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Addressing the Climate Emergency: The Untapped Potential of South African Constitutional Law

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ABSTRACT: Since the early to mid-2010s, rights-based climate litigation has emerged as a prominent tool for those seeking to secure more ambitious climate action and hold governments and corporations accountable for climate harms. South Africa has been the site of a number of rights-based climate cases since the mid-2010s. This article examines the current state of rights-based climate-litigation in South Africa while contextualising it within the larger global body of rights-based climate cases. In doing so, this article aims to identify gaps and opportunities for rights-based climate litigation and articulate how this litigation in South Africa can help secure more ambitious climate action domestically and contribute to the progressive development of human rights and climate change case law globally.

KEYWORDS: climate change, human rights, litigation

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I INTRODUCTION

We are already bearing witness to a world 1.1 degrees Celsius warmer, on average, than pre-industrial times.[1] Impacts once thought to be exceedingly rare – from severe droughts and wildfires to epoch-defining flooding – are becoming, increasingly, commonplace. The culprit? Human activities cumulatively out of sync with planetary boundaries, including the burning of fossil fuels, rapid deforestation, and land use change – all of which are feeding the ongoing climate emergency.[2]

People around the world have mobilised in response, challenging the fossil-fueled status quo and working to secure the urgent and ambitious climate action needed to avert the most catastrophic scenarios of global warming.

Human rights-based climate litigation is one such response.[3] Though its origins lie in a 2005 petition submitted by the Arctic Inuit to the Inter-American Commission against the United States,[4] rights-based climate litigation did not become a recurring and widespread phenomenon until after the Paris Agreement was negotiated in 2015.[5] Since then, a handful of pioneering cases have paved the way for the exponential increase in rights-based climate lawsuits visible today.[6]

In important ways, the rise of rights-based climate litigation has been an exercise in transnational exchange, as litigators, judges, and advocates have looked to doctrines, norms, and strategies devised in other jurisdictions to apply to their own. Even so, rights-based lawsuits retain features specific to their domestic legal context, making it imperative to understand how they are situated both domestically and internationally in order to shed light on the evolution of this dynamic legal trend.

Using South African climate litigation as its example, this article seeks to do just that. By updating original data presented in previously published research,[7] it sketches out the international context, namely, how rights-based climate litigation is rooted in the interplay between the international climate and human rights regimes as well as key trends and the overall state of the field. This overview provides a frame in which to understand South African rights-based climate litigation. Given the richness of constitutional jurisprudence in South Africa, the original contribution of this article consists in assessing how courts and litigators

[1] NASA Earth Observatory 'World of Change' (13 January 2022), available at https://earthobservatory.nasa.gov/world-of-change/global-temperatures.

[2] V Masson-Delmotte 'Summary for Policymakers' *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* (2021), available at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf.

[3] We take an inclusive approach to defining rights-based climate litigation, including any climate case – meaning any case where climate change is a central or ancillary concern but explicitly mentioned – that references rights arguments or language in its petition or rulings. We use the terms 'human rights and climate change (HRCC) litigation' and 'rights-based climate litigation' interchangeably.

[4] S Watt-Cloutier et al 'Petition No. P-1413-05' (2006), available at 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/.

[5] C Rodríguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (2022) 1.

[6] Ibid at 9.

[7] C Rodríguez-Garavito 'Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action' in C Rodríguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (2022) 9–83.

have (or have not) made use of constitutional law and rights to advance action on climate change in South Africa.

Ultimately, this analysis suggests that while South African litigation has made important contributions to the transnational climate litigation field – especially in relation to challenging fossil fuel projects – there is substantial opportunity for innovation and growth, particularly with respect to applying and progressively developing constitutional jurisprudence in the context of climate change.

II ROOTING HUMAN RIGHTS AND CLIMATE CHANGE LITIGATION IN GLOBAL CLIMATE GOVERNANCE

Climate change has aptly been characterised as a super wicked problem[8] for the multifarious implications it has for society. Indeed, though describing a particular phenomenon associated with anthropogenic interference in climate systems, climate change can also be thought of as a 'bundle' of interconnected challenges – from greenhouse gas mitigation to adaptation to climate finance and reparations for loss and damage.

In response, global governance around climate change has evolved dramatically in an attempt to tackle the complex regulatory challenges posed by the climate emergency.

Beginning in the early 1990s, the international climate regime, as established by the United Nations Framework Convention on Climate Change (UNFCCC)[9] and further refined by the Paris Agreement,[10] has been at the forefront of efforts to secure global action on climate change. In more recent years, the international human rights regime has played an increasingly critical role in attempts to hold state and non-state actors alike accountable for their actions and inactions on climate change.[11]

Understood together, these two mutually reinforcing regulatory regimes clarify the scope of state and, albeit to a lesser degree, nonstate obligations on climate change. It is within the context of this interplay between the two regimes that human rights and climate change (HRCC) litigation has become a global phenomenon.

A Urgency and ambition: The interplay between the climate and human rights regimes and how it bounds state and nonstate action

Together, the international climate change and human rights regimes clarify the *ambition* and *urgency* with which states and, to a lesser degree, corporations must act. This puts guardrails around what can be considered appropriate state and nonstate behaviour and offers metrics against which courts can assess – and have assessed – the adequacy of state and nonstate action and inaction.

[8] Eg, RJ Lazarus 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94 *Cornell Law Review* 1153, 1159–1160.

[9] United Nations Framework Convention on Climate Change (1992).

[10] Paris Agreement to the United Nations Framework Convention on Climate Change (2015).

[11] Eg, JH Knox 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477; Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change 'Promotion and Protection of Human Rights in the Context of Climate Change Mitigation, Loss and Damage and Participation', UN Doc. A/77/226 (26 July 2022).

1 *Ambition*

In this context, ambition refers to the depth and scale of action a state or corporation takes to address the drivers of the climate emergency. And this ambition can be measured in reference to a particular outcome: preservation of a stable climate system.

To preserve a stable climate system, according to the international consensus embodied in the temperature target set by the Paris Agreement, global warming must be limited to 'well below 2°C above pre-industrial levels' with all efforts geared towards limiting 'the temperature increase to 1.5°C above pre-industrial levels'.[12] Warming beyond this poses a substantial risk of triggering tipping points in the global climate system that would compromise its stability.

When states act in a manner that would, in the aggregate, fail to respect this hard temperature limit, it cuts against the imperative to preserve a stable climate system and therefore constitutes low ambition. This, in turn, exceeds another boundary imposed by the Paris Agreement: states must act with their 'highest possible ambition', with emission reductions that 'represent a progression' over time.[13]

In other words, states must, under the international climate regime, take actions consistent with *actually* limiting warming to the Paris temperature target. Otherwise, they fall below the level of ambition required of them.

Nevertheless, though the international climate regime imposes these boundaries on state action, there is an accountability gap stemming from the fact that the substance of states' individual commitments – made through their nationally determined contributions (NDCs)[14] – are voluntary. This is where the human rights system comes into play.

Climate change, given the harms it has and will generate, triggers states' duties to safeguard human rights and prevent foreseeable rights violations.[15] Courts and human rights bodies have imported the Paris temperature target as a benchmark to assess compliance with states' duties to protect human rights, as it represents the international consensus as to when the risk to the global climate system – and the human rights dependent upon it – becomes too substantial.[16]

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[12] Paris Agreement (note 10 above) at Art 1(a).

[13] Ibid at Art 4(3).

[14] Nationally Determined Contributions (NDCs) are the primary mechanism envisaged by the Paris Agreement to achieve the collective temperature target. In these NDCs, states must detail how they intend to contribute to the global response to climate change, including the targets they have and will set for greenhouse gas emission reductions as well as the measures through which they will reach those targets.

[15] For example, JH Knox 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc. A/HRC/31/52 (1 February 2016), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/015/72/PDF/G1601572.pdf?OpenElement; Special Rapporteur on Human Rights and the Environment 'Safe Climate', UN Doc. A/74/161 (15 July 2019), available at https://www.unep.org/resources/report/safe-climate-report-special-rapporteur-human-rights-and-environment.

[16] For example, Rechtbank den haag (Tribunal de district de la Haye), équipe commerce, Associations Vereniging Milieudefensie, Greenpeace Pays-Bas, Actionaid c. Royal Dutch Shell, C/09/571932 / HA ZA 19-379, 26/05/2021, para 4.4. ('The goals of the Paris Agreement are derived from the IPCC reports. The IPCC reports on the relevant scientific insights about the consequences of a temperature increase, the concentrations of greenhouse gases that give rise to that increase, and the reduction pathways that lead to a limitation of global warming to a particular temperature. Therefore, the goals of the Paris Agreement represent the best available scientific findings in climate science, which is supported by widespread international consensus. The non-binding goals of the Paris Agreement represent a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change.')

State action consistent with the Paris temperature target comports with 'the obligations of States, acting together in accordance with the duty of international cooperation, to protect human rights from the dangerous effects of climate change'.[17] Failing to act, on the other hand, in a manner consistent with achieving this temperature target, which includes failing to fulfil international climate commitments, has been considered 'a prima facie violation of the State's obligations to protect the human rights of its citizens'.[18] The two governance regimes are, as a result, mutually reinforcing.

The key to the human rights system's particular contribution to climate governance is its enforceability. States are *individually* responsible for meeting their human rights obligations. Human rights law, moreover, protects *substantive outcomes* in the context of climate change – in particular, limiting global warming to approximately 1.5 degrees Celsius. Warming past this would trigger impacts so disastrous as to be substantively unacceptable from a human rights perspective.[19] As a result, mere promises do not pass muster: states are individually and legally obligated to implement measures that are consistent, in terms of both ambition and timing, with limiting global warming to the Paris temperature target. In contrast to much of the international climate regime, state obligations to act on climate change under human rights law are binding. In this way, the human rights system adds 'teeth' to the boundaries around state action and ambition level laid down by the climate regime.

Note that though corporations are not explicitly included within the ambit of the Paris Agreement, the standards set by the Paris Agreement as well as human rights law have been used to inform the duties that corporations are legally obliged to fulfil.[20] One such example is *Milieudefensie v Shell*, where the Hague District Court used the goals and benchmarks of the Paris Agreement as well as human rights norms to inform the obligations that Shell, a fossil fuel company, has under an unwritten duty of care, including an obligation to reduce greenhouse gas emissions.[21]

2 *Urgency*

Urgency constitutes the other axis defining the boundaries of acceptable action and, in the context of addressing the climate emergency, refers to the time frame in which states and non-state actors must act.

Under both the international climate regime and the human rights system, state action on climate change must be progressive. With respect to the former, this flows from the requirement that NDCs reflect a 'progression over time'.[22] With respect to the latter, this derives from the principle of non-retrogression, which is a hallmark of human rights law, in particular socioeconomic rights law. The principles of non-retrogression and progression provide that states, in developing and implementing measures to advance the enjoyment of human rights, must work to progressively fulfil rights that are not immediately achievable. States may not, in accordance with these principles, alter these measures such that they represent

[17] See Knox (note 15 above) at para 73.

[18] Special Rapporteur on Human Rights and the Environment 'Safe Climate' (note 15 above) at para 74.

[19] Ibid at 26–32.

[20] Ibid at 32.

[21] *Milieudefensie v Royal Dutch Shell* (note 16 above); see also '*Milieudefensie v Royal Dutch Shell' Climate Litigation Accelerator Toolkit*, available at https://clxtoolkit.com/casebook/milieudefensie-v-royal-dutch-shell/.

[22] Paris Agreement (note 10 above) at Art 3.

a decline in ambition or level of protection.[23] In short, in this emphasis on progression and non-retrogression, the two regulatory regimes are again mutually reinforcing and provide constraints on how states can act over time.

The goals of the Paris Agreement, especially its temperature target, also shape the time frame within which states must act. Because climate change is nonlinear – as its impacts compound and the risk of passing tipping points in the climate system increases exponentially over time – there is a substantial benefit to acting now, when action is less costly and more effective relative to the future.[24]

Beyond this, the international climate regime does not detail how state action must be distributed over time. This is significant because a state could, under the regime's stated terms, offload emission reduction burdens to the future to spare present generations from their associated restrictions, risking a scenario where young and future generations would be required to shoulder severe limitations on their activities – indeed, on their freedoms – in order to limit global warming to 1.5 degrees Celsius. In other words, the road to 1.5 degrees Celsius, without the additional norms and obligations of the human rights regime, could be filled with serious infringements on rights. This was the key insight of the pivotal *Neubauer v Germany* case. In *Neubauer*, the German Constitutional Court found that the government's failure to provide post-2030 targets that would specify how the country would achieve climate neutrality in 2050 risked imposing the bulk of emission reductions on young and future generations close to 2050. The risk that rights and freedoms would be severely and disproportionately encumbered in the future was, according to the Constitutional Court, inconsistent with constitutional rights protections. The Court explained further:

> Even provisions that only begin posing significant risks to fundamental rights over the course of their subsequent implementation can fall into conflict with the Basic Law … This is certainly the case where a course of events, once embarked upon, can no longer be corrected.[25]

As ever more of the CO_2 budget is consumed, the requirements arising from constitutional law to take climate action become ever more urgent and the potential impairments of fundamental rights that would be permissible under constitutional law become ever more extreme … The restrictions on freedom that will be necessary in the future are thus already built into the generosity of the current climate change legislation. Climate action measures that are presently being avoided out of respect for current freedom will have to be taken in future – under possibly even more unfavourable conditions – and would then curtail the exact same needs and freedoms but with far greater severity … The amount of time remaining is a key factor in determining how far freedom protected by fundamental rights will have to be restricted – or

[23] For example, A Nolan et al 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights Law' in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (2014), 121, 122–125 & 133–139; BTC Warwick 'Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights' (2019) 19 *Human Rights Law Review* 467, 468–475.

[24] For example, DI Armstrong et al 'Exceeding 1.5°C Could Trigger Multiple Climate Tipping Points' (2022) 377 *Science* 1.

[25] 'Constitutional Complaints against the Federal Climate Change Act Partially Successful [press release]' *Bundesverfassungsgericht* (29 April 2021) 33, available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html ('*Neubauer v Germany*').

how far fundamental rights may be respected – when making the transition to a climate-neutral society and economy.[26]

Accordingly, human rights law clarifies how states must implement emission reductions over time so as not to disproportionately burden young and future generations and exacerbate intergenerational inequities, serving to safeguard rights-consistent outcomes for young and future generations.

Applying an integrated reading of these two regulatory regimes is crucial because it clarifies the temporal and substantive boundaries that the regimes together lay around state and nonstate action beyond what would be clear from an isolated reading of each regime individually. From this integrated reading, new possibilities and opportunities emerge, which is precisely the context in which HRCC litigation became a global trend. It is to this point we turn next.

III GLOBAL HRCC LITIGATION: IMPLEMENTING THE TWO REGIMES FROM THE BOTTOM UP

Global rights-based climate litigation has blossomed in the context of this interplay between the international human rights and climate change regimes. Indeed, it has served as a bottom-up tool to turn nonbinding individual climate commitments at the international level into binding and enforceable domestic commitments while embedding them within rights norms and principles. In this way, it has attempted to hold both states and corporations to the ambition and urgency with which they must act under the two governance regimes.[27]

In this section, we provide a brief overview of the status of global rights-based climate litigation. Then, we discuss how global HRCC litigation reflects the interplay between the two regimes, honing in on how this litigation has sought to enforce the boundaries around ambition and urgency.

A The distribution, status, and key features of global rights-based climate litigation: an overview

Of the 279 HRCC cases worldwide, 253 have been filed since 2015.[28] Given that the vast majority of these lawsuits were filed in the last six years or so, it is no surprise that most of these cases are currently pending before courts or quasi-judicial bodies or are on appeal. Of those cases that have been definitively decided, defendants/respondents[29] have a slight edge: 54 have been resolved in favour of the plaintiffs/applicants and another 76 concluded with findings for the defendants/respondents.[30]

[26] Ibid at 37.

[27] Rodríguez-Garavito (note 7 above) 15.

[28] Until June 2023. Data is from the HRCC Case Database maintained by the Climate Litigation Accelerator at New York University School of Law. See 'CLX Rights-Based Climate Cases Database' *Climate Law Accelerator*, available at https://clxtoolkit.com/casebook/.

[29] We are using the terminology 'defendants/respondents' and 'plaintiffs/applicants' to reflect the diversity of proceedings in global HRCC litigation.

[30] Ibid.

There have been rights-based climate cases filed on every continent, with the exception of Antarctica. More specifically, litigators have filed cases in 44 national courts[31] as well as 14 regional and international judicial and quasi-judicial bodies.[32]

Geographically, Europe takes the lead as the region with the greatest number of HRCC lawsuits. Thereafter, Latin America[33] follows in terms of the numerical penetration of HRCC litigation. Crucially, East Asia has not been the site of much HRCC litigation, with the exception of a handful of cases in Japan and South Korea. This is significant, given the major role that China plays in global greenhouse gas emissions. Relatedly, the United States has also not seen an abundance of rights-based climate litigation, though the United States is a leading jurisdiction for non-rights-based climate lawsuits.[34] The legal traditions of both these major emitters have thus far posed substantial obstacles to those interested in pursuing this type of climate litigation in these jurisdictions.[35]

Though the specific claims, arguments and norms advanced in HRCC litigation vary from case to case, certain broad trends characterise this body of case law.[36] To start, most cases challenge the *mitigation* of greenhouse gas emissions versus *adaptation* to climate impacts. Though mitigation is crucial to averting dangerous scenarios of global warming, this relative dearth of attention paid to adaptation is significant since most countries in the Global South are not, relatively speaking, major emitters. Instead, they face the brunt of climate impacts, making adaptation a high-level concern. And, as a result, HRCC litigation, as a field of legal practice, has missed half the problem.

Despite its relative invisibility from the perspective of HRCC litigation, adaptation is nonetheless emerging as a more visible and contentious issue within international climate negotiations and law and has been the subject of specialised reports from institutional actors like the UN Environment Programme and the Intergovernmental Panel on Climate Change (IPCC).[37] This may serve as an impetus for litigators to more systematically take up the issue of adaptation in HRCC litigation.

[31] HRCC cases have been filed in the following countries: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Czech Republic, Ecuador, France, Finland, Germany, Guyana, India, Indonesia, Ireland, Italy, Japan, Kenya, Luxembourg, Mexico, Nepal, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Philippines, Poland, Romania, Russia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, Uganda, United Kingdom, United States. Ibid.

[32] HRCC cases have been filed in the following regional and international judicial and quasi-judicial bodies: Court of Justice of the European Union; East African Court of Justice; Economic Community of West African States (ECOWAS) Court of Justice; European Committee of Social Rights; European Court of Human Rights; European Ombudsman; Inter-American Commission on Human Rights; Inter-American Court of Human Rights; International Court of Justice; International Criminal Court; Organization for Economic Co-operation and Development (OECD); UN Committee on the Rights of the Child; UN Human Rights Committee; and UN Special Rapporteurs.

[33] For the purpose of mapping out trends in HRCC litigation, we include Mexico and the Caribbean within the Latin America categorisation.

[34] Non-rights-based climate lawsuits are all those that cannot be classified as rights-based. For the definition of rights-based climate litigation that we deploy, see note 3 above.

[35] Rodríguez-Garavito (note 7 above) at 34.

[36] Ibid at 15–24.

[37] UN Environment Programme *Too Little, Too Slow – Adaptation Gap Report* (2022), available at https://www.unep.org/resources/adaptation-gap-report-2022; HO Pörtner et al 'Summary for Policymakers' in HO Pörtner et al (eds) *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022), available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.

Most HRCC cases, moreover, target *governments* as opposed to *corporations*. More specifically, of the 279 of HRCC lawsuits that have been filed globally, only 45 target corporations.[38] There has, however, been some traction in closing this gap, as an increasing number of cases expressly challenge corporate contributions to climate change, especially after the initial victory against Shell in the Dutch *Milieudefensie v Shell* case.[39] As examined in more detail elsewhere in this article, South African courts may be especially well-positioned to fill this gap, given the extensive body of constitutional law that courts have already developed to define and implement the constitutional duties of private actors, including corporations, in South Africa.

Rights-based climate cases, in general, fall into one of two camps in terms of the substantive targets they pursue.[40] In the first camp, litigators challenge *government or corporate climate policies* for, among other things, their inadequate speed, ambition or level of implementation. The majority of rights-based climate cases fit into this category. The landmark *Urgenda v Netherlands* case, in which plaintiffs challenged the Dutch government's emission reduction targets as inadequate and thus a violation of their legal obligations, is a prime example.[41] Similar lawsuits have been filed in Brazil, France, Switzerland, the United Kingdom, Ireland and South Korea, among other jurisdictions.[42]

In the second camp, litigators challenge specific *projects*, including fossil fuel infrastructure, that they view as inconsistent with efforts to keep global warming well below 2 degrees Celsius. This includes cases seeking to prevent the construction of new oil or gas infrastructure in Tanzania, Uganda and Kenya;[43] the expansion of coal mines in Australia;[44] and the addition of new runways in airports in Austria and the United Kingdom.[45]

The throughline of this section is that HRCC litigation has tried to, often successfully, articulate obligations on climate change, informed by the goals of the international climate regime as well as human rights law, that are domestically binding on states and corporations and therefore enforceable. Elsewhere, we discuss in detail numerous examples of courts holding

[38] See 'CLX Rights-Based Climate Cases Database' (note 28 above).

[39] Rechtbank Den Haag (2021) *Milieudefensie et al v Royal Dutch Shell PLC*, Judgment of 16 May, C/09/571932/HA ZA 19-379.

[40] Rodríguez-Garavito (note 7 above) 18–19.

[41] HR 20 December 2019, 41 NJ 2020, m.nt. J.S. (Urgenda/Netherlands) (Neth.).

[42] *Laboratório do Observatório do Clima v Minister of Environment and Brazil*, Sabin Center for Climate Change Law, available at http://climatecasechart.com/non-us-case/laboratorio-do-observatorio-do-clima-v-environmental-ministry-and-brazil/; *Notre Affaire à Tous v France* N°s 1904967, 1904968, 1904972, 1904976/4-1 (Paris Administrative Tribunal 2021) (Fr.); *Verein KlimaSeniorinnen Schweiz v DE* 1C_37/2019 (Federal Supreme Court 2020) (Switzerland)*; Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy*, see *Plan B Earth v. Sec'y of State for Bus., Energy & Indus. Strategy* [2018] EWHC 1892 CO/16/2018 (appeal taken from Eng.) (UK)*; Friends of the Irish Environment* v. *Ireland* [2019] IEHC 747, 748 (H. Ct.) (Ir.); *Kim Yujin et al. v South Korea*, Sabin Center for Climate Change Law, available at http://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea/.

[43] *Center for Food and Adequate Living Rights et al v Tanzania and Uganda*, Sabin Center for Climate Change Law, available at http://climatecasechart.com/non-us-case/center-for-food-and-adequate-living-rights-et-al-v-tanzania-and-uganda/; *Save Lamu v National Environmental Management Authority* [2019] eKLR, available at http://kenyalaw.org/caselaw/cases/view/176697/.

[44] *Minister for the Environment v Sharma* [2022] FCAFC 35.

[45] *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214; *In re Vienna-Schwechat Airport Expansion,* Sabin Center for Climate Change Law, available at http://climatecasechart.com/non-us-case/in-re-vienna-schwachat-airport-expansion/.

states and corporations accountable using a combination of standards set by the international climate regime and obligations stemming from human and constitutional rights law.[46]

Instead of dwelling on global trends and comparative law, the goal of this article is to examine how South African rights-based climate litigation emerged within the context of these larger developments within the international climate and human rights regimes and has features that both reflect larger trends within the global body of HRCC litigation and are distinctive. In the remainder of the article, we turn to South African rights-based climate litigation, including an analysis of its essential features, gaps and opportunities.

IV SOUTH AFRICA'S HRCC LITIGATION WITHIN THE GLOBAL CONTEXT

A Climate change in South Africa

Before launching into the analysis of South African climate litigation, we take a brief look at how climate change has and will likely unfold in South Africa. Climate impacts are already being felt throughout the country – from extreme flooding[47] to drought[48] and wildfires.[49] These impacts are predicted to worsen as the average global temperature rises, especially since much of South Africa has and will continue to warm at a faster rate – as much as twice as fast – than the average global temperature.[50] This means that, depending on the trajectory that global greenhouse gas emissions take, South Africa may experience up to 6 degrees Celsius of warming within several decades, with catastrophic consequences for marine and terrestrial ecosystems and the communities that rely upon them.[51]

South Africa is, importantly, a major emitter globally. Though the emissions of countries like China and the United States dwarf those of South Africa, the latter nonetheless is the fourteenth largest emitter of greenhouse gases in the world.[52] This is primarily the result of the country's coal-intensive electricity generation, among other factors. Unlike some other larger emitters that will not, from a comparative perspective, face the brunt of climate impacts, South Africa is, as mentioned earlier, especially vulnerable to the impacts of climate change. This creates a palpable tension, whereby South African communities will be especially vulnerable to the impacts of global greenhouse gas emissions, to which the country as a whole has made a meaningful contribution.

In understanding the domestic context, it is also important to note that, given the pervasive socioeconomic inequality that characterises the country, greenhouse gas emissions

[46] Rodríguez-Garavito (note 5 above).

[47] A Tandon 'Climate change made extreme rains in 2022 South Africa "twice as likely"' *Carbon Brief* (13 May 2023), available at https://www.carbonbrief.org/climate-change-made-extreme-rains-in-2022-south-africa-floods-twice-as-likely/.

[48] World Bank Group 'South Africa' *Climate Change Knowledge Portal*, available at https://climateknowledgeportal.worldbank.org/country/south-africa/vulnerability.

[49] Ibid.

[50] Department of Environmental Affairs: Republic of South Africa *South Africa's 3rd Climate Change Report: 2017* (November 2018), available at https://www.dffe.gov.za/research-documents

[51] Ibid at chapter 2.

[52] R McSweeney & J Timperley 'The Carbon Brief Profile: South Africa' *Carbon Brief* (15 October 2018), available at https://www.carbonbrief.org/the-carbon-brief-profile-south-africa/.

are not spread equally across society – those with greater concentrations of wealth drive a disproportionate percentage of the country's greenhouse gas emissions.[53]

B Climate litigation in South Africa

Climate litigation is not an entirely new phenomenon in South Africa. Since at least the mid-2010s, civil society organisations and local communities have challenged actions that contribute to global warming. Indeed, there are at least eight cases[54] that at least in part tackle climate change and its associated harms and incorporate rights language or arguments: *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape*; *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs*; *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs*; *South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and the Environment*; *Earthlife Johannesburg v Minister of Environmental Affairs*; *Sustaining the Wild Coast v Minister of Mineral Resources and Energy*; *African Climate Alliance v Minister of Mineral Resources and Energy*; and *Herd Nature Reserve v Limpopo Economic Development Agency*.[55]

These HRCC cases have largely focused on the coal-fired generation of electricity, in particular targeting specific coal-fired power plants. This, significantly, differentiates South African HRCC litigation from the global trend insofar as it typically targets *projects* instead of *policies* (whereas, from a global perspective, the opposite is true). Nevertheless, as with HRCC litigation more generally, South African HRCC litigation also seeks to enforce the urgency and ambition with which the government and corporations must act on climate change by challenging projects inconsistent with limiting warming to 1.5 degrees Celsius and whose time horizon would compromise the transition from fossil fuels.

To map out the state of South African rights-based climate litigation, we characterise cases according to a typology based on the primary target of the litigation. According to this three-pronged typology, HRCC cases in South Africa fall into one of three camps, challenges

[53] T Gore & L McDaid 'You Can't Eat Electricity' (May 2013) *Oxfam Discussion Papers*, available at https://oxfamilibrary.openrepository.com/bitstream/handle/10546/292662/dp-south-africa-low-carbon-development-inequality-hunger-280513-en.pdf.

[54] This list is taken both from the Sabin Center Climate Change Litigation Database and from the research conducted by the authors.

[55] *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* [2020] ZAWCHC 8, 2020 (3) SA 486 (WCC) ('*Philippi Horticultural Area Food & Farming Campaign*'); *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 61561/17 (1 June 2021) ('Khanyisa Thermal Power Plant case'); *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs* unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 54087/17 (4 May 2022) ('KiPower Thermal Power Plant case'); *South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and the Environment* [2022] ZAGPPHC 741 ('*South Durban Community Environmental Alliance*'); *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] ZAGPPHC 58, [2017] 2 All SA 519 (GP) ('*Earthlife Johannesburg*'); *Sustaining the Wild Coast v Minister of Mineral Resources and Energy* [2022] ZAECMKHC 55, 2022 (6) SA 589 (ECMk) ('*Sustaining the Wild Coast*'); *African Climate Alliance v Minister of Mineral Resources and Energy* pending application before the High Court of South Africa, Gauteng Division, Pretoria, Case No 56907/21; T Carnie 'Limpopo Bushveld "Monster Steel" Project Challenged in Court' *Daily Maverick* (17 January 2023), available at https://www.dailymaverick.co.za/article/2023-01-17-limpopo-bushveld-monster-steel-project-challenged-in-court/.

to: (i) fossil fuel power plants, (ii) fossil fuel exploration and development, and (iii) the systematic use of coal.

1 *Fossil fuel power plants*

Challenges to fossil fuel-based power plants represent one of the more developed strategies in South African HRCC litigation. One of the earliest successes in rights-based climate litigation in South Africa – and, indeed, the world – came from a case filed by two South African environmental organisations challenging plans to construct a new coal-fired power plant station near Lephalale in the Limpopo Province. In *Earthlife Johannesburg*, the applicant environmental organisations (Earthlife Africa and groundWork) challenged the government's issuance of an environmental authorisation under the National Environment Management Act 107 of 1998 (NEMA) to build the Thabametsi Power Plant.[56] They argued that NEMA requires the government to consider all relevant factors when weighing whether to authorise a new coal-fired power plant – and that climate change impacts were relevant factors that the government failed to consider.

The High Court of South Africa sided with Earthlife and groundWork, finding that the government was required to consider the potential climate change impacts generated by the new power plant when deciding whether to issue an environmental authorisation under NEMA.

In its ruling, the High Court explained that courts, with respect to legislation like NEMA, are 'duty bound' to 'promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question'.[57] In that spirit, the Court cited Section 24 of the Constitution – which protects South Africans' right to an environment that is not harmful to their health or well-being – as the relevant constitutional right to consider when interpreting the content of NEMA. More specifically, the Court noted:

> Section 24 recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures [to] protect the environment 'for the benefit of present and future generations' and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences.[58]

The Court also provided that it was mandated, per Section 233 of the Constitution, to interpret NEMA in a manner consistent with international law. The UNFCC, for example, incorporates the precautionary principle, which is thus relevant to understanding the scope and content of NEMA.

These two points regarding constitutional interpretation – reading domestic statute consistently with both Section 24 of the Constitution and relevant international law, like

[56] *Earthlife Johannesburg* (note 55 above).

[57] Ibid at para 81.

[58] Ibid at para 82.

the UNFCCC – comprise a common thread that weaves through much of South Africa's climate litigation as well as its constitutional environmental litigation more broadly. The explicit permeability of South African constitutional law to international law also positions South African HRCC litigation to plug directly into the global jurisprudence developing on climate change. Intergenerational equity, for example, has emerged as a strong feature of the global body of climate change and human rights jurisprudence and can be deployed to bolster HRCC cases in South Africa that incorporate claims on the basis of this principle to secure *urgency* of action.

Building off the success of *Earthlife Johannesburg*, other South African NGOs filed cases targeting coal and gas-fired power plants, arguing that the precedent established by *Earthlife Johannesburg* should apply in those instances too. Namely, the Khanyisa Thermal Power Plant[59] and KiPower Thermal Power Plant[60] cases sought to challenge environmental authorisations granted for coal-fired power plants on the basis of the precedent established by *Earthlife Johannesburg* – that the government authorised these plants without an adequate climate change impact assessment, as is now required by law.

In *South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and the Environment*, the applicant environmental organisations (South Durban Community Environmental Alliance and the Trustees of the Groundwork Trust) challenged the government's decision to authorise the gas-powered Richards Bay Power Plant on several bases, including that the decision was grounded on an inadequate assessment of the potential climate impacts of the plant.[61] In making this argument, the applicants pointed to Section 24 of the Constitution as providing the environmental principles that shape the scope and content of the framework established by NEMA, including environmental authorisations.

This camp of cases is numerically significant – about half of all rights-based climate cases in South Africa follow this mould, challenging the construction and operation of coal and gas-fired power plants. Given that most HRCC litigation globally focuses on challenging policy, litigators in other jurisdictions looking to also target projects may find this body of case law instructive. In particular, this camp of South African litigation demonstrates that success need not rest in arguments that are especially new – instead, litigators can take well-developed components of environmental or administrative law, like the environmental impact assessment, and expand their application in the context of the climate emergency. And even so, these cases have still successfully held the government and others to account for projects inconsistent with the type of *ambition* needed on climate change to avoid dangerous scenarios of global warming, including surpassing the temperature target – thus also illustrating how South African HRCC litigation can hold state and nonstate actors accountable for the urgency and ambition requirements articulated under the international climate and human rights regimes, among other sources.

2 *Fossil fuel exploration and development*

Second in this case typology are challenges to fossil fuel exploration and development, which include several recent rights-based climate cases that challenge corporate plans to explore for

[59] Note 55 above.

[60] Ibid.

[61] *South Durban Community Environmental Alliance* (note 55 above) at para 9.1.

and exploit new fossil fuel reserves in South Africa. A small fraction of HRCC cases globally target this early stage of fossil fuel development, including, for example, *Greenpeace Nordic v Minister of Petroleum and Energy*.[62] This strand of South African HRCC litigation can, therefore, be situated within a relatively small cohort of global HRCC cases, making these South African cases relatively rare for HRCC litigation from a global perspective.

In *Sustaining the Wild Coast,* applicant NGOs and communities sought to check the exploitation of new fossil fuel reserves before it even started – by challenging seismic surveying.[63] In particular, the applicants sought a ruling affirming that an environmental authorisation under NEMA was required before Shell could proceed with its plans to conduct seismic surveys for fossil fuel reserves off the eastern coast of South Africa, in an area known as the Wild Coast. While the High Court considered the matter, the applicants pushed for an interim interdict to restrain Shell from proceeding.

The applicants were successful in their pursuit for an interim interdict. The High Court found, in short, that there was a *prima facie* showing of a right – in this case, community consultation rights – that was at risk of imminent and irreparable harm – here, the damage to marine ecosystems on which the communities rely, generated by seismic surveying. Though the court focused, for the purpose of the interim decision, on community consultation rights, the applicants had also cited constitutional rights, including constitutional environmental rights as well as constitutional cultural and communal rights, as the basis for an interim interdict.

The High Court subsequently ruled again for the applicants in its final ruling. In that decision, the High Court found that the decisions to grant Shell exploration rights failed to comply with a number of rights-based obligations, including Shell's community consultation obligations, thus rendering them invalid.[64]

In *South Durban Community Environmental Alliance v Minister of Environment, Forestry and Fisheries*, the applicant environmental organisation (South Durban Community Environmental Alliance) similarly challenged the government's decision to authorise exploratory drilling off the coast of South Africa.[65] The decision to authorise the drilling, according to the applicant, included a number of procedural and administrative law defects, including the government's failure to give adequate consideration to international law (eg, the Convention on Biological Diversity[66] and the World Heritage Convention[67]) and failure to conduct a climate change impact assessment. As such, the authorisation decision should not stand. Like in other South African HRCC cases, reference to Section 24 of the Constitution as providing an overarching framework for the government's obligations under domestic statutes was interwoven into much of the petition. As of time of writing, this case is still pending before the court.

Strategically, litigators in these cases demonstrate a hallmark of HRCC litigation globally: sensitivity to time. Given that climate change unfolds non-linearly, acting earlier is imperative. And litigators in this camp of cases are seeking to facilitate that type of early action by keeping additional fossil fuels in the ground. In other words, to achieve the temperature target set by the Paris Agreement, it is imperative that additional greenhouse gases (emitted through expanded

[62] *Greenpeace Nordic v Minister of Petroleum and Energy* (2020) HR-2020-2472-P (Norway).
[63] *Sustaining the Wild Coast* (note 55 above).
[64] Ibid.
[65] *South Durban Community Environmental Alliance* (note 55 above).
[66] Convention on Biological Diversity (1993).
[67] World Heritage Convention (1972).

fossil fuel production) do not compound extant emissions to accelerate the time horizon of global warming. These cases reflect that insight and thus seek to enforce the urgency with which states and corporations must respond to the climate emergency.

3 *Systematic reliance on coal*

And third in this typology of South African HRCC cases are challenges to the systematic reliance on coal in the country. Notably, most rights-based climate cases in South Africa target *fossil fuel projects*, meaning specific initiatives to continue and expand the extraction and use of fossil fuels, which, again, differentiates them from the global trend in HRCC litigation. A recently filed case, however, bucks the trend insofar as it challenges a policy-level decision to expand coal-fired electricity generation as part of South Africa's electricity source portfolio. In *African Climate Alliance v Minister of Mineral Resources and Energy*[68] – known more widely as the #CancelCoal case – the three applicant environmental NGOs target the revised Integrated Resource Plan (IRP), which, among other things, details how the country will meet its electricity needs over a certain period of time.[69] It specifically provides how much electrical capacity will come from each of a number of possible sources, including renewable sources like solar and wind, gas and, importantly for this case, coal. In particular, the revised IRP plans for 1500 megawatts (MW) of electricity to be generated through *new* coal-fired power capacity – thereby expanding the use of one of the dirtiest, most polluting forms of energy in spite of the ongoing climate emergency.

In 2020, the Minister of Mineral Resources and Energy along with the National Energy Regulator of South Africa (NERSA) confirmed this expansion of coal-fired power under the national regulatory framework governing the electricity supply industry (the Electricity Regulation Act 4 of 2006), paving the way for the construction and operation of new coal-fired power plants.

Following this, the applicants filed suit in 2021, arguing that the challenged decisions – the IRP provision expanding coal-fired electrical generation and the implementing decisions of the Minister and NERSA – violate constitutional rights as well as fail to provide sufficient reason and justification. Crucially for the development of South African constitutional jurisprudence on climate change, the petition is expressly concerned with articulating the boundaries of acceptable government action in light of the impacts of climate change on constitutional rights:

> [T]he procurement of 1500 MW of new coal-fired power represents a severe threat to the constitutional rights of the people of South Africa, including the section 24 environmental rights, the best interests of the child, the rights to life, dignity and equality, among other implicated rights. These constitutional violations will disproportionately impact the poor and vulnerable, including women, children and young people. Children are physically and psychologically more vulnerable to the shocks and disruptions caused by a polluted environment and climate change. They will also have to live with the consequences of the government's decision for decades to come … Already in 2016, electricity produced by new solar and wind was almost half the price of electricity from new coal … In these circumstances, there is no reasonable and justifiable basis for the limitation of constitutional rights resulting from the government's plans for new coal.[70]

[68] *African Climate Alliance v Minister of Mineral Resources and Energy* (note 55 above).

[69] Integrated Resource Plan, GN1360/2019 *Government Gazette No. 42784* (18 October 2019).

[70] Founding affidavit for applicant in *African Climate Alliance v Minister of Mineral Resources and Energy* (note 55 above) (10 November 2021), available at https://climatecasechart.com/wp-content/uploads/

This plan for new coal impermissibly infringes on constitutional rights – and lacks reason and justification, as required under applicable administrative law – because it would, among other reasons, intensify climate impacts by generating additional greenhouse gas emissions and 'make it more difficult and costly for South Africa to achieve ambitious emission-reductions, consistent with its "fair share" contribution to achieving the Paris Agreement goals'.[71] In other words, the South African government is responsible for achieving a certain level of ambition in climate action and its systematic reliance on coal is preventing that ambition. Note how the petitioners imported a doctrine that has emerged in the global body of rights-based climate jurisprudence – the fair share obligation – to link new coal-fired power to constitutional rights violations.

Moreover, by focusing on the disproportionate impacts of climate change – made worse by the additional greenhouse gas emissions envisaged by the expanded coal-fired electrical generation – on children, young people and future generations, the petition makes intergenerational equity a core concern. In particular, the petition underscores how children – who will bear the brunt of intensified climate impacts – 'largely depend on – and are left to trust – those presently in power to conserve the environment, protect society's common heritage, and ensure a safe climate now and during the decades to come'.[72] In fact, the petitioners argue that the government's decision, in violation of the protections against unfair discrimination baked into the substance of the Section 24 rights, 'unfairly discriminates on the basis of age, as it [is] the young who will disproportionately shoulder the burden of climate change, as the harms intensify in the coming years'.[73]

This provides an opportunity for the High Court to comment on the intergenerational protections offered by the Constitution in the context of the ongoing climate emergency – especially, with regards to Section 24, which explicitly includes future generations within the ambit of its protections.[74]

This case also heavily reflects developments in the global body of HRCC litigation insofar as the latter, like this case, is often centrally concerned with the disproportionate impacts of climate change on children, young people, and future generations. What makes this case, however, relatively distinct from the typical youth-led or youth-oriented HRCC case globally is that South African constitutional environmental protections explicitly include protections for present *and* future generations. As a result, this case has the opportunity to clarify the nexus between the right to a healthy environment, climate change, and intergenerational duties and responsibilities, including the *time frame* in which climate action must be achieved.

The applicants have asked the High Court for a declaration invalidating the portion of the IRP providing for the procurement of new coal-fired power as well as the Minister's decision, along with NERSA, to formally authorise the use of new coal-fired electrical power. Whether the requested relief will be granted remains to be seen, as the case is still pending before the court. How the court rules in this case may have meaningful implications for the body of South African constitutional law on climate change, as the explicit linkage between inadequate climate policy and constitutional rights violations proffered in the case makes it likely that the court

non-us-case-documents/2021/20211110_Case-No.-5690721_petition.pdf at paras 15, 16, 17.1, 21.

71 Ibid at para 258.

72 Ibid at para 217.

73 Ibid at para at 360.

74 Constitution S 24.

will comment on the relationship between government action, constitutional protections and climate change, should it reach the merits of the case.

In other words, the #CancelCoal case has the potential to clarify the government's constitutional obligations on climate change as well as the protections offered by constitutional rights, especially under Section 24, in the context of climate change.

Nevertheless, this case is pending before the High Court of South Africa – not the Constitutional Court. Since it is not the highest court on constitutional matters, the persuasive authority of the decision that is ultimately handed down by the High Court will be somewhat constrained.

C Trends and gaps in South African rights-based climate litigation

Litigators in South Africa have secured meaningful wins thus far in using climate litigation as a tool to challenge corporate and government behaviour that contributes to climate change and is inconsistent with the global effort to limit global warming. These cases – including *Earthlife Africa Johannesburg* and *Sustaining the Wild Coast* – have temporarily or permanently blocked fossil fuel projects that would increase greenhouse gas emissions.

Thus far, rights-based climate litigation in South Africa has been primarily reactive – focused on combatting greenhouse gas emissions project by project. This is not necessarily a shortcoming – systematically subverting or delaying plans for high-emitting activities can help meaningfully constrain greenhouse gas emissions. In practice, though, this approach has an opportunity cost: the lack of proactive cases intended to secure more ambitious society-wide emission reductions.

In other words, with the exception of the #CancelCoal case, litigators have yet to take full advantage of rights-based climate litigation to address inadequacies in governmental policies and regulations on climate.

The #CancelCoal case, however, is the first major step towards filling this gap. How the court ultimately resolves this case will likely shape the future development of South African rights-based climate litigation, especially as it relates to constitutional rights arguments, given the central role they play in the #CancelCoal case.

In the South African context, rights-based climate litigation that is fundamentally concerned with adapting to the already occurring and inevitable impacts of climate change is largely missing, as is also the case with rights-based climate litigation globally. This gap in the South African context, though, is especially stark, given the heightened vulnerability of much of its population to climate impacts as well as the accelerated rate, noted above, at which climate change is occurring in South Africa relative to much of the world.

D Relationship to global rights-based climate litigation

South African rights-based climate litigation has not evolved in a vacuum; rather, it has unfolded as strides have been made in other jurisdictions around the world to use the courts to secure urgent and ambitious climate action.

There is some evidence that South African climate litigation has been shaped by developments abroad. The invocation of South Africa's 'fair share' obligation in the #CancelCoal case, for example, reflects the development of this concept in other cases, including, for example,

the *Sacchi v Argentina* case before the UN Committee on the Rights of the Child,[75] *Duarte Agostinho v Portugal*,[76] and *Milieudefensie v Royal Dutch Shell*.[77]

Moreover, developments in the international climate regime that have influenced rights-based climate litigation in other jurisdictions has also played a role in rights-based climate litigation in South Africa. As has been the case with HRCC litigation more generally, South African litigators and courts typically reference both the reports of the IPCC as well as the Paris Agreement and commitments made thereunder. They have used, as is again the case more generally, IPCC reports as evidence of the severity of climate impacts and urgency of the situation while citing the Paris temperature goal as a benchmark to assess the appropriateness of government and corporate action.

E The role of constitutional law in South African climate litigation

Constitutional law – including constitutional principles, norms and rights – has been a common thread throughout the body of South African HRCC cases. Its inclusion, however, has ranged from peripheral – referenced as part of the relevant legal background for the case – to central – comprising the key basis on which the case has been brought.

Even when constitutional law plays an ostensibly peripheral role, its influence may in fact be deeper. A number of cases, for example, are grounded on claims under the National Environment Management Act (NEMA). NEMA, however, was enacted 'as the primary legislative instrument which gives effect to the environmental rights contained in Section 24 of the Constitution', as the High Court made clear in *Philippi Horticultural Area Food & Farming Campaign*.[78] In other words, even HRCC cases based on statutory claims have been informed by constitutional principles and the governance structure facilitated by Section 24 of the Constitution. NEMA, for example, 'is to be interpreted purposively in a manner that is consistent with the Constitution'.[79] This, in turn, is a function of the principle of subsidiarity, a constitutional principle that provides that direct reliance on a constitutional provision – for example, Section 24 of the Constitution – is not possible in instances where legislation giving effect to an aspect of that provision has been codified.[80] In other words, in issue areas where NEMA applies, applicants must rely on this legislation – though informed by the Constitution – instead of Section 24 directly.

In terms of the development of South African constitutional law on climate, the outcome of the #CancelCoal case will likely play a role in defining future trajectories for constitutional rights-based climate cases, assuming the High Court reaches a verdict on the merits.

Moreover, the articulation of South African constitutional jurisprudence on climate has been and will continue to be influenced by developments in the country's constitutional

[75] *Sacchi v Argentina*, 'Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019' UN Committee on the Rights of the Child, CRC/C/88/D/104/2019, 22 September 2021.

[76] *Duarte Agostinho v Portugal*, Case No. 39371/20 (European Court of Human Rights).

[77] *Milieudefensie v Royal Dutch Shell*, C/09/571932 / HA ZA 19-379 (RDH 2021).

[78] *Philippi Horticultural Area Food & Farming Campaign* (note 55 above) at para 71.

[79] Ibid.

[80] M Murcott & W van der Westhuizen 'The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on Motau and My Vote Counts' (2015) 7 *Constitutional Court Review* 43, 43–53.

jurisprudence on the environment. Though *Fuel Retailers Association*[81] – adjudicated by the Constitutional Court in 2007 – continues to be one of the most, if not the most, authoritative cases on constitutional environmental law, another case bears mentioning: *Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* – or, as it is better known, the 'Deadly Air' case.[82]

In the 'Deadly Air' case, two environmental organisations sued various South African agencies for their failure to reduce decades-long air pollution in a portion of the Highveld region to non-hazardous levels. They argued that this situation, among other things, constitutes a breach of Section 24(a) of the Constitution, which provides that South Africans have a right to an environment that is not harmful to their health or well-being.

The High Court handed down its ruling in March 2022, finding for the applicants and providing insight into the scope and content of the protections afforded by Section 24(a) of the South African Constitution. In short, the High Court found that the levels of air pollution far exceeded the level deemed safe by applicable statutes governing air quality, meaning that the environment was harmful to health and well-being and had been for the years that the government failed to make progress on it. The court, moreover, rejected the government's argument that it could not be held responsible for a 'state of affairs', arguing that the unacceptable levels of pollution were the direct result of the government's failure to promulgate regulations that its own Department of Environmental Affairs deemed necessary. This years-long failure to regulate contradicts the government's duty to ensure the 'expeditious and effective' realisation of the right to an environment that is not harmful to health and well-being. Ultimately, the government was deemed to have breached the environmental right provided for under Section 24(a) of the Constitution.[83]

While analysing the claims of the case, the High Court also affirmed that the environment cannot be wholly sacrificed at the altar of economic gain – government-sanctioned economic development does not comply with the terms of Section 24 if it fails to safeguard environmental health and wellbeing. Put differently:

> The principle of sustainable development further requires that measures put in place to achieve economic development should not sacrifice the environment and human life and wellbeing and it must be that a balance should be struck. Where one trumps the other, it cannot be said the right of section 24(a) has been achieved.[84]

Though the 'Deadly Air' case is not an HRCC case – and nor was it a precedent set by the Constitutional Court – its delineation of the content of Section s24(a) may nevertheless be applied in HRCC cases seeking to use Section 24(a) as the basis for their claims. In particular, it provides that the government will likely prove unsuccessful in arguing that climate impacts or high greenhouse gas emissions represent a 'state of affairs' for which they are not responsible. Instead, this case suggests that a court would find them liable if they have failed to regulate – or, perhaps, failed to regulate *adequately*. The latter point may be especially relevant for HRCC litigation in South Africa, as it may provide a basis for litigators to attack inadequate ambition

[81] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC 13, 2007 (6) SA 4 (CC) (*Fuel Retailers Association*).

[82] *Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* [2022] ZAGPPHC 208.

[83] Ibid at paras 178–183.

[84] Ibid at para 175.

for emissions reductions or slow or ineffectual implementation of commitments to reduce greenhouse gases.

Moreover, the 'Deadly Air' case also suggests that economic development cannot be used as a carte blanche to justify environmentally degrading activities – the sustainable development principle embedded in Section 24 requires that a balance is struck between economic development and environmental protection. Applied in the context of HRCC litigation, this suggests that activities contributing to the country's greenhouse gas emissions cannot be justified on the basis of economics alone. Indeed, as the High Court in *Earthlife Johannesburg* noted, 'climate change poses a substantial risk to sustainable development in South Africa … Short-term needs must be evaluated and weighed against long-term consequences'.[85]

V OPPORTUNITIES GOING FORWARD: WHY SOUTH AFRICAN CONSTITUTIONAL LAW ON CLIMATE MATTERS

Though South Africa was home to some of the earliest HRCC cases, the relatively small number of such cases overall means that this line of litigation is still in its infancy. And, as such, there are opportunities for growth and impact.

Indeed, the opportunities for South African constitutional law on climate change are twofold. The first stems from the fact that South African constitutional law is permeable to developments in international law. Indeed, consideration of international law is mandated by the Constitution – Section 39(1)(b) explicitly provides that 'when interpreting the Bill of Rights, a court, tribunal or forum must consider international law'.[86] This means that South African courts may be particularly amenable to incorporating developments in constitutional law in other jurisdictions into their analysis of climate claims under the South African Constitution. The precedent established by the German Constitutional Court in *Neubauer v Germany*, for example, may provide persuasive insight into how South African courts can safeguard intergenerational equity on climate through constitutional protections.

Second, given how, from a comparative perspective, South African constitutional jurisprudence has served as a model for other jurisdictions around the world, progressive development of the constitutional jurisprudence on climate change has the potential to influence how courts weigh constitutional climate claims in other countries. It may, for example, be able to influence courts in other Global South countries that are also heavily reliant on coal, like India.

More concretely, both with respect to the application of socioeconomic rights jurisprudence to climate cases and in terms of holding private actors accountable for climate harms, South African courts are especially well-positioned to extend and apply existing jurisprudence, establishing important precedent for global HRCC litigation writ large.

South African jurisprudence on socioeconomic rights is rich and may provide doctrines, concepts and norms that can advance rights-based climate claims, especially in the Global South context. It may, moreover, help accelerate HRCC litigation within the country, since it may provide a framework to expand HRCC litigation, especially where there are gaps. For example, with the exception of the #CancelCoal case, HRCC litigation in South Africa has not taken on policies that contribute to climate change or undermine needed climate action.

[85] *Earthlife Johannesburg* (note 55 above) at para 82.

[86] Constitution S 39(1)(b).

With respect to socioeconomic rights, however, courts have been more than willing to strike down policies that violate socioeconomic rights, like to the right to housing. These precedents can inform and be applied within the context of rights-based climate litigation to challenge inadequate policies and secure better ones.

With respect to private actors, South African jurisprudence on the constitutional duties of private actors is well-developed. This provides litigators and courts the opportunity to use this extant body of case law in the context of climate change to hold private actors, especially corporations like fossil fuel companies, responsible for their contributions to the ongoing climate emergency. Indeed, this existing jurisprudence could be leveraged to create room for innovative and strategic litigation against private actors, targeting the human rights harms associated with dirty energy and other forms of climate pollution and serving as guideposts for courts in other jurisdictions to do the same.

Rights-based climate litigation has become an important tool in the effort to accelerate global climate action. It took years for this field of practice to launch in earnest and was only made possible by the broader coherence of the human rights and climate change field. Though litigators in South Africa have secured several important successes in HRCC cases, this field of practice is still in its early stages in South Africa. Time, however, is limited – greenhouse gas emissions must be dramatically slashed by the end of this decade to avoid dangerous scenarios of climate change. In this context, South African HRCC practitioners and scholars can draw on the growing number of international and comparative lawsuits and rulings – as well as the relevant South African precedents and the rich domestic tradition of constitutional, environmental and human rights jurisprudence – to help address the climate emergency with the urgency and ambition that it requires.