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**Authors**

Morganthau, Tamara  
Reisch, Nikki

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# LITIGATING THE FRONTLINES: WHY AFRICAN COMMUNITY RIGHTS CASES ARE CLIMATE CHANGE CASES

Tamara Morgenthau\* and Nikki Reisch\*\*

## ABSTRACT

Communities facing extractive industry and destructive land-use projects in Africa have appealed to the continent's human rights bodies and subregional courts to protect their lives and livelihoods, and the environments on which both depend. To date, most of these cases have not been considered "climate change litigation." But the rights they have championed and the legal decisions they have produced are vital to climate change mitigation and adaptation strategies in Africa and around the world.

Avoiding climate catastrophe requires keeping fossil fuels in the ground and leaving forests intact. Litigation can advance those life- and planet-saving goals if it reinforces the ability of frontline communities to resist new pipelines, mining concessions, and plantations. Courts can validate the role of communities as stewards of their lands and participants in natural resource governance, provide them the compensation they are owed for past harms, and order the restoration of their environments. The adjudicative bodies that comprise the African human

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\* Tamara Morgenthau is a human rights lawyer. As a Clinical Teaching Fellow with Berkeley Law's International Human Rights Law Clinic and a Bertha Fellow with EarthRights International, she was part of legal teams representing individuals and communities harmed by largescale development projects. Tamara holds a J.D. from the University of Ottawa, an LL.M. from New York University School of Law, and a B.A. from the University of Western Ontario.

\*\* Nikki Reisch is the Director of the Climate and Energy Program at the Center for International Environmental Law (CIEL). She coauthored this Article in her personal capacity, and it does not necessarily represent the views of CIEL. Nikki holds a J.D. from New York University School of Law and a B.A. from Yale University.

rights system have produced a rich jurisprudence that furthers these aims. Past decisions recognizing communal rights to land tenure and resource control, participatory development, and a healthy environment establish important legal footholds for climate litigation globally.

This Article examines four such precedents from African regional bodies and argues that the type of frontline community cases they represent and the collective rights they expound are critical to effective and equitable climate action. These cases provide legal support for a community-centered strategy essential to mitigating climate change: stopping the drivers of global warming upstream at their source, rather than downstream through emissions regulations. The climate litigation movement should embrace such upstream approaches and build on these precedents. The scale and scope of the climate crisis requires expansive thinking about the types of cases and rights that can help secure urgently needed climate justice.

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## INTRODUCTION

Africa is among the world's regions most vulnerable to the impacts of climate change.<sup>1</sup> It also has a long and continuing history of exploitative natural resource extraction with dire consequences for local communities and the environment. To date, the continent has seen relatively few lawsuits framed explicitly as climate change cases—cases that seek to regulate or remedy the causes or consequences of climate change—although such suits have begun to emerge.<sup>2</sup> African regional human rights bodies and subregional courts<sup>3</sup> have more experience, however, with lawsuits that seek to mediate conflict over land and natural resource governance and the environmental impacts of extractive and industrial activities.<sup>4</sup> Although they have not been framed in terms of greenhouse gas emissions or legal rights to a safe climate, many of these frontline community cases involve disputes over carbon-intensive activities, such as fossil fuel extraction, agro-industrial plantations, or deforestation. These cases also center on rights critical to effective and equitable climate action, such as communal rights to land tenure and resource control, participatory development, and a healthy

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1. See Isabelle Niang et al., *Africa, in* CLIMATE CHANGE 2014—IMPACTS, ADAPTATION, AND VULNERABILITY: PART B: REGIONAL ASPECTS: CONTRIBUTION OF WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1199, 1205 (Vicente R. Barros et al., eds. 2014), [https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap22\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap22_FINAL.pdf) [<https://perma.cc/QPZ7-L5PC>]; *Responding to Climate Change*, U.N. ENV'T PROGRAMME, <https://www.unenvironment.org/regions/africa/regional-initiatives/responding-climate-change> [<https://perma.cc/72NX-E2WH>]; see also Ove Hoegh-Guldberg et al., *Impacts of 1.5°C Global Warming on Natural and Human Systems*, in GLOBAL WARMING OF 1.5°C: AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY 175, 178, 197 (Valérie Masson-Delmotte et al., eds. 2019), [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Chapter3\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Chapter3_Low_Res.pdf) [<https://perma.cc/CG2T-TBQV>].

2. See Louis J. Kotzé & Anél du Plessis, *Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent*, U. OR. J. ENV'T L. & LITIG. (forthcoming); Pooven Moodley, *Litigation to Challenge Large Extractive Projects is Gaining Traction in Africa*, OPEN GLOB. RTS. (June 28, 2020), <https://www.openglobalrights.org/litigation-to-challenge-extractive-projects-gaining-traction-in-africa> [<https://perma.cc/3CUF-452R>]; Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT'L L. 679, 703 (2019).

3. Throughout this Article, the phrase “African regional human rights bodies” (or “African human rights bodies”) refers to the regional human rights organs under the auspices of the African Union, as well as courts of subregional economic communities in Africa that adjudicate cases involving human rights claims. See *infra* Part I (discussing the structure of the African human rights system).

4. See Kotzé & du Plessis, *supra* note 2.

environment.<sup>5</sup> Such cases should be understood as climate litigation, recognized as critical to the development of successful strategies for addressing the climate crisis, and amplified as valuable jurisprudential contributions to the normative framework for climate justice.

Climate litigation denotes a relatively recent and rapidly growing category of lawsuits that concern the causes or consequences of climate change.<sup>6</sup> The scope of the cases that fall within this category remains contested.<sup>7</sup> In its narrowest sense, climate litigation refers to cases that seek regulation of greenhouse gas emissions, which are the primary cause of climate change. It also includes cases that demand

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5. Soc. & Econ. Rts. Action Ctr. (SERAC) & the Ctr. for Econ. & Soc. Rts. (CESR) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n. H.P.R.] (Oct. 2001) [hereinafter Ogoni case]; Socio-Economic Rts. & Accountability Project v. Nigeria, No. ECW/CCJ.JUD/18/12, Judgment, The Court of Justice of the Economic Community of West African States [ECOWAS] (Dec. 12, 2012) [hereinafter SERAP]; Ctr. for Minority Rts. Dev. & Minority Rts. Grp. Int'l on behalf of Endorois Welfare Council v. Kenya, Communication 276/03, Afr. Comm'n H.P.R. (Nov. 25, 2009) [hereinafter Endorois]; Afr. Comm'n H.P.R. v. Kenya, No. 006/2012, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (May 26, 2017) [hereinafter Ogiek]. Additional human rights cases on behalf of other communities facing extractive industry activities are currently pending. See, e.g., *Ivory Coast: Support for the Similimi "Mine Community,"* ADVOCES. FOR CMTY. ALTS., <https://advocatesforalternatives.org/cases/cote-divoire> [<https://perma.cc/Z98X-FE92>] (discussing legal action before the ECOWAS CCJ by communities in Cote d'Ivoire affected by manganese extraction); Jonathan Kaufman, *Sierra Leone Villagers Seek Mining Justice at ECOWAS Court*, ADVOCES. FOR CMTY. ALTS. (Oct. 3, 2019), <https://advocatesforalternatives.org/2019/10/03/sierra-leone-villagers-seek-mining-justice-at-ecowas-court> [<https://perma.cc/VHH3-79EB>] (describing lawsuit brought by residents of Koidu in Sierra Leone against their government for violating their rights to property, environment, and health in connection with a diamond mine); Maina Waruru, *Campaigners Take Tanzanian and Ugandan Governments to Court to Stop Total's Oil Pipeline*, DESMOGUK CLEARING THE PR POLLUTION (Nov. 13, 2020), <https://www.desmog.co.uk/2020/11/13/campaigners-take-tanzanian-and-ugandan-governments-court-stop-total-s-oil-pipeline> [<https://perma.cc/4WCT-XC9B>] (profiling a lawsuit filed in the East African Court of Justice challenging the development of a massive oil pipeline from Uganda to Tanzania).

6. Two of the most widely cited repositories of climate change litigation are the Climate Change Litigation Databases maintained by the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter, and the Climate Change Law of the World database, maintained by the Grantham Research Institute on Climate Change and the Environment at London School of Economics. See *Climate Change Litigation Databases*, COLUM. L. SCH.—SABIN CTR. FOR CLIMATE CHANGE L. & ARNOLD & PORTER, <http://climate-casechart.com> [<https://perma.cc/52KJ-6CFN>]; Grantham Research Institute on Climate Change and the Environment, *Climate Change Laws of the World*, LONDON SCH. OF ECON., <https://climate-laws.org> [<https://perma.cc/5F23-TMZC>] (last visited July 24, 2020).

7. See generally Peel & Lin, *supra* note 2 (discussing how commonly applied definitions of climate litigation reflect a Global North perspective and exclude many Global South cases, in which climate change arguments are often more peripheral); see also JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 4–8 (2015).

protection from, or redress for, the impacts of a changing climate on people and their environment. Whether rooted in constitutional, statutory, or human rights claims, these core climate cases focus expressly on climate governance and associated regulatory regimes. Lawsuits challenging the inadequacy of states' emissions reduction targets or their failure to fulfill their climate mitigation commitments under international agreements or national law are quintessential examples of such litigation. Cases along these lines have been filed in the Netherlands,<sup>8</sup> the United States,<sup>9</sup> Switzerland,<sup>10</sup> Ireland,<sup>11</sup> India,<sup>12</sup> the United Kingdom,<sup>13</sup> France,<sup>14</sup> Germany,<sup>15</sup> Canada,<sup>16</sup> Colombia,<sup>17</sup> Peru,<sup>18</sup> and

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8. See, e.g., HR 20 december 2019, ECLI:NL:HR:2019:2007 (The State of the Netherlands/Sichting Urgenda) (Neth.) [Urgenda Foundation v. Kingdom of Netherlands]. For an English version of the judgment and case history, see *Urgenda Foundation v. State of the Netherlands*, COLUM. L. SCH.–SABIN CTR. FOR CLIMATE CHANGE L. & ARNOLD & PORTER, <http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands> [<https://perma.cc/CW9V-ZUVA>].

9. See, e.g., *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

10. See, e.g., Bundesgericht [BGer] [Federal Supreme Court] May 5, 2020, 1C\_37/2019 [Verein KlimaSeniorinnen Schweiz et al. v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)], <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament> [<https://perma.cc/WZB7-WQCJ>].

11. See, e.g., *Friends of the Irish Env't v. Government of Ireland* [2020] IESC 49, [https://www.courts.ie/view/judgments/681b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020\\_IESC\\_49.pdf/pdf](https://www.courts.ie/view/judgments/681b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020_IESC_49.pdf/pdf).

12. See, e.g., *Pandey v. India*, (2017) No. 793 JR, <http://climatecasechart.com/non-us-case/pandey-v-india> [<https://perma.cc/WV8E-ZCAL>].

13. See, e.g., *Plan B Earth v. Sec'y of State for Bus., Energy & Indus. Strategy* [2019] C1/2018/1750, C1/2018/1750, <http://climatecasechart.com/non-us-case/plan-b-earth-others-v-secretary-state-business-energy-industrial-strategy> [<https://perma.cc/3XF2-V53D>].

14. See, e.g., *Notre Affaire à Tous v. France* (filed Dec. 17, 2018), <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france> [<https://perma.cc/46NV-BXTH>].

15. See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 22, 2018, 64S/18 FH-sk, [Friends of the Earth Germany v. Germany], <http://climatecasechart.com/non-us-case/friends-of-the-earth-germany-association-of-solar-supporters-and-others-v-germany> [<https://perma.cc/5H8B-NV6Q>]; see also Bundesgerichtshof [BGH] [Federal Court of Justice] 00271/17/R/SP, [Family Farmers and Greenpeace Germany v. Germany], <http://climatecasechart.com/non-us-case/family-farmers-and-greenpeace-germany-v-german-government> [<https://perma.cc/H6LR-SWBD>].

16. See, e.g., *ENVironment JEUnesse v. Canada*, [2019] C.S. Québec, No. 500-06-000955-183 (Can. Que), <http://climatecasechart.com/non-us-case/environnement-jeunesse-v-canadian-government> [<https://perma.cc/4G43-5DYT>] (appeal pending).

17. See, e.g., Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civil abril 5, 2018, M.P.: Luis Armando Tolosa Villabona, STC4360-2018, Expediente 11001-22-03-000-2018-00319-01 (Colom.) [Andrea Lozano Barragán et al. v. Presidencia de la República, Sentencia de la Corte Suprema de Justicia], <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others> [<https://perma.cc/4LR6-CKYB>].

18. See, e.g., *Alvarez v. Peru* (filed Dec. 16, 2019), <http://climatecasechart.com/non-us-case/alvarez-et-al-v-peru> [<https://perma.cc/WT4Z-BSST>].

South Korea,<sup>19</sup> among other states. Additional examples include lawsuits filed against governments for inaction or delay in implementing measures to adapt to the adverse consequences of climate change,<sup>20</sup> or against companies for their role in causing climate-related harms and their responsibility for the costs of adaptation.<sup>21</sup> Cases against multiple states concerning the adequacy of their climate action have been filed before the U.N. Committee on the Rights of the Child<sup>22</sup> and the European Court of Human Rights.<sup>23</sup> Slightly broader conceptions of climate litigation encompass cases that challenge specific projects on the grounds that they are incompatible with greenhouse gas emission targets and contribute to climate harm. This latter category includes, for example, lawsuits seeking to enjoin the construction of coal-fired power plants or airport expansions.<sup>24</sup>

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19. See, e.g., Complaint, Hunbeobjaepanso [Const. Ct.], filed Mar. 12, 2020, (S. Kor.) [Kim Yujin v. South Korea], <http://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea> [<https://perma.cc/6F8Y-YD7V>].

20. See, e.g., Asghar Leghari v. Fed'n of Pak., (2015) W.P. 25501/2015 (Pak.), [https://elaw.org/pk\\_Leghari](https://elaw.org/pk_Leghari) [<https://perma.cc/T5NY-4LVD>].

21. A growing number of local and state governments in the United States have filed civil actions against fossil fuel companies on various grounds including public nuisance, negligence, and trespass, as well as consumer fraud and deception. The Sabin Center for Climate Change, Climate Litigation Database lists the actions and associated filings. See *U.S. Climate Change Litigation: Common Law Claims*, COLUM. L. SCH.–SABIN CTR. FOR CLIMATE CHANGE L. & ARNOLD & PORTER, <http://climatecasechart.com/case-category/common-law-claims> [<https://perma.cc/FM6Q-WZN3>]; *U.S. Climate Change Litigation: State Law Claims: Enforcement Cases*, COLUM. L. SCH.–SABIN CTR. FOR CLIMATE CHANGE L. & ARNOLD & PORTER, <http://climatecasechart.com/case-category/enforcement-cases> [<https://perma.cc/3EFY-GB29>].

22. See, e.g., Petition, Commc'n to the Comm. on the Rts. of the Child, in the case of, *Sacchi, et al. v. Argentina, et al.*, (filed Sept. 23, 2019), <http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al> [<https://perma.cc/429H-9SC4>].

23. Youth for Climate Just. v. Austria et al., Eur. Ct. H.R. (filed Sept. 2, 2020), <http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al> [<https://perma.cc/A9QZ-4S6X>] [hereinafter Youth for Climate Just. v. Austria].

24. See, e.g., *EarthLife Afr. Johannesburg v. Minister of Env't Affs.* 2017 (High Ct.) (S. Afr.), <http://climatecasechart.com/non-us-case/4463> [<https://perma.cc/K2PN-4S3E>] (challenging development of coal-fired power plant in South Africa); *Plan B Earth v. Sec'y of State for Transp.* [2020] EWCA (Civ) 214 (U.K.), <http://climatecasechart.com/non-us-case/plan-b-earth-v-secretary-of-state-for-transport> [<https://perma.cc/B7BG-74UE>] (challenging runway expansion at Heathrow airport); *Verfassungsgerichtshof [VfGH] [Constitutional Court]*, June 1, 2017, W109 2000179–1/291E (Austria) [In re Vienna-Schwachat Airport Expansion], <http://climatecasechart.com/non-us-case/in-re-vienna-schwachat-airport-expansion> [<https://perma.cc/X3GX-XQUU>] (challenging construction of a third runway at Vienna's main airport); see also César Rodríguez-Garavito, *International Human Rights & Climate Governance: The Origins, Norms and Implications of the "Rights Turn" in Climate Litigation* 26–27 (paper presented at the NYU Litigating the Climate Crisis Conference, Mar. 2020) (on file with authors) (including the above cases in an overview of climate litigation).

Farther toward what is conventionally understood to be the periphery of climate litigation are cases that have clear implications for the mitigation of climate change or adaptation to its consequences, but which engage only indirectly with climate change or in which climate change arguments may not be central. Such cases may seek remedies that would have the effect of preventing or reducing carbon emissions or preserving carbon sinks but are not premised on emissions regulations or legal rights to protection from climate change and its consequences. A growing number of scholars include these cases in catalogs of climate litigation, but the recognition is far from systematic and still ties inclusion to whether climate change is mentioned in the parties' pleadings or the adjudicators' decisions.<sup>25</sup> We contend that this peripheral category should be expanded to encompass cases seeking to abate land-use activities that drive greenhouse gas emissions by unlocking fossil fuels or destroying natural carbon sinks—regardless of whether the pleadings or decisions raise the issue of climate change at all.<sup>26</sup>

This Article focuses on four such landmark decisions from regional bodies in Africa that have been excluded even from this peripheral category to date, despite their contributions to climate action and to evolving jurisprudence on the right to a healthy environment and safe climate. These decisions are among the leading human rights cases in Africa and mark global and regional firsts for the adjudication or recognition of certain aspects of communal rights:

*Social and Economic Rights Action Center (SERAC) v. Nigeria (Ogoni or the Ogoni case),*<sup>27</sup>

*Socio-Economic Rights and Accountability Project v. Nigeria (SERAP),*<sup>28</sup>

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25. See, e.g., Peel & Lin, *supra* note 2, at 683–85, 690–95, 700–10 (collecting and analyzing thirty-four Global South climate cases, 59 percent of which feature climate change at the periphery, not the core, and including among climate cases from Africa a suit in Nigeria that concerned gas flaring but was not argued or decided on climate change grounds); Rodríguez-Garavito, *supra*, at n.3, annex (including only those cases that explicitly reference climate change in pleadings or decisions).

26. Some scholars have cautioned against stretching the category of “climate litigation” too far. Kotzé and du Plessis, for example, warn that if too many types of climate-related harm are included under the umbrella of climate litigation, “this special litigation category then merely blends into the broader body of environmental litigation.” Kotzé & du Plessis, *supra* note 2, at 6. They agree, however, that climate litigation necessarily includes actions designed to “force actors to avoid damage, to reduce greenhouse gas emissions and to take measures to increase resilience and reduce vulnerability in the face of a changing climate.” *Id.* The cases from the African human rights system discussed below are clearly such actions.

27. Ogoni case, *supra* note 5.

28. SERAP, *supra* note 5.



*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (Endorois)*,<sup>29</sup> and

*African Commission on Human and Peoples' Rights v. Kenya (Ogiek)*.<sup>30</sup>

All four cases concern activities that alter community land and resources in ways that increase greenhouse gas emissions, decrease carbon storage, and exacerbate vulnerability to the impacts of climate change by eroding socioeconomic and ecological resilience. The decisions center around four rights guaranteed by the African Charter on Human and Peoples' Rights (African Charter) which are critical to climate justice: the rights of peoples to free disposal of their wealth and natural resources, to property, to economic, social, and cultural development, and to a "satisfactory" environment.<sup>31</sup>

While neither argued nor decided on climate change grounds, these cases—and other frontline community cases that similarly champion collective rights—are appropriately considered climate litigation for several reasons. First, they represent a vital complementary strategy for mitigating climate change and protecting future generations: enabling communities to keep fossil fuels in the ground and keep forests intact. Cases that focus on stopping the upstream drivers of climate change, such as oil, gas, and coal extraction and deforestation, can slow global warming *at least as effectively* as conventional climate cases that aim at securing policy commitments to reduce downstream emissions. Additionally, safeguarding community participation in natural resource governance, as the four precedents discussed here do, is necessary to the success of this upstream strategy.<sup>32</sup> Data shows that Indigenous Peoples and other natural resource-dependent local communities acting as stewards of their land play a vital role in protecting carbon stores, preventing

29. Endorois, *supra* note 5.

30. Ogiek, *supra* note 5.

31. African Charter on Human and Peoples' Rights arts. 14, 21–22, 24, June 27, 1981, 1520 U.N.T.S. 217, (entered into force Oct. 21, 1986) [hereinafter African Charter].

32. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC SPECIAL REPORT ON CLIMATE CHANGE, DESERTIFICATION, LAND DEGRADATION, SUSTAINABLE LAND MANAGEMENT, FOOD SECURITY, AND GREENHOUSE GAS FLUXES IN TERRESTRIAL ECOSYSTEMS: SUMMARY FOR POLICYMAKERS (APPROVED DRAFT) 32, 34 (Aug. 7, 2019), [https://www.ipcc.ch/site/assets/uploads/2019/08/4.-SPM\\_Approved\\_Microsite\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2019/08/4.-SPM_Approved_Microsite_FINAL.pdf) [<https://perma.cc/NX75-RAQV>] (discussing the contribution of customary land tenure and Indigenous practices to the response to climate change); Rachel McMonagle, *International Day of Indigenous People: Land Rights and Biodiversity Conservation*, THE LAND PORTAL (Aug. 21, 2020), <https://land-portal.org/blog-post/2020/08/international-day-Indigenous-people-land-rights-and-biodiversity-conservation> [<https://perma.cc/QJ6J-R943>] (discussing the "growing consensus that the land tenure rights of local communities and Indigenous groups are central to biodiversity preservation, sustainable development, and climate change mitigation and adaptation").

greenhouse gas emissions, conserving biodiversity, and ensuring resilience, all of which help to mitigate and adapt to climate change.<sup>33</sup>

Second, supporting and amplifying the precedents set in such frontline community cases will ensure greater equity and diversity in the climate litigation movement and strengthen the influence such cases have on developing jurisprudence. Upstream and ground-up cases such as those discussed in this Article represent a vital counterweight to legal strategies led from afar and focused downstream on emissions reduction and top-down policies. Lawsuits that address the local, social, and environmental harms of carbon-intensive activities predominate among climate cases in the Global South to date, reflecting a “justice-centered approach focused on protecting vulnerable populations.”<sup>34</sup> Their exclusion from consideration among climate cases dilutes the influence of actors in the Global South on strategies adopted by climate litigators and on the development of climate law.<sup>35</sup>

Finally, in recognizing communal rights to land tenure and resource control, participatory development, and a healthy environment, the jurisprudence from the African regional bodies discussed in this Article—while not new—offers a fresh perspective and important legal footholds for climate litigation strategies. These precedents provide a strong foundation for more cases in Africa on behalf of frontline communities threatened by both the causes and the consequences of climate change. Their relevance is not, however, limited to the African continent. It extends beyond the jurisdiction of the African Charter and even beyond upstream, ground-up community cases like those discussed here. The collective rights expounded in the four cases discussed below could bolster existing arguments in conventional climate

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33. Vicky Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Rep. on the Rights of Indigenous Peoples*, U.N. Doc. A/HRC/36/46, ¶ 7 (Nov. 1, 2017) [hereinafter Report of the Special Rapporteur on Indigenous Peoples]; see also John E. Fa et al., *Importance of Indigenous Peoples’ Lands for the Conservation of Intact Forest Landscapes*, 18 FRONTIERS ECOLOGY & ENVIRONMENT 135 (2020); see generally CALEB STEVENS ET AL., WORLD RESOURCES INSTITUTE AND RIGHTS AND RESOURCES INITIATIVE, SECURING RIGHTS, COMBATING CLIMATE CHANGE: HOW STRENGTHENING COMMUNITY FOREST RIGHTS MITIGATES CLIMATE CHANGE (2014); cf. Wilmien Wicomb & Henk Smith, *Customary Communities as Peoples and Their Customary Tenure as Culture: What We Can Do with the Endorois Decision*, 11 AFR. HUM. RTS. L.J. 422 (2011) (discussing “customary communities,” whose tenure rights are based on customary law, and may not fit within the definition of Indigenous or tribal peoples).

34. See Peel & Lin, *supra* note 2, at 683–85, 703–08, 716, 722 (noting that climate is peripheral in a majority of Global South climate cases).

35. See *id.* at 682 (explaining that consideration of Global South case developments “underscores that judicial contribution to global climate governance is not purely a Global North phenomenon”).

change litigation based largely on individual rights (such as the right to life, physical integrity, and subsistence) and enhance normative developments around the rights to a healthy environment and a safe climate. Increasing references to, and reliance on, African human rights case law would enrich the jurisprudence emerging from national courts and regional bodies around the world.

In Part I, we provide a brief background on the structure and jurisdiction of the institutions that comprise the African human rights system. In Part II, we examine the four landmark cases' elaboration of community rights to freely dispose of their wealth and natural resources, to property, to development, and to a healthy environment. Part III reflects on why these decisions should be considered climate litigation and should inform future legal strategies of the climate justice movement not only in Africa, but in diverse contexts globally. Finally, the conclusion emphasizes the importance of upstream legal strategies that support community power and resilience to resist the drivers of climate change and to withstand its consequences.

## I. THE AFRICAN HUMAN RIGHTS SYSTEM

The African Charter is the primary regional human rights instrument in Africa.<sup>36</sup> It was adopted in 1981 by the Organization of African Unity, the predecessor to the African Union,<sup>37</sup> and came into force in October 1986. The Charter has a unique breadth, covering civil and political as well as economic, social, and cultural rights, and addressing both collective and individual rights.<sup>38</sup> The collective rights set forth in the Charter are vested in “peoples,”<sup>39</sup> a term that the Charter does not define,<sup>40</sup> but which has been interpreted by African human rights bodies

36. African Charter, *supra* note 31.

37. Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3 (entered into force May 26, 2001). The African Union was established in 2000 to replace the Organization of African Unity.

38. RACHEL MURRAY, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMMENTARY* 508 (2019).

39. African Charter, *supra* note 31, arts. 19–24; *see also* Endorois, ¶¶ 149–150 (“[T]he African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of peoples.”).

40. In *Ogiek*, the Court explained that the drafters of the Charter omitted a definition of “peoples” to “permit a certain flexibility in the application and subsequent interpretation by future users of the legal instrument, the task of fleshing out the Charter being left to the human rights protection bodies.” *Ogiek*, *supra* note 5, ¶ 196; *see also* Endorois, *supra* note 5, ¶ 147 (noting that there is no universal and unambiguous definition of “peoples”), ¶ 151 (discussing “objective features that a collective of individuals should manifest to be considered as ‘peoples’” including collective enjoyment of, or collective deprivation of, certain rights, such as those under Articles 19 to 24 of the Charter); Sudan Hum. Rts. Org.

to encompass national populations,<sup>41</sup> substate ethnic groups and communities<sup>42</sup> as a minority or majority of the national population,<sup>43</sup> and Indigenous Peoples.<sup>44</sup> (See discussion *infra* Part II.)

The African Union has two primary bodies charged with promoting and protecting human rights and interpreting the Charter: the African Commission on Human and Peoples' Rights (the Commission) and the African Court on Human and Peoples' Rights (the Court).<sup>45</sup>

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& Ctr. on Housing Rts. & Evictions (COHRE) v. Sudan, Communication 297/03–296/05, Afr. Comm'n H.P.R., ¶ 220 (May 27, 2009) [hereinafter Sudan Hum. Rts. Org. & COHRE] (recognizing the “fluid” jurisprudence in this area but identifying a set of characteristics that a “people may use to identify themselves . . . including language, religion, culture, the territory they occupy in a state, common history, ethno-anthropological factors,” race, and ethnic identity).

41. Ogiek, *supra* note 5, ¶ 197; see also Rachel Murray & Steven Wheatley, *Groups and the African Charter on Human and Peoples' Rights*, 25 HUM. RTS. Q. 213, 231 (2003).

42. Ogoni case, *supra* note 5, ¶ 55 (Oct. 2001); Endorois, *supra* note 5, ¶¶ 255, 267; Ogiek, *supra* note 5, ¶¶ 198–99 (extending the right to substate peoples “provided [they] do not call into question the sovereignty and territorial integrity of the State without the latter’s consent”).

43. See Sudan Hum. Rts. Org. & COHRE, *supra* note 40, ¶ 220.

44. Endorois, *supra* note 5, ¶ 162 (recognizing the Endorois as an Indigenous community and as a peoples under the African Charter); Ogiek, *supra* note 5, ¶¶ 105–12, 198–99, 208 (recognizing the Ogiek as an Indigenous population to whom the collective rights under Articles 21 and 22 of the Charter apply). The authors recognize that the definition of Indigenous Peoples and its application in the African context is the subject of vibrant discussion and an extensive literature. See, e.g., Derek Inman et al., *Evolving Legal Protections for Indigenous Peoples in Africa: Some Post-UNDRIP Reflections*, 26.3 AFR. J. INT'L & COMP. L. 339, 341–47 (2018) (discussing indigeneity as a contested concept in Africa); ALBERT KWOKWO BARUME, *LAND RIGHTS OF INDIGENOUS PEOPLES IN AFRICA* (2010), [https://www.iwgia.org/images/publications/0002\\_Land\\_Rights\\_of\\_Indigenous\\_Peoples\\_In\\_Africa.pdf](https://www.iwgia.org/images/publications/0002_Land_Rights_of_Indigenous_Peoples_In_Africa.pdf) [<https://perma.cc/2NS2-PUTD>]. The African Commission, for example, has established a Working Group of Experts on the Rights of Indigenous or Ethnic Communities, with a mandate to “examine the concept of indigenous populations / communities in Africa” and recommend measures to monitor and protect their rights. See *Working Group on Indigenous Populations/Communities in Africa*, AFR. COMM'N H.P.R., <https://www.achpr.org/specialmechanisms/detailmech?id=10> [<https://perma.cc/K5LZ-FGVF>]. This Article does not address the question of who qualifies as “Indigenous” or the full scope of the rights afforded to Indigenous Peoples. Rather, it focuses narrowly on the way that the selected cases discuss the rights of Indigenous Peoples.

45. African Charter, *supra* note 31, arts. 30, 45; Org. of African Unity [OAU], *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, art. 3 (June 10, 1998) [hereinafter Protocol Establishing the African Court]. (The African Union Assembly has adopted protocols for the creation of a new court that would be formed by merging the non-operational African Court of Justice and the African Court on Human and Peoples' Rights. This proposed body does not currently exist, however, because the protocols have not been ratified by the requisite number of states to come into effect. See African Union, *Protocol on the Statute of the African Court of Justice and Human Rights* (July 1, 2008); African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (June 27, 2014); see also INT'L JUSTICE RESOURCE CENTER (IJRC), *ADVOCACY BEFORE THE AFRICAN HUMAN RIGHTS SYSTEM: A MANUAL FOR ATTORNEYS AND ADVOCATES PREVENTING AND*

Both bodies hear cases (which the Commission calls communications) concerning member states' alleged violations of their human rights obligations, but the scope of their respective jurisdiction and authority differs.<sup>46</sup> The Commission, which has jurisdiction over all member states of the African Union,<sup>47</sup> can hear cases filed by states, individuals, and nongovernmental organizations.<sup>48</sup> Its rulings take the form of recommendations to states.<sup>49</sup> The Court complements the mandate of the Commission but is an independent body.<sup>50</sup> It has jurisdiction over only those states that have ratified the Protocol establishing the Court—as of May 2020, thirty of Africa's fifty-five states.<sup>51</sup> Individuals and NGOs may bring cases to the Court only against those states that have expressly consented to the Court's jurisdiction over such petitions,

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REMEDYING HUMAN RIGHTS VIOLATIONS THROUGH THE INTERNATIONAL FRAMEWORK 116–19 (2016) [hereinafter IJRC, *ADVOCACY BEFORE THE AFRICAN HUMAN RIGHTS SYSTEM*].) In addition to the Commission and Court, there is a third specialized human rights body created under the auspices of the African Union: the African Committee of Experts on the Rights and Welfare of the Child. Established by the African Charter on the Rights and Welfare of the Child (ACRWC), this Committee has a mandate to “promote and protect” the rights enshrined in the ACRWC and can hear complaints by individuals and nongovernmental organizations. With a growing number of climate change cases brought by or on behalf of children around the world, the Committee may be an important—and to date underutilized—venue for such cases in Africa. See OAU, *African Charter on the Rights and Welfare of the Child*, arts. 32, 42, 44, OAU Doc. CAB/LEG/24.9/49 (July 11, 1990), <https://www.acerwc.africa/acerwc-full-text> [<https://perma.cc/M46U-ARRZ>]; *About Communications*, AFR. COMM. OF EXPERTS ON THE RTS. & WELFARE OF THE CHILD, <https://www.acerwc.africa/about-communications> [<https://perma.cc/R7WR-YD9A>].

46. African Charter, *supra* note 31, art. 45; Protocol Establishing the African Court, *supra* note 45, arts. 7, 27–30.

47. *Id.* at pmb1., art. 30.

48. See Afr. Comm'n H.P.R., *Information Sheet No. 2: Guidelines for the Submission of Communications*, at 5, [https://www.achpr.org/public/Document/file/English/achpr\\_infosheet\\_communications\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr_infosheet_communications_eng.pdf) [<https://perma.cc/94RW-4PNL>]; see generally Afr. Comm'n H.P.R., *Information Sheet No. 3: Communication Procedure*, [https://www.achpr.org/public/Document/file/English/achpr\\_communication\\_procedure\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr_communication_procedure_eng.pdf) [<https://perma.cc/Q9VC-ZCRD>].

49. African Charter, *supra* note 31, art. 53; Afr. Comm'n H.P.R., *Rules of Procedure of the African Commission on Human and Peoples' Rights*, Rule 92 (2010), [https://www.achpr.org/public/Document/file/English/Rules\\_of\\_Procedure\\_of\\_the\\_African\\_Commission\\_on\\_Human\\_and\\_PeoplesRightsOf2010\\_%20Legal%20Instruments%20\\_%20ACH-PR.pdf](https://www.achpr.org/public/Document/file/English/Rules_of_Procedure_of_the_African_Commission_on_Human_and_PeoplesRightsOf2010_%20Legal%20Instruments%20_%20ACH-PR.pdf) [<https://perma.cc/8SZK-AJ35>]. The Commission's recommendations are included in an “Annual Activity Report” to the OAU Assembly of Heads of State and Government. Upon adoption by the Assembly, those recommendations become binding on states parties. See African Charter, *supra* note 31, arts. 52–54, 59; Afr. Comm'n H.P.R., *Rules of Procedure of the African Commission on Human and Peoples' Rights*, Rules 110(3)(4); Afr. Comm'n H.P.R., *Communications Procedure*, <https://www.achpr.org/procedure> [<https://perma.cc/9GBV-26FD>].

50. Protocol Establishing the African Court, *supra* note 45, art. 2.

51. AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, <http://en.african-court.org> [<https://perma.cc/CHP6-GTRW>] (last visited Sept. 13, 2020).

which at present is only six states.<sup>52</sup> While the Court's jurisdiction *ratione loci* is thus more limited than the Commission's, its decisions are binding orders.<sup>53</sup>

In addition to these continental bodies, there are subregional courts that adjudicate cases involving alleged human rights abuses. One such body discussed below is the Economic Community of West African States (ECOWAS)<sup>54</sup> Community Court of Justice (CCJ).<sup>55</sup> The Court has jurisdiction over cases involving violations of human rights occurring in any ECOWAS member state.<sup>56</sup> The Court can accept cases from states, individuals, and NGOs.<sup>57</sup> The CCJ has interpreted its jurisdiction *ratione materiae* broadly to include rights found in the African Charter as well as other regional and international treaties ratified by member states.<sup>58</sup> Unlike the Commission and the Court, the ECOW-

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52. Protocol Establishing the African Court, *supra* note 45, arts. 5, 34(6). Previously, ten states had made such declarations accepting the Court's jurisdiction over complaints referred by individuals and NGOs, but four states have since withdrawn their declarations. *See Declarations Entered by Members States*, AFR. CT. H.P.R., <https://en.african-court.org/index.php/basic-documents/declaration-featured-articles-2> [<https://perma.cc/PKC3-8ZNT>].

53. Protocol Establishing the African Court, *supra* note 45, art. 30; *see also infra* note 178, recognizing that the rate of state compliance with judgments and remedial orders remains concerningly low.

54. *See generally* Revised Treaty of the Economic Community of West African States (ECOWAS), July 24, 1993, 2373 U.N.T.S. 233 [hereinafter Revised Treaty]; *Basic Information*, ECON. CMTY. OF W. AFR. STATES (ECOWAS), <https://www.ecowas.int/about-ecowas/basic-information> [<https://perma.cc/6GYN-2827>].

55. Revised Treaty, *supra*, art. 15; Economic Community of West African States [ECOWAS], *Protocol A/P.1/7/91 on the Community Court of Justice* (July 6, 1991). Other sub-regional bodies include the Southern Africa Development Community Tribunal (which is currently suspended), the East African Court of Justice, and the Common Market for Eastern and Southern Africa (COMESA) Court of Justice. *See SADCAT*, S. AFR. DEV. CMTY., <https://www.sadc.int/about-sadc/sadc-institutions/tribun> [<https://perma.cc/W8PR-2LVG>]; *Court / About Us*, E. AFR. CT. OF JUSTICE, [https://www.eacj.org/?page\\_id=19](https://www.eacj.org/?page_id=19) [<https://perma.cc/9V3C-FLHV>]; *The COMESA Court of Justice*, COMESA COURT OF JUSTICE, <https://comesacourt.org> [<https://perma.cc/XFJ2-5B2P>]; *see also* IJRC, *ADVOCACY BEFORE THE AFRICAN HUMAN RIGHTS SYSTEM*, *supra* note 45, at 8–9, 30–36. While the East African Court of Justice and the COMESA Court do not have explicit jurisdiction over individual human rights complaints, they are “empowered to decide individual complaints concerning alleged violations of national or community laws, which may involve fundamental rights.” IJRC, *ADVOCACY BEFORE THE AFRICAN HUMAN RIGHTS SYSTEM*, *supra* note 45, at 30.

56. ECOWAS, *Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol*, art. 3 (Jan. 19, 2005) [hereinafter Supplementary Protocol].

57. *Id.* art. 4; *see also* SERAP, *supra* note 5, ¶¶ 42–45 (finding that the case could be brought by SERAP, an NGO).

58. SERAP, *supra* note 5, ¶¶ 28–29.

AS CCJ does not require petitioners to first exhaust domestic remedies before filing a complaint.<sup>59</sup>

While attention to African human rights jurisprudence is growing, the case law produced by the Commission, the Court, and the CCJ is often overlooked by scholars, advocates, and sister institutions.<sup>60</sup> Legal developments in Africa have been relatively underrepresented both in the academic literature on climate litigation and in the practice of many climate litigators and funders in the Global North, who play an outsized role in influencing the direction of legal strategies in the fight against climate change.<sup>61</sup> The next Part encourages greater attention to African jurisprudence in the growing movement to use law for climate justice, reinforcing the recent work of some other scholars who have analyzed the contribution of the Global South to transnational climate litigation.<sup>62</sup>

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59. Supplementary Protocol, *supra* note 56, art. 4(d).

60. See, e.g., Rachel Murray, *International Human Rights: Neglect of Perspectives from African Institutions*, 55 INT'L & COMPAR. L. Q. 193 (2006). While the discrepancy is no doubt due in part to the relatively more recent establishment of the African human rights bodies, as compared to the Inter-American and European systems, and their comparatively smaller caseloads, searches for the phrases “African Court” or “African Commission” in the text of judgments of the Chambers and Grand Chamber of the European Court of Human Rights generated approximately one fifth of the results produced by searches for “Inter-American Court” and “Inter-American Commission.” See Search Results, HUDOC EUR. CT. OF HUM. RTS., <https://hudoc.echr.coe.int/eng#%20> (choose only “Grand Chamber” and “Chamber” under Case-Law: Judgments, then search for the respective body in search bar “African Commission,” “African Court,” “Inter-American Commission,” or “Inter-American Court”). A similar search by the authors on Westlaw for the phrases “African Court” or “African Commission” in the titles of law reviews and journal articles produced markedly fewer results than comparable searches for “European Court of Human Rights” or “Inter-American Court” and “Inter-American Commission.”

61. See, e.g., Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 (3) WIREs CLIMATE CHANGE e580, 4–5 (2019); Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, 9:1 TRANSNAT'L ENV'T L. 77, 78, 84 (2020); JOANA SETZER & REBECCA BYRNES, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2020 SNAPSHOT 4 (2020), [http://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation\\_2020-snapshot.pdf](http://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf) [<https://perma.cc/NMK9-QHUV>]; Samvel Varvastian, *The Human Right to a Clean and Healthy Environment in Climate Change Litigation* 4 & nn.18–21 (Max Planck Inst. for Compar. Pub. L. & Int'l L. Research Paper Series, Paper No. 2019-09, 2019) (discussing the dominant types, uneven jurisdictional distribution and mixed success of climate litigation); Peel & Lin, *supra* note 2, at 681.

62. See, e.g., Peel & Lin, *supra* note 2; Moodley, *supra* note 2; Setzer & Benjamin, *supra*; Joana Setzer & Lisa Benjamin, *Climate Change Litigation in the Global South: Filling in Gaps*, 114 AJIL UNBOUND 56 (2020); César Rodríguez-Garavito, *Human Rights: The Global South's Route to Climate Litigation*, 114 AJIL UNBOUND 40 (2020); Rodríguez-Garavito, *supra* note 24.

## II. COMMUNITY RIGHTS TO LAND AND RESOURCES: CORNERSTONES OF CLIMATE ACTION

Lawsuits brought by frontline communities challenging extractive industry and land-use projects have the capacity to mitigate climate change. They also center the populations disproportionately vulnerable to climate change and elevate their priorities, perspectives, and demands. The four decisions discussed below—*Ogoni*, *SERAP*, *Endorois*, and *Ogiek*—illustrate the powerful jurisprudence of the African regional human rights system concerning Indigenous land rights and community control over natural resources. All four cases underscore that community participation in decisionmaking about land and resource use is central to protecting human rights and a key bulwark against environmentally destructive projects.

The four cases involve claims by communities that experienced physical or economic displacement and/or environmental destruction due to extractive and land-use activities. *Social and Economic Rights Action Center (SERAC) v. Nigeria*,<sup>63</sup> brought before the Commission, and *Socio-Economic Rights and Accountability Project v. Nigeria*, a case before the ECOWAS CCJ,<sup>64</sup> addressed claims by communities whose health, livelihoods, and environment were harmed by oil extraction in the Niger Delta in Nigeria.<sup>65</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* concerned the creation of a game reserve and the granting of ruby mining concessions on Endorois ancestral land.<sup>66</sup> Lastly, *African Commission on Human and Peoples' Rights v. Kenya* involves harms suffered by the Ogiek peoples in Kenya's Mau Forest due to the creation of a forest reserve and logging concessions on their territory.<sup>67</sup> The discussion below focuses on the decisions' interpretation and application of four rights enshrined in the African Charter: the right to freely dispose of wealth and natural resources (Article 21), the right to property (Article 14), the right to development (Article 22), and the right to a healthy environment (Article 24). All four of these rights are collective rights; Articles 21, 22, and 24 expressly refer to "peoples," whereas Article 14 has been interpreted to apply collectively, as

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63. *Ogoni* case, *supra* note 5.

64. *SERAP*, *supra* note 5.

65. While both cases are about oil pollution in the Niger Delta, *SERAP* is broader than the *Ogoni* case in the sense that it encompasses all of the Niger Delta, not just Ogoniland, and narrower in the sense that it focuses only on the harms caused by oil spills rather than the oil industry at large.

66. *Endorois*, *supra* note 5.

67. *Ogiek*, *supra* note 5.



well as to individuals.<sup>68</sup> Together, the cases' application of these rights reinforces the legal foundations for community involvement in natural resource governance—a critical pillar of the global climate justice movement and the fight against climate catastrophe.

#### A. The Right to Freely Dispose of Wealth and Resources

The African Charter expressly guarantees the collective right to participate in and benefit from the use of natural resources. Article 21(1) of the African Charter states: “All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.”<sup>69</sup> Through the *Ogoni*, *Endorois*, and *Ogiek* cases, the Commission and Court have affirmed the justiciability of this right for peoples within a state. They have interpreted the provision as entitling communities that reside in natural resource–endowed territories with strong rights to participate in and benefit from decisions regarding the development of those territories. These cases not only reinforce other international legal protections of Indigenous Peoples' control over their lands, property, and natural resources,<sup>70</sup> they also suggest that non-Indigenous communities with the status of peoples under the African Charter could invoke this right as they confront harms related to the causes and the consequences of climate change.

The Commission's 2001 decision in the *Ogoni* case was the first to interpret Article 21 and apply it to a group of peoples *within* a state. The complainants in that case argued that the Nigerian government enabled public-private oil consortia to exploit oil reserves in Ogoniland, the Ogoni peoples' ancestral territory, without involving or benefiting the local population, and with devastating consequences for their environment and welfare.<sup>71</sup> The Commission's finding that Nigeria violated the

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68. *Id.* ¶ 123.

69. African Charter, *supra* note 31, art. 21. The African Charter has included this as a distinct right, separate from the right to self-determination, found in Article 20 of the Charter. This is a slightly different approach than the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which address self-determination and the right to freely dispose of wealth and natural resources under a single article—Articles 1 of the Covenants, which contain identical language.

70. *See infra* Subparts II.B–C, which discuss the application of these rights to Indigenous Peoples. Specifically, the African regional human rights bodies have recognized that Indigenous Peoples' traditional tenure affords them the same property rights as formal title, and recognizes their right to free, prior, and informed consent over decisions that affect their property rights. The African Commission also recognized that, under the right to development, Indigenous Peoples' right to free, prior, and informed consent extends to projects that would have major impacts within Indigenous territories.

71. *Ogoni* case, *supra* note 5.

right of the Ogoni peoples to freely dispose of their wealth and natural resources implicitly recognized that the right enshrined in Article 21 vests in, and is justiciable by, subnational ethnic and cultural communities—“peoples” within a state.<sup>72</sup> The Commission did not detail what remedy Article 21 requires. Its analysis, nonetheless, lays a foundation for understanding the content of the right and what principles must be upheld in respecting its joint vestiture in states and substate peoples. At its core, the Commission construed the right as a safeguard against private exploitation of natural resources to the detriment of the local population.<sup>73</sup> It proclaimed that the state cannot “green light” investment that destroys the peoples’ land and “devastatingly affect[s their] well-being.”<sup>74</sup> By incorporating the peoples’ “well-being” into this right, the Commission placed an important check on how a state can freely dispose of its natural resources, including subsoil hydrocarbon reserves.<sup>75</sup>

Subsequent cases have elaborated upon this decision, cementing the justiciability of Article 21 and its application to the state and peoples. First, both *Endorois* and *Ogiek* have affirmed the application of Article 21 to “sub-state ethnic groups and communities”—namely, the Endorois Indigenous Peoples of the Lake Bogoria area and the Ogiek Indigenous Peoples of the Mau Forest, both in Kenya.<sup>76</sup> In these affirmations, the Commission, and subsequently the Court, articulated explicitly what was implicit in the *Ogoni* case: namely, that “people inhabiting a specific region within a state can claim the protection of Article 21.”<sup>77</sup> In recognizing that this right vests in a substate group, these cases do not treat the claimants solely as rightful *beneficiaries* of state control of natural resources, but as rightful *participants* in that control.

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72. *Id.* The decision implicitly recognizes the Ogoni as peoples possessing the rights at issue, but the Commission does not provide any analysis. *See id.* ¶ 58. Although the Ogoni identify as Indigenous Peoples the Commission did not discuss their indigeneity in applying the collective rights under the Charter.

73. *Id.* ¶ 56 (discussing the restoration of “cooperative economic development.”); *see also* African Charter, *supra* note 31, art. 21(5).

74. *Ogoni case*, *supra* note 5, ¶ 58.

75. *See* Werner Scholtz, *Human Rights and the Environment in the African Union Context*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 401, 408, 410–11 (Anna Grear & Louis J. Kotzé, eds. 2015) (discussing the significance of wellbeing as a component of the right to development and environment, by virtue of the interconnection of the two rights).

76. *Ogiek*, *supra* note 5, ¶¶ 105–12, 198–99; *see also* *Endorois*, *supra* note 5, ¶¶ 162, 255, 267 (Nov. 25, 2009).

77. *Id.* ¶ 167; *see also id.* ¶ 255; *Ogiek*, *supra* note 5, ¶¶ 198–99.

The consequence of that joint vestiture, *Endorois* indicates, is that neither the state nor the peoples concerned can affect the governance of natural resources without regard for the rights of the other.<sup>78</sup> The Commission found that the Endorois, as a people, “have the right to freely dispose of their wealth and natural resources in consultation with the [ ] State.”<sup>79</sup> Although the Commission could have stated its decision more clearly, its analysis in *Endorois*, read against the backdrop of the *Ogoni* case, suggests that the state has a duty to consult Indigenous Peoples before allowing extraction, exploration, or exploitation of natural resources contained within their territories.<sup>80</sup> The analysis also leaves open the possibility that this right extends to situations where the activities in question are adjacent to a peoples’ lands, but affect resources on which they depend.<sup>81</sup> Where Article 21 violations involve spoliation, the Commission affirmed that communities are entitled to restitution and compensation.<sup>82</sup> Insofar as activities that contribute to climate change—and the effects of climate change itself—result in spoliation of resources, Article 21 may provide an additional basis for legal challenge and accountability.

The right to freely dispose of wealth and natural resources is closely connected to the right to property, discussed more fully below,

78. The combined effect of this jurisprudence with other interpretations of this right by the African Commission is that the right vests in both the state and peoples within the state. See, e.g., Afr. Comm’n H.P.R. Res. 224(LI)2012, Resolution on a Human Rights-Based Approach to Natural Resources Governance (May 2, 2012), <https://www.achpr.org/sessions/resolutions?id=243> [<https://perma.cc/JGN2-MV74>] (affirming that the state “has the main responsibility for ensuring natural resources stewardship with, and for the interest of, the population,” and also calling upon states to ensure the “free, prior and informed consent of communities,” when exercising this duty).

79. *Endorois*, *supra* note 5, ¶ 268.

80. *Id.* ¶¶ 266–67. The Commission’s analysis relies on Inter-American jurisprudence. Although the American Convention on Human Rights does not have a parallel provision to Article 21 of the African Charter, Inter-American human rights bodies have read such a right into the right to property. The referenced Inter-American case law recognizes Indigenous Peoples’ right to natural resources *necessary for their survival* and examines whether the challenged exploration or extractive activity affects those necessary natural resources. The Commission does not seem to adopt this same survival-related limitation, instead interpreting Indigenous Peoples’ right to freely dispose of natural resources as applying to any resources *contained* within their traditional lands. *Id.* ¶¶ 256, 261, 266, 267; see also Complainant’s Submissions on the Merits, Afr. Comm’n H.P.R. v. Republic of Kenya (*Ogiek case*), App. No. 006/2012, Afr. Ct. H.P.R., ¶ 609 (2017) [hereinafter *Ogiek Complainant’s Submissions*] (advocating a similar interpretation). The Inter-American jurisprudence is not entirely analogous to the Article 21 context; the right to property, on which the Inter-American cases are based, is subject to express limitations laying out conditions under which it may permissibly be encroached by the state. The right to freely dispose of wealth and natural resources, by contrast, contains no such in-built circumscription.

81. *Endorois*, *supra* note 5, ¶¶ 262, 267.

82. *Id.* ¶ 268; see also African Charter, *supra* note 31, art. 21(2).

but remains a distinct legal entitlement. In *Ogiek*, the Court found that the violation of the applicants' Article 21 rights flowed from the violation of their property rights, specifically their right to use and enjoy the produce of their land. The displacement of the Ogiek peoples and their consequent deprivation of the "food produced by their ancestral lands" did not merely constitute an infringement of their property interests. Because of their status as a recognized substate peoples, that property deprivation also amounted to a violation of the right guaranteed by Article 21.<sup>83</sup>

The contours of the right to freely dispose of wealth and natural resources should be understood in light of the history and purpose of Article 21, as expressed by the drafters of the African Charter. Rooted in a recognition of the legacy of colonialism and the exploitation of African peoples' resources for the benefit of outside powers, the provision aims to "restore co-operative economic development."<sup>84</sup> Joint vestiture of the right in the state and substate peoples can help achieve this goal.

Moreover, the Commission and the Court have made clear that governments cannot subordinate the rights of subsistence communities to the state's economic interests or to the profit motives of private parties. The permissibility of a state's use of natural resources turns in part on its impact on the wellbeing of the peoples on whose land the resources are located. Reading Article 21 in the context of surrounding provisions in the Charter—namely, Articles 22 and 24, which are both implicitly future-oriented in their focus on development (discussed further *infra*)—suggests that the concept of wellbeing includes consideration of environmental degradation and impairment of community land use, cultural activities, or livelihoods—for both present and future generations.<sup>85</sup>

## B. The Right to Property

The African Charter protects against arbitrary deprivations of property.<sup>86</sup> Adopting and building on the progressive interpretation of the right to property articulated by other regional bodies,<sup>87</sup> the Com-

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83. *Ogiek*, *supra* note 5, ¶ 201.

84. *Ogoni case*, *supra* note 5, ¶ 56.

85. See *infra* Subparts III.B–III.C on the right to development and a healthy environment.

86. African Charter, *supra* note 31, art. 14 ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.").

87. See, e.g., *Endorois*, *supra* note 5, ¶¶ 185–237 (citing jurisprudence from Inter-American Court of Human Rights and the European Court of Human Rights, as well as the UN Declaration on the Rights of Indigenous Peoples and general comments and

mission and the Court recognized for the first time in the *Endorois* and *Ogiek* decisions that Indigenous Peoples' traditional tenure affords them the same property rights as formal title. This recognition of land rights based on customary law in Africa represents a significant advancement for the protection of Indigenous Peoples' land tenure globally—and a potentially important legal basis for challenging carbon-intensive activities on communally held lands.

As set out above, securing land tenure for Indigenous and other resource-based communities is a vital strategy for mitigating climate change. Indigenous Peoples play a key role in “sustainable environmental management of natural resources and biodiversity conservation, both of which are essential elements for combating climate change.”<sup>88</sup> Studies confirm that traditional Indigenous territories—land managed or owned by Indigenous Peoples—“hold eighty percent of the planet’s biodiversity”<sup>89</sup> and one-third of the world’s intact forest landscapes, which contain more high-quality forest than non-Indigenous land.<sup>90</sup> Some local communities that do not have the legal status of Indigenous Peoples play a similar role in protecting their traditional lands and the natural resources on which their livelihoods and culture depend. A recent cross-regional study of over eighty forest areas shows that “community-owned and-managed forests delivered both superior community benefits and greater carbon storage” than alternative approaches to resource management.<sup>91</sup> A 2018 study showed that “the collective forestlands of Indigenous Peoples and local communities” store carbon “equivalent to thirty-three times global energy emissions in 2017.”<sup>92</sup> Thus, in upholding the property rights of Indigenous communities in Kenya, *Endorois* and *Ogiek* provide important jurisprudential support

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recommendations of U.N. treaty bodies in analyzing the right to property); *Ogiek*, *supra* note 5, ¶¶ 126–31 (citing the U.N. Declaration on the Rights of Indigenous Peoples in analyzing the right to property).

88. Report of the Special Rapporteur on Indigenous Peoples, *supra* note 33, ¶ 7; see also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 32, at 34; McMonagle, *supra* note 32.

89. Report of the Special Rapporteur on Indigenous Peoples, *supra* note 33, ¶ 7 (citing Claudia Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners*, WORLD BANK 1, 5 (Washington, D.C., 2008)).

90. John E. Fa et al., *supra* note 33.

91. Report of the Special Rapporteur on Indigenous Peoples, *supra* note 33 (citing WORLD RESOURCES INSTITUTE AND RIGHTS AND RESOURCES INITIATIVE, SECURING RIGHTS, COMBATING CLIMATE CHANGE: HOW STRENGTHENING COMMUNITY FOREST RIGHTS MITIGATES CLIMATE CHANGE (2014)).

92. ALAIN FRECHETTE ET AL., A GLOBAL BASELINE OF CARBON STORAGE IN COLLECTIVE LANDS: INDIGENOUS AND LOCAL COMMUNITY CONTRIBUTIONS TO CLIMATE CHANGE MITIGATION 1, 3 (2018).

for community control of natural resource management as a key strategy for averting the climate crisis.

In deciding *Endorois*, the Commission became the first African regional body to address and recognize the property rights of Indigenous Peoples' over their ancestral lands. In affirming the Endorois' claims to their ancestral land,<sup>93</sup> from which they had been evicted to make way for a game reserve and mining concessions, the Commission took a broad view of the right to property<sup>94</sup> and its application to Indigenous Peoples. It held that Indigenous communities' rights and interests in, and the benefits they derive from, their ancestral lands constitute property<sup>95</sup>. The state has a duty to give legal effect to these property rights, through a legal framework that recognizes community property systems.<sup>96</sup> The Commission went on to draw four primary conclusions about the right to property for Indigenous Peoples: (1) traditional possession has "the equivalent effect as that of a state-granted full property title;" (2) traditional possession provides Indigenous Peoples a right to obtain official recognition and registration of property title; (3) Indigenous Peoples who unwillingly left or lost possession of their land maintain their property rights unless that land was lawfully transferred to third parties in good faith; and (4) if the latter occurred, Indigenous Peoples are entitled to restitution or to other land of "equal extension and quality."<sup>97</sup>

The Commission's broad protections of Indigenous property rights carry through to its interpretation of the permissible deprivations of those rights. As a general matter, governments can infringe property rights so long as the encroachments are "in the interest of public need or in the general interest of the community" and carried out in accordance with appropriate national and international laws.<sup>98</sup> Limitations must be proportionate to a legitimate need and be the least restrictive measure possible.<sup>99</sup> The proportionality test adopted in *Endorois* sets a high bar when the deprivation involves Indigenous Peoples' land: "Only [] the most urgent and compelling interest of the state" can justify

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93. *Endorois*, *supra* note 5, ¶ 183.

94. *Id.* ¶ 186 (finding that the right to property encompasses access to one's property, freedom from invasion or encroachment upon the property, and undisturbed possession, use and control of property as the owner(s) deem fit).

95. *Id.* ¶ 187.

96. *Id.* ¶ 196.

97. *Id.* ¶ 209.

98. *Id.* ¶¶ 211, 291.

99. *Id.* ¶ 214.

encroachments on Indigenous Peoples' property.<sup>100</sup> The threshold test enunciated by the Commission incorporates a recognition that "[I]ndigenous ownership of resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people."<sup>101</sup> Applying this standard, the Commission found that unlawfully evicting the Endorois from their ancestral land, denying their property rights, and threatening their cultural survival was "disproportionate to any public need served by the Game Reserve."<sup>102</sup>

In line with other regional and international bodies and the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>103</sup> the Commission held that before encroaching on Indigenous Peoples' land, the government must obtain their free, prior, and informed consent (FPIC), which "requires consent be accorded."<sup>104</sup> In the case of the Endorois, no such consent was given. The Commission also recognized the Endorois' right to restitution, or alternative land of equal quality chosen through mutual agreement, and adequate compensation for encroachments on their land—neither of which was provided.<sup>105</sup> In dismissing the government's defenses of its failure to provide restitution or compensation, the Commission recognized that the "Endorois—as the ancestral guardians of [the] land [at issue]—are best equipped to

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100. *Id.* ¶ 212 (citing a comment by the 2005 Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights).

101. *Id.* ¶ 212 (citing a comment by the 2005 Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights); *see also* ¶ 216 (stating that incorporating the right to life into the public interest test is affirmed by Inter-American Court of Human Rights jurisprudence, which has found that forcibly displacing Indigenous Peoples from their land to living conditions that are incompatible with human dignity can be a violation of the right to life).

102. *Id.* ¶ 214.; *see also id.* ¶¶ 215, 218, 235.

103. Article 32 of the UN Declaration on the Rights of Indigenous Peoples recognizes that: "States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples, art. 32 (Sept. 13, 2007); *see also id.*, arts. 10, 19 (recognizing the right to FPIC in other contexts); Int'l Labour Org. [ILO], *Indigenous and Tribal Peoples Convention*, No. C169 (June 27, 1989); Endorois, *supra* note 5, ¶¶ 226, 291 (recognizing that Indigenous Peoples have a right to FPIC), ¶¶ 293, 296 (citing a UN expert and treaty body recommending FPIC for Indigenous Peoples).

104. Endorois, *supra* note 5, ¶ 226; *see also id.* ¶¶ 225, 234. The Commission found there was no effective community participation in decisions about the land use and the state did not obtain such consent. *Id.* ¶ 228.

105. *Id.* ¶¶ 231–37.

maintain its delicate ecosystems.”<sup>106</sup> Recognition of that stewardship role, as set out further below, can be critical for Indigenous Peoples and natural resource-dependent communities seeking to protect their lands in the face of projects that are detrimental to the local environment and the global climate.

The African Court in *Ogiek* affirmed the Commission’s analysis in *Endorois*, marking the second African human rights body to recognize Indigenous (and collective) land tenure.<sup>107</sup> The Court held that the right to property for Indigenous Peoples must be interpreted in light of Article 26 of UNDRIP, which emphasizes that Indigenous Peoples may have property rights based on their possession, occupation, and use of traditional lands, rather than title.<sup>108</sup> It was undisputed that the Ogiek occupied the Mau Forest as their ancestral land since time immemorial. Because the Court found that they constitute Indigenous Peoples, it held they had the right under Article 14 of the Charter to occupy, use, and enjoy their land—the three elements of the right to property, in its classical conception.<sup>109</sup>

Of perhaps the greatest significance to climate justice advocates, the Court found that the government’s eviction of the Ogiek from the Mau Forest to create a conservation area was neither necessary nor proportionate to the goal of preserving the natural ecosystem.<sup>110</sup> The Court found no evidence that the Ogiek’s continued presence in the area was depleting the natural environment. To the contrary, the Court found evidence that the main causes of environmental degradation were encroachments by the government and third parties on Ogiek land through government excisions for settlements and “ill-advised logging concessions.”<sup>111</sup> The Court’s conclusions affirmed the applicants’ arguments, namely: (1) that the conservation of forest resources is vital to Ogiek culture,<sup>112</sup> (2) that they are capable of managing the forest sustainably, and (3) that the government could have pursued its goal through alternative means that would have respected the Ogiek’s property rights, for instance, by using traditional forest management knowledge.<sup>113</sup> The Court thus held that “by expelling the Ogiek from their ancestral lands against their will, without prior consultation, and

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106. *Id.* ¶ 235.

107. *Ogiek*, *supra* note 5, ¶ 129.

108. *Id.* ¶¶ 126–27.

109. *Id.* ¶¶ 124, 128.

110. *Id.* ¶¶ 129–30.

111. *Id.* ¶ 130.

112. *Ogiek* Complainant’s Submissions, *supra* note 80, ¶ 530.

113. *Id.* ¶ 531.



without respecting the conditions of expulsion in the interest of public need, the [state] violated their rights to land as guaranteed by Article 14 read in light of [UNDRIP].”<sup>114</sup>

In affirming robust property rights for Indigenous Peoples, the *Endorois* and *Ogiek* decisions create strong legal avenues for Indigenous Peoples in Africa to secure rights over their land and secure recognition of their role in sustainable management of natural resources.<sup>115</sup> Moreover, as the wording in Article 14 of the Charter applies to “peoples,” advocates have argued that it remains open for African regional human rights bodies to recognize the customary land rights of other rural communities.<sup>116</sup> The Commission’s recognition that the Endorois are best placed to care for their lands and the Court’s recognition in *Ogiek* that private development, not Indigenous Peoples’ subsistence practices, were the primary causes of environmental degradation are significant judicial acknowledgments of communities’ stewardship roles, which merit amplification and replication through other cases. If *Ogiek* is any indication, a community’s sustainable land management practices can influence the analysis of whether the state’s encroachment on their property, such as for natural resource extraction, is necessary and proportional to a legitimate state objective. Building on these precedents, collective property rights may provide climate change litigants with another tool to resist activities that drive climate change and advance effective strategies for mitigating and adapting to global warming.

### C. The Right to Development

The African Charter was the first binding treaty to include the right to development, and the Commission was the first international or regional human rights body to find a violation of that right.<sup>117</sup> Article 22 of the African Charter provides: “All peoples shall have the

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114. *Id.* ¶ 131.

115. These cases set strong precedents on which communities can rely in future cases. The requirement that states enact legislation recognizing customary community tenure, to give effect to the recognition of Indigenous land rights, has wide-reaching potential. The African Commission has additional means beyond adversarial disputes to ensure states’ compliance with their obligations under the Charter, such as through its mandate to promote and protect human rights. *See e.g.*, African Charter, *supra* note 31, arts. 30 & 45 (setting forth the Commission’s functions to promote and protect rights); art. 62 (requiring each State Party to submit a report every two years on the “legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.”).

116. *See* Wicomb & Smith, *supra* note 33.

117. Scholtz, *supra* note 75, at 402, 407–11.

right to their economic, social and cultural development.”<sup>118</sup> This is an individual and collective right,<sup>119</sup> which the Commission and the Court have interpreted to afford to peoples both procedural and substantive guarantees to participate in and benefit from development decisions that affect their land, lives, and livelihood. By defining development as economic, social, and cultural, Article 22 offers an important legal basis for resisting the prioritization of economic outcomes over the realization of social and cultural rights.<sup>120</sup> Especially when read together with the rights to environment, to property, and to free disposal of wealth and natural resources, the right to development offers natural resource-dependent communities another means to protect their lands and livelihoods from activities that contribute to local environmental harm and global climate change.

*Endorois* is the first case globally to lay out the elements of the right to development.<sup>121</sup> The Endorois argued that Kenya violated their right to development by not including them in the planning process for the game reserve established on their ancestral lands.<sup>122</sup> They also argued that they did not share in the benefits that the game reserve produced; to the contrary, they suffered economically, socially, and culturally following their eviction, and sustained a loss in choice and in potential for improving their wellbeing.<sup>123</sup> In finding a violation, the Commission agreed with the petitioners’ submission that the right to development is about the freedom to choose.<sup>124</sup>

Through *Endorois*, the Commission distinguished two elements of the right to development—one substantive (constitutive) and one procedural (instrumental)—that elevate the social and cultural dimensions

118. African Charter, *supra* note 31, art. 22(1).

119. *Id.* art. 22(2).

120. See Scholtz, *supra* note 75, at 408, 415 (discussing the significance of the provision incorporating aspects beyond economic development).

121. The Commission previously found a violation of the right to development in *Democratic Republic of the Congo v. Burundi, Rwanda, Uganda and Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*. The Commission’s analysis in both those cases, however, was very limited and did not elaborate on the elements of the right. See *Democratic Republic of the Congo v. Burundi, Rwanda, Uganda*, Communication 227/99, Afr. Comm’n H.P.R., ¶¶ 87, 95 (May 29, 2003); *Sudan Hum. Rts. Org. & COHRE*, *supra* note 40, ¶ 224.

122. *Endorois*, *supra* note 5, ¶ 269.

123. Submission on the Merits of CEMIRIDE (on Behalf of the Endorois Community), Ctr. for Minority Rts. Dev. (Kenya) & Minority Rts. Grp. (on behalf of Endorois Welfare Council) v. Kenya (Endorois), Communication 276/2003, Afr. Comm’n H.P.R. ¶¶ 232–87 [hereinafter *Endorois Complainant’s Submission*].

124. *Endorois*, *supra* note 5, ¶ 278; see also *Endorois Complainant’s Submission*, *supra*, ¶¶ 231–33.

of Article 22, giving communities a right to participate in and benefit from development.<sup>125</sup> On the procedural side, “peoples” have a right to participate in decisions that affect their territory.<sup>126</sup> Significantly, the Commission laid out robust requirements for meaningful participation that respond to the inherent power imbalance between rural communities and the government or private development companies encroaching on their lands. The Commission explained that participation requires good faith consultation that accords with the affected community’s customs and traditions and has the objective of reaching an agreement through “constant communication between the parties.”<sup>127</sup> The community needs to be given an opportunity to shape the policies or its role in the project at issue,<sup>128</sup> and it must be meaningfully informed of the nature and consequences of the consultation process.<sup>129</sup> To satisfy these rights, the state must ensure that it both disseminates information and accepts community input submitted to it.<sup>130</sup> In situations involving projects that would have major impacts within Indigenous territories, the state must not only consult, but also obtain the community’s free, prior, and informed consent, according to its customs and traditions.<sup>131</sup> While the Commission articulated these requirements in the context of Article 22, they are equally relevant to the participation, consultation, and FPIC necessary under Articles 14 and 21.

On the substantive side, the state must ensure not only that the community is included in the development process and its benefits,<sup>132</sup> but also that it is empowered to improve its capabilities and choices.<sup>133</sup> The state cannot satisfy this right by giving aid—for example, food assistance to a community that was subsistence-based and can no longer grow crops. When the state authorizes “development” activities on Indigenous territories, benefit-sharing must amount to “reasonable and equitable” compensation for the exploitation of natural resources on which the community depends.<sup>134</sup>

The Commission’s finding that the state violated both the substantive and procedural elements of the Endorois’ right to development

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125. Endorois, *supra* note 5, ¶ 277.

126. *Id.* ¶¶ 289, 291.

127. *Id.* ¶¶ 282, 289.

128. *Id.* ¶ 282.

129. *Id.* ¶ 292.

130. *Id.* ¶ 289.

131. *Id.* ¶ 291.

132. *Id.* ¶ 297.

133. *Id.* ¶ 283.

134. *Id.* ¶ 296; *see also id.* ¶¶ 296, 297–98.

highlights the potential utility of this right in influencing natural resource governance, and in particular, elevating the voices and the role of communities in efforts to mitigate climate change. In *Endorois*, while community members were informed about the impending game reserve, the information was presented as a “*fait accompli*,” they were not given an opportunity to shape the policies or their role in the Reserve<sup>135</sup> and did not have a full understanding of the nature and consequences of the Reserve.<sup>136</sup> Significantly, the Commission did not accept the government’s argument that community participation was satisfied indirectly through Kenya’s democratic electoral system, wherein the Endorois are represented; participation, as set out above, requires much more, including direct access to information and opportunities to influence development decisionmaking.<sup>137</sup>

In 2017, the Court found that Kenya again violated the right to development when it evicted the Ogiek people from their ancestral land without their consent and failed to include them in development planning.<sup>138</sup> Here, the Court seized the opportunity to interpret Article 22 in light of Article 23 of UNDRIP, which provides that Indigenous Peoples have the right to determine priorities and strategies for exercising their right to development.<sup>139</sup> Indigenous Peoples’ participatory rights include the right to be actively involved in shaping the programs that affect them, and as far as possible, to administer such programs through their own institutions.<sup>140</sup> In this case, the Court found that the continuous evictions of the Ogiek from their ancestral land adversely impacted their economic, social, and cultural development. The government

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135. *Id.* ¶ 281.

136. *Id.* ¶ 282, 292.

137. *Id.* ¶¶ 270, 276 (government’s argument). The Commission also found that instead of benefiting from the reserve, the eviction of the Endorois from their ancestral land forced them into a precarious post-dispossession settlement where they “faced a significant loss in choice,” and could not carry out their traditional subsistence practices. As a result, the Commission held they were entitled to compensation, which required “equitable distribution of benefits derived from the Game Reserve.” *Id.* ¶¶ 296–97, 288.

138. Ogiek, *supra* note 5, ¶ 202.

139. *Id.* ¶ 209. Some commentators have critiqued *Endorois* for not seizing the opportunity to have interpreted the right to development in line with UNDRIP Articles 23 and 32. They argued it would have provided greater clarity into the content of the right and that the Commission “missed a golden opportunity to fully embrace the concept of Indigenous rights for Africa.” Korir Sing’ Oei A. & Jared Shepherd, ‘*In Land We Trust*’: *The Endorois’ Communication and the Quest for Indigenous Peoples’ Rights in Africa*, 16 *BUFF. HUM. RTS. L. REV.* 57, 108–11 (2010).

140. Ogiek, *supra* note 5, ¶ 209.

should have, but failed to, include them in designing and implementing the health, housing, and other economic programs that affect them.<sup>141</sup>

Through its procedural and substantive guarantees, the right to development may provide further legal basis on which climate justice advocates can challenge extractive and land-use projects that contribute to the climate crisis. The cases discussed above support the principle that decisions about whether, where, and how projects are pursued must involve affected communities. Moreover, the jurisprudence discussed in this Article on the right to development, when read together with the right to a satisfactory environment under Article 24 of the African Charter, discussed below, underscores that economic interests do not trump environmental considerations.<sup>142</sup> These rights provide communities with grounds to demand that environmental concerns be a primary consideration in decisions affecting the use of their lands and natural resources, especially as they relate to the approval of carbon-intensive projects that contribute to local environmental harm and global climate change. The jurisprudence supports the notion, core to the concept of sustainability, that the purported benefits of “development” projects must be evaluated against their costs to both the present and future generations of the affected community.<sup>143</sup>

#### D. The Right to a Healthy Environment

The African Charter was the first human rights treaty to include an express right to a healthy environment<sup>144</sup>—a right that is increasingly recognized in international and national law.<sup>145</sup> Article 24 of the Char-

141. *Id.* ¶ 210.

142. See Lilian Chenwi, *The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 59, 66–69, 82 (John H. Knox & Ramin Pejan eds., 2018); Scholtz, *supra* note 75, at 411–13, 419–20.

143. See Afr. Comm’n H.P.R., *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, ¶¶ 86(q), 92(g) (2011) (articulating state obligations to prevent the destruction of natural resources in order to protect the right to food and health of future generations and to adopt strategies to ensure sufficient and safe water for future generations); see generally Brief for the Center for International Environmental Law as Amicus Curiae, Oslo Dist. Ct. Jan. 4, 2018, Case No. 16-166674TVI-OTIR/06 (Nor.), <https://www.xn-klimasksm1-95a8t.no/wp-content/uploads/2019/10/Brief-of-Amicus-Curiae-CIEL-in-GreenpeaceNaturUngdom-v-Norway-Oct-28-2017.pdf> [<https://perma.cc/9QAV-DZV2>] [Greenpeace Nordic Assoc. & Natur og Ungdom (Nature & Youth) v. Gov. of Norway] (discussing the right to intergenerational equity as a principle of international environmental law and states’ obligations to protect the right of future generations to a healthy environment).

144. Chenwi, *supra* note 142, at 62.

145. See David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment),

ter provides that “all peoples have the right to a general satisfactory environment favourable to their development.”<sup>146</sup> Although the Charter uses the phrase “satisfactory environment,” the Commission has recognized that this is interchangeable with “healthy environment, as it is widely known.”<sup>147</sup> With the *Ogoni* case, the Commission became “the first judicial forum globally to pronounce in detail on a regional right to a healthy environment.”<sup>148</sup> Eleven years later, in *SERAP*, the ECOWAS CCJ decided a second fundamental case expounding this right. Both cases take a holistic view of the right to a healthy environment as one that intersects with other rights and is essential to quality of life.<sup>149</sup> Read together, these decisions recognize the environment as a carefully balanced system, which must be managed in a manner that enables its inhabitants to maintain an adequate standard of living today and in the future.<sup>150</sup> The region’s pioneering recognition of a justiciable right to a healthy environment makes African human rights jurisprudence persuasive authority on which other domestic and international tribunals may rely. Climate justice advocates may also cite these decisions as they increasingly connect the human and environmental harms of climate change.<sup>151</sup>

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*Rep. on Right to a Healthy Environment: Good Practices*, ¶¶ 10–13, annex II (“Legal recognition of the right to a healthy environment”), U.N. Doc. A/HRC/43/53 (2019) (presenting an updated list of states that legally recognize the right to a safe, clean, healthy and sustainable environment, and summarizing its codification in regional treaties); John H. Knox (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), *Rep. on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶¶ 28–36, U.N. Doc. A/73/188 (July 19, 2018) [hereinafter Knox] (describing the evolution of national and regional recognition of the right to a healthy environment, through the constitutional and/or legislative protections in more than 150 states, regional human rights agreements, and jurisprudence); see also *Indigenous Communities of the Lhaka Honhat (Our Land) Ass’n v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400 (Feb. 6. 2020)* [hereinafter *Indigenous Communities of the Lhaka Honhat (Our Land) Ass’n*] (finding a violation of the right to a healthy environment under Article 26 of the American Convention, the right to progressive development).

146. African Charter, *supra* note 31, art. 24.

147. See *Ogoni*, *supra* note 5, ¶ 52.

148. See Knox, *supra* note 145, ¶ 35; Kotzé & du Plessis, *supra* note 2, at 3 & n.9 (citing Louis J. Kotzé & Anél du Plessis, *The African Charter on Human and Peoples’ Rights and Environmental Rights Standards*, in ENVIRONMENTAL RIGHTS: THE DEVELOPMENT OF STANDARDS 93 (2019)).

149. *Ogoni* case, *supra* note 5, ¶ 51; *SERAP*, *supra* note 5, ¶¶ 100–01 (quoting the ICJ’s description of the environment as “the living space, the quality of life and the very health of human beings, including generations unborn”).

150. *Ogoni* case, *supra* note 5, ¶¶ 100–01.

151. The Inter-American system, for example, has referenced and relied on the Commission’s *Ogoni* decision in recognizing a right to a healthy environment. See *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context*

The interpretation in the *Ogoni* case of the right to a healthy environment and its corresponding obligations on the state places primacy on conservation and the participation of affected communities. The Commission highlighted the interconnection between environmental rights and the right to health under Article 16, as well as the right to development, which is separately enshrined in Article 22, but also referenced in the text of Article 24.<sup>152</sup> The intersecting nature of the right is evident in the duties it imposes on states. At its core, a state's substantive obligation is to "take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources," and "desist from directly threatening the health and environment of their citizens."<sup>153</sup> The Commission also set out procedural requirements to ensure that states uphold the "spirit of Articles 16 and 24."<sup>154</sup> These include: "ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous material and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities."<sup>155</sup> Centered on access to information and participation, these measures—which the Commission found the state failed to undertake with respect to the Ogoni—can help protect the rights of the affected community to a healthy environment.<sup>156</sup>

The *SERAP* case provides a more detailed analysis of the state duties that flow from the right to a healthy environment. In *SERAP*, the CCJ defined a state's duty under Article 24 as "an obligation of

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of the Protection and Guarantee of the Rights to Life and to Personal Integrity—Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017) ¶¶ 50, 61, 141, 215; *see also* Indigenous Communities of the Lhaka Honhat (Our Land) Ass'n, *supra* note 145, ¶¶ 240, 244.

152. *Ogoni* case, *supra* note 5, ¶ 52.

153. *Id.*

154. *Id.* ¶ 53.

155. *Id.*

156. *Id.* ¶¶ 53–54. The importance of public access to information and participation in environmental decisionmaking has been recognized in regional agreements in Europe and Latin America. *See* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *opened for signature* June 25, 1998, 2162 U.N.T.S. 447; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, *opened for signature* Sept. 27, 2018. To date no comparable regional agreement exists in Africa.

attitude and an obligation of result,<sup>157</sup> which requires state action to prevent, monitor, and remediate harms, including by holding third parties accountable for damage suffered.<sup>158</sup> A state's compliance with Article 24, the Court stressed, is not assessed merely by the government's efforts to *enact* legislative, administrative, and other measures, but also by the state's efforts to *enforce* those measures, through "vigilance and diligence" to ensure "concrete results."<sup>159</sup> Importantly, the decision recognizes that these responsibilities are not limited to a single point in time, but are ongoing, and apply to both current and future generations.<sup>160</sup>

The decision concludes that Nigeria violated the rights of residents of the Niger Delta to a healthy environment by failing to prevent oil production from polluting the environment, hold the polluters accountable, and ensure the victims received adequate reparations.<sup>161</sup> The CCJ found that the ongoing degradation of the environment due to oil spills and other pollution was proof in and of itself that the state had failed to enforce applicable legislation and regulations.<sup>162</sup> The Court emphasized that the duty to apply the law was the government's and could not "be left to the mere discretion of oil companies."<sup>163</sup> The state's failure to hold the perpetrators of the "many acts of environmental degradation" accountable, the Court held, enabled the offenders to carry on their harmful activities "with clear expectation of impunity."<sup>164</sup> The Court ordered remedial measures reflecting the collective nature of the environmental harm.<sup>165</sup>

The above African precedents on the right to a healthy environment can be useful to climate justice advocates as they continue to develop innovative legal strategies to challenge government inaction and corporate recklessness with respect to greenhouse gas emissions and demand bold, equitable adaptation measures. These decisions

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157. SERAP, *supra* note 5, ¶ 100.

158. *Id.* ¶ 105.

159. *Id.* ¶¶ 101, 105.

160. *Id.* ¶¶ 100–01, 104, 107.

161. *Id.* ¶¶ 111–12.

162. *Id.* ¶ 107.

163. *Id.* ¶ 109.

164. *Id.* ¶¶ 110–11. Significantly, the Court also included agreements on compensation in the bucket of items that the government should not leave to the discretion of the oil companies. *See id.* ¶ 109.

165. *Id.* ¶ 121. The Court rejected the claims for compensation in favor of collective remedies. The appropriateness of compensation for collective harm is beyond the scope of this Article, but the Court's approach raises important questions about the challenge of fashioning remedy for environmental harm, which are particularly salient in the context of climate litigation.



recognize that the right to a healthy environment requires the state, as the custodian of shared natural resources (the commons), to use those resources sustainably to ensure that the environment can support peoples' livelihoods. As scholar Werner Scholtz has observed, the focus on sustainability is the "bridge between" Articles 22 and 24.<sup>166</sup> The link is evident in the text of Article 24 which qualifies the satisfactory environment as one favorable to peoples' development.<sup>167</sup> Both Article 22 on the right to development and Article 24 on the right to a satisfactory environment favorable to development are future-oriented. They protect peoples' prospects for improving their welfare and implicitly uphold the core concept of sustainability, the notion that present actions must not impair the future realization of rights. While the precise scope of the term "sustainable development" remains ill-defined,<sup>168</sup> the jurisprudence and the Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter provide some guidance on how to ensure that economic development is balanced against obligations to protect the environment and livelihoods for present and future generations. For example, states must alleviate the adverse effects of development, industrialization, and global warming on ecosystems, livelihood, and food security.<sup>169</sup> Climate change mitigation and adaptation will also require rethinking the nature of economic development. Frontline communities can invoke the rights and duties affirmed in the above cases to ensure development policies and projects consider sustainability, remain consistent with promoting their empowerment and support an environment that can provide an adequate standard of living.

### III. UNDERSTANDING COMMUNITY RIGHTS CASES AS CLIMATE LITIGATION

The above cases, like others that arise from the impacts of carbon-intensive activities on community rights to land, resources, development, and a healthy environment, should be considered climate

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166. Scholtz, *supra* note 75, at 402, 413.

167. African Charter, *supra* note 31, art. 24; Scholtz, *supra* note 75, at 407.

168. Scholtz, *supra* note 75, at 412.

169. Ogoni case, *supra* note 5, ¶ 52, 57; SERAP, *supra* note 5, ¶ 100; Afr. Comm'n H.P.R., *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights*, *supra* note 143, ¶ 67(s), ¶ 86(e) ("Care should be taken [in states' plans and policies] to ensure the most sustainable management and use of natural and other resources for food"), ¶ 86(q) (requiring states to "[p]revent the destruction of natural resources of the country, in order to protect the right to food and health of future generations."), ¶ 92(g) (requiring states to "adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations.").

litigation regardless of whether they raise the issue of climate change or are argued on climate change grounds. These cases, and the rights they expound, have the capacity to enhance the efficacy and the equity of climate action and to enrich climate jurisprudence.

#### A. Enhancing the Effectiveness of Climate Action

Upstream strategies to stop the drivers of climate change at their source can be at least as effective at mitigating global warming as top-down strategies aimed at reforming or enforcing emissions policies—and often more so. Evolving conceptions of climate change litigation include cases that directly or indirectly seek to stop activities incompatible with targets established to reduce greenhouse gas emissions. The cases highlighted in this Article seek the same result. The rights championed and remedies sought in the four suits discussed above would help address the problem of climate change at the source, by supporting community involvement in resource governance and stopping destructive land use, including extraction and deforestation.

*Endorois* and *Ogiek* illustrate the utility of cases centered around collective rights to property and free disposal of wealth and natural resources to securing community control of land and resources, which are necessary components of effective climate change mitigation. Recognizing communities' environmental stewardship role can enable them to engage in activities that further the mitigation and adaptation aims of climate litigation. The *Endorois* and *Ogiek* communities, for example, sought restitution of their lands, which would involve cessation or at least suspension of the mining and logging concessions on those territories. In *Endorois*, the Commission recommended that the Kenyan government recognize the *Endorois*' rights of ownership and return their ancestral land.<sup>170</sup> In *Ogiek*, the communities sought rescission of all titles and concessions illegally granted with respect to *Ogiek* ancestral land and the return of such land to the *Ogiek* with common title.<sup>171</sup> The recognition of customary land tenure and traditional possession as a basis for asserting a property right is critical to securing Indigenous

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170. *Endorois*, *supra* note 5, at Recommendations, 1(a). Since this judgment, representatives of the *Endorois* note that the community has “now signed a memorandum of understanding with the Kenya Wildlife Service, Baringo County Council and the Kenyan Commission to UNESCO that recognises Lake Bogoria as *Endorois* ancestral land and requires *Endorois* inclusion in land management.” *Kenya: Protecting the Endorois' Right to Land*, MINORITY RTS. GRP. INT'L (Nov. 13, 2016), <https://minorityrights.org/law-and-legal-cases/centre-for-minority-rights-development-minority-rights-group-international-and-endorois-welfare-council-on-behalf-of-the-endorois-community-v-kenya-the-endorois-case> [<https://perma.cc/TU6F-FWSU>].

171. *Ogiek*, *supra* note 5, ¶ 43(E)(i)(c).

Peoples' control of their territory, as a significant portion of Indigenous land is held informally and through customary tenure.<sup>172</sup> Maintaining or restoring land under Indigenous control has the potential not only to stop its transformation for carbon-intensive activities but also to ensure that the land will be managed in an environmentally sustainable way.

Similarly, *Ogoni* and *SERAP* illustrate how litigation addressing the livelihood impacts of environmental harm through the right to a healthy environment can support abatement of climate-destructive activities and community involvement in environmental decisions. In the *Ogoni* case, the Commission called for both retrospective and prospective measures: a “cleanup of lands and rivers damaged by oil operations;” environmental and social impact assessments for any future oil development and independent oversight bodies; and the provision of “information [regarding] health and environmental risks and meaningful access to regulatory and decisions-making bodies to communities likely to be affected by oil operations.”<sup>173</sup> The ECOWAS CCJ’s order in *SERAP* likewise requires the Nigerian government to restore and prevent future harm to the environment and to hold the perpetrators of environmental damage accountable.<sup>174</sup> If fully implemented, such restoration and prevention measures could require cessation or limitation of oil production in the area. This would both further climate change mitigation ends and support community resiliency, which is an essential component of adaptation to climate change. Moreover, these precedents, read together with *Endorois* and *Ogiek*, support community involvement in natural resource governance, by emphasizing that participation and access to information are integral to both the right to a healthy environment and the right to development. The right to development incorporates a right for affected communities to be active participants, through consultation, in decisionmaking about the balance between economic interests and social and cultural rights—a balance that must be struck with both the present and the future in mind.

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172. Peter Veit & Katie Reytar, *By the Numbers: Indigenous and Community Land Rights*, WORLD RES. INST. (March 20, 2017), <https://www.wri.org/blog/2017/03/numbers-indigenous-and-community-land-rights> [<https://perma.cc/5NM9-9DBL>] (“[A]t least one-third to one-half of the world’s land is held by Indigenous Peoples and local communities informally, under customary tenure arrangements alone. Without legal recognition, Indigenous Peoples, communities and their lands are vulnerable to illegal, forced or otherwise unjust expropriation, capture and displacement by more powerful interests.” (internal quotation marks omitted)).

173. *Ogoni* case, *supra* note 5, at 15 (recommendations to government).

174. *SERAP*, *supra* note 5, ¶ 121(i)(ii).

## B. Ensuring Greater Equity in Climate Advocacy

Recognizing cases driven by and supportive of frontline communities as climate litigation, and amplifying their strategies and precedents, can help bring greater equity to the climate litigation movement. First, doing so elevates the voices and experiences of those immediately harmed by carbon-intensive activities that are fueling global warming, centering the human dimensions and impacts of climate change. It also draws attention to the critical role that frontline communities play in addressing the causes and managing the impacts of climate change.

Second, integrating lawsuits like the community challenges to extractive industries and land-use activities discussed here, in which climate change figures peripherally, if at all, into understandings of climate litigation ensures the field is more global in scope. Such cases have predominated to date among climate litigation in the Global South, where many actions are not framed as climate change lawsuits, but as broader human rights, environmental protection, and land use cases.<sup>175</sup> Highlighting those cases as climate litigation increases the likelihood that perspectives, priorities, and precedents from the Global South influence the climate justice agenda and the future course of climate law and policy.<sup>176</sup> Omitting these community rights-centered cases from conceptions of climate litigation, however, risks diluting the influence not only of litigants but also of judicial institutions in the Global South on emerging jurisprudence, and on understandings of how law can serve climate justice. Bringing such cases and jurisprudence into the climate litigation fold also will help ensure that efforts to use law to solve the climate crisis do not replicate the patterns of exclusion and inequity that have exacerbated climate change.<sup>177</sup>

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175. See Peel & Lin, *supra* note 2, at 683–86, 694–95, 700–08, 710–16.

176. Peel & Lin, *supra* note 2, at 702; see also *id.* at 682 (“[A]nalysis of the Global South experience of climate litigation is essential if transnational climate jurisprudence is to contribute in a meaningful way to global climate governance, and particularly, to ensuring just outcomes for the most climate-vulnerable. Moreover, a fuller understanding of transnational climate litigation—one that considers developments in the Global South—underscores that judicial contribution to global climate governance is not purely a Global North phenomenon.”).

177. As noted throughout, the jurisprudence in the African human rights system builds upon precedents from other regional bodies, particularly the Inter-American system. Recognition that the types of cases profiled in this Article constitute climate change litigation would also extend to cases brought by frontline communities before other regional human rights bodies.

### C. Enriching Climate Jurisprudence

Finally, the collective rights recognized by African regional bodies can bolster individual rights arguments presented in core climate change litigation cases. The significance of the decisions discussed here is not limited to the remedies they ordered for the communities concerned but extends to their potential influence on jurisprudential developments within Africa and beyond. While noncompliance with judgments is a shortcoming of the African regional human rights system,<sup>178</sup> a discussion of which is beyond the scope of this Article, weak enforcement does not negate the normative power of the principles enunciated in the decisions. The African human rights precedents discussed above may be relied upon in domestic litigation in Africa and internationally and by other regional and international human rights bodies. Beyond their impact on subsequent jurisprudence, these decisions may influence norm development, provide guidance for future policymaking, and empower claimants in other cases.<sup>179</sup>

In future African climate change litigation, domestic courts across the continent may apply rights enshrined in the African Charter, such as the collective rights highlighted here, or use African regional bodies' interpretation of those rights to guide application of domestic law.<sup>180</sup> As more climate change-focused claims come before African

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178. See AMNESTY INT'L, THE STATE OF AFRICAN REGIONAL HUMAN RIGHTS BODIES AND MECHANISMS: 2018–2019, at 36–37, AI Index AFR 01/115/2019 (2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/AFR0111552019ENGLISH.PDF> [<https://perma.cc/9LV9-CUAA>]. While the rate of state compliance with judgments and remedial orders of recommendations remains concerningly low, this issue is not limited to the African regional human rights system. Moreover, judgments can be powerful for rights holders, even beyond their enforcement, and advocates can, and do, devise creative strategies to seek their implementation. Following its judgment in the *Endorois* case, for example, the African Commission has called on Kenya to implement the decision, lending additional support to petitioners' efforts to obtain redress. See Afr. Comm'n H.P.R. Res. 257(LIV)2013, Resolution Calling on the Republic of Kenya to Implement the Endorois Decision (Nov. 5, 2013), <https://www.achpr.org/sessions/resolutions?id=277> [<https://perma.cc/JSD5-7XWE>]. See also OPEN SOCIETY JUSTICE INITIATIVE, STRATEGIC LITIGATION IMPACTS: INSIGHTS FROM GLOBAL EXPERIENCE 58, 79 (2018), <https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf> [<https://perma.cc/9PA2-JPUW>] (discussing the actions the Endorois took to monitor and encourage implementation of the decision).

179. See generally OPEN SOCIETY JUSTICE INITIATIVE, STRATEGIC LITIGATION IMPACTS: INSIGHTS FROM GLOBAL EXPERIENCE, *supra* (discussing the material, instrumental, and non-material impacts of strategic litigation).

180. See Kotzé & du Plessis, *supra* note 2, at 21–26 (discussing litigation in Nigeria where the Court applied the African Charter, which was incorporated domestically); Frans Viljoen, *Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa*, 43 J. AFR. L. 1 (1999) (discussing the domestic application of the African Charter in sixteen countries in Africa).

regional human rights bodies, litigants can draw on these precedents to argue that climate action is needed to protect collective, as well as individual rights.

These African precedents also can be cited as persuasive authority in other jurisdictions, whether in similar cases brought by frontline communities or in more traditional climate cases focused on emissions regulation and the impacts of global warming. The interpretation of the rights developed by African regional human rights bodies can influence the development of similar rights applied by other regional and international institutions as well as domestic courts and thereby contribute to greater norm development.<sup>181</sup> For example, the African precedents discussed above can influence the growing case law on the right to a healthy environment, supporting attempts to obtain judicial enforcement of environmental guarantees in domestic constitutions<sup>182</sup> and broader recognition that the right to a healthy environment is integral to the realization of all other human rights. These African cases may also offer useful frameworks for understanding the concepts of sustainability and development, which often underlie arguments about the consistency of state action with a safe climate. They emphasize that sustainability requires consideration of impacts on a community's capacity to improve its members' livelihoods, environment, and well-being. Moreover, they give content to the concept of development by creating a framework to ensure that economic interests do not trump social and cultural considerations.

## CONCLUSION

Given the scale and scope of the challenge that the climate crisis represents and the mixed track record of conventional climate lawsuits to date, climate litigators need to think more expansively about the types of cases and the types of rights that can help secure effective and equitable climate action. Climate litigation is not just about remediating climate change–induced harms or securing commitments to reduce global emissions in the future. It is also about frontline community defense against the extractive and land-use projects that drive global

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181. See Scholtz, *supra* note 75, at 420; Chenwi, *supra* note 142, at 85. At least one sister institution, the European Court of Human Rights, has a climate case pending before it. In September 2020, six Portuguese youth filed a complaint against 33 European countries for violating their human rights, including the right to life, through their contributions to climate change and failure to take sufficient mitigation measures. Youth for Climate Just. v. Austria, et al., *supra* note 23.

182. Peel & Lin, *supra* note 2, at 712, 721.

climate change and destroy local environments. Just as the climate justice movement has awakened to the importance of upstream supply side arguments (*e.g.*, stopping the pipeline of fossil fuels at the source), so too should the climate litigation movement awaken to the importance of upstream legal strategies—those that support community power to keep fossil fuels in the ground and forests intact.

Whether those cases are argued or decided on the basis of climate change has no bearing on their ultimate impact on global warming, and thus their importance to the climate justice movement. Scholars and advocates are already recognizing that rights-based cases which may not directly focus on climate change should nevertheless be considered climate change litigation, albeit as a peripheral category. This Article supports this recognition and advocates its extension to include cases that arise from a loss of land or harm to the environment in connection with activities that emit greenhouse gases and destroy natural carbon sinks.

Climate justice advocacy requires multipronged strategies. The African human rights jurisprudence discussed in this Article offers important legal advancements that can be used to build stronger climate cases within Africa and, potentially, around the world. As advocates innovate ways to use human rights law and fora for climate justice—as part of an ongoing “rights turn” in climate litigation<sup>183</sup>—they should look to cases that elaborate the collective rights of frontline communities to resist the carbon-intensive activities that drive climate change and protect communities’ resilience to adapt to its consequences.

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183. Rodríguez-Garavito, *supra* note 24.