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PART III

Justice, Equity and Activism

Climate Change and Multinationals in Nigeria: A Case for Climate Justice

Eghosa O Ekhator and Edward O Okumagba

Introduction

Climate change, which has led to a plethora of negative impacts on the world, remains a raging issue globally. The destructive effects of climate change can be discerned in the short term via natural hazards including drought, flooding, landslides, storms and tidal waves; and in the long term via the continuing destruction of the environment.¹ Furthermore, the Intergovernmental Panel on Climate Change (IPCC) report in 2021 has highlighted the various threats climate change poses to the survival of the planet.² The report evidences that there has been a big rise in global warming and the greenhouse gas (GHG) emissions, which are having negative impacts on the planet and on billions of people.³ No part of the world is left out from climate change impacts. This has led to droughts, heatwaves, heavy rainfall and cyclones occurring in different parts of the world.⁴ Africa is one of the

¹ T Kompas, Van Ha Pham and T Nhu Che, 'The Effects of Climate Change on GDP by Country and the Global Economic Gains from Complying with the Paris climate accord' (2018) 6(8) *Earth's Future* 1153–73.

² United Nations, *Climate Change 2021: The Physical Basis* (Intergovernmental Panel on Climate Change IPCC, 2021) <https://www.unep.org/resources/report/climate-change-2021-physical-science-basis-working-group-i-contribution-sixth>; U Afinotan, 'How Serious is Nigeria About Climate Change Mitigation Through Gas Flaring Regulation in the Niger Delta?' (2022) 24(4) *Environmental Law Review* 288–304.

³ IPCC Report 2021 (n 2).

⁴ IPCC Report 2021 (n 2); Afinotan (n 2).

places bearing the brunt of climate change. According to the IPCC, ‘Africa is one of the most vulnerable continents to climate variability and change’.⁵

The impacts of climate change will have negative consequences on the human rights and wellbeing of its victims in Nigeria (especially the Niger Delta).⁶ In Nigeria, climate change has led, among other things, to increased and frequent flooding, rising sea levels and droughts.⁷ For example, the flooding that took place in late 2022 in Nigeria affected more than 2.5 million people and led to the widespread destruction of farmland in the country.⁸ Nigeria is one of the ten countries categorized by the International Rescue Committee (IRC) as highly vulnerable to climate change impacts.⁹ This has been exacerbated by a plethora of factors not limited to poverty, the activities of multinational companies (MNCs) and endemic environmental injustice issues in many parts of the country (especially the Niger Delta, wherein the oil and gas industry is located).

The activities of MNCs in the Nigerian oil and gas industry also have negative impacts on the climate.¹⁰ Gas flaring is a regular occurrence in the Niger Delta region of Nigeria (where the oil and sector is predominantly

⁵ Intergovernmental Panel on Climate Change (IPCC), ‘Special Report on the Regional Impacts of Climate Change: An Assessment of Vulnerability’, (2007), <https://www.grida.no/climate/ipcc/regional/index.htm>, accessed 25 May 2023. Furthermore, a plethora of reports have highlighted that Africa is overly impacted by climate disasters. For example, rising sea levels and temperature, extreme weather conditions and unpredictable rain patterns are having negative impacts on health, water and food security and development in African countries. Generally, see World Meteorological Organization (WMO), ‘State of the Climate in Africa 2019 (WMO-No.1253) 2020’, https://library.wmo.int/index.php?lvl=notice_display&id=21778#.X5giydPsYiR, accessed 25 May 2023.

⁶ M Addaney, E Boshoff and B Olutola, ‘The Climate Change and Human Rights Nexus in Africa’ (2017) 9(3) *Amsterdam Law Forum* 5–28.

⁷ Climate Knowledge Portal for Development Practitioners and Policy Makers, ‘Nigeria’, <https://climateknowledgeportal.worldbank.org/country/nigeria/vulnerability> accessed 25 May 2023.

⁸ International Rescue Committee (IRC), ‘10 Countries at Risk of Climate Disaster’, 25 May 2023, <https://www.rescue.org/article/10-countries-risk-climate-disaster> accessed 25 May 2023.

⁹ IRC (n 8).

¹⁰ In Nigeria, many MNCs, including Shell, Chevron and Agip, have always had subsidiaries that operated in the oil and gas industry in Nigeria. For example, Shell Petroleum Development Company of Nigeria (SPDC), a Royal Dutch Shell (RDS) subsidiary, is one of Nigeria’s oldest oil firms and the first company to export oil from Nigeria has led the field in the oil and gas sector in the country. Generally, see JG Frynas, MP Beck and K Mellahi, ‘Maintaining Corporate Dominance After Decolonization: the “First Mover Advantage” of Shell-BP in Nigeria’ (2000) 27(85) *Review of African Political Economy* 407–25. RDS is now called Shell plc.

located).¹¹ Gas flaring occurs ‘when oil is pumped out of the ground, the gas produced is separated and, in Nigeria, most of it is burnt as waste in massive flares’.¹² Therefore, in the process of refining, the natural gas, otherwise called ‘associated gas’, is removed from the crude oil being refined.¹³ Notwithstanding a plethora of laws and regulations, the Nigerian government has been unable to tackle the menace of gas flaring in the country.¹⁴ Nigeria is one of the ‘top ten flaring countries [that] accounted for 75 percent of all gas flaring and 50 percent of global oil production in 2021’.¹⁵ Nigeria’s significant economic reliance on the oil and gas industry has limited its ability to address the human rights and climate-related issues emanating from gas flaring.

This chapter relies on the concept of climate justice as its analytical lens. Climate justice – which is a variant of the environmental justice paradigm – can be used as a means to evaluate strategies to improve access to justice and protect climate change victims in Nigeria. This chapter also examines the potential of climate change litigation in Nigeria as one of the strategies in ventilating climate justice issues in the country. There are many definitions and understandings of climate change litigation.¹⁶ The use of climate change litigation is soaring globally, and it has become a key slant of the emergent transnational litigation.¹⁷ According to scholars, climate change litigation is still in its infancy in Nigeria.¹⁸ This chapter

¹¹ Generally, see I Aye and EO Wingate, ‘Nigeria’s Flare Gas (Prevention of Waste & Pollution) Regulations 2018’ (2019) 21(2) *Environmental Law Review* 119–27.

¹² Amnesty International, ‘Nigeria: Petroleum, Pollution and Poverty in the Niger Delta’, (2009) 18 <https://www.amnesty.org/en/documents/afr44/018/2009/en/>, accessed 25 May 2023.

¹³ M Ishisone, ‘Gas Flaring in the Niger delta: The Potential Benefits of Its Reduction on the Local Economy and Environment’, <http://nature.berkeley.edu/classes/es196/projects/2004final/Ishone.pdf>, accessed 25 May 2023.

¹⁴ Generally, see KO Mrabure and BO Ohimor, ‘Unabated Gas Flaring Menace in Nigeria. The Need for Proper Gas Utilization and Strict Enforcement of Applicable Laws’ (2020) 46(4) *Commonwealth Law Bulletin* 753–79; Aye and Wingate (n 11).

¹⁵ World Bank, ‘2022 Global Gas Flaring Tracker Report’, 2022, <https://www.worldbank.org/en/programs/gasflaringreduction/publication/2022-global-gas-flaring-tracker-report>, accessed 25 May 2023.

¹⁶ J Setzer and LC Vanhala, ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’ (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* e580. Also see the discussion about definitions and conceptualizations of this by the editors in the introductory chapter to this volume.

¹⁷ P Obani and E Ekhatior, ‘Transnational Litigation and Climate Change in Nigeria’ in *Symposium: Nigeria and International Law: Past, Present and the Future* (AfronomicsLaw Blog 2021), <https://www.afronomicslaw.org/category/analysis/transnational-litigation-and-climate-change-nigeria>, accessed 25 May 2023.

¹⁸ U Etemire, ‘The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight’ (2021) 2 *Carbon & Climate Law Review* 158; PK Oniemola, ‘A Proposal

explores how it might expand in future and considers its potential to improve climate justice in the country.

This chapter is divided into five further parts. The first part discusses the role of MNCs in climate change-related activities. This part of the chapter also focuses on how their role is addressed in the 2015 Paris Agreement on Climate Change, which was adopted in December 2015. Part two of the chapter focuses on climate justice. The third part of the chapter discusses how climate litigation can be a tool or strategy to promote climate justice. The fourth part focuses on the potential of climate litigation in Nigeria against the backdrop of recent judicial and legislative developments. The fifth part of the chapter is the conclusion.

Multinationals and climate change

MNCs are said to be the major contributors to climate change in the world today.¹⁹ Fossil fuel companies have been singled out as needing to take responsibility for climate change.²⁰ In the Carbon Majors Report published in 2017, it was confirmed that ‘Just 100 companies have been the source of more than 70% of the world’s greenhouse gas emissions since 1988’.²¹ Unquestionably, activities in the global energy industry, especially those associated with energy production and consumption, continue to be major sources of GHG emissions, thus resulting in extensive climate change.²² A report by Zhang *et al* avers that a fifth of CO₂ emissions come from MNCs’ global supply chains.²³ Since the publication of the Carbon Majors Report

for Transnational Litigation Against Climate Change Violations in Africa’ (2021) 38 *Wisconsin International Law Journal* 301; E Okumagba, ‘Examining Global Court Practices in Reducing Climate Change Impacts Through litigation: Lessons for Nigeria’ in EO Ekhaton, S Miller and E Igbinosa, (eds) *Implementing the Sustainable Development Goals in Nigeria: Barriers, Prospects and Strategies* (Routledge 2021).

¹⁹ M Rumpf, ‘Climate Change Litigation and the Private Sector – Assessing the Liability Risk for Multinational Corporations and the Way Forward for Strategic Litigation’ in OC Ruppel, T Markus, E Schulev-Steindi and H Müllerova (eds), *Climate Change, Responsibility and Liability* (Nomos Verlagsgesellschaft mbH & Co. KG 2022) 441–90.

²⁰ R Heede, ‘Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010’ (2014) 122(1) *Climatic Change* 229–41.

²¹ T Riley, ‘Just 100 Companies Responsible for 71% of Global Emissions, Study Says’, *The Guardian*, 10 July 2017, <https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change>, accessed 25 May 2023.

²² NA Obeng-Darko, ‘Editorial’ OGEL Special Issue on ‘Energy Transitions’ (2021) 19(1) *Oil, Gas & Energy Law*.

²³ Z Zhang *et al*, ‘Embodied Carbon Emissions in the Supply Chains of Multinational Enterprises’ (2020) 10(12) *Nature Climate Change* 1096–101.

2017, many MNCs have been progressively subject to climate change-based litigation by different actors.²⁴ MNCs are also now at the driving force behind the new markets for what has been termed ‘green’ goods and services in different parts of the world.²⁵ Therefore, MNCs are at the forefront of developing and embedding GHG targets as one of the strategies to combat the effects of climate change.²⁶ It should be noted that many of the changes espoused by MNCs have come about because of pressure from relevant stakeholders, including non-governmental organizations (NGOs), government and investors, among others.²⁷

The 1992 United Nations Framework Convention on Climate Change (UNFCCC) is said to have established a climate change architecture or framework.²⁸ The Paris Climate Change Agreement of 2015 (Paris Agreement) is a key element of the global climate governance architecture.²⁹ COP21 to the UNFCCC witnessed over 196 parties voluntarily pledging to a treaty in furtherance of mitigation strategies for climate change,³⁰ where in signing the Paris Agreement countries came together to agree a route on how to reduce GHG emissions and ensure that global warming remains ‘well below 2°C’.³¹ The Glasgow Climate Pact was agreed to by 197 countries during the COP 26 that took place in 2021.³² This is said to be the first

²⁴ See Rumpf (n 19).

²⁵ J Pinkse and A Kolk, ‘Multinational Enterprises and Climate Change: Exploring Institutional Failures and Embeddedness’ (2012) 43(3) *Journal of International Business Studies* 332–41.

²⁶ D Wang and T Sueyoshi, ‘Climate Change Mitigation Targets Set by Global Firms: Overview and Implications for Renewable Energy’ (2018) 94 *Renewable and Sustainable Energy Reviews* 386–98.

²⁷ R Sullivan and A Gouldson, ‘The Governance of Corporate Responses to Climate Change: An International Comparison’ (2017) 26(4) *Business Strategy and the Environment* 413–25.

²⁸ S Hori and S Syugyo, ‘The Function of International Business Frameworks for Governing Companies’ Climate Change-Related Actions Toward the 2050 Goals’ (2020) 20(3) *International Environmental Agreements: Politics, Law and Economics* 541–57.

²⁹ L Wegener, ‘Can the Paris Agreement Help Climate Change Litigation and Vice Versa?’ (2020) 9(1) *Transnational Environmental Law* 17–36.

³⁰ A Savaresi, ‘The Paris Agreement: A New Beginning?’ (2016) 34(1) *Journal of Energy & Natural Resources Law* 16–26.

³¹ B Comyns, ‘Climate Change Reporting and Multinational Companies: Insights from Institutional Theory and International Business’ (2018) 42(1) *Accounting Forum* 65–77.

³² UNFCCC, ‘The Glasgow Climate Pact – Key Outcomes from COP26’, https://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact-key-outcomes-from-cop26?gclid=Cj0KCCQiA7bucBhCeARIsAIOwr-8ys8neosn3oP2CKvo3Vy-TXDNdKEzeyWx9Szgbun3erXRzSRG4U0UaAhHDEALw_wcB, accessed 25 May 2023; Afinotan (n 2).

international climate agreement to expressly mention fossil fuels.³³ However, the provision referring to fossil fuels that eventually appeared is said to be a highly watered-down or diluted version, due to compromises between negotiators at the conference.³⁴

Irrespective of express mentions, the crux of Paris Agreement is for individual countries to start transitioning from an economy largely based on fossil fuels to a decarbonized economy.³⁵ It sets a target to reduce emissions enough to restrict the rise in the global average temperature to well below 2°C, the scientifically-advised limit of safety, with an aspiration not to go below 1.5°C above pre-industrial levels.³⁶ Arguably, current climate plans and targets are still inadequate to meet the Paris Agreement climate goals, and countries will be compelled to re-evaluate their reliance on fossil fuels. Already, this has led to an increase in renewable energy development initiatives in different parts of the world.³⁷

In 2016, during the COP22, member states discussed the role and utility of companies in helping in the implementation and effectiveness of climate change mechanisms.³⁸ As stated above, the Paris Agreement is said to be the most important international treaty to be reached by the global community in recent years.³⁹ Although companies were not explicitly involved in the Paris negotiations, more than 500 signalled their support by agreeing to the Paris Pledge for Action.⁴⁰ ‘By signing this pledge, companies agree to implement and even exceed commitments made by governments under the Paris Agreement.’⁴¹ The role of MNCs in facilitating climate change places

³³ M Gagen, ‘Glasgow Climate Pact: Where Do all the Words and Numbers We Heard at COP26 Leave Us?’, *The Conversation*, 2021, <https://theconversation.com/glasgow-climate-pact-where-do-all-the-words-and-numbers-we-heard-at-cop26-leave-us-171704>.

³⁴ Gagen (n 33).

³⁵ Generally, see EG Pereira, Alberto José Fossa and Eghosa O Ekhtator *et al*, ‘Fossil Fuel and the Global Energy Transition: Regulation and Standardisation as Panacea for a More Sustainable World Energy Order’ (2022) 8(5) *Brazilian Journal of Development* 39838–65.

³⁶ F Harvey, ‘The Paris Agreement Five Years On: Is It Strong Enough to Avert Climate Catastrophe?’, *The Guardian*, 8 December 2020, <https://www.theguardian.com/environment/2020/dec/08/the-paris-agreement-five-years-on-is-it-strong-enough-to-avert-climate-catastrophe>, accessed 25 May 2023.

³⁷ A Balthasar *et al*, ‘Energy Transition in Europe and the United States: Policy Entrepreneurs and Veto Players in Federalist Systems’ (2020) 29 (1) *The Journal of Environment & Development* 3–25.

³⁸ Hori and Syugyo (n 28).

³⁹ J Vidal and A Vaughan, ‘Paris Climate Agreement “may signal end of fossil fuel era”’, *The Guardian*, 13 December 2015, <https://www.theguardian.com/environment/2015/dec/13/paris-climate-agreement-signal-end-of-fossil-fuel-era>, accessed 25 May 2023.

⁴⁰ Comyns (n 31).

⁴¹ Comyns (n 31), 65.

an obligation (at least a moral one) on them to be at the forefront of efforts aimed at addressing climate change.

An important pre-requirement for MNCs and private sector adaptation is the ability or capacity to adapt. Adaptation and mitigation policies are expensive ventures and increases economic costs for companies.⁴² Perhaps only rich and wealthy firms (especially MNCs) are in the position to engage in such measures. Adaptive capacity affects the extent to which a business or firm is cognizant of its 'vulnerability, and can evaluate, make decisions about and implement adaptation measures, whether in anticipation or in response to climate change impacts'.⁴³

However, not all companies or MNCs have adequate capacity to deliver adaptation to climate change for their operations or the communities in which they operate. Also, some companies might claim that, due to government policies, regulations and laws, they are unable to do more to deliver adaptation and mitigation measures. Arguably, this is what is occurring in the Niger Delta region of Nigeria. Here, some MNCs are pulling out of some parts of the extractive industry after decades of economic activities that have exacerbated the environmental crisis in the Niger Delta region. However, even though some MNCs are divesting from onshore oil and gas operations in Nigeria, MNCs still have an obligation to finance environmental remediation/restoration activities, decommission disused facilities, and pay just compensation for other damages, 'whilst ensuring proper consultation and thorough consideration of community needs throughout this process'.⁴⁴

Mitigation is the duty to reduce climate-producing endeavours.⁴⁵ Policies or measures 'to mitigate global climate change entail significant economic costs. Yet a growing number of firms lobby in favour of regulation to mitigate carbon emissions'.⁴⁶ Thus, notwithstanding the costs of adaptation and mitigation responses by MNCs to climate change, and the opposition of some MNCs to these measures, there appears to be universal approval by a

⁴² A Kennard, 'The Enemy of My Enemy: When Firms Support Climate Change Regulation' (2020) *International Organization* 187–221.

⁴³ A Averchenkova *et al*, 'Multinational Corporations and Climate Adaptation – Are We Asking the Right Questions? A Review of Current Knowledge and a New Research Perspective' (2015) Grantham Research Institute on Climate Change and the Environment Working Paper 183, 2.

⁴⁴ Stakeholder Democracy Network (SDN), 'Divesting from the Delta: Implications for the Niger Delta as International Oil Companies Exit Onshore Production', 2021, <https://www.stakeholderdemocracy.org/report-divestment/>, accessed 25 May 2023.

⁴⁵ GAS Edwards, 'Climate Justice' in B Coolsaet (ed), *Environmental Justice: Key Issues* (Routledge 2021) 148–60.

⁴⁶ Kennard (n 42), 187.

plethora of MNCs.⁴⁷ Thus, it can be argued that there is a business case for MNCs to engage in adaptation and mitigation activities that will invariably enhance or contribute to profit maximization.⁴⁸

Therefore, the extent of the climate challenge has led to a growing recognition at global and national levels of the need to engage the private sector, especially MNCs, in climate change governance.⁴⁹ However, some stakeholders and academics have argued that major MNCs are not meeting their net-zero climate change pledges.⁵⁰ For example, the Corporate Climate Responsibility Monitor Report 2022 suggests that many MNCs fall short of the targets set in the globally agreed goals of the Paris Agreement and that were developed to avoid the serious impacts of climate change.⁵¹

Reliance on the concept of climate justice can be one of the strategies that can be used to protect and promote the rights of Nigerians in climate actions. The most vulnerable in society tend to be the major victims of the negative impacts of climate change in different parts of the world. Climate justice is commonly referred to as the inequitable 'distribution of costs and burdens of climate change'.⁵² The concept of climate justice is a framework that has been developed to help in addressing the injustices or inequities inherent in the global climate regime.⁵³

Arguably, the concept of climate justice is implicit and explicit in some of the existing international frameworks on climate change (for example, the Paris Agreement and UNFCCC). Hence the next section focuses on the concept of climate justice and its implications for climate change governance.

Overview of climate justice

There is a plethora of definitions or connotations of climate justice; there is no universally accepted definition.⁵⁴ For example, climate justice is premised on the need for international law to protect the rights of the most vulnerable

⁴⁷ Kennard (n 42), 187.

⁴⁸ Sullivan and Gouldson (n 27).

⁴⁹ Obani and Ekhatior (n 17).

⁵⁰ S Meredith, 'World's Biggest Companies Accused of Exaggerating Their Climate Actions', CNBC, 7 February 2022, <https://www.cnbc.com/2022/02/07/study-worlds-biggest-firms-seen-exaggerating-their-climate-actions.html>, accessed 25 May 2023.

⁵¹ Meredith (n 50).

⁵² P Kashwan, 'Climate Justice in the Global North: An Introduction' (2021) 5(1) *Case Studies in the Environment* 1–13, 4.

⁵³ F Sultana, 'Critical Climate Justice' (2022) 188(1) *The Geographical Journal* 118–24.

⁵⁴ T Jafry, K Helwig and M Mikulewicz (eds), *Routledge Handbook of Climate Justice* (Routledge 2018).

from the unequal negative impacts of climate change.⁵⁵ However, this chapter favours the definition of climate (change) justice as proffered by the Task Force on Climate Change Justice and Human Rights of the International Bar Association (the IBA Task Force). The IBA Task Force defines climate justice as follows:

To ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems and, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights.⁵⁶

Thus, climate justice is a concept or framework that acknowledges that climate change will unduly affect people or communities who are less capable in preventing, adapting or being able to respond to its negative impacts, such as the now common extreme weather occurrences, rising sea levels and new resource limitations.⁵⁷ In essence, climate justice embeds the explicit recognition of the development inequities accentuated by climate change.⁵⁸

Climate justice is an offshoot of environmental justice, and environmental justice is also a movement and concept.⁵⁹ For example, there is close connection between the struggles for environmental justice and climate justice in the Niger Delta. Thus, there is an explicit link between the grassroots struggles of people suffering from pollution to broader concerns about the climate change impact of MNCs – mostly because of the same conduct by the same MNCs. They pollute locally, and globally, with the effects being felt even more locally due to vulnerabilities in the Niger Delta.⁶⁰

⁵⁵ DS Olawuyi, 'Advancing Climate Justice in International Law: An Evaluation of the United Nations Human Rights-Based Approach' (2015) 11 *Florida A & M University Law Review* 103–25.

⁵⁶ International Bar Association (IBA), 'Achieving Justice and Human Rights in an Era of Climate Disruption', (2014) 2 <https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04>, accessed 25 May 2023.

⁵⁷ IBA (n 56); Sultana (n 53).

⁵⁸ IBA (n 56); Edwards (n 45).

⁵⁹ For example, K Jenkins, 'Setting Energy Justice Apart from the Crowd: Lessons from Environmental and Climate Justice' (2018) 39 *Energy Research & Social Science* 117–21, 117 defines environmental justice 'as the distribution of environmental hazards and access to all natural resources; it includes equal protection from burdens, meaningful involvement in decisions, and fair treatment in access to benefits'.

⁶⁰ Also, see K Bouwer, 'The influence of human rights on climate litigation in Africa' (2022) 13 (1) *Journal of Human Rights and the Environment* 157–77, 158.

Hence, notable environmental justice NGOs such as the Environmental Rights Action (ERA) have been at the forefront of promoting climate justice action in Nigeria.⁶¹

Environmental justice has an indelible impact on how climate justice has been conceptualized and developed as a scholarly construct.⁶² On the other hand, Edwards suggests that ‘climate justice’ as an idea or a concept emerged concurrently in scholarly circles and civil society when climate change issues rose to prominence and public consciousness in the 1990s.⁶³ Like environmental justice, climate justice is rooted in anti-establishment social movements. Schlosberg and Collins suggests that one of the conceptualizations of climate justice is that it is rooted in grassroots movements.⁶⁴ At the international level, climate justice is also a transnational movement encompassing a coalition of groups that mobilized during successive climate change conferences.⁶⁵ This is exemplified in the development of the Bali Principles of Climate Justice, which, according to Gonzalez, is ‘the first major articulation of the idea of climate justice by a transnational social movement’.⁶⁶

Notwithstanding that the concepts of climate justice and environmental justice originated as theories in the Global North, this terminology has diffused to other parts of the world.⁶⁷ In the Global South, climate justice has become a popular mobilizing narrative used by various stakeholders to formulate strategies to hold different actors (including government and non-state actors) accountable for their actions, omissions and commitments under various climate change frameworks (both domestic and global).⁶⁸ Arguably,

⁶¹ Generally, see DN Pellow, ‘Global Environmental and Climate Justice Movements’ in É Laurent and K Zwickl (eds), *The Routledge Handbook of the Political Economy of the Environment* (Routledge 2021).

⁶² D Schlosberg and LB Collins, ‘From environmental to climate justice: climate change and the discourse of environmental justice’ (2014) 5(3) *Wiley Interdisciplinary Reviews: Climate Change* 359–74.

⁶³ Edwards (n 45), 149. Also, see RD Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Westview 1990).

⁶⁴ Schlosberg and Collins (n 62).

⁶⁵ CG Gonzalez, ‘Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses’ (2018) 36 *Wisconsin International Law Journal* 366–96.

⁶⁶ Gonzalez (n 65), 371.

⁶⁷ Generally, see PC Pezzullo, ‘Environmental Justice and Climate Justice’ in M Grasso and M Giugni (eds), *The Routledge Handbook of Environmental Movements* (Routledge 2022) 229–44. However, some scholars and activists suggest that concept of climate justice originated in the Global South. Generally, see Carbon Brief, ‘In-depth Q&A: What is “climate justice”?’ 4 October 2021, <https://www.carbonbrief.org/in-depth-qa-what-is-climate-justice/>, accessed 25 May 2023.

⁶⁸ S Fisher, ‘The Emerging Geographies of Climate Justice’ (2015) 181(1) *The Geographical Journal* 73–82.

the character of climate justice might be distinct in the Global South. For example, Pezzullo suggests that in some parts of the Global South climate justice is characterized by reliance on ancient or indigenous knowledge and already existing environmental justice mobilization movements.⁶⁹ Hence, some scholars and activists suggest that Global South and Global North countries contributed equally to the development of environmental justice and climate justice paradigms.⁷⁰

Akin to environmental justice, which is underpinned by distributional, procedural and recognitional justice dimensions, among others; climate justice is also underpinned by similar justice dimensions. Therefore, the three recurrent themes of environmental justice (and climate justice) consist of distributive, procedural and recognition elements and these are sometimes referred to as the 'three concepts of justice'.⁷¹ Also, the IPCC, via its Intergovernmental Panel on Climate Change Working Group III in a report in 2022, states that the climate justice concept consists of distributional, procedural and recognition principles.⁷²

The distributional dimension of climate justice focuses on the 'fair distribution of costs and burdens of climate change and the societal responses to climate change'.⁷³ In many parts of the world, people are not protected equally from the vagaries of climate change and the most vulnerable in society tend to bear the worst effects of climate change. This means that poorer countries suffer disproportionately and that more vulnerable communities within both less and relatively affluent nations experience or are subject to environmental and climate injustice. One conceptualization of this distributive dimension is via the North/South divide.⁷⁴ Gonzalez and Atapattu have noted that developed countries are responsible for climate change damage, 'accounting for seventy four per cent of global economic activity since 1950, though such nations comprise only eighteen per cent

⁶⁹ Pezzullo (n 67).

⁷⁰ LSE Grantham Research Institute on Climate Change and the Environment, 'What Is Meant by "Climate Justice"?', 7 June 2022, <https://www.lse.ac.uk/granthaminstitute/explainers/what-is-meant-by-climate-justice/#:~:text=More%20generally%2C%20climate%20justice%20highlights,their%20higher%20per%2Dcapita%20emissions.>, accessed 25 May 2023.

⁷¹ G Walker, *Environmental Justice: Concepts, Evidence and politics* (Routledge 2012). On the other hand, according to D Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (OUP 2007), the four dimensions of environmental justice are distribution, recognition, participation and capabilities.

⁷² Climate Change 2022: Impacts, Adaptation and Vulnerability, www.ipcc.ch/report/ar6/wg2/, accessed 25 May 2023.

⁷³ Kashwan (n 52), 4.

⁷⁴ CG Gonzalez and S Atapattu, 'International Environmental Law, Environmental Justice, and the Global South' (2016) 26 *Transnational Law & Contemporary Problems* 229–42.

of the planet's population'.⁷⁵ Notwithstanding their lesser contribution to climate change, several countries and marginalized societies or communities in the Global South bear an unequal share of the negative impacts of climate change due to their vulnerable physical locations and inadequate resources for climate change actions.⁷⁶

In the Global North, (for example, in the United States), ethnic minorities and poorer people in society, who are already facing environmental injustices, bear the worst of climate change.⁷⁷ In the Global South, already vulnerable communities and individuals face the brunt of environmental injustices exacerbated by the impacts of climate change.⁷⁸ The Niger Delta is said to be among the least developed parts of Nigeria, and has a high incidence of poverty and inadequate infrastructure or amenities.⁷⁹ Due to the more than six decades of oil exploration production activities, the Niger Delta is also one of the areas in Nigeria most impacted by climate change and the industries that cause it, especially with the rise in global warming and the impacts of gas flaring and allied activities.⁸⁰ Unless concerted efforts are made by the relevant stakeholders to develop climate actions, the Niger Delta will continue to bear the brunt of the negative impacts of climate change and the industries that have caused it.

Another dimension of climate justice is procedural justice, 'which refers to whether and how the groups most affected by climate change have meaningful opportunities to participate in brainstorming, designing, and implementing climate responses'.⁸¹ In Nigeria, very few laws encourage public participation and consultation in environmental and climate-based issues. Furthermore, there is a plethora of challenges associated with procedural justice in Nigeria (especially in oil and gas, where the bulk of environmental injustices takes place), including the limited resources of

⁷⁵ Gonzalez and Atapattu (n 74), 230.

⁷⁶ Gonzalez (2018) (n 65).

⁷⁷ Kashwan (n 52).

⁷⁸ R Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (Routledge 2013).

⁷⁹ E Emeseh, 'Limitations of Law in Promoting Synergy Between Environment and Development Policies in Developing Countries: a Case Study of the Petroleum Industry in Nigeria' (2006) 24 *Journal of Energy and Natural Resources Law* 574–606.

⁸⁰ HP Faga and U Uchechukwu, 'Oil Exploration, Environmental Degradation, and Future Generations in the Niger Delta: Options for Enforcement of Intergenerational Rights and Sustainable Development Through Legal and Judicial Activism' (2019) 34 *Journal of Environmental Law & Litigation* 185–218.

⁸¹ Kashwan (n 52), 5. Also, Kashwan argues that in the United States, ethnic minorities have been underrepresented in environmental (including) climate movements and environmental law-making process.

litigants and delays in judicial proceedings, among others.⁸² These factors have hampered access to environmental justice in Nigeria and arguably will also have negative impacts on climate justice. Fortunately, activists, NGOs (local and foreign), oil communities, individuals and other relevant stakeholders have relied on national, sub-regional and regional litigation to improve access to environmental justice in Nigeria, and this has implications for climate justice in Nigeria.⁸³ Litigation is one of the strategies that can be used to enhance the procedural justice dimension of climate justice.

The next dimension of climate justice is recognitional justice. Chu and Michael,⁸⁴ relying on Miranda Fricker's work,⁸⁵ define recognitional justice as the 'explicit forms of unfair treatment of experiences, understandings, and participation in communicative or decision-making practices'. Many relevant actors or stakeholders from different social groups are not always recognized as legitimate actors, whose awareness of the problems and interests (or priorities) 'should inform the design and implementation of policies and programs'.⁸⁶ Furthermore, some marginalized or vulnerable groups can also be misrecognized which, according to Fraser, is how some policies or actions lead to the situation whereby relevant stakeholders are seen as 'less than full members of society' and prevented from participating as equals.⁸⁷

One of the major causes of the intractable conflicts in Niger Delta is the lack of recognition and participation of the people of the Niger Delta in the governance framework.⁸⁸ Thus, laws that encourage public participation and consultation with the people in environmental and climate-based issues should be enacted in Nigeria. In the context of the Niger Delta,

⁸² EO Ekhaton, 'Improving Access to Environmental Justice Under the African Charter on Human and Peoples' Rights: The Roles of NGOs in Nigeria' (2014) 22(1) *African Journal of International and Comparative Law* 63–79.

⁸³ Obani and Ekhaton (n 17).

⁸⁴ E Chu and K Michael, 'Recognition in Urban Climate Justice: Marginality and Exclusion of Migrants in Indian Cities' (2019) 31(1) *Environment and Urbanization* 139–56, 142.

⁸⁵ M Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007).

⁸⁶ Kashwan (n 52), 6.

⁸⁷ N Fraser, 'Rethinking Recognition' (2002) 3 *New Left Review* 107–20, 114. Also, some scholars have argued that in the United States, government policies and responses have prioritized richer parts of the United States rather than the areas with ethnic minorities and poorer citizens. Generally, see Kashwan (n 52) and P McKenna, 'What's Happening in Puerto Rico Is Environmental Injustice,' SLATE, 27 September 2017, <https://slate.com/technology/2017/09/puerto-rico-is-experiencing-a-crisis-created-by-environmental-injustice.html>, accessed 25 May 2023.

⁸⁸ R Ako, P Okonmah and T Ogunleye, 'The Niger Delta Crisis: A Social Justice Approach to the Analysis of Two Conflict Eras' (2009) 11(2) *Journal of African Development* 105–22.

oil-producing or host communities should be recognized by the government and MNCs as important stakeholders in environmental governance.⁸⁹

However, it should be noted that reliance on justice principles in the climate justice paradigm has been criticized by some scholars. One reason given is that the emphasis on justice diminishes rather than enhances climate policy and regulation.⁹⁰ Furthermore, the notion of justice or injustice can be subject to different understandings and interpretations. The concept of climate justice is also understood and subject to a wide range of understandings (and interpretations) in its usage, and this is said to be one of its major weaknesses.⁹¹

Another major criticism is that the concept or principles of climate justice have already been integrated partially in the current climate change regime.⁹² This is exemplified by the implicit recognition of climate justice in the preamble to the Paris Agreement.⁹³ This does not mean that climate justice has been achieved. A major weakness of the inclusion of the concept of climate justice (including human rights) in the Paris Agreement is that the preamble is not enforceable.⁹⁴ Some of the global mechanisms promoting climate justice remain generally out of the reach of many of the individuals who are seeking or pursuing climate justice.⁹⁵

Notwithstanding the criticisms of climate justice, it remains a valid and useful framework to analyse injustices in the global climate regime. Also, the concept of climate justice is one of the strategies that have been relied upon by activists, NGOs, communities, and other relevant stakeholders in different parts of the world (including in developing countries) in mitigating the negative impacts of climate change on the most vulnerable in society and helping to hold MNCs and government accountable for their climate action commitments.

Climate litigation is on the rise globally. The next section focuses on how climate litigation can be used as one of the strategies to promote climate justice.

⁸⁹ Ako, Okonmah and Ogunleye (n 88).

⁹⁰ Edwards (n 45).

⁹¹ Jenkins (n 59).

⁹² CG Gonzalez, 'Racial Capitalism, Climate Justice, and Climate Displacement' (2021) 11(1) *Oñati Socio-Legal Series, Symposium on Climate Justice in the Anthropocene* 108–47.

⁹³ JR May and E Daly, 'Global Climate Constitutionalism and Justice in the Courts' in Jordi Jaria-Manzano and Susana Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar Publishing 2019).

⁹⁴ A Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67(4) *International & Comparative Law Quarterly* 759–77.

⁹⁵ May and Daly (n 93).

Climate litigation to promote climate justice

Arguably, due to the weaknesses in the global climate change framework (including the Paris Agreement), other strategies, including litigation, have evolved to seek justice or redress for past and future harm arising from climate change.⁹⁶ It has also been contended that the Paris Agreement has positively impacted the rising number of climate-related cases in different parts of the world.⁹⁷ Furthermore, the role of climate litigation in impacting climate governance has been recognized by a plethora of international agencies, including the UNEP and IPCC.⁹⁸

Climate litigation is now a global phenomenon challenging governments and corporations (including MNCs) for their climate change response.⁹⁹ Furthermore, there is perceived slowness in Global South countries, but the character of climate litigation in those countries may be different, including a close connection with environmental justice cases.¹⁰⁰ Notwithstanding the disproportionate impact of climate change on Africa, some scholars posit that there have been very few cases in Africa.¹⁰¹ There will be a rise in climate litigation cases in Africa soon. One plausible reason for this assertion, is that the regional African Human Rights system which is well-grounded and has been at the forefront of innovative treaties and judicial decisions. Also, previous environmental rights or environmental justice decisions of national, sub-regional, and regional courts in Africa can be reconceptualized from a

⁹⁶ C Beaugard *et al*, 'Climate Justice and Rights-Based Litigation in a Post-Paris World' 21(5) *Climate Policy* 652–65.

⁹⁷ Generally, see J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' 113(4) *American Journal of International Law* 679–726; J Setzer and C Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2022).

⁹⁸ Generally, see UNEP, 'The Status of Climate Litigation: A Global Review', 2017, <https://wedocs.unep.org/handle/20.500.11822/20767>. 'Climate Change 2022: Mitigation of Climate Change', Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change <https://www.ipcc.ch/report/ar6/wg3/>, accessed 25 May 2023.

⁹⁹ G Ganguly, J Setzer and V Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 *Oxford Journal of Legal Studies* 841.

¹⁰⁰ Peel and Lin (n 97); C Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 *American Journal of International Law* 40–4.

¹⁰¹ LJ Kotzé and A du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent' 50(3) *Environmental Law* 615–63.

climate justice or climate protection lens.¹⁰² This will have implications for climate litigation in Africa in the future.¹⁰³

This chapter relies on a broader definition or conceptualization of climate litigation – that existing environmental rights/justice cases can be reconceptualized as climate litigation whether they have peripheral or central connections with climate change issues.¹⁰⁴ Thus, in the context of climate litigation in Nigeria, Niger Delta environmental justice cases are arguably the model of climate litigation in the country.¹⁰⁵ This chapter analyses or reconceptualizes *Gbemre v Shell* and *Centre for Oil Pollution Watch v Nigerian National Petroleum Corpn*¹⁰⁶ as climate litigation case law or jurisprudence. The reasons for focusing specifically on these two cases is because they are internationally recognized as expressly being climate cases,¹⁰⁷ and environmental justice and climate justice issues are close in those cases.¹⁰⁸

The next section focuses on the potential of climate litigation in Nigeria.

Climate change litigation in Nigeria

Before discussing climate litigation in Nigeria, this section will briefly highlight the climate change regime in Nigeria. The Nigerian government has always actively engaged with international climate conferences and negotiations.¹⁰⁹ African states are expected to enact substantive climate change laws due to their international obligations under international (including African Union) instruments.¹¹⁰ However, the Nigerian Constitution does

¹⁰² Also see T Morgenthau and N Reisch, 'Litigating the Frontlines: Why African Community Rights Cases Are Climate Change Cases' (2020) 25 *UCLA Journal of International Law & Foreign Affairs* 85.

¹⁰³ SJ Adelman, 'Climate Change Litigation in the African System' in I Alogna, C Bakker and J-P Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021).

¹⁰⁴ Bouwer (n 60).

¹⁰⁵ Also, see Bouwer (n 60); Etemire (n 18).

¹⁰⁶ *Gbemre v Shell*, Suit No. FHC/B/CS/153/05; *Centre for Oil Pollution Watch v Nigerian National Petroleum Corpn* [2019] 5 NWLR 518.

¹⁰⁷ For example, the University of Columbia climate chart website lists *Gbemre* and *COPW* as climate litigation cases from Nigeria, <http://climatecasechart.com/non-us-juris-diction/nigeria/>, accessed 25 May 2023.

¹⁰⁸ However, see M Adigun and AO Jegede, 'A Human Rights Approach to Climate Litigation in Nigeria: Potentialities and Agamben's State of Exception Theory' (2023) 16(3) *Carbon & Climate Law Review* 179–91, who analysed climate litigation in Nigeria from human rights-centred approach.

¹⁰⁹ OF Oluduro, 'Combating Climate Change in Nigeria: An Appraisal of Constitutional and Legal Frameworks' (2020) 38 *Wisconsin International Law Journal* 269–300.

¹¹⁰ For example, the Africa Union's Climate Change and Resilient Development Strategy and Action Plan (2022–2032) 4 states that 'the Strategy provides a robust framework for ensuring climate justice for Africa through inclusive and equitable participation in climate action and climate-resilient development pathways'.

not explicitly provide for measures by the state and its citizens to adequately tackle the scourge of climate change in Nigeria.¹¹¹ Until November 2021, when President Buhari signed into law Nigeria's Climate Change Act 2021,¹¹² there was no standalone or specific climate change legislation in Nigeria.¹¹³ Arguably, the enactment of the Climate Change Act is a fulfilment of Nigeria's commitments to the ideals of the global climate regime, including the Paris Agreement.

Notwithstanding the absence of climate change law in Nigeria until November 2021, a plethora of laws, policies and guidelines have been used as means of regulating climate change issues in Nigeria.¹¹⁴ Furthermore, the new climate change law in Nigeria has been applauded by scholars and other relevant stakeholders for its mechanisms, such as the establishment of the National Council on Climate Change.¹¹⁵ Some of the other key innovations of the Nigerian Climate Change Act include the following: it provides a framework for achieving low GHG emissions and embedding climate action into national programmes; the possibility of the development of the Climate Change Fund (including for carbon taxes); and the law is applicable to both private and public companies, and government agencies and bodies.¹¹⁶ The National Council on Climate Change has been established and the first Director General of its Secretariat was appointed in July 2022.¹¹⁷ These recent developments shows that the Nigerian government is committed to the successful implementation of the Climate Change Act in the country.

¹¹¹ Oluduro (n 109).

¹¹² A copy of the Nigerian Climate Change Act 2021 is available online at https://climate-laws.org/document/nigeria-s-climate-change-act_5ef7, accessed 25 May 2023.

¹¹³ Generally, see MA Ayoade, 'Bridging the Gap Between Climate Change and Energy Policy Options: What Next for Nigeria?' in P Kameri-Mbote *et al* (eds), *Law | Environment | Africa* (Nomos Verlagsgesellschaft mbH & Co. KG 2019).

¹¹⁴ Some of the laws and policies include the Nigerian Constitution 1999, the National Environmental Standards and Regulations Enforcement Agency (NESREA) (Establishment) Act 2007, the 2011 National Adaptation Strategy and Plan of Action on Climate Change for Nigeria (NASPA-CCN) and the 2012 Nigeria Climate Change Policy Response and Strategy, among others. Generally, see OO Olashore, 'Implementation of the International Legal Framework Regarding Climate Change in Developing Countries; A Review of Nigeria, Kenya, and Botswana's Environmental Provisions Governing Climate Change' (2019) 21(3) *Environmental Law Review* 189–209.

¹¹⁵ PwC Nigeria, 'Nigeria's Climate Change Act – Things to Know and Prepare for', 18 January 2022, <https://www.pwc.com/ng/en/publications/nigeria-climate-change-act-things-to-know.html>, accessed 25 May 2023. Also see the chapter by Ademola Jegede in this volume.

¹¹⁶ PwC Nigeria (n 115).

¹¹⁷ Z Abubakar, 'President Buhari Appoints DG National Council on Climate Change', Voice of Nigeria (VON), 29 July 2022, <https://von.gov.ng/president-buhari-appoints-pioneer-dg-national-council-on-climate-change/>, accessed 25 May 2023.

However, there are weaknesses.¹¹⁸ Section 15(1)(e) of the Nigerian Climate Change Act stipulates for a carbon tax in the country. Arguably, one of the major strengths of carbon tax regime under the Nigerian Climate Change Act is that, if it is well implemented, it might help reduce climate pollution by internalizing its economic costs and disincentivizing emissions,¹¹⁹ if properly applied. On the other hand, some argue that, due to the antecedents of governmental agencies and activities of MNCs in the Nigerian oil and sector, carbon taxes will not have the desired impacts in Nigeria. One major criticism is that the development of carbon taxes without adequate consultation with the relevant stakeholders might be unsuccessful and could lead to additional burdens on taxpayers in Nigeria.¹²⁰ Notwithstanding the criticisms of carbon tax regime in Nigeria, it is a step in the right direction for climate justice in the country. It should be said that, despite the new legislation, and notwithstanding that the Nigerian government has promised to end gas flaring in country by 2030,¹²¹ continuous gas flaring in the Niger Delta will continue in the meantime, worsening environmental and climate change harms in Nigeria.¹²²

Arguably the enactment of the Climate Change Act will have positive implications for climate change litigation in Nigeria. For example, section 34 of the Climate Change Act states:

(1) A person, or private or public entity that acts in a manner that negatively affects efforts towards mitigation and adaptation measures made under this Act commits an offence and is liable to a penalty to be determined by the Council.

¹¹⁸ PwC (n 115). Also see Adigun and Jegede (n 108).

¹¹⁹ Generally, see A Mojeed, 'Climate Change: FG to Unveil Carbon Tax System in Nigeria', Premium Times, 13 February 2023, <https://www.premiumtimesng.com/news/more-news/581752-climate-change-fg-to-unveil-carbon-tax-system-for-nigeria.html>, accessed 25 May 2023. For the utility of the carbon tax regime in South Africa, see M Nemavhidi and AO Jegede, 'Carbon Tax as a Climate Intervention in South Africa: A Potential Aid or Hindrance to Human Rights?' (2023) 25(1) *Environmental Law Review* 11–27.

¹²⁰ PwC (n 115). However, on the other hand, the new Petroleum Industry Act 2021 has just reduced taxes on petroleum activities; perhaps there is space for additional tax burdens for MNCs in Nigeria. Arguably, if MNCs and other emitters are charged carbon taxes, such taxes can be used to address some of the climate-related impacts of the oil and gas industry.

¹²¹ J Lo, 'Nigeria to End Gas Flaring by 2030, Under National Climate Plan', Climate Home News, 13 August 2021, <https://climatechangenews.com/2021/08/13/nigeria-end-gas-flaring-2030-national-climate-plan/#:~:text=The%20Nigerian%20government%20has%20pledged,huge%20part%20of%20Nigeria's%20emissions>, accessed 25 May 2023.

¹²² Furthermore, the Nigerian government is in the process of awarding contracts to capture flared gas in the country, <https://www.reuters.com/world/africa/nigeria-award-flare-gas-contracts-by-end-december-2022-10-04/>, accessed 25 May 2023.

- (2) A Court, before which a suit regarding climate change or environmental matters is instituted, may make an order –
- (a) to prevent, stop or discontinue the performance of any act that is harmful to the environment;
 - (b) compelling any public official to act in order to prevent or stop the performance of any act that is harmful to the environment;
 - (c) compensation to the victim directly affected by the acts that are harmful to the environment.

Furthermore, the possible imposition of climate obligations on public and private entities, under section 23 and 24 of the Act, could form the basis of a cause of action against them in climate litigation. Also, section 26 provides for climate change education. This can both boost climate awareness but also lead to litigation in Nigeria if the provisions of the section are not met. Thus, the new legislation will not only hopefully improve climate action in Nigeria, but also create avenues for legal challenges if its promises are not fulfilled. There are clear legislative duties to reduce harm and a failure to meet these can be challenged in the courts.¹²³

As highlighted in the previous section, one strategy for enhancing the procedural justice dimension of climate justice is via climate litigation. Akin to environmental justice, climate justice is also based on the realization of human rights, including the right to health, the right to life, the right to healthy environment, the right to information, access to justice and participation, among others.¹²⁴ Enforceable human rights provisions in national constitutions can be ‘greened’ to enhance climate justice in countries.¹²⁵ The Nigerian Constitution does not provide for justiciable and enforceable socio-economic rights,¹²⁶ and the overarching view is that there has been no justiciable or enforceable right to the environment *per se*.¹²⁷ Arguably, this is no longer the case. By virtue of the Supreme Court judgment

¹²³ Also, see MT Ladan, ‘Nigeria’s Climate Change Act and Policy 2021 and the Future of Climate Litigation’, SSRN, 2022, <https://ssrn.com/abstract=4019698> or <http://dx.doi.org/10.2139/ssrn.4019698>, accessed 25 May 2023.

¹²⁴ Gonzalez (n 65); Gonzalez (n 92).

¹²⁵ BE Ugochukwu, ‘Climate Change and Human Rights: How? Where? When?’ (2015) CIGI Papers, No. 82, November 2015, Osgoode Legal Studies Research Paper No. 45/2016 SSRN, <https://ssrn.com/abstract=2760399>.

¹²⁶ O Enabulele and E O Ekhaton, ‘Improving Environmental Protection in Nigeria: a Reassessment of the Role of Informal Institutions’ (2022) 13(1) *Journal of Sustainable Development Law and Policy* 162–99.

¹²⁷ On the other hand, Nigeria is a signatory to the African Charter on Human and Peoples’ Rights (‘African Charter’). The African Charter was domesticated into Nigerian law via the African Charter on Human and Peoples’ Rights (Enforcement and Ratification)

in the *Centre for Oil Pollution Watch v Nigerian National Petroleum Corpn* (the *COPW* case),¹²⁸ the right to environment is now justiciable and enforceable in Nigeria. In Nigeria, a strategy or route on how climate litigation can be relied upon in Nigeria is via the right to environment litigation that plays an important role in environmental protection in Nigeria. The right to a healthy and clean environment under domestic law and international human rights law can be the basis of climate change litigation¹²⁹ and enhancing climate justice in Nigeria. Also, the enactment of the Climate Change Act 2021 provides an opportunity for public participation in the burgeoning climate change framework in Nigeria. Furthermore, litigation premised on the Climate Change Act will arguably promote public awareness and advocacy by relevant stakeholders in the country.

The next part discusses two cases in Nigeria that are key to climate litigation in the country. The cases are *Gbemre v Shell* and the *COPW* case.¹³⁰ The first case to be discussed is the *Gbemre*'s case.

***Gbemre* case**

One of the first climate change cases in the world is *Gbemre v Shell Petroleum Development Nigeria Ltd* (the *Gbemre* case). According to Varvastian and Kalunga, *Gbemre* was the 'very first case to raise the issue of climate change in an African court'.¹³¹ Hence, the *Gbemre* case is internationally recognized or seen as a 'climate case'.¹³² In *Gbemre*, the plaintiff (on behalf of himself and his community) filed a suit against Shell (SPDC), the Attorney General and the Nigerian National Petroleum Corporation (NNPC) to end the practice of gas flaring. The plaintiff argued that the gas flaring laws that permitted gas flaring subject to ministerial approval contravenes the plaintiff's right to a healthy and clean environment. The court held that the gas flaring laws were 'inconsistent with the Applicant's right to life and/or

Act 1983. Article 24 of the African Charter provides the rights of the African people to a healthy environment, and, by domestication, Nigeria has localized the rights which are also enforceable in Nigeria. Arguably, the African Charter in tandem with relevant Nigerian laws can also be the basis of climate litigation in Nigeria.

¹²⁸ *Gbemre v Shell*, Suit No. FHC/B/CS/153/05; *Centre for Oil Pollution Watch v Nigerian National Petroleum Corpn* [2019] 5 NWLR 518.

¹²⁹ S Varvastian, 'The Human Right to a Clean and Healthy Environment in Climate Change Litigation' *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* (2019–09).

¹³⁰ *Gbemre v Shell* (n 128).

¹³¹ S Varvastian and F Kalunga, 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after *Vedanta v. Lungowe*' (2020) 9(2) *Transnational Environmental Law* 323–45, 332.

¹³² Generally, see Bouwer (n 60), 166.

dignity of human person' as enshrined in the Nigerian Constitution and the African Charter.¹³³

The court also held that the failure of SPDC and NNPC to undertake an environmental impact assessment (EIA) exercise in the Iwherekan community concerning the impacts of their gas flaring activities was in violation of section 2(2) of the Environmental Impact Assessment Act of 1992. This has implications for procedural and recognition dimensions of environmental (and climate) justice in the Niger Delta. The EIA Act is one of the few Nigerian laws explicitly promoting the participation and consultation of Nigerian citizens and other relevant stakeholders in environmental governance.¹³⁴ Here, the actions of SPDC and NNPC had negative impacts on the participation and recognition of Nigerian citizens in the EIA process, thereby worsening access to environmental justice (and climate justice) in Nigeria. This is arguably because some MNCs and governmental agencies in Nigeria regularly ignore the provisions of the Act regarding EIA exercises.¹³⁵

The *Gbemre* case was the first Nigerian judicial decision where the court adopted 'constitutional human rights approach to environmental protection with respect to climate unfriendly activities in the oil and gas sector'.¹³⁶ In its decision, the court alluded to and reiterated the plaintiffs' claims in their affidavit that 'gas flaring leads to the emission of carbon dioxide, the main greenhouse gas' and 'contributes to adverse climate change'.¹³⁷ From the distributive dimension of the climate justice paradigm, *Gbemre* shows how the negative consequences of climate change has more adverse impacts on the already poor and vulnerable in the Niger Delta. For example, uneven consequences of gas flaring are faced by the Niger Delta people, and most of the flare sites are located close to the oil-producing communities, and away from the more prosperous parts of the country. Thus, the environmental (and climate) injustices as exemplified by gas flares are unevenly distributed in Nigeria to the detriment of already vulnerable members of society (especially those living in the Niger Delta).

This judgment has been criticized and has not been enforced, so it has not had any impacts.¹³⁸ However, despite this, in 2021 SPDC instituted an appeal

¹³³ *Gbemre v Shell* (n 128), 30.

¹³⁴ *Ekhaton* (n 82).

¹³⁵ Generally, see *Ekhaton* (n 82).

¹³⁶ *Etemire* (n 18), 414.

¹³⁷ *Gbemre v Shell* (n 128), 4 and 5. Also see *Etemire* (n 18), 162–3.

¹³⁸ Generally, see B Faturoti, G Agbaitoro and O Onya, 'Environmental Protection in the Nigerian Oil and Gas Industry and *Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue?*' (2019) 27(2) *African Journal of International and Comparative Law* 225–45.

at the Court of Appeal against the decision in *Gbemre*.¹³⁹ The appeal was heard on 18 January 2023. This appeal will arguably create an opportunity for the Nigerian judiciary to provide more clarity on the implications of the *Gbemre* case for environmental justice (including climate justice) in the country. At the time of writing, a decision is still awaited.

However, some scholars have questioned whether *Gbemre* is a climate case.¹⁴⁰ For example, Bouwer suggests that the extent to which *Gbemre* is more of a climate case than other litigation against MNCs in Nigeria is questionable, because the judge just mentions climate change in passing.¹⁴¹ Thus, it is not any more material to the reasoning than in other case filed against oil MNCs in Nigeria. The argument of this chapter is that the climate change identity of *Gbemre* is better understood because of the closeness or connection between climate justice and environmental justice in this context.¹⁴² Furthermore, the large amount of litigation or cases filed against oil MNCs in Nigeria has to some extent improved the business activities of MNCs.¹⁴³ Arguably, *Gbemre* alone did not do much to improve climate justice in Nigeria, but it is recognized as a climate change case. Also, the utility or relevance of *Gbemre* can be juxtaposed with less well-known local litigation (in Nigeria) that has done a lot more to improve conditions in the Niger Delta.¹⁴⁴

The next part of this chapter focuses on a recent Nigerian Supreme Court decision, the *COPW* case, and its implications for climate justice and climate litigation in the country.

¹³⁹ E Addeh, 'Shell Challenges Judgement Ordering Halt to Gas Flaring in N'Delta Community', Thisday, 26 December 2021, <https://www.thisdaylive.com/index.php/2021/12/29/shell-challenges-judgement-ordering-halt-to-gas-flaring-in-ndelta-community>, accessed 25 May 2023.

¹⁴⁰ Etemire (n 18); PE Oamen and EO Erhagbe, 'The impact of climate change on economic and social rights realisation in Nigeria: International cooperation and assistance to the rescue?' (2021) 21 (2) *African Human Rights Law Journal* 1080–1111, Bouwer (n 60).

¹⁴¹ Bouwer (n 60).

¹⁴² Also see Bouwer (n 60). Another justification for reconceptualizing *Gbemre* as a climate litigation case, is that the judge in the case engaged with climate change issues. This formulation can be premised on the definition of climate litigation by Ganguly *et al* (n 99).

¹⁴³ Generally, see Ekhaton (n 82).

¹⁴⁴ For examples of successful lawsuits instituted against oil companies operating in Nigeria, see Centre for Environment, Human Rights and Development (CEHRD), 'After Bodo: Effective Remedy & Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria', 2015, <https://www.bebor.org/wp-content/uploads/2016/03/CEHRD-After-Bodo-Report.pdf>, accessed 25 May 2023.

Centre for Oil Pollution Watch case

Prior to the recent decision of the Supreme Court in *Centre for Oil Pollution Watch v Nigerian National Petroleum Corpn*, NGO involvement in public interest litigation in Nigeria was seriously hindered by the doctrine of *locus standi*. Nigerian courts were reluctant to rule that NGOs had the requisite legal standing to institute court cases especially in human rights and environmental issues.¹⁴⁵ However, in *COPW*, some of the justices in explicitly referred to sections 20 and 30 of the Nigerian Constitution, section 17(4) of the Oil Pipelines Act and article 24 of the African Charter to hold that the right to a clean and healthy environment is recognized under Nigerian law.¹⁴⁶ The Supreme Court held that environmental NGOs have the *locus standi* (legal standing) to institute environmental cases in Nigeria.¹⁴⁷ This case has liberalized the *locus standi* of NGOs in environmental matters in Nigeria, thereby improving access to environmental justice and promoting sustainable development for those wishing to bring action to protect the environment in Nigeria.¹⁴⁸

The *COPW* case has implications for climate change litigation in Nigeria¹⁴⁹ and, as such, the promotion of climate justice. Arguably, the *COPW* case promotes the three dimensions of environmental justice and climate justice – distributive, procedural and recognition. For example, the court stated:

every person, including NGOs, who bona fide seek in the law court the due performance of statutory provisions or public laws, especially laws

¹⁴⁵ Also, see EP Amechi, and A Ihua-Maduenyi, 'Greening the Judiciary in Nigeria: Centre For Oil Pollution Watch v. NNPC in Perspectives' (2022) 1(2) *African Journal of Law and Justice System* 39–60; MC Anozie, and EO Wingate, 'NGO Standing in Petroleum Pollution Litigation in Nigeria – Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation' (2020) 13(5–6) *The Journal of World Energy Law & Business* 490–7.

¹⁴⁶ However, 'it should be noted that these comments by the Supreme Court's justices on right to environment were made *obiter* and right to environment was not an issue directly before the court. On the other hand, this decision can serve as a launchpad to further develop the evolving jurisprudence around economic and social rights (ESR) in Nigeria'. See E Ekhatior, 'Sustainable Development and the African Union Legal Order' in O Amao, M Olivier and K Magliveras (eds), *The Emergent African Union Law: Conceptualization, Delimitation, and Application* (Oxford University Press 2021) 335–58, 353.

¹⁴⁷ *COPW* 571.

¹⁴⁸ However, TN Alatisé, 'The Future of "Standing to Sue" in Environment and Climate Change Litigations in Nigeria' (2022) 13(1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 28–39, 37 argues that there 'is the need to translate this judicial breakthrough into a substantive legislative provision in order to remove it from the vagaries of judicial interpretations'.

¹⁴⁹ Oamen and Erhagbe (n 140); Etemire (n 18).

designed to protect human lives, public health and the environment, should be regarded as proper persons clothed with in law to request adjudication on such issues of public nuisance that are injurious to human lives, public health and environment.¹⁵⁰

Arguably, this can be applied to climate action in Nigerian courts.

Furthermore, from a distributive justice dimension, one possible implication of the *COPW* case is that oil communities and individuals suffering from the negative impacts of the activities of oil MNCs will be able sue such companies successfully notwithstanding the lack of explicit environmental rights provisions in the Nigerian Constitution. Thus, this might act as a restriction on the oil companies engaging in egregious activities that will worsen environmental injustices in Nigeria.

From a procedural justice dimension, *COPW* arguably improves or enhances access to environmental justice (including climate justice) in Nigeria for individuals, communities and environmental injustice victims. For example, NGOs can now sue on behalf of communities or individuals in environmental justice litigation. Many environmental injustice victims in the Niger Delta are poor and do not have the financial resources and technical expertise to take on oil companies in Nigeria. Thus, the broadening of the legal standing of environmental NGOs will enable NGOs (acting in the public good via public interest litigation) to sue on behalf of environmental injustice victims. With proper engagement, this will improve the participation of individuals and communities in environmental justice in Nigeria. Environmental public interest litigation takes more prominence in Nigeria because many of the government agencies that are responsible for environmental protection and remediation do not live up to that legal responsibility. Thus, litigation by public-spirited individuals and NGOs or pressure groups can be a strategy to ensure that governmental agencies live up to their environmental protection responsibility in Nigeria.¹⁵¹

From a recognition justice dimension, everyone in Nigeria (and not just the government and MNCs) by virtue of the *COPW* case is now seen as a relevant stakeholder in the promotion of environmental justice in the country. The court stated that no specific person or individual owns the environment, and the 'environment is a public good'.¹⁵² Thus, arguably by virtue of *COPW*, every Nigerian (including public-spirited taxpayers and NGOs) are recognized stakeholders in environmental justice (including climate justice) promotion in Nigeria.

¹⁵⁰ *COPW* 595.

¹⁵¹ Also see, *COPW* 591–2.

¹⁵² Also see Etemire (n 18), 166; *COPW* 590–1, 597–8.

The Supreme Court in *COPW* specifically referred to climate-related issues and used climate-related terminologies in the judgment.¹⁵³ According to Etemire, this ‘serves as a clear indication by the apex court of the challenges of climate change and global warming, and the fact that the courts have a key role to play in tackling these challenges for the benefit of present and future generations’.¹⁵⁴ Thus, the Supreme Court is currently in tune with matters relating to climate change. Furthermore, Oamen and Erhagbe suggest that the decision has undoubtedly improved the prospects of climate litigation in Nigeria.¹⁵⁵ For example, NGOs are no longer constrained by rigid rules of standing in environmental adjudication in Nigeria.¹⁵⁶ Hence, based on the *COPW* case, NGOs, climate injustice victims, individuals, and communities, can institute cases in Nigeria to ventilate their rights in climate-related environmental justice cases, or more direct climate litigation.¹⁵⁷

Another innovation from the *COPW* case is that the Supreme Court recognized that courts in Nigeria – under sections 16 (2), 17 (2)(d)(3), and 20 of the 1999 Constitution, section 17(4) of the Oil Pipelines Act and the Oil and Gas Regulations – are ‘under a duty to protect the environment, in appropriate cases, and would fail in that duty if they do not facilitate the protection these laws have put in place’.¹⁵⁸ This has implications for climate litigation jurisprudence in Nigeria, and this is arguably a clear directive from the apex court to the relevant stakeholders in environmental protection regime in the country. Taking this approach will allow the existing human rights provisions of the Constitution and existing laws to be used as means for enforcing climate justice in Nigeria.

The view of this chapter is that the jurisprudence of the two cases (*Gbemre* and *COPW*) analysed is paving the way for improved environmental and climate justice in Nigeria. The cases ‘are noteworthy for recognizing the right to a clean and healthy environment and for establishing a range of

¹⁵³ Per Aka’ahs J, 580.

¹⁵⁴ Etemire (n 18), 167–8.

¹⁵⁵ Oamen and Erhagbe (n 140).

¹⁵⁶ However, see TN Ogboru, ‘The Sufficient Interest Requirement for Locus Standi in Environmental Litigation: A Case Review of Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation (NNPC) [2019] 5 NWLR (PT 1666) 518’ (2020/2021) 20(1) *University of Benin Law Journal* 29–56, who is very critical of the *COPW* judgment.

¹⁵⁷ This argument is premised on the definition or formulation of climate litigation by Bouwer. Bouwer argues that climate litigation in the Global South has its unique characteristics and existing environment rights/justice (and relevant human rights) cases can be reconceptualized as climate litigation whether they have peripheral or central connections with climate change issues, see Bouwer (n 60). Also, relying on Ganguly, Setzer and Heyvaert (n 99) definition or conceptualization of climate litigation, the *COPW* can be seen as climate case because climate change was expressly referred in the judgment.

¹⁵⁸ *COPW* 577.

qualitative human rights standards that Nigeria must observe in order to protect her citizens. Such elaborate human rights standards can be extended to climate change issues/litigation'.¹⁵⁹

Conclusion

Climate litigation is one of the strategies that can be used in attaining climate justice, especially in Global South countries. Arguably, there is going to be a rise in climate change litigation in Africa due to the adverse impacts of climate change and the broadening or reworking of existing legal frameworks (including the use of municipal, sub-regional and regional courts) in Africa to encapsulate such cases. Furthermore, the potential of climate litigation in holding MNCs accountable for their alleged human rights abuses and environmental degradation is also a factor that might aid the rise of climate change litigation on the continent.¹⁶⁰

This chapter has argued that some existing relevant environmental justice cases (for example, *Gbemre* and *COPW*) in Nigeria can be reconceptualized as climate litigation cases, even though they have peripheral connections to climate change as the litigation was brought to address other environmental problems. This fits within the existing jurisprudence of environmental justice litigation in Nigeria, and the Global South, where frequently climate change arguments are introduced (or implicit) along with claims about other environmental problems. In Nigeria, the connection is particularly pronounced, because the harm caused by MNCs, particularly in the Niger Delta, is closely associated with the same activities of those MNCs that cause climate change. The destruction in the Niger Delta also makes those communities more vulnerable to climate change impacts. Notwithstanding that scholars have argued that climate litigation is in its infancy in Nigeria, on this understanding it is very well developed, and there is significant potential for the prospects in such cases to improve.

The decisions in *Gbemre*, and especially *COPW*, arguably signify a fundamental move by Nigerian courts to improve access to environmental justice (including climate justice) and environmental rights in Nigeria. By the liberalization of the locus standi rule, and the recognition that the right to the environment is justiciable and enforceable in Nigeria, the courts are promoting environmental justice (and climate justice) in the country. This will enhance the ability of the victims of environmental injustice and climate

¹⁵⁹ Ladan (n 123), 10. Furthermore, the two cases can be seen as climate cases because they expressly mention climate change issues in the judgments.

¹⁶⁰ O Rumble and A Gilder, *Climate Litigation on the African Continent* (Konrad Adenauer Stiftung 2021).

change to rely on the courts to enhance access to justice for vulnerable individuals and communities in Nigeria – thus, arguably, promoting the three dimensions of environmental justice and climate justice – distributive, procedural and recognition.

The position of this chapter is that climate litigation is one of the strategies that can be used to promote climate justice in Nigeria. There are other strategies, including an activist judiciary (as represented by the views of the some of the judges in *CPOW* and the judge in *Gbemre*), a vibrant civil society, the political will of the government to enact new laws (as seen in the recently enacted Climate Change Act 2021) and the enforcement of laws and regulations. Climate litigation should also be seen as complementary to regulatory process or frameworks and not the sole panacea for tackling the negative impacts of climate change in Nigeria.