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Climate Litigation in the Global South: Constraints and Innovations

Joana Setzer

Lisa Benjamin
Lewis & Clark Law School, lbenjamin@lclark.edu

Climate Litigation in the Global South: Constraints and Innovations[Ψ]

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Joana Setzer[*] and Lisa Benjamin[**]

Abstract: Cases involving climate change have been litigated in the courts for some time, but new directions and trends have started to emerge. While the majority of climate litigation has occurred in the United States and other developed countries, cases in the Global South are growing both in terms of quantity and the quality of their regulatory outcomes. However, so far climate litigation in the Global South has received scant attention from the literature. We argue that climate litigation in the Global South opens up avenues for progress on climate change in these highly vulnerable countries. We first highlight capacity constraints within Global South countries to provide context to the approach to climate litigation in the Global South – how these cases push the climate litigation agenda forward by linking climate change and human rights, and often addressing climate change indirectly, integrating it into other environmental matters in spite of the significant constraints experienced in these countries. Drawing upon Legal Opportunity Structures (LOS) approaches, we identify two factors that are contributing to this increased activity and initial positive outcomes: access to justice in conjunction with the existence of progressive climate and environmental rights legislation, and judicial opportunism, which combined pave the way to innovative climate litigation outcomes.

Keywords: Climate change litigation, Global South, Human rights, Legal Opportunity Structures

1. INTRODUCTION

Cases involving climate change have been litigated in the courts for some time, but new directions and trends have started to emerge. While the majority of climate litigation has occurred in the United States (US) and other developed countries, cases in the Global South[1]

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[*] Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science (LSE), London (United Kingdom (UK).
Email: j.setzer@lse.ac.uk.
[**] Lewis & Clark Law School, Portland, Oregon.
Email: lbenjamin@lclark.edu.

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[1] Defining the groupings of poorer countries in the world has been subject to much debate. The terms 'Third World', 'developing world' and 'Global South' originated in different periods and have been contested in terms of their utility and appropriateness. Today, the term 'Global South' (and its counterpart 'Global North') has been the favoured option by scholars and policy-makers. It is based on an earlier 'North–South' distinction of the 1980s, but the prefix 'Global' clarifies that this is not a geographical categorization of the world, but one based on economic inequalities though with some spatial resonance in terms of where the countries are situated. S.H. Chant & C. McIlwaine, *Geographies of Development in the 21st Century: An Introduction to the Global South* (Edward

are growing both in terms of quantity and the quality of their regulatory outcomes. Over the past years, cases of strategic climate litigation have been initiated in Brazil, Colombia, India, Indonesia, Pakistan, the Philippines, and South Africa. These cases push forward climate jurisprudence in the chosen jurisdictions, and perhaps even beyond to other Global South countries. Despite resource and governance constraints, some strategic cases from the Global South have achieved bold outcomes. Yet, so far climate litigation in the Global South has received scant attention in the literature.

In this article we tease out some initial findings from a selection of strategic climate cases filed in the Global South. Admittedly, the reliance on a small number of strategic cases, in selected jurisdictions, offers a limited picture of climate litigation in the Global South. Nevertheless, this narrow focus is a useful entry point to investigate how climate change is being adjudicated in the Global South. We are interested in exploring how these positive judicial outcomes have been achieved, given the capacity constraints experienced by these and other countries in the Global South, particularly around the environmental rule of law. Ultimately, the strategies and outcomes from these courts in the Global South might be able to contribute to the development of transnational climate change litigation.[2]

We begin by considering the significant capacity constraints for climate litigation to develop in the Global South. This examination provides context for the characteristics of this initial trend of innovation in the countries where strategic climate litigation has been brought. We then identify initial trends in Global South climate litigation. To a certain extent, climate cases in the Global South follow trends observed in the Global North. However, Global South climate litigation has unique characteristics that are distinct from those observed in Global North. Strategic approaches to and outcomes of litigation in the Global South reflect these different characteristics.

Even where the contours (for example strategies and legal grounds) of Global North and Global South climate litigation are similar, we observe that the context and content of the filing is 'painted in different colours'. This is the case with constitutional rights or human rights claims, which litigants in both the Global North and South have relied on. But in Global South countries the character of human rights claims is arguably more desperate due to the high vulnerability of their populations to climate-induced risks and loss and damage, as well as their limited access to life-sustaining resources.[3] For example, an innovative approach to corporate liability was used in the *Carbon Majors Inquiry* carried out by the Philippines Human Rights

Elgar, 2008), pp. 6, 11. Yet, within 'Global South' countries, there are different layers of development and legal capacity. The Global South countries that we consider in this article are all relatively affluent and have fairly strong civil society and legal systems.

[2] Traditionally, the term 'transnational litigation' refers to claims involving foreign plaintiffs or defendants located outside the court's jurisdiction, and/or the possibility of enforcing foreign judgments in domestic courts. See M.S. Quintanilla & C.A. Whytock, 'Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law' (2011) 18(1) *Southwestern Journal of International Law*, pp. 31-52, at 32. Specifically looking at transnational climate litigation in the US, see M. Byers, F. Kelsey & A. Gage, 'The Internationalization of Climate Damages Litigation' (2017) 7(2) *Washington Journal of Environmental Law & Policy*, pp. 264-319. But scholars of climate litigation also describe climate litigation as 'transnational' in that it is part of a 'global' climate justice movement, even where cases involve only domestic litigants and decisions of domestic courts greenhouse gas producer. See J. Peel & J. Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (forthcoming) (2019) 113(3) *American Journal of International Law*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3379155.

[3] L. Kotzé, 'Human Rights, the Environment and the Global South', in S. Alam, S. Atapattu, C.G. Gonzalez & J. Razzaque (eds), *International Environmental Law and the Global South* (Cambridge University Press, 2015), pp. 171-191, at 178-9.

Commission in the context of loss and damage suffered by their citizens as a result of an extreme event which killed over 6,000 people.[4] In *Future Generations* v. *Ministry of the Environment and Others*, the Supreme Court of Colombia also focused on the issue of human rights, but went further to discuss intergenerational equality and solidarity, private liability and accountability for climate change, human dependence on the environment, and even recognized Colombia's Amazon basin as an entity subject of rights.[5]

In other cases, the trends in Global South climate litigation reflect the priorities of the jurisdiction where the filing is made. These lawsuits are purposely adapted to address challenges that are generally more acute in developing countries. Indeed, while a number of landmark cases of strategic climate litigation in the Global North are targeted at driving governmental ambition on climate change, litigants from the Global South are more likely to use litigation to compel governments to enforce existing policies for mitigation and adaptation, attempting to overcome implementation constraints. For example, in *Ashgar Leghari* v. *Federation of Pakistan*, the Court ordered a number of regulatory outcomes in the face of delay and lack of action on climate change adaptation by government agencies on the basis of human rights violations.[6] In a related vein, Peel and Lin suggest Global South litigation connects the 'peripheral' nature of climate issues to wider disputes over constitutional rights, environmental protection, land use, disaster management and natural resource conservation.[7] For example, in *EarthLife Africa Johannesburg* v. *Minister of Environmental Affairs & Others*, South Africa's High Court determined that global climate change was a relevant consideration in the environmental review of plans for a new coal-fired plant.[8]

Based on these characteristics, and drawing upon Legal Opportunity Structures (LOS) approaches, we identify two related factors that are driving and contributing to the initial regulatory outcomes observed in Global South strategic climate litigation: access to justice in conjunction with the existence of progressive climate and/or environmental rights legislation, and judicial opportunism. When these factors are combined, they have the potential to help actors in the Global South overcome countervailing dynamics of significant capacity constraints in implementing environmental legislation and managing fragmented and under resourced institutional structures, and can therefore contribute to progressive outcomes.

Taking into consideration the initial trends of climate litigation in the Global South, and the factors that contribute to this movement, we anticipate that strategic climate litigation in the Global South is likely to increase in the coming years. Moreover, it may lead to outcomes that uphold or advance climate change protections, particularly around climate change adaptation,

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[4] The term Carbon Majors and the Carbon Majors Inquiry are underpinned by a study published by R. Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122(1-2) *Climatic Change*, pp. 229-41. Documents and other information about the Inquiry are available at: https://essc.org.ph/content/nicc.

[5] P.A.A. Alvarado & D. Rivas-Ramírez, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court' (2018) 30(3) *Journal of Environmental Law*, pp. 519–26; and P.V. Calzadilla, 'A Paradigm Shift in Courts' View on Nature: The Atrato River and Amazon Basin Cases in Colombia' (2019) 15(0) *Law, Environment and Development Journal*, pp. 1-11, available at: http://www.lead-journal.org/content/19001.pdf.

[6] *Leghari* v. *Pakistan*, Case No. 25501/2015, Lahore High Court, Order of 4 Sept. 2015, available at: http://www.lse.ac.uk/GranthamInstitute/litigation/ashgar-leghari-v-federation-of-pakistan-lahore-high-court-green-bench-2015.

[7] Peel & Lin, n. 2 above.

[8] *Earthlife Africa Johannesburg* v. *Minister of Environmental Affairs & Others*, Case No. 65662/16, High Court, Order of 8 Mar. 2017, available at: http://www.lse.ac.uk/GranthamInstitute/litigation/earthlife-africa-johannesburg-v-minister-of-environmental-affairs-others.

in jurisdictions that have adopted progressive procedural as well as regulatory approaches to environmental protection and justice. With more countries in the Global South implementing procedural and regulatory innovations in the environmental field, the new directions opened by progressive climate litigation could provide lessons and clear avenues for other litigants. Yet, it remains to be seen whether these specific instances of positive climate outcomes will remain cabined within the progressive judicial environments of these specific countries, or whether they may broaden to develop a distinct field of climate jurisprudence.

In Section 2, this article briefly reviews the capacity constraints that many Global South countries experience in implementing international environmental law as well as domestic environmental rule of law. Section 3 identifies climate litigation trends in the Global South. Section 4 identifies two key features of emerging Global South litigation, highlighting their innovative characteristics, and comparing them to similar efforts and outcomes of climate litigation in the Global North. Section 5 discusses two reasons for these key features, which have arguably contributed to successful outcomes and innovative initiatives. The final section identifies potential lessons and impacts of these successes going forward.

2. THE NORTH-SOUTH DIVIDE AND CAPACITY CONSTRAINTS

Many Global South countries have not traditionally viewed climate change as one of their greatest threats, focusing instead on immediate needs for economic development, poverty reduction, and energy security,[9] as well as more immediate environmental threats, such as hazardous waste and safe drinking water.[10] Because environmental issues are intertwined with economic issues, international environmental law has long been a site of intense contestation over environmental priorities and liability for past harms.[11] Some countries in the Global South viewed environmentalism as a luxury that low-income countries could not afford to implement, and as a hurdle to achieving poverty reduction and economic development.[12] Past histories of colonialism, and postcolonial global economic orders, have also led to environmental harms and poverty in the Global South, thereby engendering further mistrust by these countries regarding environmental protection efforts by the Global North.[13]

The international environmental law architecture also leads to constraints in implementation in countries in the Global South. Many multilateral environmental agreements have significant reporting requirements, as well as a number of annual conferences which take place all over the world.[14] Limited human and financial resources in countries in the Global South mean they often struggle to maintain a presence at these meetings, and to comply with reporting requirements. The primary needs for adequate financing, appropriate technology transfer, and effective dispute resolution mechanisms in order to aid implementation in the Global South are

[9] O. Mertz et al., 'Adaptation to Climate Change in Developing Countries' (2009) 43 *Environmental Management*, pp. 743-752, at 744; Bazilian et al. 'Interactions between Energy Security and Climate Change: A Focus on Developing Countries' (2011) 39 *Energy Policy*, pp. 3750-3756, at 3750. However, there are a number of countries in the Global South where for many years climate change has been considered a priority (e.g., small island developing states).
[10] S. Atapattu & C.G. Gonzalez, 'The North-South Divide in International Environmental Law: Framing the Issues', in Alam et al., n. 3 above, pp. 1-21, at 10.
[11] Ibid., p. 2.
[12] R. Gordon, 'Unsustainable Development', in Alam et al., n. 3 above, pp. 50-73, at 50.
[13] Atapattu & Gonzalez, n. 10 above, p. 5.
[14] V.P. Nanda, 'Global Environmental Governance and the South', in Alam et al., n. 3 above, pp. 130-151, at 135.

yet to be met.[15] Partly as a result, countries in the Global South often lack the capacity to build and maintain effective environmental institutions, create strong scientific knowledge bases for environmental policy making, effectively integrate environmental concerns into national economic development planning, and set up effective environmental monitoring and implementation schemes. In addition, conflicts between environmental protection and economic development are particularly pronounced in these countries due to policy priorities focused on development projects which target foreign direct investment.[16]

Where environmental legislation exists, policy makers face an array of barriers to enforcement, including weak and fragmented institutions, incomplete legal foundations, and limited political will.[17] Many countries lack the resources, infrastructure, technology and monitoring facilities needed to support effective enforcement. Additionally, environmental legislation may be outdated, or may not match existing technical, economic, and human resource limitations.[18] Environmental legislation also often requires the establishment of new institutions. Where established, these are often poorly resourced, with fragmented institutional structures where administrators may operate in silos. In Brazil, for example, budgetary constraints, inappropriately staffed agencies, as well as strong industrial and commercial lobbies have all hampered enforcement of environmental legislation.[19] In South Africa, the legacy of apartheid and its consequential economic and spatial inequality has placed tremendous pressure on policy makers to ensure energy security through cheap, and often fossil-fuel intensive, energy sources.[20]

Non-governmental organizations (NGOs) and environmental defenders often step in to these governance gaps, working with local communities to identify environmental risks and impacts and promote human rights in the context of large-scale extraction projects through the protection of biodiversity, water and forestry.[21] Yet, some governments in the Global South restrict the activities of organizations that receive foreign funding on the basis of maintaining transparency and accountability.[22] From 1993 to 2012, 39 of the world's low and middle-income countries enacted laws that restrict the activities of these organizations.[23] Moreover, environmental defenders are often subjected to threats, intimidation, physical violence, and even death. Murders of environmental defenders are on the rise worldwide, and especially in resource-rich countries.[24] A report by Global Witness[25] names 207 activists killed in 2017, with

[15] Ibid., p. 146.
[16] E. Emeseh, 'Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: a Case Study of the Petroleum Industry in Nigeria' (2006) 24(4) *Journal of Energy Natural Resources*, pp. 574-606, at 598; C. Lo & G. Fryxell, 'Enforcement Strategies Among Environmental Protection Officials in China' (2003) 23(2) *Journal of Public Policy*, pp. 81-115, at 83.
[17] A. Blackman, 'Can Voluntary Environmental Regulation Work in Developing Countries? Lessons from Case Studies' (2008) 36(1) *The Policy Studies Journal*, pp. 119-141, at 120; G. Eskeland & E. Jimenez, 'Policy Instruments for Pollution Control in Developing Countries' (1992) 7(2) *The World Bank Research Observer*, pp. 145-169.
[18] S. Singh & S. Rajamani, 'Issue of Environmental Compliance in Developing Countries' (2003) 47(12) *Water Science and Technology*, pp. 301-304, at 301.
[19] Ibid.
[20] Bazilian, n. 9 above, p. 3754.
[21] UN Environment, *Environmental Rule of Law: First Global Report* (24 January 2019), available at: https://www.unenvironment.org/resources/assessment/environmental-rule-law-first-global-report.
[22] Ibid., p. 157.
[23] Ibid.
[24] Ibid., p. 172.
[25] Global Witness, *At What Cost? Irresponsible business and the murder of land and environmental defenders in 2017* (24 July 2018 – updated in January 2019), available at: https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/. On the other hand, activists

Brazil, the Philippines, and Colombia listed as the most dangerous countries. Kellman has also documented threats to environmental public prosecutors who have attempted to enforce environmental regulations in Brazil.[26]

Nevertheless, countries where progressive climate outcomes in litigation have been experienced are all on the list of countries most dangerous for environmental defenders, as documented between 2000 and 2015. Brazil is at the top of this list with 527 defenders murdered, the Philippines is third with 115, Columbia fourth with 103; lower on the list are Indonesia with 11, Pakistan with five, and South Africa with one.[27] Considering these constraints and pressures, it is remarkable that strategic climate litigation in the Global South has appeared at all.

3. CLIMATE LITIGATION IN THE GLOBAL SOUTH

Over the last 20 years climate litigation has emerged as an alternative governance mechanism to address climate change.[28] The contours of what constitutes climate litigation is unclear, as the number of cases varies immensely, involving litigation around government permits issued for fossil fuel projects, to implementation of climate change adaptation plans. Markell and Ruhl define climate litigation as any piece of federal, state, tribal or local administrative or judicial litigation in which party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the issue or policy of climate change, its causes or impacts.[29] Peel and Osofsky define it as cases which have the issue of climate change at their core, and that generally raise climate-specific arguments or judicial analysis referring to climate change.[30] They also provide a model for understanding the regulatory impact of climate change, with litigation focused in three main areas: constitutional interpretation, statutory interpretation (including procedural and substantive requirements) and, under common law, nuisance, negligence, and public trust areas of law.[31]

It is generally recognized that the first climate legal action was brought in the US in 1990,[32] while the first case expressing itself as climate litigation is understood to have been initiated in New South Wales (Australia) in 1994.[33] As of May 2019, almost 1,300 lawsuits and

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and even researchers in the Global North suffer retaliation through the courts. SLAPP and lawsuits against researchers. See M. Poggio, Fossil Fuel Industry Ally Targets UCLA Law Professors', *Climate Liability News* (12 December 2018), available at https://www.climateliabilitynews.org/2018/12/12/ucla-law-professor-ann-carlson-cara-horowitz-cei/.

[26] J. Kellman, 'The Brazilian Legal Tradition and Environmental Protection: Friend or Foe' (2002) 25 *Hastings International & Comparative Law Review*, pp. 145-167, at 164.

[27] UN Environment, n. 21 above, p. 173, Figure 4.8.

[28] J. Peel & H.M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015), pp. 9-25.

[29] D. Markell & J.B. Ruhl, 'An Empirical Assessment of Climate Change in The Courts: A New Jurisprudence or Business as Usual?' (2012) 64 *Florida Law Review*, pp. 15-86 at 21.

[30] Peel & Osofsky, n. 28 above, p. 4.

[31] Ibid., p. 36.

[32] B. Preston, 'Climate Change Litigation (Part 1)' (2011) 3 *Carbon and Climate Law Rev*iew, pp. 3-14, at 8.

[33] B. Preston, 'Recent Climate Litigation Concerning Environmental Rights', presentation given at The Asia Pacific Judicial Colloquium on Climate Change: Using Constitutions to Advance Environmental Rights and Achieve Climate Justice, Lahore High Court in Pakistan (26 February 2018), available at https://www.ajne.org/event/asia-pacific-judicial-colloquium-climate-change#quicktabs-event_tabs=2. Judge Preston was referring to *Greenpeace Australia Ltd v. Redbank Power Co.*, in which the Land and Environment Court of New South Wales upheld a state council decision granting development consent for the construction of a power station. Greenpeace asserted that air emissions from the power station would exacerbate the greenhouse

administrative investigations involving climate change have been identified in 28 jurisdictions, with over 1,000 cases filed in the U.S.[34] The increase in the number of climate-related litigation cases has been attributed to the worsening of climatic conditions and to the use of litigation as a strategy aimed at drawing public attention to the issue of climate change and increasing political will to tackle it.[35] These climate lawsuits are concentrated in a relatively small number of jurisdictions, most of them in the Global North. The US has been at the 'epicenter' of the climate change litigation phenomenon.[36] Australia has also experienced a high number of climate litigation cases (97),[37] followed by the United Kingdom (46), New Zealand (16), Canada (14), and Spain (13). In the Global South, 32 cases of climate litigation have been identified, of which over half are in Asia (18 cases), 5 are in Africa, and 9 in Latin America.

Whereas Global North climate litigation began in the 1990s, climate litigation in the Global South started almost 20 years later, and became visible in the late 2010s.[38] We still have a very limited understanding of how the Global South is engaging with climate change litigation,[39] and what legislation or procedures allow or facilitate legal claims in that context.[40]Academic examination of climate litigation has been mostly produced by scholars from the Global North and has primarily focused on a small number of high-profile cases concentrated in North America, Europe, and Australia. Setzer and Vanhala's systematic analysis of climate litigation scholarship confirms this imbalance, and calls for comprehensive studies focused on Global South litigation.[41]

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effect. Available at: http://www.lse.ac.uk/GranthamInstitute/litigation/greenpeace-australia-ltd-v-redbank-power-co-land-and-environment-court-of-new-south-wales-1994/.

[34] For US cases, see the database maintained by the Sabin Center for Climate Change Law, in collaboration with Arnold & Porter Kaye Scholer LLP, available at: http://climatecasechart.com/us-climate-change-litigation. For cases in other jurisdictions, see the Climate Change Litigation of the World database, jointly produced by the Sabin Center and the Grantham Research Institute on Climate Change and the Environment at the London School of Economics, available at: http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world. Examining trends in litigation, see J. Setzer & M. Bangalore, 'Regulating Climate Change in the Courts', in A. Averchenkova, S. Fankhauser & M. Nachmany (eds), *Trends in Climate Change Legislation* (Edward Elgar, 2017), pp. 175-92.

[35] UN Environment, n. 21 above.

[36] Ibid., p. 17.

[37] J. Peel & H.M. Osofsky, 'Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia' (2013) 35(3) *Law & Policy*, pp. 150-83.

[38] For a comprehensive survey of these cases, see Peel & Lin, n. 2 above.

[39] J. Lin, 'Climate Change and the Courts' (2012) 32 *Legal Studies*, pp. 35-57; J. Lin, 'Climate Change Litigation in Asia and the Pacific' in G.van Calster, W. Vandenberghe & L. Reins (eds), *Research Handbook on Climate Change Mitigation Law* (Edward Elgar, 2015), pp. 578-602; L. Vanhala, 'The Comparative Politics of Courts and Climate Change' (2013) 22(3) *Environmental Politics*, pp. 447-74; M. Wilensky, 'Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation' (2015) 26(1) *Duke Environmental Law & Policy Forum*, pp. 131-79.

[40] J. Peel & H.M Osofsky, n. 28 above, p. 62.

[41] J. Setzer & L. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) *WIREs Climate Change*, early view [https://doi.org/10.1002/wcc.580]. Of the 130 articles identified up to September 2018, 76 per cent (99) focus on Global North jurisdictions, 20 per cent (26) have an international focus or cover jurisdictions in both the North and South. Only five of the identified journal articles looked at litigation or litigation-related issues in the Global South: X. He, 'Legal and Policy Pathways of Climate Change Adaptation: Comparative Analysis of the Adaptation Practices in the United States, Australia and China' (2018) 7(2) *Transnational Environmental Law*, pp. 347-73; T-L. Humby, 'The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs' (2018) 30(1) *Journal of Environmental Law*, pp. 145–55; C. Nyinevi, 'Universal Civil Jurisdiction: An Option for Global Justice in Climate Change Litigation' (2015) 8(3) *Journal of Politics and Law*, pp. 135-148, available at: https://ssrn.com/abstract=2650371; J. Williams, 'The Impact of Climate Change on Indigenous People – The Implications for the Cultural, Spiritual, Economic and Legal Rights of Indigenous People' (2012) 16(4) *The International Journal of Human Rights*, pp. 648-88; B. Ugochukwu, 'Litigating the Impacts of Climate Change:

In other areas of law, scholars have pointed to the fact that jurisprudence coming from the South might be used to develop legal jurisprudence and political issues in Northern jurisdictions. While Global South scholars and legal institutions occupy a marginal position in the interpretation, use, and transformation of modern constitutionalism, a number of creative courts in the Global South have contributed (or attempted to contribute) to the structural transformation of the public and private spheres of their countries.[42] A study of Courts in Asia, Africa, and Latin America concluded that many of these are 'activist tribunals', and that some of their jurisprudence contributes directly to the ongoing global conversation on constitutionalism, bringing new light to interpreting the principle of separation of powers, connecting social and economic rights with the principle of human dignity, and strategies to allow poor individuals access to justice.[43]

4. TWO KEY FEATURES OF GLOBAL SOUTH CLIMATE LITIGATION

We compare Global South strategic climate litigation to Global North strategic climate litigation, highlighting two key features of emerging Global South litigation: the outward looking objective of combating ongoing environmental degradation, and, on a doctrinal level, the use of rights-based principles.[44] Unlike strategic climate litigation in the Global North, litigants in the Global South currently do not focus on eliciting new regulatory targets or instruments from governments on reducing emissions. Rather, they use existing legislative tools and human rights discourses to highlight the vulnerability of their populations to climate change and protect their valuable ecosystems. By comparing the two approaches, we do not diminish one or the other strategy, but rather aim to contrast a more recent trend in litigation in the Global South in relation to a more established one in the Global North. There are different levels of synergies and contrasts between litigation in the Global South and the Global North, and these are also highlighted below.

4.1. Combat Ongoing Environmental Degradation

A number of landmark strategic climate litigation cases in the Global North are targeted at driving governmental ambition on climate change. The *Urgenda* case has so far been successful in determining that the Dutch government needs to reduce its emissions to 25% below 1990 levels by 2030.[45] In *Juliana et al.* v. *United States of America et al* plaintiffs claim that governmental failure to take action on climate change deprives future generations of the same

The Challenge of Legal Polycentricity' (2018) 7 *Global Journal of Comparative Law*, pp. 91-114. Since their assessment other articles have been published, including Alvarado & Rivas-Ramírez (n. 5 above), and a forthcoming comprehensive analysis by Peel and Lin (n. 2 above).

[42] M. Hailbronner, 'Transformative Constitutionalism: Not only in the Global South' (2017) 65(3) *American Journal of Comparative Law*, pp. 527-65.

[43] D.B. Maldonado, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, 2013).

[44] Peel & Lin (n. 2 above) identify a number of key characteristics of climate cases in the Global South, including the reliance on constitutional rights or human rights claims, and that individuals and NGOs in the Global South are using litigation to compel their governments to implement and enforce *existing* policies for mitigation and adaptation - and, rather surprisingly, most cases currently comprise mitigation.

[45] *Stichting Urgenda v. Government of the Netherlands* (Ministry of Infrastructure and the Environment), ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (Urgenda). See also J. van Zeben, Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide? (2015) 4(2) *Transnational Environmental Law*, pp. 339-57.

protection provided to previous generations.[46] While the case has faced significant procedural hurdles regarding standing,[47] if successful it could direct the US government to develop a plan to reduce carbon dioxide (CO_2) emissions.[48] *Urgenda* and *Juliana* inspired other cases, including a lawsuit brought by young people who are part of the NGO Environment JEUnesse against the Canadian government for alleged failure to protect the fundamental rights of young people.[49] Similarly, in France, four NGOs took a first step towards a lawsuit against the state, by submitting a formal notice to the French Prime Minister and 12 members of the government for their inadequate efforts to effectively tackle climate change, in violation of a statutory duty to act.[50]

In contrast to this approach, rather than requesting direct regulatory action on climate change by governments, plaintiffs in the Global South take a more indirect route. Cases are brought to address poor enforcement of existing planning and/or environmental legislation, possibly acknowledging the capacity constraints involved in passing new legislation on climate change in some jurisdictions. In addition, these cases tend to include efforts to protect important native ecosystems. A common strategy in the Global South has been for governments to engage with climate change arguments through taking action against defendants for enforcement of existing environmental and planning legislation.[51] This is the case for enforcement actions brought by the Ministry of Environment of Indonesia against companies in the extractive sector (mining, oil palm, and timber logging) for violations of natural resource management laws.[52] This strategy has also been used in different environmental class actions brought by the Brazilian Prosecutor's office for violations of natural resource management laws (e.g., unauthorized clearing of forest for the development of economic activities).[53]

NGOs in the Global South have also started using the courts to enforce legislation regarding the licencing of polluting activities. Peel and Lin[54] identify five out of the 32 cases in the Global South docket that referred to environmental impact assessment (EIA) or used this as one of the grounds of action. Some of these cases have climate change in the 'periphery' of the claim

[46] M.C. Blumm & M.C. Wood, 'No Ordinary Lawsuit: Climate Change, Due Process and the Public Trust Doctrine' (2017) 67(1) *American University Law Review*, pp. 1-87.

[47] In October 2018 Chief Justice Roberts granted a temporary halt in response to a request by the federal government. The Supreme Court subsequently lifted the stay on November 2nd, and the Department of Justice subsequently requested a stay from the US District Court for the District of Oregon which was granted in part a temporary stay on the 9th November 2018.

[48] Blumm & Wood, n. 46 above. See also J. Peel & H. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*, pp. 37–67, and P. Singer, 'The Trial of the Century, Fighting for a Healthier Planet', *The Daily Star* (15 September 2018), available at http://www.dailystar.com.lb/Opinion/Commentary/2018/Sep-15/463429-the-trial-of-the-century-fighting-for-a-healthier-planet.ashx.

[49] See http://climatecasechart.com/non-us-case/environnement-jeunesse-v-canadian-government/.

[50] See https://notreaffaireatous.org/wp-content/uploads/2018/12/CP-ANGLAIS.pdf

[51] Peel & Lin, n. 2 above.

[52] For a discussion about climate change litigation in Indonesia, see A.G. Wibisana & C.M. Cornelius, 'Climate Change Litigation in Indonesia' (2018), working paper presented at the Climate Change Litigation Scholarship Workshop, Faculty of Law, National University of Singapore, 7-8 June.

[53] For an analysis of cases decided by the Brazilian courts, see G. Wedy, 'Climate Legislation and Litigation In Brazil', *Sabin Center for Climate Change Law Working Papers*, October 2017, available at http://columbiaclimatelaw.com/files/2017/10/Wedy-2017-10-Climate-Legislation-and-Litigation-in-Brazil.pdf; and, in Portuguese, J. Setzer, K. Cunha & A. Botter-Fabri (eds), *Climate Litigation: New Frontiers for Environmental Law in Brazil* (Thompson Reuters/Revista dos Tribunais, 2019).

[54] Peel & Lin, n. 2 above. Of these five cases they identify, one was in Asia and four in Africa.

(e.g., the final decision might result in benefits from a climate mitigation perspective [55]), while others have climate change as their 'core' (e.g., the lack of consideration of climate impacts challenges the validity of the approval given). The case of *Earthlife Africa Johannesburg* v. *Minister of Environmental Affairs & others* is an example where climate change was central to the case. Humby argues that the case made a 'meaningful contribution' to climate change litigation, as notwithstanding the absence of an express legal obligation to conduct a focused climate change impact assessment, the Gauteng High Court ruled that climate change is a relevant consideration when granting an environmental authorization.[56]

Other climate litigation suits in the Global South focus on the destruction of emblematic ecosystems. By doing this, climate litigation gives continuity to the environmental movement's agenda. For example, in *Future Generations* v. *Ministry of the Environment and Others*, a group of 25 children and young adults between the ages of 7 and 26 required the government to comply with its prior commitment to stop deforestation in the Amazon forest by 2020. This lawsuit was the first on climate change and future generations in Latin America and concerned a long-standing problem – the conservation, maintenance, and restoration of the Amazon forest. Attempts to address deforestation in the Amazon have been made for over several decades through many different legal and non-legal strategies,[57] but this particular case is being framed in terms of its climate impacts and brought as a climate lawsuit.[58]

4.2. Vulnerability and Rights-based Claims in the Global South

Despite human rights and climate change linkages becoming increasingly understood,[59] courts were initially reluctant to adjudicate in ways that highlight these linkages.[60] However, in the past years the legal relationship between human rights and climate change started to emerge in courts, to a point where Peel and Osofsky identified a 'rights-based turn' in climate litigation.[61] The international framework of human rights is well-established, and can provide existing principles and frameworks within which climate litigation and judicial decision making operate. For instance, the human rights-based approach established by the United Nations (UN) can provide procedural and substantive protections to citizens in the context of climate impacts, and can help to ensure that development-based projects do not result in adverse human rights consequences.[62] As a result, a number of new climate cases centre around human rights.

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[55] However, as Kim Bouwer argues, 'peripheric' climate litigation cases that interface with climate policy might also undermine domestic climate change policy: K. Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30(3) *Journal of Environmental Law*, pp. 483–506.

[56] Humby, n. 42 above, analyzes the Thabametsi case through the lens of Preston's conceptual framework for the judiciary to make a 'meaningful contribution' to tackling climate change. See B. Preston, 'The Contribution of the Courts in Tackling Climate Change' (2016) 28(1) *Journal of Environmental Law*, pp. 11–7.

[57] J. Kellman, n. 26 above, p. 145.

[58] The plaintiffs plead the Court to order the state to act in various ways, including: design and implement a national action plan as well as an intergenerational agreement to reduce deforestation; upgrade the 'Territorial Management Plan'; suspend the main activities that are causing of deforestation; investigate illicit activities that contribute to deforestation; and revise all public resources destined for the reduction of deforestation. See http://www.lse.ac.uk/GranthamInstitute/litigation/future-generation-v-ministry-environment-others/.

[59] See J. Knox, 'Climate Change and Human Rights Law' (2009) 50(1) *Virginia Journal of International Law*, pp. 163–218; and S. Humphreys & M. Robinson, *Human Rights and Climate Change* (Cambridge University Press, 2010).

[60] Setzer & Vanhala, n. 41 above; also S. Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, 2016).

[61] Peel & Osofsky, n. 48 above.

[62] D.S. Olawuyi, 'Advancing Climate Justice in National Climate Actions: The Promise and Limitations of the United Nations Human Rights-Based Approaches', in R.S. Abate (ed.), *Climate Justice: Case Studies in Global and Regional Governance Challenges* (ELI, 2016), pp. 3-24, at 7.

For instance, the lawsuits brought by *Urgenda, Juliana et al* and *JEUnesse* all focused on issues of vulnerability and human rights violations. *Urgenda* grounded the case on the duty of care under Article 21 of the Dutch Constitution and Article 6:162 of the Dutch Civil Code to ensure 'the livability of the country and the protection and improvement of the living environment'.[63] The District Court of the Hague decided that Article 6:162 of the Civil Code was breached due to a tortious act commited by the state – the act of hazardous negligence of not taking adequate action to prevent climate harm. On appeal, rather than accepting the duty of care from tort law, the Court of Appeals ruled that the duty of care was informed by human rights. The Court recognized a 'positive obligation [of the state] to take concrete actions to prevent a future violation of Articles 2 and 8 ECHR [European Convention for the Protection of Human Rights and Fundamental Freedoms[64]]'.[65] The Court of Appeals ruled that dangerous climate change would result 'in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life'[66] (referring to the rights protected under Articles 2 and 8). In *Juliana et al.* v. *United States of America et al*., young people claim that failure by the government to take action on climate change violates their Fifth Amendment Rights by denying protection to future generations of essential natural resources, including a safe climate.[67] The plaintiffs have also relied on the public trust doctrine, and the violation of rights to life, liberty, and property as well as failing to protect public natural resources. The *Environment JEUnesse* case against the Canadian government claims violation of the fundamental rights of young people under the Canadian Charter of Rights and Freedoms and the Québec Charter of Rights and Freedoms.[68]

The application of the human rights framework to the impacts of climate change has been one of the key features of litigation in the Global South. In addition to the reasons why rights-based cases are being brought in the Global North, many countries in the Global South have constitutions which already provide for human rights protections, as well as agencies or commissions which oversee the implementation and operationalization of those rights.[69] Also, historically marginalized communities in the Global South have successfully vindicated collective human rights in regional human rights bodies, and some national courts have a record of innovation in human rights and environmental rights.[70] The role of progressive legislation and judges will be further discussed in the next section, when we examine the rationale for strategic climate litigation and innovative decisions in the Global South.

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[63] Rb. Den Haag 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda Foundation/Netherlands*) (Neth.) 4.36, http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196. See van Zeben, n. 45 above.

[64] Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: http://www.echr.coe.int/pages/home.aspx?p=basictexts.

[65] Court of Appeal of the Hague, *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, C/09/456689 / HA ZA 13-1396 (9 Oct. 2018), para. 41 (quotes from the translation provided by the Court) available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610,. See also B. Mayer, *The State of the Netherlands* v. *Urgenda Foundation:* Ruling of the Court of Appeal of The Hague (9 October 2018) (2019) 8(1) *Transnational Environmental Law*, pp. 167-92.

[66] Ibid., para. 45.

[67] 217 F. Supp. 3d 1224 (D. Or. 2016).

[68] See http://climatecasechart.com/non-us-case/environnement-jeunesse-v-canadian-government/.

[69] This is the case of the countries mentioned in this article. See 'Constitute Project', available at https://www.constituteproject.org/. Also United Nations High Commissioner for Human Rights (OHCHR), 'Human Rights and Constitution Making' (UN, 2018), available at https://www.ohchr.org/Documents/Publications/ConstitutionMaking_EN.pdf.

[70] See C. G. Gonzalez, Environmental Justice, Human Rights, and the Global South (2015) 13(1) *Santa Clara Journal of International Law*, pp. 151-196 at 165. Also Maldonado, n. 43 above and Section 5 below.

The socio-economic and political context of Global South jurisdictions also matters. Colonial and postcolonial activities of Northern countries combined with multinational corporate actors have caused drains on wealth, dysfunctional institutions, rent-seeking elites, and ethnic conflicts which have led to grave human rights abuses and environmental destruction.[71] Consequently, the environment/human rights nexus is often closely related to issues of equity, survival, security, human capital development, and defunct governance practices, making human rights violations particularly pertinent in the Global South.[72]

But the application of a human rights framework to the impacts of climate change is particularly relevant in the Global South because populations in these countries are extremely vulnerable. The most recent report of the Intergovernmental Panel on Climate Change (IPCC) states that climate-related risks for natural and human systems are higher for global warming of 1.5 degrees Celcius (°C) than at present, but lower than for the risks related to a 2°C rise above pre-industrial levels.[73] The impact of the risks will depend on the magnitude and rate of warming, but also on geographic locations, levels of development and vulnerability, and choices of adaptation and mitigation.[74] Disadvantaged and vulnerable populations, indigenous people, and local communities highly dependent on agriculture or coastal livelihoods are at disproportionately higher risk.[75] Poverty and disadvantage are likely to increase in vulnerable populations as global warming increases.[76] Countries in the tropics and Southern hemisphere subtropics have populations that will be exposed to the largest impacts on economic growth due to climate change should global warming increase from 1.5°C to 2°C, and the number of people exposed to climate-related risks and susceptible to poverty may reach up to several hundred million by 2050.[77]

For the abovementioned reasons, a human rights framework is particularly relevant in building a compelling climate justice narrative in the Global South. This narrative enhances political will for greater ambition in climate policy formation, and also provides vulnerable countries and communities with the opportunity to account for their experience of climate impacts.[78]

However, the adoption and implementation of a human rights approach in the context of climate change in the Global South is a complex issue for a number of reasons. Firstly, the traditionally vertical relationship between the state and individual for the enforcement of human rights violations does not take into account the historic responsibility of the Global North for the impacts of climate change. A human rights approach also imposes obligations, with consequential costs, to manage and mitigate the impacts of climate change on some countries which are least responsible for climate change, which has obvious equity implications. Therefore, a climate justice framework may be more appropriate, particularly for smaller nations.[79] Despite these inequities, developing countries agreed to take on obligations

[71] Kotzé, n. 2 above, pp. 178-9.
[72] Ibid., p.179.
[73] IPCC, '1.5°C Special Report – Summary for Policymakers' (6 Oct. 2018) available at: https://www.ipcc.ch/sr15/, p. 5.
[74] Ibid., p. 8.
[75] Ibid., p. 11.
[76] Ibid.
[77] Ibid., pp. 11-2.
[78] E. Cameron & M. Limon, 'Restoring the Climate by Realizing Rights: The Role of the International Human Rights System' (2012) 21(3) *RECIEL*, pp. 204-19 at 204.
[79] S. Atapattu, 'Justice for Small Island Nations: Intersections of Equity, Human Rights and Environmental Justice' in Randall S Abate (ed), *Climate Justice* (ELI, 2016), pp. 299-322.

under the Paris Agreement[80] to address climate change, albeit in an approach that is nationally determined with differentiated obligations for developing countries.[81]

In addition, human rights-based approaches face practical constraints at the national level in Global South countries.[82] As Olawuyi notes, human rights have varying levels of protection and implementation in countries where climate injustices are most severe, and local challenges such as the inadequacy or absence of climate change laws, restrictive property laws or inadequate capacity and lack of resources impacts the capacity of vulnerable groups to invoke human rights norms to seek redress.[83] Vulnerable countries may fear using a human rights narrative which would invite the international community to interrogate their own questionable human rights records, particularly in the area of political and civil rights.[84]

Notwithstanding these considerable complexities and constraints, a number of cases in the Global South have invoked the issue of human rights violations due to the impacts of climate change, and they have seen progressive outcomes. In the *Leghari* v. *Federation of Pakistan*[85] case, Judge Syad Mansoor Ali Shah provided an extensive decision in 2015, in which he listed the impacts of climate change in Pakistan and focused on the vulnerability of citizens in that country, referring to climate change as 'a defining issue of our time'.[86] While the Pakistani Constitution did not contain a specific right for environmental protection, the Judge focused on Articles 9 and 11 of the Constitution protecting the rights to life, human dignity, property and information access, combined with international environmental law principles such as sustainable development, the precautionary principle, the public trust doctrine, and inter-generational equity. He determined that together these provisions provided a sufficient judicial toolkit for him to make a positive decision on the impacts of climate change.

A further case brought by a youth petitioner in Pakistan claims that climate change harms and continuously threatens mental and physical health and quality of life. It infringes on the constitutionally guaranteed right to life, and on the fundamental rights of the youth petitioner, as well as future generations in Pakistan.[87] While the judicial approach in the *Leghari* case may seem unusual, there is already a judicial precedent in Pakistan which lends itself to such interventionist judicial activity. In 2012, the High Court of Lahore ordered the establishment of the River Ravi Commission to manage the river's restoration, held periodic hearings on the Commission's progress, and ordered full-scale implementation of the bioremediation project in 2015.[88]

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[80] Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: http://unfccc.int/paris_agreement/items/9485.php.

[81] Art. 3 Paris Agreement, ibid., states that all countries are to take ambitious action. Moreover, Art. 4(3) notes that all countries' nationally determined contributions will reflect their highest possible ambition while respecting common but differentiated responsibilities and respective capabilities, in the light of differing national circumstances. Art. 4(4) also folds in an element of differentiation by stating that developed countries should take the lead by instituting economy-wide absolute emission reductions and developing countries should enhance mitigation action and move, over time, towards economy-wide emission reductions or limitation targets.

[82] Olawuyi, n. 62 above, pp. 6-7.

[83] Ibid.

[84] Cameron & Limon, n. 77 above, p. 206.

[85] Lahore High Court P. No. 25501/2015.

[86] Ibid.

[87] *Rabab Ali* v. *Federation of Pakistan, Supreme Court of Pakistan* (2016).

[88] W.P. No. 9137/2012 Lahore High Court, and W.P. No. 9137/2012, Lahore High Court, 2015.

Similarly, in the Colombian climate case, the Supreme Court was asked to rule on the impacts of climate change on the rights of future generations. The plaintiffs argued that the government failed to respect current children's constitutional rights to a healthy environment, life, health, nutrition and water, as well as failing to protect the rights of future generations.[89] The Court's decision relied on the future generations argument to press the government to take action on climate change, including to mandate the formulation and implemention of action plans to address deforestation in the Amazon.[90] With respect to standing, the decision applied the same constitutional provisions used for the protection of the environment for current generations, but this time to protect future generations, thereby substantially expanding the limits of such rights.[91]

The *Carbon Majors Inquiry* that is being held by the Philippines Commission on Human Rights adds a new angle to existing human rights strategies: that a relatively small group of Northern corporations is aggravating the already vulnerable livelihoods of Philippine citizens.[92] This first legal action against fossil fuel intensive corporations in the Global South has been innovative in that it eschews the normal tort-based approaches,[93] and instead focuses on an investigation of the role of Carbon Major corporations in specific extreme events. The petition, submitted by Greenpeace Southeast Asia, the Philippine Rural Reconstruction Movement to the Philippines Commission on Human Rights and a group of Filipino citizens, specifically situated its requests in the context of the extreme events and slow onset events experienced by residents in the Philippines, and in particular the events of Typhoon Haiyan. The costs of this and other extreme events experienced in the Philippines in terms of human lives, financial costs to the state, and additional impacts of climate change on traditional livelihoods such as fishing and agriculture, are extensive and highlighted in the petition.

The Commission responded to the petition by opening an investigation, and its approach has also been innovative. The work of the Commission is framed as a dialogue which highlights the voices and experiences of the climate vulnerable, with a focus on the responsibilities of corporations headquartered in the Global North.[94] While the Commission cannot impose fines

[89] See *Future Generations v. Ministry of the Environment and Others* (n 5).

[90] Supreme Court Decision in Spanish and unnoficial translation of exerpts to English available at: http://www.lse.ac.uk/GranthamInstitute/litigation/future-generation-v-ministry-environment-others/

[91] Alvarado, n. 5 above, at p. 524.

[92] See n. 4 above, and A. Savaresi et al., 'The Impacts of Climate Change and Human Rights: Some Early Reflections on the Carbon Majors Inquiry' (2018), Climate Change Litigation in the Asia Pacific held at the University of Singapore, available at https://ssrn.com/abstract=3277568, which charts the human rights dimensions of the case. Also S. Seck, 'Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism and State Sovereignty' (2017) 26(2) *Transnational Law & Contemporary Problems*, pp. 383-413, who critiques the choice of entity as only investor-owned Carbon Majors as well as the underlying assumptions of international law and the detrimental impacts on climate justice they entail.

[93] Climate litigation scholarship coming from the Global North generally approaches liability from tort claims. However, as Kysar argues, tort-based climate change claims for damages in the US and in other common law systems in the Global North face a legal system filled with doctrines that are premised on a classical liberal worldview in which threats such as global climate change simply do not register, making it difficult for climate change plaintiffs to obtain favorable judicial decisions. Although legal principles such as joint and several liability might provide a mechanism by which to overcome these obstacles, judges have expressed reluctance to attribute responsibility for climate change to any particular individual or group of plaintiffs. See D.A. Kysar, 'What Climate Change Can Do About Tort Law' (2011) 41(1) *Environmental Law*, pp. 1-71. For examples of unsuccessful use of tort-based climate change claims against Carbon Majors in the Global North, see *Native Village of Kivalina v ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal 2009), aff'd, 696 F.3d 849 (9th Cir. 2012).

[94] Since it began the investigation, the Philippines Commission on Human Rights held several hearings around the world, garnering significant public attention, with three sittings in The Philippines, and also in New York from 27-28th September 2018, and London from 6-9th November 2018. Carbon-major corporations are also facing

or force the defendants to reduce emissions, it can seek the assistance of the UN to encourage the defendants to cooperate, make recommendations to the government and issue a fact-finding report.[95] The legal conclusions of this investigation may influence further suits in the Global South as well as in the Global North. In terms of underlying narratives, the investigation can help expose the relationship between major emitters based in the Global North and the suffering experienced by people living in the Global South.

Also targeting Carbon Majors, but crossing the North-South divide, the ongoing case of *Saúl Luciano Lliuya* v. *RWE* was brought in Germany by a plaintiff from and in respect to damages incurred in the Global South. Lliuya, a farmer and mountain guide in Peru, claimed liability from RWE, a pan-European energy company based in Germany. The damages claimed were proportionate to RWE's share of global greenhouse gases, amounting to approximately €17,000. Lliuya based his claim on paragraph 1004 of the Germany Civil Code which deals with interference with property.[96] The Peruvian Ministry of Health and the National Authority for Civil Protection determined that Lliuya and the lives of people in his village would be especially affected by a possible flood. The Civil High Court in Hamm in an oral hearing accepted Lliuya's reasoning that the defendant's emissions 'advanced, to a not irrelevant degree' the probability of the glacial flooding.[97] This unusual and daring lawsuit is a real case study to educate judges and the public how vulnerable populations in the Global South are disproportionately affected by carbon intensive corporations headquartered in the Global North.

While these cases demonstrate a number of synergies in climate litigation, with an increasing focus in both the Global North and Global South on the role of human rights and Carbon Major corporations in climate change, the approach taken by litigants in the Global South is particularly relevant given the precarious nature of human rights in these countries.

Country	**Case**	**Mitigation, Adaptation, Loss & Damage**	**Human Rights and/or Environmental degradation**
Philippines	*Philippine Reconstruction Movement and Greenpeace* v. *Carbon Majors*	Adaptation	Human Rights
Colombia	*Future Generations* v. *Ministry of the Environment and Others*	Mitigation	Environmental degradation
Germany	*Saul Luciano Lliuya* v. *RWE*	Adaptation / Loss and Damages	Environmental degradation and Human Rights (through the impact of Loss and Damage)
South Africa	*EarthLife Africa Johannesburg* v. *Minister of Environmental Affairs & others*	Mitigation	Environmental degradation

litigation claims in the Global North. See L. Benjamin, 'The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties' (forthcoming 2020) *Utah Law Review*, available at https://www.ssrn.com/abstract=3379848 .

[95] M.L. Banda & S. Fulton, 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law' (2017) 47 *European Law Review*, pp. 10121-10134, at 10132.

[96] *Lliuya v RWE*, 23rd November 2015 (unauthorized translation provided by Germanwatch e.v.).

[97] The Voltum was read out in court in November 2017 as a preparatory opinion, but this is an internal court document and is not publicly available.

Pakistan	*Ashgar Leghari* v. *Federation of Pakistan*	Adaptation	Human Rights

Table 1. Selection of Global South strategic climate litigation mentioned, with an indication of the issue areas they address

Having identified these key features of emerging climate jurisprudence in the Global South, it is important to identify what may be some of the main reasons underpinning these innovative approaches and some of the outcomes already achieved.

5. RATIONALE AND OUTCOMES

Pursuing a legal campaign is a lengthy, costly, and risky process for litigants, both in wealthier and poorer countries. As highlighted in Section 2, litigants in Global South jurisdictions face additional challenges, from significant capacity constraints to death threats. Differing legislative backgrounds, judicial histories and social and political contexts contribute greatly to the contrasts between Global North and Global South climate litigation. It is therefore surprising that organizations in the Global South have been investing time and resources to bring legal cases dealing with climate change, and that some have achieved a certain degree of success. We turn now to what is driving these innovative approaches and outcomes in the climate litigation sphere. Legal Opportunity Structures approaches offer a useful framework for explaining variables conditioning access to judicial governance and also seek to account for the role of judges in the policy output process.[98] Bearing in mind the limitations resulting from the selective nature of the cases examined, we identify reasons for innovative cases and outcomes in the Global South: how litigants are either overcoming or using procedural requirements for access to environmental justice, and the existence of progressive legislation and judicial approaches to climate change.

5.1. Access to Justice

The existence of a court is only one of the conditions granting access to justice. Litigants depend on standing rules, which vary across jurisdictions, in order to be granted the right to access courts – individually, collectively, or as a third party or *amicus curiae*. Rules governing standing to sue are a crucial dimension of Legal Opportunity Structures approaches for environmental litigation.[99]

In many developing countries, the requirements for standing have been interpreted stringently by courts.[100] Yet, the Global South countries where cases of strategic climate litigation have been decided (see Table 1) all allow citizen suits in their constitutions and environmental legislation.[101] Countries such as India and the Philippines have allowed broad standing for

[98] Chris Hilson was among the first to deploy the terms 'legal opportunity' and 'legal opportunity structure' to describe the conditions for social movements to pursue their goals through litigation. C. Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9(2) *Journal of European Public Policy*, pp. 238-55. Since then, many other researchers have been using and developing this framework. See, for example, B.M. Wilson & J.C.R. Cordero, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics' (2006) 39(3) *Comparative Political Studies*, pp. 325-351; and L. Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46(3) *Law & Society Review*, pp. 523-56.

[99] L. Vanhala, n. 96 above.

[100] Emeseh, n. 16 above, p. 603.

[101] UN Environment, n. 21 above, p.187.

individuals and organizations, extending to the unborn in the Philippines.[102] South Asian courts in particular have seen much success in using public interest litigation to address environmental concerns, partly due to judicial support for the achievement of sustainable development.[103] Emeseh cites a number of cases in this region where technical standing restrictions have been done away with, and very broad interpretations given to constitutional provisions to ensure access to the courts in environmental cases.[104] Some of these countries have also attempted to address the geographic remoteness of litigants by sending specialized buses to remote regions, as illustrated by the Philippines Supreme Court and the Brazilian state of Amazonia's Court of Environment and Agrarian issues.[105] The progressive judicial outcomes identified in strategic climate litigation in the Global South can be understood as part of the history of environmental jurisprudence in these countries, combined with progressive procedural requirements which aid class action suits.

In addition to standing, financial resources and lack of expertise are yet another hurdle that litigants in the Global South need to overcome in order to secure access to justice.[106] The existence of Legal Opportunities is no guarantee that litigants will be successful in their claims. As Charles Epp argues, 'combining rights consciousness with a bill of rights and a willing and able judiciary improves the outlook for a rights revolution, but material support for sustained pursuit of rights is still crucial'.[107] In the context of climate issues, the adjudication of climate cases often involves complex intersections between social, economic, and political interests. Limited specialist knowledge in the policy-science nexus can thus severely constrain access to justice.[108]

To support strategic climate litigation in the Global South, philanthropists have been providing financial resources as well as technical expertise to allow cases in the Global South to be filed, and some Northern NGOs have been providing strategic support (e.g., defining media and communications strategy) to partner organizations in the Global South.[109] As a result, Global

[102] Supreme Court Rules of Procedure, The Philippines, A.M. No.09-6-8-SC (2010). The Philippines has a history of progressive environmentalism as highlighted by the *Minors Oposa v Secretary of the Department of the Environment and Natural Resources* (33 I.L.M. 173 (1994)), where the Supreme Court ruled that the plaintiffs had standing to represent generations unborn in the protection of environmental rights.
[103] Emeseh, n. 16 above, p. 602.
[104] Ibid citing *Shella Zia v WAPDA* PLD 1994 SC 693, where the Pakistan Supreme Court held the right to life in the constitution included the right to a healthy environment, and *Oposa* v. *Secretary of Department of Environment and Natural Resources* (33 ILM 173(1994)) where the Supreme Court of the Philippines allowed plaintiffs to sue on behalf of future generations; and *Faroque* v. *Bangladesh* No. 3 Sri Lanka 4-6 July 1997 where a broad interpretation of 'aggrieved person' was found under the Bangladesh Constitution.
[105] Ibid., p. 186.
[106] Other constraints are geographic remoteness and scarce government resources: ibid., p. 184.
[107] C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998), p. 17. Whereas the costs rules of legal system are usually understood as part of Legal Opportunity Structures (e.g. loser-pays acts as a disincentive to taking litigation because of the risk and uncertainty), financial resources are often not conceptualized. Further discussions regarding financial hurdles in strategic litigation can be found in C.L. Arrington, 'Hiding in Plain Sight: Pseudonymity and Participation in Legal Mobilization' (2019) 52(2) *Comparative Political Studies*, pp. 310-41; L.Vanhala, 'Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home' (2018) 40(1) *Law & Policy*, pp. 110-27; L. Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy' (2018) 51(3) *Comparative Political Studies*, pp. 380-412.
[108] UN Environment, n. 21 above, p.183.
[109] Peel & Lin (n. 2 above) conducted an analysis of amicus curie briefs as well as interviews with stakeholders and found that 43% of Global South litigation enjoyed support from local or non-local NGO support, and of those cases, 57% of non-local NGO support was from the Global North.

South climate cases brought by local communities or individuals often enjoy the support of local NGOs, which in turn are supported by transnational cooperation with NGOs located outside the jurisdiction in which the case was brought.

5.2. Progressive Legislation and Judicial Approaches

Domestic legislation is another important dimension of Legal Opportunity Structures. An existing legal framework that recognizes environmental and human rights facilitates the defense of these rights in courts. Similarly, progressive judicial approaches are central in determining precedents in strategic cases.

Cases of strategic climate litigation in the Global South have relied on using existing constitutions and legislation, instead of adopting the tort-based approaches from the Global North. The adoption of constitutions by many countries around the world over the past two decades has also been accompanied by an 'environmental rights revolution', with environmental problems increasingly being addressed through the prism of human rights and constitutionalism.[110] A number of countries in the Global South, such as Brazil, Colombia, Kenya and Mexico, have constitutional provisions that recognize the right to a healthy environment and the role of the public prosecutor's office in the enforcement of this right against private corporations or the government. In addition to the legal culture and background doctrinal frameworks, which can provide different interpretive outcomes of climate legislation,[111] all countries in the Global South have already adopted some sort of climate law or policy.[112] The combination of constitutional provisions with a growing body of robust climate change legislation provides an increasingly solid basis for climate litigation.[113]

Yet, ultimately, the decision to enforce existing progressive environmental and/or climate legislation or, in its absence, to decide favourably for litigants in strategic regulatory climate litigation, depends on the judges. Some judges in the Global South have been drivers of innovative approaches to climate change. They have explicitly challenged legal formalism, and have been active outside the court room on climate change. Perhaps the clearest example of progressive judicial decision making which attempts to overcome institutional lethargy by the government can be found in the *Leghari* v. *Federation of Pakistan* case.[114] Judge Syad Mansoor Ali Shah identified adaptation as the way forward for Pakistan and developing countries generally, and interpreted existing national policies accordingly, focusing on adaptation as an integral and synergistic complement to future national planning on climate change.[115] The Court ordered the appointment of a national focal point on climate change, and members of the

[110] G. Ganguly, J. Setzer & V. Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies*, pp. 841-68. R. O'Gorman, 'Environmental Constitutionalism: A Comparative Study' (2017) 6(3) *Transnational Environmental Law*, pp. 435-462, at 435-6.
[111] E. Scotford & S. Minas, 'Probing the Hidden Depth of Climate Law: Analysing National Climate Legislation' (2019), *Review of European, Comparative and International Environmental Law*, early view [Available online: https://doi.org/10.1111/reel.12259] pp. 67-81, 72.
[112] Some countries have climate laws or policies which are broad and integrative in scope, such as Mexico's General Law on Climate Change. Others that do not have discrete climate legislation rely on climate-compatible development plans and adaptation and disaster management. M. Nachmany et al., 'The 2015 Global Climate Legislation Study: A Review of Climate Legislation in 99 Countries. Summary for Policy-makers' (2015) GLOBE & Grantham Research Institute on Climate Change and the Environment, p.16. Also Townshend et al., 'How National Legislation can Help to Solve Climate Change' (2013) 3(5) *Nature Climate Change*, pp. 430-4, at 430.
[113] Environmental Law Alliance Worldwide - Elaw (2014) 'Holding Corporations Accountable for Damaging the Climate', available at: https://www.elaw.org/system/files/elaw.climate.litigation.report.pdf.
[114] Lahore High Court P. No. 25501/2015.
[115] Ibid., 7.

Climate Change Commission, and retained jurisdiction to hear progress reports. The Commission subsequently submitted a number of progress reports to the Court. In 2018 the Commission and Court determined that the remaining items on the agenda of the Commission could be implemented by the Government, thereby dissolving the Climate Change Commission and replacing it with a Standing Committee on Climate Change to assist and ensure the continued implementation of the policy and framework. During the progress of the case, a new Climate Change Act was passed in 2017, illustrating how climate litigation and regulatory progress can have a cooperative relationship. While there is some scepticism as to whether the new Act will be fully implemented,[116] the objects and reasons section of the Act notes the extreme vulnerability of the country to climate change, and was passed as a result of renewed political will on the issue.[117] The judiciary in this case took on significant policy and regulatory activities, essentially stepping into the shoes of government and establishing and directing policy-making initiatives and institutions.

Similarly, a progressive and heterodox legal reasoning was followed by the Colombian Supreme Court in the decision adopted in *Future Generation* v. *Ministry of the Environment and Others.* Alvarado and Rivas-Ramirez highlight how different this outcome was from the traditionally moderate jurisprudence usually adopted when applying public interest-oriented constitutional rights. The decision discussed 'intergenerational equality and solidarity, private liability and accountability for climate change, and human dependence on the environment - topics rarely, if ever, debated by the Supreme Court'.[118] However, the implementation of ambitious judicial orders can be challenging. Despite the decision, over the past year deforestation in the Amazon increased, prompting the plaintiffs to seek a declaration that the government and other defendants have failed to fulfil the orders of the Supreme Court.[119]

These progressive judicial approaches may be an attempt by the judiciary to acknowledge the extreme vulnerability of their populations to climate change, while at the same time circumventing deficiencies in existing legislation or capacity constraints in enforcement. Indeed, decisions given in these strategic cases suggest that judges in the Global South are open to adapting their traditional role of administering justice to the challenges posed by climate change litigation, even if this means holding their own government accountable.[120] It is possible that climate litigation finds a stronger footing in jurisdictions which have express constitutional provisions on environmental protection.[121] Nevertheless, these cases demonstrate that progress can also be made where no environmental constitutional provisions exist, provided judges are willing and able to take action on climate change. As exemplified by the *Leghari* case, a court that is willing to exercise an active role can guide and build regulatory capacity even where the

[116] R.S. Khan, 'Pakistan Passes Climate Change Act, Reviving Hopes – and Scepticism', *Reuters* (24 March 2017).
[117] Ibid.
[118] Alvarado & Rivas-Ramirez, n. 5 above, pp. 522-4. Nevertheless, the Columbian courts have a judicial history in innovative approaches to environmental protection. For example, in 2016, the Sixth Chamber of Review of the Constitutional Court of Columbia granted rights to the Atrato River, its basin and tributaries (T-622 of 2016, May 2017).
[119] S.A. Sierra, 'The Colombian Government has Failed to Fulfil the Supreme Court's Landmark Order to Protect the Amazon' (5 April 2019), available on https://www.dejusticia.org/en/the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon/.
[120] Banda & Fulton, n. 93 above, p. 10131. The engagement of activist judges with climate change is also observed transnationally in the Oslo Principles on Global Climate Change Obligations to Reduce Climate Change and the Enterprises Principles. While the Principles may remain a progressive interpretation of fiduciary duties, judicial experts anticipate more progressive judicial decision making along these lines, particularly by activist jurists, as the threat of climate change and associated damages further materializes.
[121] Ibid., p. 10123.

statutory and institutional framework is ineffective.[122] However, it might also be that in some of these cases judges take bold decisions on climate cases without realizing the extent to which their decisions are innovative.[123]

6. LESSONS AND PROSPECTS

Based on the initial trends of strategic climate litigation in the Global South, and taking into consideration factors that contribute to this movement, some lessons can be gleaned. In contrast to Global North cases, strategic climate litigation in the Global South is generally not asking for more ambitious regulatory action to be taken by governments, even if this is an indirect outcome of the case. This may be an implicit acknowledgement of capacity constraints as well as a recognition of the climate equity implications involved. Asking national governments to implement stringent mitigation measures at the expense of poverty reduction, energy security needs, or other development agendas, will be taxing for the judiciary in the Global South. This is particularly pertinent in small developing countries. However, enforcing existing environmental legislation, protecting ecosystems and boosting adaptation efforts and enhancing institutional structures, all of which may have mitigation co-benefits, can be easier tasks to achieve through the courts. This may explain why these key features emerge in strategic climate litigation in the Global South, and may establish new strategic directions in climate litigation going forward.

Similarly, strategic climate litigation in the Global South does not rely extensively on traditional tort-based approaches to climate damage against either state or non-state actors. Instead, litigation in the Global South relies on existing legislation to achieve climate aims, and utilizes human rights-based approaches. These approaches can find synergies with litigation in the Global North which also, and so far successfully, adopts rights-based approaches. But rights-based approaches to climate litigation in the Global South make even more sense considering their populations' high vulnerability to climate impacts. Where specific climate legislation does not exist, plaintiffs instead focus on existing legislation or human rights instruments to achieve climate-related goals.

In this context, climate litigation in the Global South may continue to lead to successful outcomes and regulatory progress, and would be particularly helpful to most vulnerable populations if targeted at addressing adaptation to climate change. While, so far, most Global South climate lawsuits focus on mitigation issues (e.g., challenging coal-fired power plants, mining of coal and preventing carbon-intensive practices such as timber logging and oil palm cultivation),[124] adaptation efforts by governments pay dividends in that they save lives and can be compatible with existing development plans and efforts. Finding co-benefits between developmental and climate mitigation and adaptation efforts may be a key innovation by Global South judges which can in turn inform policy makers in the Global South. Some governments in the Global South are already passing legislation which focuses on climate-resilient development and green-growth strategies.[125]

[122] Ibid., p. 10134.
[123] Wibisana & Cornelius, n. 52 above, argue that judges might have been oblivious that they established a novel and unique jurisprudence.
[124] This was a surprising finding for Peel & Lin, n. 2 above.
[125] For example, Ethiopia, Rwanda and South Korea, see Townshend et al., n. 111 above, p. 431.

It is also possible that climate litigation in the Global South will gather pace as the impacts of climate change become more frequent and severe in these countries.[126] For instance, the island state of Vanuatu is considering litigation for climate impacts from both Global North governments and corporations located in the Global North.[127] While it is unclear whether the positive outcomes so far achieved will spread to other countries in the Global South which lack these legal characteristics, it is also important not to reduce the significance of a judgment to its dispositive part. Even if a claim is dismissed, a judicial decision may highlight a need for legal change, and/or help to raise social awareness, contributing to behaviour change.[128]

Another question is whether the regulatory impacts and frameworks established in the context of Global North cases should be applied, and if necessary adjusted, in the context of the growing number of climate litigation cases in the Global South. Synergies with litigation in the Global South appear in the EIA realm. The African EIA climate cases – especially if their results are amplified by South-South partnering in subsequent cases – signal a potential growth area for future Global South climate litigation.[129] While there have not been many cases in Africa, and procedural difficulties remain,[130] if this trend takes off it would mirror the development of jurisprudence in climate litigation 'hotspots' in the Global North like the US and Australia. In addition, given the history of judicial activism on environmental provisions in South Asian courts, we might observe more cases that uphold or advance climate change protections in this region as well.

7. CONCLUDING REMARKS

For decades, Northern countries have been advocating collective action to protect the environment, while Southern countries have insisted that Northern countries take the lead in addressing climate change. This divide is motivated in part by tensions regarding historic responsibility for environmental degradation, concerns regarding sovereignty over natural resources, and the desire to prioritize poverty reduction and development over environmental conservation in the Global South. The new climate litigation emerging in the Global South could help to reframe the limitations observed by the climate justice movement in the context of a persistent divide between countries in the Global North and the Global South over core environmental issues. Plaintiffs and judicial actors in the Global South are finding innovative ways to overcome significant capacity constraints, legislative deficiencies, procedural and implementation hurdles, and sometimes unsafe political environments to achieve positive climate outcomes.

[126] UNEP and Sabin Center, n. 34 above, 25.
[127] See https://www.climateliabilitynews.org/2018/11/26/vanuatu-climate-liability-suit/.
[128] G. Ganguly, J. Setzer & V. Heyvaert, n. 108 above, p. 866).
[129] Peel and Lin, n. 2 above. In Australia, EIA climate cases have consolidated the practice of including climate change considerations in environmental impact assessment undertaken for projects with substantial GHG emissions or the potential to be impacted by climate change consequences such as sea level rise. See J. Peel, H. Osofsky & A. Foerster, 'Shaping the 'Next Generation' of Climate Change Litigation in Australia' (2017) 41(2) *Melbourne University Law Review*, pp. 793-844, at p. 796.
[130] Emhesh, n. 16 above.

Litigation can not only circumvent and bypass political partisan divides,[131] but it can also create fluid pathways between multiple actors at the subnational, national, and international levels.[132] However, litigation can perhaps be more useful in the Global South in its regulatory role of creating pathways between fragmented institutional actors. It could bind together previously fragmented governance structures in the Global South, to ensure they focus on national climate goals, whether they be mitigation, adaptation, disaster management, or a combination of those aims. This regulatory outcome has already been highlighted by the progressive outcomes of the *Leghari* case where the judge mandated coherent action by government actors over time until institutional coherence on the issue was achieved.

The valuable role of litigation as a regulatory tool has begun to be seized upon in the Global South. As populations in these countries are the most vulnerable to climate impacts, and as impacts increase, the observations gleaned from an initial spate of cases may solidify into a litigation trend. The regulatory impact of this litigation in the context of the Global South may therefore provide lessons and open up new avenues for progress on climate change in these highly vulnerable countries which suffer from capacity constraints. Despite these constraints, this initial spate of strategic litigation attempts to overcome the traditional North-South divide, with litigants relying on human rights arguments, existing legislation, and progressive procedural rules to achieve climate-resilient development. The latest strategies and decisions from courts in the Global South suggest that it might be possible for the Global South to innovate and establish new trends towards climate change adaptation and mitigation in an ever more transnational climate jurisprudence.

[131] H.M. Osofsky & J. Peel, 'Energy Partisanship' (2016) 65 *Emory Law Journal*, pp. 695-794, at 695, although the authors note that courts are not a 'panacea' for partisanship, at 761.
[132] H.M. Osofsky, 'The Role of Climate Change Litigation in Establishing the Scale of Energy Regulation' (2011) 101(4) *Annals of the Association of American Geographers*, pp. 775–82.