Transnational Litigation and Climate Change in Nigeria

By:

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The UN Sustainable Development Goals (SDGs) is a central part of the 2030 Agenda for Sustainable Development that was adopted by the UN Member States, as a shared blueprint for peace and prosperity for people and the planet . The SDGs consist of 17 ambitious goals and 169 targets that are designed to advance sustainable development, with the involvement of both developing and developed countries in a global partnership. One of these is SDG 13, focused on taking urgent action to combat climate change and its impacts. In this regard, international law has been increasingly pivotal in underpinning regional and domestic initiatives for climate action, particularly through international mechanisms such as the 1992 United Nations Framework Convention on Climate Change, the 1997 Kyoto Protocol, and the 2015 Paris Agreement on Climate Change including the agreement on Nationally Determined Contributions of countries for reducing their domestic greenhouse gas emissions. International law offers a framework for regulating foreign investments in climate change action.

Furthermore, non-state actors (especially MNCs) themselves play an integral role in the international global climate regime. For developing countries, the activities of MNCs, major investors in the carbon intensive sectors of the economy such as energy, transportation, agriculture, and manufacturing, play a critical role in achieving countries' reaching their climate change targets. More so, some of the largest oil and gas companies (fossil fuel companies) in terms of daily production are based in developing countries. International law also makes an important contribution through the development of international soft law mechanisms urging multinational corporations (MNCs) to respect human rights in relation to climate change.

At the national level, the international law mechanisms for climate action continue to influence climate change legislation and non-legislative initiatives, including emission reduction targets, renewable energy and low-carbon technology targets, climate change risk assessment and adaptation and mitigation. Notwithstanding the contributions of international law to climate action across various levels of governance, the international climate governance regime is beset with weak enforcement and accountability mechanisms.

Arguably due to the weaknesses of global climate governance regime, climate litigation has become an important strategy adopted by victims and their representatives in foreign jurisdictions for regulating the impacts of businesses on human rights and the environment in oil and gas producing communities, particularly in developing countries. This post focuses on the prospects for advancing SDG 13 in Nigeria, particularly through the transnational litigation.

A plethora of climate related cases have occurred in various domestic, regional, sub-regional and international tribunals around the world. Many of these cases have been instituted to compel 'climate mitigation policies and regulations to reduce the emission of greenhouse gases into the atmosphere, to demand compliance with existing rules and to push for more equitable and adequate policies, both for mitigation and for climate adaptation.'

Globally, especially in Africa, a human rights approach to climate litigation encompassing constitutional claims is evolving. Although the majority of climate change litigation targets governments, a growing number of cases

tackle MNCs in carbon intensive sectors where activities of MNCs pose a risk or already cause a rise in greenhouse gas emissions and corporate abuse of human rights.

The cases can further be encapsulated in the overarching lens of transnational litigation involving MNCs, especially in their home states. Transnational climate change litigation is utilised by the relevant stakeholders to hold African countries and MNCs accountable for climate change effects and related human rights violations. In this regard, there has been a rise in both strategic and routine climate litigation cases across the world.

For example, in Pakistan, in 2015, a court in the case of *Leghari v. Federation of Pakistan* for the first time, accepted arguments that the failures of the Pakistani government to address climate change essentially violated the rights of the petitioners. Peel and Ofosky aver that *Leghari* 'case forms part of an emerging body of pending or decided climate change-related lawsuits that incorporate rights-based arguments in several countries, including the Netherlands, the Philippines, Austria, South Africa, and the United States (US).'

Another example is the Netherlands, where the Dutch Supreme Court in *Urgenda Foundation v State of Netherlands*, mandated the Dutch government to lower its greenhouse gas emissions by a specified amount, 25% below 1990 levels by 2020, stating that the government's existing commitment of 17% emissions reduction was insufficient. It has been posited that 'this is the first time that this has occurred in any jurisdiction.' One major strength of the *Urgenda* decision was that the Urgenda's (an NGO in Netherlands) claims in court were anchored on right-based arguments.

In May 2021, in *Milieudefensie et al. v. Shell*, the District Court of The Hague ordered Royal Dutch Shell to cut down the CO2 emissions of the whole Shell group by 45% below 2019 levels by 2030. The court also explicitly highlighted the utility of a human rights approach in climate change cases, holding that there is a 'widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.' Furthermore, the court explicitly relied on the decision in *Urgenda* and the various pronouncements made by the UN Human Rights Committee and the UN Special Rapporteur on Human Rights in

its judgment, further indicating the influence of international law mechanisms.

The foregoing analysis is analogous to the Nigerian situation where transnational litigation has been utilised by a plethora of stakeholders including local communities, civil society organisations (CSOs) and victims of environmental injustice arising from the activities of oil MNCs in the Niger Delta region of Nigeria. CSOs in Nigeria have adopted litigation as a deliberate strategy in influencing the activities of government and MNCs in the oil and gas sector. Notwithstanding that litigation as a regulatory strategy is beset by many impediments, its major strength is encapsulated in the following statement:

> Successful litigation outcomes can on their own create new laws and rules of engagement. This is more particularly in common law country situations where the rule of *precedent* applies. Consequently, when the highest court of the land makes a new pronouncement on any legal, regulatory or even operational issue as a court of final instance, such pronouncement remains the law governing the sector of its coverage until either there is a review of such law or there is an Act of Parliament to the contrary.

The soaring number of cases filed abroad, mainly in the home states of the MNCs, with the support of CSOs exemplifies the increasing reliance on transnational litigation in holding MNCs accountable for environmental degradation and human rights violations in Nigeria. These cases have largely been instituted by local communities and victims of environmental injustice amongst other stakeholders (sometimes in collaboration with foreign NGOs) in the United States of America, the Netherlands, and the United Kingdom. An examination of the cases and their outcomes foregrounds the implications of transnational litigation for climate change action in Nigeria.

Overall, these cases illustrate how local communities seek to enforce their agreements with MNCs through judicial processes outside Nigeria and illustrate the potential judicial options available to host communities that suffer from environmental injustice accentuated by the activities of MNCs in Nigeria. On this point, *Kiobel v Shell* is a class action that was based on the defendant's alleged complicity in the state's crimes committed against the Ogoni people. The United States Supreme court dismissed the suit, finding that Shell's

connection to the United States was unconvincing and as such, that it had no jurisdiction on the matter and the Alien Tort Claims Act was held to be inapplicable. This decision was reached notwithstanding that Shell has business offices in the United States.

In *Akpan v Shell*, a class action was brought against Shell in the Netherlands based on years of oil pollution allegedly perpetuated by Shell in three villages in the Niger Delta with the collaboration of CSOs (both local and foreign) and the Niger Delta fishermen from the affected communities. The court held that the defendant was liable to pay compensation for loss resulting from two specific oil spills from an abandoned wellhead but dismissed other claims of a general duty of care against the defendant. It is instructive that in this case, the court reiterated the relevance of the claim not only based on the personal interest of the plaintiff but also for the benefit of the rest of the community and the environment.

A similar thread that runs through the transnational cases by Nigerian litigants is the importance of class action for protecting the human rights, including environmental rights of individuals and communities affected by the activities of MNCs in the oil and gas industry. Another important convergence in these cases is the active role of non-state actors in promoting access to justice for victims of human rights violations from the activities of MNCs. The reliance of the courts on common law and related remedies presents opportunities for learning and strengthening the jurisprudence in a way that could enhance judicial activism in the resolution of similar rights claims in domestic courts in Nigeria, despite the formal recognition of the right to environment in the national constitution. This is particularly remarkable, given the potential of climate change litigation to compel relevant actors towards more ambitious climate action, as reflected in the recent decision of a civil court in the Hague that "by 2030, Shell must cut its CO2 emissions by 45% compared to 2019 levels".

The ultimate relief sought by the litigants in the considered cases is damages for the violations occasioned by the multinational corporations. This does not by itself advance the realisation of SDG 13. Furthermore, the claims before foreign jurisdictions do not seek to influence the legal and institutional framework in the locations where the multinational corporations operate, which ultimately

facilitate or at least enable violations. Foreign courts would be unable to secure the enforcement of their decisions in Nigeria or compel the Nigerian government to regulate the operations of multinational corporations in ways that advance SDG 13 and other goals linked to human rights and environmental protection. This undermines the prospects for legislative or institutional reforms through the litigation of rights claims in foreign jurisdictions. Hence, while international law has contributed significantly to the development of climate change law and policy in general, and to the protection of individuals and communities who have been victims of human rights violations and environmental degradation by multinational corporations, litigation of related claims by the victims in foreign courts cannot be overly relied upon to advance either SDG 13/climate change or human rights in Nigeria.

Nonetheless, given the transboundary nature of climate change impacts, transnational climate change litigation remains a viable strategy for compelling climate change mitigation and adaptation action. One option that could be explored for improving the effectiveness of climate change litigation is a global treaty for the international enforcement of court judgements in climate change cases. The aim of the treaty would include simplification of the process of enforcement across all the Member States to ensure compliance by affected parties to the suit. The enforcement of judgements from foreign courts could also be explored as a tool for triggering legislative and institutional reforms for climate action in the enforcing jurisdiction.

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