

INTRODUCTION TO THE SYMPOSIUM ON JACQUELINE PEEL & JOLENE LIN, “TRANSNATIONAL CLIMATE LITIGATION: THE CONTRIBUTION OF THE GLOBAL SOUTH”

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Climate change litigation has attracted a great deal of scholarly attention, but that attention has been disproportionately directed towards cases brought in the United States and Europe. As Jacqueline Peel and Jolene Lin explain in *Transnational Climate Litigation: The Contribution of the Global South*, this focus has ignored the rapidly developing jurisprudence in the Global South, which is contributing in innovative ways to transnational climate governance. This symposium invited a number of scholars and practitioners to share their reflections on Peel and Lin’s article.

In 2015, the Paris Agreement raised hopes that states were finally going to take effective steps to address the climate crisis.¹ Eschewing a one-size-fits-all approach, the Agreement requires each of its parties to communicate a National Determined Contribution (NDC) reflecting the party’s highest possible ambition to reduce greenhouse gas emissions. The current NDCs are understood to be inadequate. As the UN Environment Programme (UNEP) pointed out, full implementation of those commitments would mean that the global average temperature would still rise 3-4°C by 2100²—far above the Agreement’s goal of holding the increase “to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”³ To address this situation, the Paris Agreement requires each party to communicate every five years a new NDC with progressively greater ambition. It also provides for iterative, synchronized processes through which the parties are to take stock of their collective progress in order to inform their next NDC.⁴

Four years after Paris, the outlook is grim. Under the Trump Administration, the United States—the second-largest emitter of greenhouse gases—will effectively withdraw from the Agreement on November 4, 2020. While no other party has followed suit (yet), the repercussions of the withdrawal are geopolitically tangible. Moreover, after stabilizing briefly between 2014 and 2016, total greenhouse gas emissions began to increase again, reaching a record high of 55.3 gigatons of CO₂ equivalent in 2018.⁵ Fossil fuel emissions alone grew two percent in 2018.⁶ Every year that the world does not reduce greenhouse emissions makes it more difficult to reach the Paris targets. In its most recent Emissions Gap Report, UNEP stated that emissions must drop 2.7 percent per year from 2020

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¹ Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AJIL 288 (2016).

² UN Env’t Programme, *Emissions Gap Report 2019*, at xxx.

³ [Paris Agreement](#) art. 2(1)(a), Dec. 12, 2015, UNTS I-54113.

⁴ *Id.* art. 4(3).

⁵ [UN Env’t Programme](#), *supra* note 2, at xiv.

⁶ *Id.*

to 2030 to be on track for the 2°C goal, and an even harder-to-imagine 7.6 percent every year to meet the 1.5°C goal.⁷

At the latest UN climate meeting in Madrid (COP25 in December 2019), only incremental progress (if any) was made, and much effort was spent trying simply to avoid outright regression from the spirit and letter of the Paris Agreement. Major emitting states showed waning political willingness to enhance in 2020 the level of ambition expressed in their NDCs, or to agree on robust rules for global carbon trading, which is meant to increase overall ambition. In addition, discussions on financial commitments to support vulnerable nations most affected by climate change impacts proved futile and were—together with rules on carbon markets—parked until next year’s meeting.

In the absence of effective climate action at the international level, many states have adopted national climate laws, which provide a more direct—and legally binding—tool for implementation, compliance, enforcement, and judicial review. On the international and domestic levels, advocates have turned to courts, seeking to spur the adoption of new rules and the better implementation of and compliance with existing ones. In the many countries that lack an enforceable climate framework, courts have been asked to bring other norms to bear, including constitutional and human rights. Most of the attention in legal scholarship has gone to a few high-profile, strategic cases in the Global North, especially *Urgenda*, in which a Dutch appellate court held, and the Dutch Supreme Court recently affirmed, that the Netherlands must reduce its greenhouse gas emissions to comply with its obligations under the European Convention on Human Rights.⁸

It is therefore most commendable that Jacqueline Peel and Jolene Lin have done a great deal to rectify this imbalance of attention in their pathbreaking article on climate litigation in the Global South.⁹ Reviewing cases in Asia, the Pacific, Africa, and Latin America, Peel and Lin describe the innovative ways that climate cases in the Global South are contributing to global and national climate governance: for example, rights-based arguments are more prevalent, and litigants are often employing “stealthy” strategies that present climate issues in less controversial packaging. In contrast to the many Global North cases seeking to force governments to adopt more stringent climate rules, Global South cases often seek to implement existing policies. And, contrary to the conventional (Global North) wisdom, most Global South cases focus on mitigation issues, including by preventing new coal-fired power plants and coal mining. On the basis of their analysis, Peel and Lin seek to reframe and broaden how we think about transnational climate litigation.

To further explore the issues raised by Peel and Lin, *AJIL Unbound* invited a distinguished group of scholars and practitioners to contribute essays on climate litigation in the Global South.

César Rodríguez-Garavito, a professor at the University of the Andes and the executive director of Dejusticia, argues that the emphasis on rights-based claims in Global South climate litigation follows a path blazed over the past thirty years by lawsuits based on constitutional rights in general and socioeconomic rights in particular.¹⁰ Drawing on his experience at Dejusticia, which represented twenty-five young plaintiffs who sued the Colombian government for failing to fulfill its commitment to limit deforestation in the Amazon, Rodríguez-Garavito explains how such cases have taught both litigators and courts how constitutional rights may be brought to bear on complex situations involving large and diverse victims and pervasive policy failures, which may require far-reaching judicial remedies. He also expands on Peel and Lin’s point that the Global South is far from

⁷ *Id.* at xx.

⁸ [Urgenda Found. v. State of the Netherlands](#), [2015] HAZA C/09/00456689.

⁹ Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AJIL 679 (2019).

¹⁰ César Rodríguez-Garavito, *Human Rights: The Global South’s Route to Climate Litigation*, 114 AJIL UNBOUND 40 (2020).

monolithic; he predicts that the same countries that have led the way in the socioeconomic rights jurisprudence will take the lead in the rising wave of Southern climate cases.

Shibani Ghosh, of the Centre for Policy Research in New Delhi, takes a closer look at climate litigation in India, one of the countries that have long been at the forefront of innovative environmental litigation.¹¹ She examines fourteen Indian climate cases beyond the five analyzed by Peel and Lin, and finds that most of them fall within categories that map onto the characteristics that Peel and Lin identified. Two cases, however, fall into a new category: cases in which the government defended its policies—increasing fees on timber-based industry and requiring companies to buy energy from renewable sources—by referring to climate concerns. Perhaps surprisingly, in light of the extensive Indian jurisprudence on constitutional rights and the public trust doctrine in environmental cases, the Indian climate cases have not yet applied that jurisprudence to climate change. Ghosh concludes on a cautionary note: despite their “pro-environment” reputation, Indian courts often defer to the executive on issues of economic policy or infrastructure and are famous for their overloaded dockets. Nevertheless, she predicts that the Indian contribution to climate litigation is likely to increase.

The University of Cape Coast’s Bolanle Erinoshó analyzes the prospects for climate litigation in Ghana.¹² She describes the highly controversial 2017 agreement that China would finance US\$2 billion worth of infrastructure in exchange for bauxite concessions in Ghana, including in the Atewa Forest Reserve, an environmentally sensitive area. Although the decision met with protests from local communities and environmental organizations, it did not lead to litigation. Erinoshó’s description of Ghana’s climate law illustrates one of Peel and Lin’s points about climate litigation in the Global South: that climate concerns often seem to be on the periphery rather than at the center of the litigation. The policies at the core of the Ghanaian climate framework are not legally enforceable. More generally, environmental litigation in Ghana faces serious obstacles, including lack of funding. As a result, Erinoshó suggests that any climate cases are likely to be subsumed within broader environmental issues. However, she also notes that a rights-based approach to climate litigation may be possible, as an extension of existing constitutional caselaw and the incorporation of Article 24 of the African Charter on Human and Peoples’ Rights, which recognizes the right to a satisfactory environment.

Joana Setzer of the London School of Economics and Lisa Benjamin of Lewis & Clark College of Law look at the relationship between climate litigation and legislation.¹³ The interaction between litigation and legislation can go two ways. In some countries, courts are “filling legislative gaps” by implementing government climate policies in the absence of detailed legislation. As an example, in China courts have acted as collaborators in the regulatory process, interpreting and engaging with strong government-led efforts to mitigate climate change. They relied on government policy documents to fill in gaps in the absence of more detailed climate regulation. In other countries, policy and legislative conditions have had to mature in order to make climate litigation possible. For example, Setzer and Benjamin point out that in Africa many of the recent climate-related cases focus on human rights. The reason for this, they suggest, could be the growth in constitutional protections for environmental rights in that region. Latin America could follow suit due to progressive constitutional developments on environmental human rights. An important but poorly understood issue that the authors identify relates to Global South jurisdictions where conditions are ripe for climate litigation (e.g., jurisdictions where there is existing climate legislation and access to justice) but climate change has not yet reached the courts. In these jurisdictions, it would be worth exploring potential avenues for climate litigation.

¹¹ Shibani Ghosh, *Litigating Climate Claims in India*, 114 AJIL UNBOUND 45 (2020).

¹² Bolanle Erinoshó, *Climate Change Litigation in Ghana: An Analysis of the Role of Courts in Enforcing Climate Change Law*, 114 AJIL UNBOUND 51 (2020).

¹³ Joana Setzer & Lisa Benjamin, *Climate Change Litigation in the Global South: Filling in Gaps*, 114 AJIL UNBOUND 56 (2020).

Hari Osofsky of Penn State Law considers how the geography of climate change interacts with emerging climate change litigation in Southern countries.¹⁴ She points out that in the Global South, emerging climate change litigation is largely taking place in the courts of major emitter countries that also have among the highest GDPs in the world, and where similarities exist to major emitters in the Global North. However, a number of the cases also address climate challenges, which have been less of an issue in the Global North cases, in particular those pertaining to land use. For example, several cases involved the conversion and clearing of land, including illegal logging and forest-clearing, and setting fire to land to clear it for palm oil cultivation, burning sugar cane in the harvesting process, draining and clearing a mangrove to create a landfill, reforestation to offset airline emissions, and deforestation and infrastructure development threats to high-altitude ecosystems that capture carbon. These cases reinforce that litigation strategy will vary based on the physical geography of each Southern country and how that geography translates into greenhouse gas emissions. The geographical circumstances of countries suggest both opportunities to address important mitigation and adaptation concerns and the constraints that many countries in the Global South face.

Peel and Lin's article and the reflections provided by the scholars and practitioners who contributed to this symposium shed light on the important roles and functions of climate change litigation in the Global South. These are important insights, especially in times when the absence of ambitious political will, the presence of deepening scientific certainty, and the increasingly tangible impacts of a changing climate are leading to greater reliance on litigation. As Peel and Lin's article and the essays in this symposium explain, litigation in these Southern countries can inform litigants elsewhere and help establish a "global legal language" on climate change litigation.

One aspect of that language is the growing emphasis on human rights. As Peel and Lin explain, and as several of the essays emphasize, litigants in both the Global North and South have increasingly turned to rights-based arguments to galvanize action to address the climate crisis. This strategy is also being pursued at the international level, with the encouragement of the UN human rights treaty bodies. In a 2019 joint statement, five of the treaty bodies said that "[i]n order ... to comply with their human rights obligations, and to realize the objectives of the Paris Agreement, [states] must adopt and implement policies aimed at reducing emissions, which reflect the *highest possible ambition* [Article 4.3], foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development."¹⁵ In other words, Articles 2.1 and 4.3 of the Paris Agreement together are being used to interpret and clarify the substance of human rights obligations with respect to climate change.

Accordingly, litigants from both the Global North and South have started to engage UN human rights treaty bodies in addressing ineffective climate action. A central argument is that major emitting countries are violating their due diligence obligations to protect human rights, including rights to life and health, by not fulfilling the requirement in the Paris Agreement that their NDCs should reflect their highest possible ambition.¹⁶ For example, in a 2019 communication to the UN Committee on the Rights of the Child, the petitioners (sixteen children) claim that the Convention on the Rights of the Child must be interpreted in light of the obligations of the respondent states (Argentina, Brazil, France, Germany, and Turkey) under international environmental law.¹⁷ Accordingly, the

¹⁴ Hari M. Osofsky, *The Geography of Emerging Global South Climate Change Litigation*, 114 AJIL UNBOUND 61 (2020).

¹⁵ Comm. on the Elimination of Discrimination Against Women; Committee on Economic, Social and Cultural Rights; Comm. on the Protection of the Rights of All Migrant Workers and Members of their Families; Comm. on the Rights of the Child; and Comm. on the Rights of Persons with Disabilities, [Joint Statement on "Human Rights and Climate Change"](#) (Sept. 16, 2019) (emphasis added).

¹⁶ [Paris Agreement](#), *supra* note 3, art. 4(3). See also the most recent decision adopted in Madrid, December 2019, which reminded parties to the Paris Agreement to update their NDCs and reflect their highest possible ambition when doing so. [Decision 1/CMA.2](#) at para. 6 (Dec. 15, 2019).

¹⁷ [Communication to the Committee on the Rights of the Child in the case of C. Sacchi et al. v. Argentina, Brazil, France, Germany and Turkey](#) paras. 14, 174, and 182 (Sept. 23, 2019).

petitioners argue that by failing to reduce their emissions at the “highest possible ambition” according to Article 4.3 of the Paris Agreement, the respondents have failed to comply with their human rights obligations.¹⁸ Reducing emissions at the highest possible ambition, they claim, implies *inter alia* using maximum available resources.¹⁹ This amounts to a due diligence standard for complying with human rights obligations, according to which states must take all appropriate measures to address climate change and its adverse effects, employ their best efforts or, simply, do “as well as they can.”²⁰ States everywhere have yet to live up to this standard, but litigation might be an appropriate and necessary means to push for highest ambition in climate regulation at the level needed for the rapid and unprecedented transformation of all sectors to meet the temperature goals set out in the Paris Agreement.²¹

A globally decarbonized economy by about the middle of this century requires no less. If transformative changes do not happen or come too late, we will have to deal with the consequences of our collective inaction, which most likely will be catastrophic. The impacts of climate change and global earth-system changes risk undoing the last fifty years of progress in development, global health, and poverty reduction. In fact, they risk undermining the UN Charter and international law as we know it. A future of international law where we lose the battles of climate change and global biodiversity loss is one that will have to address simultaneously mass migration, battles over resources, closing borders, violence, and unrest.

This should *deeply* worry us. International law has clearly not been able to ensure human rights, open borders, secure peace globally, or stop violence today. What could possibly make us think it may be up to these challenges in the future, if circumstances get worse? In this scenario, international law will most likely be reduced to a weak and insufficient back-up tool to manage conflict—a global contingency plan where a few benefit, and billions lose. Not much, if anything, would be left from its promise to serve as a “gentle civilizer of nations.”²² The preference for one future over the other is obvious. Whether we get there depends on the choices we make in *this* decade—choices in which the judiciary, both in the North and the South, will (have to) play a crucial role.

¹⁸ *Id.* at para. 20.

¹⁹ *Id.* at para. 178.

²⁰ Christina Voigt, [The Paris Agreement: What is the Standard of Conduct for Parties?](#), QUESTIONS INT’L L. (May 24, 2016).

²¹ The 2018 Intergovernmental Panel on Climate Change report states in very clear terms that global net emissions must get down to *zero* around 2050 in order to keep global warming somewhere close to 1.5°C. This means that fossil-fuel based emissions must be entirely phased out in about thirty years. In any case, in the second half of this century, net emissions must be *negative*, meaning that we must pump more CO₂ out of the air than is being emitted. See Intergovernmental Panel on Climate Change, [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, Summary for Policymakers](#) 3–24 (Oct. 2018).

²² MARTTI KOSKENNIEMI, [THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960](#) (2001).