for Strategic Litigation (Tanzania) – an aspect () that might shape future litigation especially on projects of a transboundary nature.

C. Climate Litigation in Africa – An Analysis

We now analyse the above cases in terms of actors, geographical context, and substantive issues.

104 *Center for Food and Adequate Living Rights Limited et al. v Attorney General of the Republic of Tanzania et al.,* Reference No 39/2020 (East African Court of Justice)., para. 44 (hereinafter '*EACOP Reference'*).

105 Ibid., p. 17 (prayers vi and ix).

106 'Cause List- First Instance | East African Court of Justice', https://www.eacj.org/?page_id=1845 (accessed 2 March 2022)..

107 EAC Treaty, article 23(1).

108 Ibid., article 38(3).

109 *Victor Lando,* 'The Domestic Impact of the Decisions of the East African Court of Justice' (2018) 18 *African Human Rights Law Journal* 463, p. 468.

I. Actors

Four (*Save Lamu v NEMA, Mbabazi v AG, EACOP Reference, Thabametsi)* of the six cases considered involve NGOs as applicants teaming up with individuals to challenge the granting of environmental authorisation to projects without considering their impacts on climate change and the enjoyment of human rights. *Gbemre v Shell* is the lone case in which an individual is suing on his own behalf and in a representative capacity of a community and *Cape Town v NERSA* the only case with an organ of state as an applicant. The defendants/respondents are: private energy companies (e.g. Shell Petroleum Development Company Nigeria Ltd and Nigerian National Petroleum Corporation in *Gbemre v Shell,* Amu Power Company Limited in *Save Lamu v NEMA,* Thabametsi Power Project Ltd and Thabametsi Power Company Ltd in *Thabametsi,* National Energy Regulator of South Africa in *Cape Town v NERSA)*; and public entities (e.g. in Tanzania and Uganda in *EACOP Reference,* Minister of Energy in *Cape Town v NERSA*, Nigeria in *Gbemre v Shell,* NEMA in *Save Lamu v NEMA*, Uganda and NEMA in *Mbabazi v AG,* Minister of Environmental Affairs, Department of Environmental Affairs in *Thabametsi;* Regional bodies – EAC (Secretary General of the East African Community) in *EACOP Reference and Application*. The choice of defendants is an indication of where the responsibility for climate action lies – governments, as these grant environmental authorisations and have authority to spearhead climate action, while private companies and individuals conduct projects with likely negative effects on climate change.

NGOs are playing a vital role in climate litigation on behalf of communities or groups of individuals that are at high risk because of government inaction or because projects are being implemented without fully investigating the effect on the environment and climate. Their role is no longer seen as being confined to public campaigns and advocating for changing laws and introducing policies that would result in climate protection but also lending support to climate litigation against states and corporations demanding for adequate climate protection.[110] Environmental NGOs, it can be argued, have a better understanding of climate change and environmental concerns through research and their on-the-ground experiences in addition to the ability to mobilize funds making their involvement in climate change litigation vital as it also means that they are better placed to shore up the financial burden in the event costs are awarded in a lost case.

II. The law and locus standi for climate change

Public interest litigation has been vital in the adjudication of human rights and environmental (including climate change) violation claims before courts in seeking redress intended for a broader public good and having the potential of affecting the litigant and a larger

110 *R. Verheyen and S. Pabsch*, 'The Role of Non-Governmental Organizations for Climate Change Litigation', in W. Karl and M. Weller (eds), *Climate Change Litigation : a Handbook* (Beck ; Oxford : Hart ; Baden-Baden, Germany : Nomos 2021), p. 510, para. 7.

cross-section of society.[111] In South Africa, it is supported by the Constitution which allows for 'certain categories of persons to approach' the court to enforce rights contained in the Bill of Rights which includes the right to an environment which is not harmful to a person's health or to their well-being.[112] Uganda's Constitution allows for 'any person or organization' to institute an action for human rights violations of another person or group.[113] The constitutional provisions are now supplemented with the UNEA which focuses on a right to a decent environment and a recourse to legal action where it is threated through an act or omission, with the law accommodating climate change as an emerging environmental issue[114]. The UNCCA which is focused on climate change provides litigation on climate change by allowing 'a person' to apply to the High Court for legal redress against the government, an individual or a private entity 'whose action or omission threatens or is likely to threaten efforts towards adaptation to or mitigation of climate change."[115] This law creates a specific climate change litigation avenue and thereby separates climate change from human rights in terms of procedure but it can be argued that this does not preclude litigation instituted on the basis of fundamental human rights and freedoms indicating how these are affected by activities contributing to climate change. A test case under the UCCA will give a sense of how courts might deal with subsequent climate change litigation but suffice it to say that a litigant can invoke a combination of the Constitution, UNEMA and UCCA in one go notwithstanding the climate change specific litigation provision in the latter legislation.

Save Lamu v NEMA in Kenya before the National Environmental Tribunal was brought under the Environmental Management and Coordination Act (EMCA) which deals with appeals in matters relating to EIA licences, and was used to point out the need for climate change considerations for coal fired power projects.[116] Alongside the EMCA is the Climate Change Act (KCCA) which accommodates climate change litigation in providing for enforcement of rights relating to climate change before the Environment and Land Court.[117] The KCCA reflects the constitutional provision on the enforcement of environmental rights which includes a right to a clean and healthy environment and it can be argued is a way of acknowledging the impact of climate change on the enjoyment of environmental rights, and

111 *Oloka-Onyango* (n 17), p. 766.

112 *T. Murombo and H. Valentine*, 'Slapp Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa' (2011) 27 *South African Journal on Human Rights* 82., pp. 87–8; section 38, Constitution of the Republic of South Africa; section 24 NEMA (South Africa).

113 Constitution of the Republic of Uganda, 1995., article 50(2) and Chapter 4 (Protection and promotion of fundamental and other human rights and freedoms).

114 The National Environment Act, No. 5 of 2019. (Laws of Uganda), section 3.

115 National Climate Change Act 2021., section 26(1).

116 'Environmental Management and Co-Ordination Act, No. 8 of 1999'. Section 129; *Save Lamu v NEMA* (n. 50), para. 138.

117 Climate Change Act, No. 11 of 2016., No. 11 of 2016 (Laws of Kenya), section 23.

as way of encouraging climate change litigation, an applicant 'does not have to demonstrate that a person has incurred loss or suffered injury'.[118]

In Tanzania where an environmental right is threatened, legal redress can be sought before a court, tribunal or person with jurisdiction and it can be argued that climate change litigation is accommodated under this provision.[119] Nigeria enacted a Climate Change Act (NCCA) which provides for litigation regarding climate change or environmental matters before a competent court which may give redress in the form of preventing, stopping or discontinuing the environmentally harmful act, compelling any public official to take action against the harmful act, and the compensation of victims directly affected by the harmful acts.[120] These developments address concerns about absence of laws with clear procedures for climate claims in Africa and its impact on legal redress for infringed rights in the context of climate change.[121]

III. Arguments, remedies and court decisions

Arguments are clustered around: activities by fossil fuel companies violating fundamental rights to life and dignity of human persons (*Gbemre v Shell)*; inaction to address climate change and the impact for the planet and future generations (*Mbabazi v AG)*; granting of Eas for coal-fired power plants in the absence of proper public participation and contribution to climate change (*Save Lamu v NEMA)*; improper investigation of climate change impacts for proposed coal-fired power stations (*Thabametsi)*; and decisions to construct fossil fuel projects without due regard for international environmental law and human rights law (*EACOP Reference*). *Gbemre, Mbabazi* and *EACOP* cases have a human rights component on whose basis climate change and its impacts are introduced to make the point that fossil fuel activities permitted by governments violate human rights that are protected under existing laws. A human rights approach in the climate change discourse puts a 'human face' on it by focusing on the 'individual victims of climate change…' and urges for global climate policies for the protection of every person's human rights so that 'no one is required to suffer serious harms so that others can benefit.'[122] Human rights law in the context of climate change are a 'gap-filler to provide remedies where other areas of the law do not', with cases involving citizens against the governments, citizens against corporations and government against government, all aimed at ensuring that governments facilitate the enjoyment of human rights through undertaking measures aimed at forestalling

118 'Constitution of Kenya, 2010' (2010)., articles 70 and 42; section 23(3) KCCA.

119 'Environment Management Act, No. 20 of 2004'., sections 4 and 5.

120 'Climate Change Act, 2021' (Laws of Nigeria), section 34(2).

121 *J. Setzer and L. Benjamin*, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9 *Transnational Environmental Law* 77, p. 84.

122 *Derek Bell*, 'Climate Change and Human Rights' (2013) 4 *Wiley Interdisciplinary Reviews: Climate Change* 159.

the impacts of climate change on the exercise of these rights[123] The arguments appear to be related to mitigation rather than adaptation like *Thabametsi* concerning the material deficiencies in the climate change impact assessment (CCIR) report such as the inadequacy of the mitigation measures to deal with the Thabametsi GHG emissions.[124] Failure to assess the social cost of Thabametsi's GHG emissions, the insufficient assessment of the risk of water scarcity, insufficient assessment of the impacts of the power station on the surrounding area's climate resilience were the other material deficiencies overlooked in the CCIR.[125] As a dry area and one that will become drier on account of climate change, it can be argued that climate resilience in this context might have an adaptation component with the impact assessments not (only) about a reduction of GHG emissions, but also about not undermining the resilience of the area when climate change impacts manifest.

The litigation has sought several remedies as pointed out in sections 2.2. and 2.3. but suffice it to say that in *Mbabazi v AG* a compensation order for the victims of climate change is requested on the basis of government's climate change inaction to past events in Uganda such as storms, heavy rains, hailstorms, drought and landslides, all of which have resulted in loss of life and property, injuries and displacements.[126] In seeking compensatory damages, there is need to establish a causal link between the actions of the defendant and the plaintiff's injury: for climate change litigation this can be done through attribution science evidence, even though it is noted that there is 'limited precedent for courts to base findings of causation on such evidence, partly due to its relative novelty'.[127] Considering that not all climate-related perils are influenced by climate change, it is of much importance to adduce 'evidence specific to the impact for which a causal link is alleged.'[128] It remains to be seen how the court will deal with this compensation request considering that climate change litigation may be instituted 'notwithstanding' that a person doing so 'cannot prove' that the act or omission complained of has caused or is likely to cause personal harm or injury to that person or any other person.[129] The foregoing provision accommodates potential litigants by widening the scope of standing but it should not be understood as taking away the litigant's onus to prove.[130] Compensation for loss suffered or damage resulting from an act or omission needs proof as a basis for court granting the order and to prevent abuse of the court process with baseless claims. Compensation is one of

123 *Annalisa Savaresi and Juan Auz*, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9 *Climate Law* 244, pp. 245, 247.

124 *Thabametsi* (n 62)., Founding Affidavit of Phillipine Lekalakala, para. 22.2.

125 *Thabametsi* (n 62).

126 *Mbabazi v AG* (n 82)., para. 11.

127 *Rupert F. Stuart-Smith and others*, 'Filling the Evidentiary Gap in Climate Litigation' (2021) 11 *Nature Climate Change* 651..

128 Ibid., p. 652.

129 National Climate Change Act 2021., section 26(2)(c), (3).

130 Evidence Act, sections 101 and 102 (Chapter 6, Laws of Uganda 2000).

several orders and declarations that the plaintiffs are requesting for as noted in 2.3 including defendants undertaking measures to reduce the impacts of climate change, implementing international conventions, treaties and protocols on climate change. It should be added that Uganda as a small polluter and whose GHG emissions contribution to climate change impacts are relatively small would also affect the compensation claim in terms of the award but for the UNCCA which does not concern itself with how much Uganda's pollution has contributed to climate change impacts includes compensation as one of the remedies court can grant.[131] Kenya has a corresponding provision on compensation, which too does not require an applicant to demonstrate that a person has incurred loss or suffered injury.[132]

In balancing the socio-economic rights and environmental human rights violations, courts are deciding that climate change mitigation and public participation are pertinent factors to be considered in EIA studies prior to the granting of environmental authorisation for fossil fuel projects, failing which renders EIA reports incomplete and inadequate.[133] However, they acknowledge as *Thabametsi* (and *Save* Lamu) that coal-fired power stations formed an essential feature of the country's medium-term electricity generation plans on account of existing government policy and that climate change action takes place in a context where poverty alleviation is prioritised.[134] Fossil fuel activities like gas flaring violate the fundamental rights to life and dignity of persons besides contributing to the enhancement of climate change but stopping such activities in one location does not preclude them from happening in other locations unless all policies and repealed laws on such activities are pulled back.[135] Courts are ordering for: the halting of specific activities like gas flaring in *Gbemre v Shell* for violation of fundamental rights under the Constitution; and setting aside EIA licences for coal-power energy projects (while these orders are far-reaching in terms of slowing down new energy projects and the financial implications involved for the proprietors, as long as the fossil fuels are lawful on account of existing laws, setting aside orders would serve a limited purpose as these projects would be permitted to go ahead provided that they meet all the legal requisites, including plans in place to limit a project's climate change impacts) and the consideration by regulatory authorities of climate change impact assessment reports and laws prior to the grant of such environmental authorisation like in *Save Lamu v NEMA*. The exhaustion of existing remedies before approaching the court is emphasised in the *Cape Town v NERSA* case in terms of inter-governmental litigation but can also apply in other instances as a way of settling climate change disputes.

131 National Climate Change Act 2021., section 26(2)(c).

132 Climate Change Act, No. 11 of 2016 (n 118)., section 23(2)(c), (3).

133 *Thabametsi* (n 62).

134 Ibid., paras. 26 and 36.

135 *Gbemre v Shell* (n 30)., para. 5.

D. Broader Issues on Climate Change Litigation in Africa

We now move to discuss some of the broader issues raised by such litigation in Africa. We have clustered these under costs, the shrinking civic space, strategic litigation against public participation, judicial decisions and enforcement, and the implications for fossil fuel use.

I. Costs

The award of costs in current litigation has been varied. The law on costs is that although their award is at the discretion of court, they should be awarded to the successful party.[136] In *Thabametsi,* the Court awarded costs to the successful party (Earthlife) based on the complexity and national importance of the matter that warranted the employment of two counsel. In *Gbemre v Shell,* the Court made no award to costs.[137] The complexity and protracted nature of climate and environmental litigation can be costly for applicants and therefore act as a hinderance for interrogating human rights violations and environmentally harmful government and private actions.[138] Litigants can abandon litigation on account of rising costs that they might not be able to pay, brought about by delays in timely disposal of cases.[139] While courts in jurisdictions like Uganda have resorted to a 'flexible approach' in among others climate and environmental litigation by declining to award costs to an unsuccessful party[140], the threat of costs still remains as there is no clear guideline or Supreme Court decision for their award that binds all lower courts. This threat of costs as a hinderance to instituting climate litigation against governments can be mitigated through an adoption of South Africa's costs regime in constitutional matters in which the State bears the costs of litigants who have been successful against it, while each party bears its own costs where the State wins against a private party[141], and this should extend to litigation brought under the UCCA when the State is a party. Not asking for costs is an option in climate litigation that would possibly have court make no decision on their award to a successful party, with each party bearing its own costs.

136 *Tracy Humby*, 'The Biowatch Case: Major Advance in South African Law of Costs and Access to Environmental Justice Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources and Others (2009) Constitutional Court of South Africa, [2009]ZACC 14' (2010) 22 *Journal of Environmental Law* 125, p. 131; *Arthur L Goodhart*, 'Costs' (1928) 38 *Yale Law Journal* 849, p. 854.

137 *Thabametsi* (n 62) para. 125.

138 *Samantha Mwesigwa and Peter Davis Mutesasira*, 'Climate Litigation as a Tool for Enforcing Rights of Nature and Environmental Rights by NGOs: Security for Costs and Costs Limitations in Uganda' (2021) 15 *Carbon & Climate Law Review* 139, p. 146.

139 *Eloamaka Carol Okonkwo,* 'Assessing the Role of the Courts in Enhancing Access to Environmental Justice in Oil Pollution Matters in Nigeria' (2020) 28 *African Journal of International and Comparative Law* 195., p. 215.

140 *Mwesigwa and Mutesasira* (n 139), p. 147.

141 *Trustees for the Time Being of the Biowatch Trust v Registrar Genetic Resources et al.* Case CCT 80/08. [2009] ZACC 14, paras 21 and 43.

II. Shrinking civic space.

In many countries worldwide there is shrinking civic space affecting the ability of NGOs and other actors to question the activities of the state and private companies.[142] The operating environment of NGOs is crucial for their continued involvement in climate litigation and of the countries considered. Because NGOs function within boundaries set by governments, they are vulnerable to control and restrictions through legal and administrative regulations or through actions that go beyond, even though they are meant to have autonomy from governments in democratic societies.[143] NGOs are often seen as threatening state security either because they question energy security issues, are funded by donors domestically and internationally and hence how much leeway NGOs have in any given country depends more on the political considerations than on an NGO's economic and social development contribution.[144] A 2019 Freedom House Special Report noted that 12 African countries (including Uganda and Tanzania) had over the last 15 years adopted legislation or policies that impeded NGOs, while six countries (including Kenya) had introduced measures which were abandoned by the executive, rejected by the legislature or invalidated by the courts.[145] The purpose of these laws and policies is to control NGOs through limiting foreign funding and hiring foreigners, onerous registration processes, and allowing government involvement in the NGO sector as a basis to scrutinize the operational environment.[146] For instance, Uganda's NGO Bureau stopped the operations of 54 NGOs citing non-compliance (expired permits, failure to file annual returns and audited books of accounts, non-registration, and other non-compliance issues) with the Non-Governmental Organisations Act 2016 (NGO Act 2016).[147] And provided that an NGO is accorded a right to be heard by the NGO Bureau in accordance with the law, Courts are reluctant to interfere with the Bureau's power to stop an NGO's operations.[148] Nigeria's NGO Bill 2017 will

142 *Annika Elena Poppe and Jonas Wolff*, 'The Contested Spaces of Civil Society in a Plural World: Norm Contestation in the Debate about Restrictions on International Civil Society Support' (2017) 23 *Contemporary Politics* 469; *Antoine Buyse*, 'Squeezing Civic Space: Restrictions on Civil Society Organizations and the Linkages with Human Rights' (2018) 22 *International Journal of Human Rights* 966; *Chris van der Borgh and Carolijn Terwindt*, 'Shrinking Operational Space of NGOs – a Framework of Analysis' (2012) 22 *Development in Practice* 1065.

143 *Michael Bratton*, 'The Politics of Government-NGO Relations in Africa' (1989) 17 *World Development* 569, p. 570.

144 Ibid., p. 576.

145 *Godfrey M. Musila*, 'Freedoms Under Threat: The Spread of Anti-NGO Measures in Africa' (2019), pp. 3-4 www.freedomhouse.org (accessed 11 March 2022).

146 Ibid.

147 National Bureau for NGOs, 'Press Release: Statement on Halting of Operations of Fifty Four (54) NGOs Due to Non-Compliance with the NGO Act 2016 (20 August 2021)' https://www.ngobureau.go.ug/en/news-and-notices/operations-of-54-ngos-halted (accessed 11 March 2022).

148 *Centre for Constitutional Governance v National Bureau for Non-Governmental Organisations*, High Court Miscellaneous Cause No 374 of 2020, Ruling of 30 July 2021 (Uganda), p. 13.; NGO Act 2016, section 7(2) on the right to be heard.

similarly be restrictive of NGOs and result in 'improper state control of NGO programs, if not outright co-optation of NGOs.'[149]

NGO challenges have involved questioning their legal standing in public interest ligation in jurisdictions like Nigeria with a narrow construct of locus standi that does not cater for representative standing in environmental litigation.[150] Nigeria's Supreme Court in *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation* has since settled the matter holding that NGOs have standing to institute environmental public interest litigation in citing among others increasing concern about climate change and global and national action taken to ensure that present and future generations benefit from the environment.[151] Unlike *Gbemre v Shell* that is only binding to courts lower than the Federal High Court and only persuasive to other high courts that can decide otherwise, the *COPW v NNPC* decision is binding on all lower courts on the basis of the doctrine of precedent.[152] In resolving the locus standi concern for NGOs in environmental litigation, the Court strikes at the 'judicial attitude that has privileged the economy over the environment' ensuring that there in the place of this attitude is substituted an environmentally positive approach to climate concerns over a pro-economy approach, and will only serve to encourage more climate litigation in Nigeria.[153] Climate litigation will benefit from NGO's that are not tied down by over-the-board legislation that interferes with their activities and threaten their very existence. The constitutionality of such anti-NGO legislation can be legally challenged and struck down in court alongside rallying international support against such legislation.

III. SLAPP suits

Climate litigation is now taking on key players like oil corporations like Shell Petroleum Development Company Limited in *Gbemre* v *Shell* (directly) and Total E&P Uganda in *EACOP* (indirectly as Total is cited as a developer of the EACOP) in point, as the contribution of their activities to climate change can no longer be ignored. Litigation puts them on a stand to take responsibility with the expectation that courts would compel them to take drastic measures to address climate change in their business context. Because the economic viability of these corporations are threatened through negative publicity from public partici-

149 *Musila* (n 146), p. 17.

150 *Miriam Chinyere Anozie and Emmanuel Onyedi Wingate*, 'NGO Standing in Petroleum Pollution Litigation in Nigeria - Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation' (2021) 13 *The Journal of World Energy Law & Business* 490, p. 491.

151 *Nigerian Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation* [2019] 5 NWLR (PT 1666) 518.571 (hereinafter '*COPW v NNPC*').

152 *Robert John Anderson Carnwath*, 'Judicial Precedent - Taming the Common Law' (2012) 12 *Oxford University Commonwealth Law Journal* 261, p. 262; *Enefiok Essien*, 'Conflicting Rationes Decidendi: The Dilemma of the Lower Courts in Nigeria' (2000) 12 *African Journal of International and Comparative Law* 23, p. 25.

153 *Uzuazo Etemire*, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight' (2021) 15 *Carbon & Climate Law Review* 158, pp. 160, 168.

pation these corporations push back through strategic litigation against public participation (SLAPP), a strategy (although not limited to environmental matters and can be taken up by individuals) that has been described as an emerging threat to public interest environmental litigation.[154] SLAPP suits are a manifestation of the 'struggle between the competing interests of developers pursuing their property rights and government or environmentalist pursuing conservation objectives.'[155] Described as vengeful and retaliatory, the objective of these suits is to 'stifle legitimate political expression' with a potential 'chilling effect on individual citizens or local officials who have access to fewer financial and legal resources to defend themselves'.[156] In *Price v Stossel,* the characteristic of these suits was described as lacking merit and that it is "brought with the goal of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party's case will be weakened or abandoned…"[157]Considered a new term in South Africa, they are likely to silence public interest environmental litigators already weighed down by other legal obstacles to their advocacy for the environment[158] In 2021, the High Court of South Africa of the Western Cape Division in strongly condemning SLAPP suits concluded that "Litigation that is not aimed at vindicating legitimate rights, but is part of a broad and purposeful strategy to intimidate, distract and silence public criticism, constitutes an improper use of the judicial process and is vexatious. The improper use and abuse of the judicial process interferes with due administration of justice and undermines fundamental notions of justice and the integrity of our judicial process. SLAPP suits constitute an abuse of process, and is inconsistent with our constitutional values and scheme."[159] Overcoming this challenge has prompted some jurisdictions like the State of California in the United States of America to enact the anti-SLAPP statute to 'counteract the chilling effect of strategic suits by providing that such suits should be dismissed under a special motion to strike'.[160]

Because these kinds of suits could potentially be used elsewhere in Africa to slow any form of activism including that on climate change and litigation which is mostly in the public interest, workshops or seminars for judicial officers on the nature of these cases to ease recognizing them could be a first step pending the enactment of legislation dealing with the challenge. Even then, the interests of justice should not suffer on account of a lack of Anti-SLAPP legislation and as such courts have an obligation to ensure that corpo-

154 *Murombo and Valentine* (n 113), p. 83.

155 Ibid., p. 84.

156 *Robert Abrams*, 'Strategic Lawsuits Against Public Participation (SLAPP)' (1989) 7 *Pace Environmental Law Review* 33, p. 39.

157 *Price v Stossel,* 620 F 3d 992 (9th Cir 2010)., Discussion, para I [1].

158 *Murombo and Valentine* (n 113), p. 97.

159 *Mineral Sands Resources (Pty) Ltd and Another v Christine Reddell and Others; Mineral Commodities Limited and Another v Mzamao Dlamini and Another; Mineral Commodities Limited and Another v John Clarke* [2021] 2 All SA 183 (WCC)., para 66.

160 *Price v Stossel* (n 158).

rations are prevented from 'weaponising' the 'legal system against the ordinary citizen and activists in order to intimidate and silence them.[161]

IV. Judicial decisions and enforcement

Climate litigation exposes enforcement challenges of judicial decisions. It was noted that since the decision in *Gbemre v Shell* there has been no corresponding action from both the executive and legislative arms of government, consigning the case to obscurity,[162] neither did Shell undertake measures to deal with gas flaring.[163] While *Gbemre v* Shell is not representative of other jurisdictions, enforcement challenges should not be ruled out in fossil fuel rich countries where corporations given their economic resources could potentially influence the enforcement of judicial decisions unfavourable to their operations. The literature also points to courts' attitude in dispensing with cases concerning contentious environmental matters with influence from private and powerful individuals.[164] States have played a role in the dispensation of justice in defeating court decisions through defiance and the reintroduction of legislation undermining them.[165] Legislation altering or undermining a judicial decision tampers with the future application of the checks and balances required for the proper functioning of civilized democracy and the restraining of peremptory behaviour by the legislature, executive and judiciary.[166] This also includes delays which affect the administration of justice with courts themselves bearing responsibility through 'irrelevant adjournments and abnormal delays' in cases involving oil companies which have nothing to lose.[167] The success of climate litigation will continually depend on States ensuring there is a conducive environment for the enforcement of climate change decisions, even those that are against them and the implications they might pose for investments or development projects in their backyards.

V. Implication for fossil fuel use

We now turn to assess what these cases mean for fossil fuel use. Litigation against fossil fuel corporations (oil and coal) seeks to hold them answerable for their contribution to cli-

161 *Mineral Sands Resources (Pty) Ltd and Another v Christine Reddell and Others; Mineral Commodities Limited and Another v Mzamao Dlamini and Another; Mineral Commodities Limited and Another v John Clarke* [2021] 2 All SA 183 (WCC) (n 159), paras. 66 and 65.

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

163 *May* and *Dayo* (n 14), p. 279.

164 *Omedo, Muigua* and *Mulva* (n 16), p. 6.

165 *Oloka-Onyango* (n 17), p. 798.

166 *Human Rights Network Uganda and Others v Attorney General*., Constitutional Petition No. 56/2013 (Court of Appeal – Uganda), Judgment of 26 March 2020, pp. 18, 34.

167 Okonkwo (n 140), p. 215.

mate change and the interference with the enjoyment of certain rights as pointed out in the Dutch case of *Milieudefensie et al. v. Royal Dutch Shell PLC* with the court ordering Royal Dutch Shell as "a major player on the fossil fuel market and responsible for CO2 emissions….and which contributes to global warming and serious and irreversible consequences and risks for the human rights of Dutch residents and the inhabitants of the Wadden region" to reduce its CO_2 emissions by at least net 45 % at end 2030.[168] Litigation aims at ensuring that these corporations comply with the relevant laws in carrying out EIAs prior to the construction of power plants to determining their effects and whether or not such projects can proceed. Attributing specific damages to emissions from specific fossil fuel companies is complicated as this moves the conversation to apportioning responsibility between companies 'producing the fuels, the end users of those fuels…and other actors involved in the fossil fuel supply and consumption chain.'[169]

Courts have stopped short of halting fossil fuel projects in Africa on account of existing laws that permit the establishment and operation of such projects provided that they comply with the requirements of existing law and as long as these are fulfilled, fossil fuel remains a viable and acceptable mode of power generation.[170] In South Africa, coal-fired power stations are an essential feature of the country's medium-term electricity generation plans in accordance with government's policy that allows for securing continued and uninterrupted supply of energy through a mix of generation technologies by bringing forward anticipated coal generation projects for earlier implementation.[171] To this end, climate change litigation is competing with existing laws and policies in challenging activities of fossil fuel companies in the context of climate change. Nevertheless, the litigation is disrupting fossil fuel extraction through the halting of projects to allow for environmental legal compliance with hope that this can hinder sole dependence on carbon through a reduction in investments for future production, but the litigation is far from ending the practice.[172] For instance in *Save Lamu v Shell,* several financial backers like China's ICBC Bank (China), South Africa's Standard Bank (SB) and African Development Bank (AfDB) have abandoned it, with SB noting that it was reducing investments in coal and AfDB indicating that the focus was on clean energy with plans on exiting the coal power industry.[173] It could be that investors and financiers can no longer ignore the global pressure requiring stopping support to projects associated with contributing to the worsening of environmental challenges in many

168 *Milieudefensie et al v Royal Dutch Shell PLC,* ECLI:NL:RBDHA:2021:5339. (Hague District Court, judgment of 26.5.2021), paras. 4.4.37 and 5.4.

169 *M. Burger and J. Wentz*, 'Holding Fossil Fuel Companies Accountable for Their Contribution to Climate Change: Where Does the Law Stand?' (2018) 74 *Bulletin of the Atomic Scientists* 397.

170 *Save Lamu v NEMA* (n 50), para. 17.

171 *Thabametsi* (n 62), paras. 31-32.

172 *N. Gaulin and P. Le Billon*, 'Climate Change and Fossil Fuel Production Cuts: Assessing Global Supply-Side Constraints and Policy Implications' (2020) 20 *Climate Policy* 888, pp. 889, 891.

173 'UNESCO World Heritage Centre - Decision - 43 COM 7B.107', https://whc.unesco.org/en/decisions/7571 (accessed 17 September 2021).

economies.[174] Nonetheless, it is argued that Kenya's political settlement, its development vision and the role of electricity in its development objective imply that the Lamu coal power project will eventually take off as its benefits to the entire country are likely to gather more support than the arguments against it that are only relevant for the Lamu community.[175] Greenpeace Africa, WWF (World Wide Fund Inc) , KEJUDE (Kenyans for Justice and Development Trust) and Columbia University are some of the other stakeholders in Kenyan society and beyond that are concerned about the environmental impacts of coal power.[176]Climate litigation has focused on upcoming fossil fuel projects with business as usual for already existing corporations whose activities continue to contribute to GHG emissions and Africa's growing energy demands and development agenda coupled with the absence of cleaner energy sources to transition to means that the legal protection for fossil fuel will persist as will their activities, with upcoming projects having to make certain that they carry out the relevant environmental and climate change studies to ensure that the impact of their activities is fully comprehended in the context of the environment and climate. Transnational tort litigation is presented as an option of holding corporations accountable in the context of climate litigation on the basis of 'their potential to impact climate law or policy, shape government action or determine development pathways.[177]

E. Conclusions

On a continent of 55 States, only five have experienced climate change litigation with South Africa seeing more growth in cases compared to other countries.[178] The cases focus on climate change, human rights, and environmental impact assessments.[179] A human rights approach has been effective in climate litigation seeing that impacts of climate change affect the enjoyment of human rights but this approach needs to be complimented with litigation focusing on major fossil fuel corporations as is happening elsewhere with

174 'Coal Dream up in Flames as Last Backer of Lamu Project Pulls out - The Standard', https://www.standardmedia.co.ke/financial-standard/article/2001394935/coal-dream-up-in-flames-as-last-backer-of-lamu-project-pulls-out (accessed 17 September 2021).

175 *Michael Boulle*, 'The Hazy Rise of Coal in Kenya: The Actors, Interests, and Discursive Contradictions Shaping Kenya's Electricity Future' (2019) 56 *Energy Research & Social Science*, p. 7.

176 Ibid., pp. 5 and 6.

177 *K. Bouwer,* 'Substantial Justice?: Transnational Torts as Climate Litigation' (2021) 15 Carbon & Climate Law Review 188; J*acqueline Peel and Jolene Lin*, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *American Journal of International Law* 679.

178 *J. Setzer and L.C. Vanhala*, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* 1, p. 5.

179 *C. Rodríguez-Garavito*, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 *American Journal of International Law* 40.

litigation concerning their domestic and global activities.[180] Climate change is not central to Africa's climate change litigation but finds its way through the human rights approach, something that climate change specific laws can address. Africa's climate litigation has avoided existing fossil fuel corporations and projects and some wonder if there is a point in suing these corporations seeing that it is unlikely that this litigation would play a larger role in mitigation efforts or phasing out of fossil fuels on account of the inherently carbon-intensive social-economic systems in place and the huge revenues of these corporations that would allow for continued operation even in the face of substantial lawsuit-related costs.[181] The continent's climate litigation is currently focused on legal compliance with existing laws and policies for upcoming fossil fuel projects while litigation in the Global North urges governmental ambition on climate change.[182] For now, one can hope that the awareness from Africa's climate litigation so far will lead to more litigation taking in more actors to drive climate action on the continent.

The state of climate litigation in Africa given the few cases reveals a continent still far from making full use of this approach to advance climate action and it has not been for lack of climate change specific laws as South Africa has made progress without a climate law and as indeed the litigation considered has all been brought under legislation not specific to climate change. It is noted that how climate litigation shapes up on the continent will be determined by the way it is affected by climate change which in turn is determined by geography alongside 'features of governance, resourcing and economic structures, and historic contribution.'[183] As to whether there will be more litigation on account of the enacted climate laws is a question of time but provided governments on the continent adopt more climate change policies that they follow up on, one would submit that the litigation numbers will be incremental and still in countries that have already experienced climate change litigation. The energy needs and development agendas of African countries mean that laws allowing for activities that contribute to GHG emissions will persist thus constraining courts' reach in determining climate change litigation and also blunting the impact of climate litigation as a potent tool in bringing about positive climate action. Notwithstanding, Courts may continue to exercise judicial activism in removing all legal impediments to climate change litigation like Nigeria's Supreme Court has done in ensuring a wider scope locus standi to accommodate a wide range of litigants to take on climate change concerns. Africa's climate litigation is still budding and still must overcome several challenges to achieve its potential of agitating for stronger climate action across the continent. Its impact is still growing, and it should still be considered a component to

180 *P. Mougeolle*, 'Practitioner's Perspective: A Brief Commentary on the French Total Climate Case' (2020) 2020 *Carbon & Climate Law Review* 128.

181 *Gunderson and Fyock* (n 10), p. 10.

182 *J. Setzer and L. Benjamin*, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9 *Transnational Environmental Law* 77, p. 79.

183 *Kim Bouwer and Tracy-Lynn Field*, 'Editorial: The Emergence of Climate Litigation in Africa' (2021) 15 *Carbon & Climate Law Review* 123, p. 124.

a range of options including the policies, enactment of laws and conclusions of treaties in addressing climate change.