THE EVOLUTION OF HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION IN NIGERIA

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Abstract

The right to life, a first generation right is well established in international law and existing international instruments. This right has made a definite contribution to environmental protection globally. There have been several instances in the recent past where the right to life has been successfully invoked in the pursuit of environmental claims and protection in different jurisdictions around the world. It is worthy of note that environmental protection was not prevalent at the time first generation rights were first formulated. The courts in some jurisdictions have explicitly recognised the links between human rights and environmental protection and have incorporated the latter into the monitoring and enforcement of the right to life.

This paper examines the evolution of this trend in Nigerian case law. It examines selected environmental laws in Nigeria and how the judiciary has interpreted the laws for the protection of the environment, focusing on gas flaring related cases. The paper traces the evolution of the various cases on gas flaring in Nigeria and the gradual shift in attitude of the Nigerian Judiciary from placing higher priority on the profits from crude oil exploration over environmental protection to human rights approaches to environmental protection. This change in attitude has culminated in the recent case of Gbemre V. Shell (2005). Ultimately, the paper seeks to answer the question 'what has changed in Nigeria despite the fact that the laws have not changed on environmental protection and gas flaring in Nigeria'? To answer this question the paper would explore the change in the approach of the judiciary as evidenced by case law and potential drivers of that change.

This paper concludes that despite the fact that the environmental laws have not changed there is an increased awareness and a readiness in the judiciary to invoke the provisions on right to life in the context of environmental protection. This change in attitude could be

attributed to a number of factors; including for example, Nigeria's commitment to end gas flaring, the economic value recently placed on associated gas that is otherwise flared, the issue of climate change, the eventual emission reduction commitments by developing countries like Nigeria, the rise in climate change litigation internationally, pressures from local and international NGOs, a relentless demand from the affected communities for affirmative action.

KEY WORDS: Human rights and environmental protection, gas flaring, climate change.
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"We do not inherit the planet from our ancestors but borrow it from our children"

A Native American proverb

1. INTRODUCTION: GAS FLARING IN NIGERIA

Gas Flaring and venting is the burning of associated gas that accompanies the extraction of crude oil from oil wells during oil exploration. The associated gas is considered uneconomical to recover by the oil companies and as such it is either flared or vented into the atmosphere.[1] The Organisation of Petroleum Exporting Countries (OPEC)'s statistical report for the year 2007[2] states that Nigeria flares an estimated 22,000 billion standard cubic meters (bcm) of its total reserve[3] which is estimated to be over thirty-six billion barrels (36, 220 m b) as at 2007 and a natural gas reserve of over five billion standard cubic meters (5, 215 c um).[4] The global carbon dioxide (CO2) emissions from flaring amount to nearly 13% of the emissions that countries have committed to reduce under the Kyoto Protocol for the

[1] Manby, B., *The Price of Oil: Corporate Responsibility and Human Rights Violation in Nigeria's Oil Producing Communities* New York, Human Rights Watch, 1999
[2] OPEC Annual Statistical Report 2007 available at http://www.opec.org/library/Annual%20Statistical%20Bulletin/pdf/ASB2007.pdf
[3] Nigeria is currently rated as the highest gas flaring nation in the world, second to Russia.
[4] OPEC's 2007 statistical report. Ibid. note 2.

target period 2008–2012.[5] According to the World Bank and the Energy Sector Management Assistance Program (ESMAP) report entitled 'Strategic Gas Plan for Nigeria';[6] Nigeria has more gas reserves than oil reserves. Gas reserves found while exploring for oil are conservatively put at 150 trillion cubit feet (tcf),[7] this represents over 5% of the world total. Current production of 4.6 billion cubic feet per day (bcfd) is largely wasted with nearly 55 percent or close to 2.5 bcfd being flared.[8]

2. HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION: MATCH MADE IN HEAVEN?[9]

Although attempts to advance substantive environmental human rights was rejected at the Rio summit on the environment and development,[10] the connection between human rights and environmental protection is undisputable in environmental law jurisprudence. Environmental degradation has an adverse effect on the quality of life, the enjoyment of life, the guaranteed fundamental human rights and ultimately the achievement of sustainable development.[11] It is welcoming that the connection between human rights and environmental protection which has been acknowledged by the judiciary in countries such as India is spreading across the globe to Africa.[12] The Ksentini Report states that the

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[5] Factsheet: Global Gas Flaring Reduction Partnership. Available at www.worldbank.org/ggfr. Site visited on the 24th August 2008

[6] Nigeria strategic gas plan ESM279/04 available at http://www.esmap.org/filez/pubs/58200861713_strategicgasplanfornigeria.pdf. Site visited on the 24th August 2008

[7] Nigerian strategic gas plan Ibid. note 6

[8] Nigerian strategic gas plan Ibid. note 6

[9] For a background reading on rights see: Dworkin, *Taking rights Seriously,* London, 1977. Also see '*The Final Report of the UN Sub-Commission on Human Rights and the Environment*, UN Doc. E/CN.4/Sub.2/1994/9, The report popularly called the 'Ksentini Report' was prepared by Mrs. Ksentini the special Rapporteur, Also available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bccaa18025675c005779c3?Opendocument. Site visited on the 25th August 2008; Boyle, A., &Anderson, M., *Human Rights Approaches to Environmental Protection* Oxford, Claredon Press 1996

[10] Bell, S., & McGillivray, D., *Environmental law,* 6th Edition, Oxford, Oxford University Press 2006 p. 175. Boyle, A., & Anderson, M., *Human Rights Approaches to Environmental Protection,* Claredon Press, 1996, p.43

[11] The FoE's report on gas flaring in Nigeria gives a comprehensive account of the effects of gas flaring in some communities in the Niger delta part of Nigeria. Some of those communities have endured non stop flaring day and night for a number of years. See the report at http://www.foe.co.uk/resource/reports/gas_flaring_nigeria.pdf

[12] Tanzania is the first African nation where the judiciary acknowledged the relationship between human rights and the protection of the environment. See Palmer, A., & Robb, C., *International Environmental Law in National Courts,* Vol. 4, Cambridge University Press, 2004 p. 454. In the case of Kessy v. City Council of Dar es Salaam,

exhaustion of natural resources leads to poverty, environmental degradation and human right abuses. The report proposed the adoption of principles on Human Rights and the Environment and it rightly declared that human rights and a sound environment together with sustainable development and peace as interdependent and indivisible.[13]

There is a great deal of interaction between rules which have as their main objective the protection of the environment and those which aim to protect people. It has become accepted that the protection of human beings involves protection of their environment. The converse is also true.[14]However, it is left to be seen if as one writer has suggested that "environmental law like human rights houses a hidden imperial ambition; both potentially touch upon all spheres of human activity and claim to override or trump other considerations".[15]

3. HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION IN OTHER JURISDICTIONS.

For the marriage of human rights and environmental law to become a match made in heaven, it has been advocated that the existing first generation rights such as the right to life must be 'reinterpreted with imagination and rigour in the context of environmental concerns which were not prevalent at the time first generation rights were formulated.[16]

3.1. INTERNATIONAL INSTRUMENTS AND REGIONAL COURTS

A number of international and regional instruments provide for the right to a healthy environment. Environmental law principles in legal instruments often grants a right to environmental protection[17]; Principle 1 of the 1972 Stockholm Declaration declares that 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations'.

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the court held that a public authority has no grounds to seek a remedy from a court to pollute the environment or to endanger people's lives, regardless of the presumed greater good.

[13] Ksentini report Ibid. note 9.

[14] Bell, S., & McGillivray, D. Ibid. note 10, pg. 10

[15] Anderson, M., *Human Rights Approached to Environmental Protection,* Ibid. Note 10

[16] Boyle, A., & Anderson, M., Ibid., note 10, Pg 6

[17] De Sadeleer, N., *Environmental principles: From Political Slogans to Legal Rules,* Oxford University Press, 2005, p.275-277

Although environmental rights are often expressed through non binding instruments,[18] the international court has been willing to acknowledge this right. Judge Weeramantry of the International Court of Justice in his separate opinion in the case of Gabcikovo-Nagymaros stated that 'the protection of the environment is likewise, a vital part of contemporary human rights doctrine, for it is *sine qua non* for numerous human rights such as the right to health and the right to life itself…….. as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[19]

The three regional courts on human rights are; the European Court of Human rights, the Inter-American Court of Human Rights and the African Court on Human and People's Rights.[20] The various judgments of the regional courts have helped to confirm the interdependence between human rights and the environment. The European Court of Human Rights in the case of Lopez Ostra v. Spain[21] upheld Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which states that everyone has the right to respect for his private and family life, his home and his correspondence. The Court held that the Kingdom of Spain had been in breach of Article 8 of the Convention.

Similarly, the Inter-American Court of Human Right acknowledged the linkages between human rights and the environment. The Court held in the case of Awas Tingni Community v. Nicaragua that logging of forestlands owned by the Awas Tingni community constituted a

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[18] See Principle 1 of the Rio Declaration, principally an instrument on environment and development, it states that 'human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'. Part IV article (21) of the United Nations Millennium Declaration[18] states that' we must spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs'. The Declaration further reaffirmed its commitment to the protection of human rights in part V. The United Nations Framework Convention on Climate Change in its preamble also recalled the provisions of the Stockholm declaration on Human Environment.

[19] Separate Opinion of Judge Weeramantry p. 91-92, available at http://www.icj-cij.org/docket/files/92/7383.pdf

[20] Asia and the pacific regions are yet to create a regional human rights court system. The league of Arab states adopted the Arab Charter on Human Rights in 2004 and came into force this year.

[21] Application no. 16798/90

violation of their human rights.[22]Article 11 of the Additional Protocol to the Inter-American Convention on Human Rights (1994)[23] states that "everyone shall have the right to live in a healthy environment and to have access to basic public services; the state parties shall promote the protection, preservation and improvement of the environment"

The African Charter on Human and Peoples rights[24] is unique because it recognises second generation and third generation rights such as an explicit right of people to an environment favourable to their development. The African Commission on Human and Peoples' Rights in Communication 155/96 – The Social and Economic Rights Action Centre and Another v. Nigeria, ruled that the Ogoni community had suffered violations of their rights to health (Article 16) and to a general satisfactory environment favourable to development (Article 24) due to the Nigerian government's failure to prevent pollution from oil exploration in the community and ecological degradation of their lands. More importantly, the court held that the right to a satisfactory environment under the Charter can be invoked in Nigerian domestic courts since the Charter has been incorporated into Nigerian domestic law. Article 24 of the African Charter on Human and People's Right states that "All peoples shall have the right to a general satisfactory environment favourable to their development" Although Article 24 seems to qualify the protection of the environment with development; it is nonetheless an affirmation of environmental rights in Africa.[25]

4 HUMAN AND ENVIRONMENTAL RIGHTS IN NATIONAL COURTS

"A nation's constitution is more than an organic act establishing governmental authorities and competences: the constitution also guarantees citizens basic fundamental human rights such as the right to life, the right to justice and increasingly the right to a clean and healthy environment".[26] National courts around the world in precedent setting cases have affirmed this belief. The judiciary in India, the United States, Pakistan, Tanzania and most recently

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[22] Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001). Available at http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html Site visited on the 29th September, 2008

[23] http://www.oas.org/juridico/english/sigs/a-52.html Site visited on the 29th September 2008

[24] http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf Site visited on the 28th September 2008

[25]Churchill, R., *Environmental Rights in Existing Human Rights Treaties,* in Boyle ,A., & Anderson, M., Ibid., note 10

[26] Bruch, C., Et al *Constitutional Environmental law: Giving Force to Fundamental Principles in force,* 26, Colum. J. Envtl. L. 131, (2001) at 133-160

Nigeria have interpreted the right to life to include a right to a healthy environment.[27] Many of the cases in the national courts have arisen from exploration and management of natural resources in local communities; oil drilling and exploration, mining, forestry operations ETC. It is welcoming to note that the country that has the most experience in linking human rights to environmental protection is India, a developing country. This could be attributable to the fact that most of the actions giving rise to the cases involve the exploration of natural resources in countries with limited regulations protecting the environment or where there are regulations they are not enforced by the national governments.

In India, the environmental provisions of the Indian constitution; Article 48A on the protection of the environment and Article 51A on the fundamental duties of the state are both principles of state policy.[28] The Indian court has however linked and enforced these principles with the constitutional right to life, guaranteed by Article 21. The case of Rural Litigation and Entitlement Kendra v. Uttar Pradesh[29] was one of the earliest cases where the Supreme Court dealt with issues relating to environment and ecological balance. The petitioner alleged that unauthorised mining in the Dehra Dun area adversely affected the ecology and environment. The Supreme Court of India upheld the right to live in a healthy environment and issued an order to cease mining operations notwithstanding he significant investment of money and time by the company. Similarly, in Subhash Kumar v. State of Bihar,[30] the Court observed that 'right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.' In Mathur v. Union of India,[31] the Supreme Court used the right to life as a basis for emphasizing the need to take drastic steps to combat air and water pollution. Similarly, in M.C. Mehta v. Union of India, the Supreme Court directed the closure or relocation of industries and ordered that evacuated land be used for the needs of the community.[32]

In the US, the case of Wiwa v. Royal Dutch Company, a case that is still pending in the US courts, the relatives of the Ogoni 9 murdered activists have instituted this action under the

[27] Other notable countries are Philippines, Brazil, Chile, Columbia, Ecuador, Bangladesh, and Nepal.
[28] Anderson, M., '*Environmental Protection in India*', in Boyle, A., & Anderson, M., Ibid.
[29] AIR 1985 SC 652
[30] AIR 1991 SC 420
[31] , (1996) 1 SCC 119
[32] (1996) 4 SCC 351

Alien Torts Act of the US. The defendants are charged with complicity in human rights abuses and environmental abuses against the Ogoni people in Nigeria. An important hallmark of the case is that the court decided that the plaintiffs can institute an action in a US court for the acts committed outside a US jurisdiction but involving a US citizen or corporation.

Article 9 of the Constitution of Pakistan states that no person shall be deprived of life or liberties save in accordance with the law. The Supreme Court in Shela Zia v. WAPDA[33] decided that Article 9 includes 'all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally'. The petitioner questioned whether, under article 9 of the Constitution, citizens were entitled to protection of law from being exposed to hazards of electro-magnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations. The Court noted that "under the Constitution, Article 14 provides that the dignity of man and subject to law, the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man and right to 'life' are guaranteed under Article 9. If both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment."

5 REGULATORY FRAMEWORK FOR ENVIRONMENTAL PROTECTION IN NIGERIA

The development of environmental regulation in Nigeria was hurried in the late 1980s by the Koko incident that occurred in the country, environmental legislation in Nigeria has been described as a product of national emergency.[34] The regulatory framework discussed below would be those relevant for for environmental protection and gas flaring in Nigeria.

[33] PLD 1994 SC 693

[34] See Obi Ogbalu '*Environmental regulation in Nigeria'* Oil and Gas Law &Taxation Review Vol. 10 Issue 6

5.1 The Nigerian Constitution

The Constitution of Nigeria does not grant an express right to a healthy, clean environment. Section 20 of the Constitution of the Federal Republic of Nigeria 1999 provides that 'the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria'. The 'right' provided under this section is not justiciable- it cannot be relied upon by an aggrieved person in a court of law since by virtue of Section 6(6)(c) of the Constitution it shall not except as otherwise provided by the Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

5.2 Federal Environmental Protection Agency Act of 1988 (FEPA)

The FEPA Act [35] creates the environmental agency in Nigeria, responsible for the protection and development of the environment, biodiversity conservation and sustainable development of Nigerian's natural resources in general and environmental technology, including initiation of policy related to environmental research and technology, among other function. S. 38, of the FEPA Act defines the environment. "Environment" includes water, air, land and all plants and human beings or animals living therein and the interrelationships which exist among these or any of them.

5.3 The Petroleum Act and the Petroleum (Drilling and Production) Regulations 1969[36]

Regulation 43 of the Petroleum (Drilling and Production) Regulations made pursuant to Section 9 of the above Act provides that not later than five years after the commencement of production from the relevant area, the licensee or lessee shall submit to the minister, any feasibility study, programme or proposals that he may have for the utilization of any natural gas, whether associated with oil or not, which has been discovered in the relevant area.[37]

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[35] CAP 131 Laws of the Federation of Nigeria 1990. This Act was amended in 1992 by Decree No 59 0f 1992. The amendment is available at http://www.nigeria-law.org/Federal%20Environmental%20Protection%20Agency%20(Amendment)%20Decree%20No.%2059%201992.htm

[36] CAP 350 Laws of the Federation of Nigeria (LFN), 1990

[37] Ibid.

5.4 Associated Gas Reinjection Act 1979[38] and Associated Gas Re-Injection (Continued Flaring of Gas Regulations) 1984[39]

Section 2(1) of the Act provides that not later than 1st October, 1980, every company producing oil and gas in Nigeria shall submit to the minister, detailed programmes and plans for either the implementation of programmes relating to the re-injection of all produced associated gas or schemes for viable utilisation of all produced associated gas. It set the limit of October to April 1980 for the oil companies to develop gas utilisation projects and to stop gas flaring by 1984, or face fines. In 1984, the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations amended the existing legislation and it provided limited exemptions for flaring in certain circumstances. It set out conditions for oil companies to fulfil to qualify for a certificate to be issued by the Minister under Section 3(2) of the Associated Gas Re-Injection Act 1979 for the continued flaring of gas in a particular field or fields. This was further strengthened in 1985 with another amendment that fixed a fine of 2 Kobo (equivalent to US$0.0009 in 1985) against the oil companies for each 1000 standard cubic feet (scf) of gas flared.

6 HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION CASES IN NIGERIA: 1990 - 2004

"In the oil sector where environmental degradation is most prevalent, the all pervading influence of the oil companies and the paternalistic attitude of the judges towards them in matters relating to environmental hazards created by the companies have made the enforcement of environmental laws ineffective…. What the judges fail to realise is that economic development can be compatible with environmental conservation".[40] Contrary to the India situation where an act damaging the environment was ordered to cease by the court despite the significant loss of investment that would occur, the situation in Nigeria has been different until quite recently. The Nigerian judiciary has been reluctant to give orders compelling companies whose operations are damaging the environment to cease the actions

[38] Cap 26, Laws of the Federation of Nigeria (LFN), 1990
[39] Ibid
[40] M.A Ajomo, 'An Examination of Federal Environmental Laws in Nigeria', in M.A Ajomo and O. Adewale (eds), Environmental law and Sustainable Development in Nigeria (Nigerian Institute of Advanced Legal Studies, 1994.

complained of.[41] The consideration of the potential loss of revenue and investment outweighs considerations for the protection of the environment.[42] This is due largely to the fact that the Nigerian economy is dependent on the revenue from the sale of crude oil.[43]

Between 1990 and 2004, there have been several oil related cases filed in the courts in Nigeria alleging pollution from oil exploration, loss of income, loss of property, contamination of drinking water leading to water borne diseases ETC. In the cases of Shell v. Tiebo VII,[44] Shell v. Isaiah,[45] Seismograph services v. Mark,[46] Ogiale v. Shell,[47] Shell v. Ambah.[48] The general characteristics that runs through all the above mentioned cases are; they are all claims for compensation for the operation of oil companies in their local communities, they are usually oil spillage claims for loss of income from fishing and farming, pollution of drinking water, damage to farmlands and crops, and damage to health as a result of water-borne diseases. The courts in their various judgements refrained from making orders for the remediation of damages done to the physical environment, the land, and water resources. However, in the case of Shell v. Farah,[49] apart from asking for compensation, the plaintiffs specifically asked the court to make an order for the rehabilitation of their damaged land. The court was creative I deciding this case because quite unlike other oil spillage cases in Nigeria where conflicting expert evidence is given for both parties, the court resolved the conflict by appointing two independent experts to assist the court in coming to a decision whether the affected land had been rehabilitated to its pre-impact conditions. Shell v. Farah prepared the way for change, it is the first case where the plaintiff prayed the court for compensation and remediation of damaged land and both claims were awarded accordingly.[50]

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[41] See article by Ebeku, K., Judicial *Attitudes to Redress for Oil Related Environmental Damage in Nigeria*, RECIEL 12(2) 2003, 199-208
[42] Ibid. 207
[43] Frynas, J., *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* Transaction Publishers, 2000 34-36.
[44] 1996] 4 NWLR (Pt 445) 657. Culled form Ebeku, S., n 42 above at 204
[45] [1997] 6 NWLR (Pt 508) 236. Ibid.
[46] [1993] 7 NWLR (Pt 304) 203. Ibid., at 206
[47] [1997] 1 NWLR (Pt 480) 148. Ibid.
[48] [1999] 3 NWLR (Pt 593) 1. Ibid.
[49] [1995] 3 NWLR (Pt 382) 148 Ibid., at 205
[50] Ibid.

It is fair to say that there has been a definite shift in the attitude of the Nigerian judiciary. Frayas is of the opinion that there has been a radical change in the approach of Nigerian judges to the law in the sense that that have come to attach grater importance to the substance of the law by exercising their powers favourably in favour of plaintiff victims in deciding oil related environmental damage cases.[51] Okorodudu-Fubara believes that the present attitude of the judges of awarding monetary compensation without addressing the preservation of the environment might change in the near future,[52] while Kaniye Ebeku[53] is a bit sceptical, he believes that if the Nigerian economy remains dependent on the revenues from oil, "it is doubtful if the courts will abandon the economic approach and move towards a sustainable approach. The recent case of Gbemre v. Shell[54]signifies the readiness of the Nigerian judiciary to interpret the constitutional right to life expansively to include the right to a healthy/clean environment.

6.1 Gbemre V. Shell[55]: The Beginning of the End of Gas Flaring In Nigeria?

The order of a Nigerian federal high court on the 14th of November 2005 marked an important watershed in the struggle by local communities in Niger Delta of Nigeria to protect their health, environment and their farmlands, and to bring an end to gas flaring. Mr Gbemre in a representative capacity for himself and for each and every member of the Iwehereken community in Delta Sate Nigeria against Shell Nigeria, Nigerian National Petroleum Corporation (NNPC) and the Attorney General of the Federation . The Applicants sought the following reliefs from the court:

- A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act,

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51 Frynas, J., Ibid., at 219

52 Okorodudu, M.T., *Law of Environmental Protection: Materials and Text*, Ibadan, 1998, p.607. Culled from Ebeku K., *Judicial attitudes to Redress for Oil-Related Environmental Damage in Nigeria*, RECIEL 12 (2) 2003, 207

53 Ibid.

54 Federal High Court, Benin 14 November 2005, Unreported Suit No FHC/B/CS/53/05, *Gbemre v. Shell* (Judge C.V. Nwokorie). The officially certified full-text of the judgment in this case can be found at <http://www.climatelaw.org/cases>.

55 http://www.climatelaw.org/media/media/gas.flaring.suit.nov2005/ni.shell.nov05.decision.pdf

Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean, poison-free, pollution-free and healthy environment.

- A declaration that the actions of the first and second defendants in continuing to Federation of Nigeria, 2004, the applicant have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state of physical and mental health as well as right to a general satisfactory environment favourable to their development.

The court declared that the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter. The court further declared that the 1st and 2nd Respondents; Shell Nigeria and NNPC were to be restrained from further flaring of gas in the applicant's community and were to take immediate steps to stop the further flaring of gas in the applicant's community.

The Court made the following declaratory order:

- That the constitutionally guaranteed fundamental rights to life and dignity of human persons provided by Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Art. 4, 16 and 24 of the African Charter on Human Procedure Rules (Procedure and Enforcement) Act Cap A9 Vol.1 Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean poison-free, pollution free and healthy environment.
- That the actions of the 1st and 2nd Respondent in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter.
- That the provisions of Section 3(2)(a) and (b) of the Associated Gas Reinjection Act, Cap A25 Vol. 1, Laws of the Federation of Nigeria 2004 and Section 1 of the Associated Gas Reinjection (continued flaring of gas) Regulations Section 1.43 of 1984 under which the continued flaring of gas in Nigeria maybe permitted are inconsistent with the Applicant's Right to life and/or dignity of human person

enshrined in the constitution and the African Charter and are therefore unconstitutional, null and void by virtue of Section 1(3) of the Nigerian Constitution.

Gbemre v. Shell is a precedent setting case in Nigeria, it is the first judicial authority to declare that gas flaring is illegal, unconstitutional, a breach of the fundamental human right to life and it should cease.

CONCLUSION

So what has changed in Nigeria? One of the potential drivers that culminated in the decision in Gbemre v. Shell could be a greater awareness of climate change and the effects resulting from it. Nigeria is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC)[56] and Kyoto Protocol[57] and it has obligations as a party to the protocol.[58] The Kwale CDM project[59] was registered as a CDM project in 2005; it is the first and only CDM project currently hosted in Nigeria. The CDM is one of three flexible mechanisms under the Kyoto Protocol that allows annex 1 countries (developed) to invest in emission reduction projects in non-annex 1 countries (developing). The project is sponsored by Eni Nigeria Agip Oil Company (NAOC) and the government of Italy.

The CDM has a twin purpose; to assist annex 1 countries to meet their binding emissions reduction targets under the protocol and to assist non-annex 1 countries in achieving sustainable development.[60] The main objective of the project is the recovery of associated gas that would otherwise be flared at Kwale (Niger Delta, Nigeria) Oil-Gas Processing Plant (OGPP). Traditionally, a large portion of associated gas produced from the Agip oil fields has been flared upon separation from the oil at Kwale, in the absence of any economically viable, commercial or other outlet for this gas, flaring of this gas results in emissions of carbon dioxide (CO2) and methane (CH4).

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[56] This convention was opened for signature at the Rio Summit

[57] The protocol came into force in 2005.

[58] See Article 10 o the Kyoto Protocol, available at http://unfccc.int/resource/docs/convkp/kpeng.pdf#page=12

[59] Project 0553: Recovery of associated gas that would otherwise be flared at Kwale oil-gas processing plant, Nigeria. Available at http://cdm.unfccc.int/Projects/DB/DNV-CUK1155130395.3/view

[60] Article 12, Kyoto Protocol Ibid., n. 58 above
"The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3"

The successful registration of this project as a CDM project is a win-win situation for the project sponsor, Agip and the host country, Nigeria. The project generates Certified Emission Reduction Credits (CERS) can be traded, the associated gas will be refined and sold, promotes sustainable development in Nigeria, it transfers technology to Nigeria, it improves air quality of the local community where associated gas had been continuously flared previously, it safeguards the environment and the health of the inhabitants of the local community thereby protecting their fundamental human rights guaranteed by the constitution of Nigeria.

Another potential driver is sustainable development and the need for every country to develop and implement a National Strategy for Sustainable Development (NSSD).[61] Although Nigeria does not have a National Strategy for Sustainable Development (NSSD), it has in place, different development strategic in piecemeal fashion that if taken together can promote sustainable development in the country.

The West African Gas Pipeline (WAGP)[62] is a project between some oil companies[63] in Nigeria to market gas to neighbouring countries in West Africa .It consists of 620 miles (1,033 kilometres) of pipelines to transport Nigeria's NLG to Ghana, Benin and Togo.[64] The project will develop Nigeria's gas currently being flared and replace petroleum products used in the generation of electricity in the West African region

The Nigerian Strategic Gas Plan 2004 is a study commissioned by the World Bank in 2004. The study entitled 'Nigerian Strategic Gas Plan[65]' established a realistic strategy and a plan of action for the implementation of gas development plans earlier submitted to the Nigerian government by the various oil companies operating in Nigeria.

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[61] See the United Nations Sustainable Development Commission website at http://www.un.org/esa/sustdev/csd/review.htm Site visited on the 10th August 2008
[62] See http://www.eia.doe.gov/emeu/cabs/wagp.html Site visited on the 2nd September 2008
[63] The oil companies are Chevron, Shell NNPC, the Ghana National Petroleum Corporation (GNPC), Societe Beninoise de Gas (SoBeGas) and Societe Togolaise de Gaz (SoToGaz).
[64] Ibid.
[65] www-wds.worldbank.org/.../WDSP/IB/2004 *Strategic Gas Plan for Nigeria, Joint UNDP/World Bank Energy Sector Management Assistance Programme (ESMAP) (February 2004)*

The study evaluated the resource base of the country and it came up with the several options for the utilisation of gas in the local and international market. In the report published in 2004, a gas master plan was developed for Nigeria.

Although the right to a clean environment was not included as one of the third generation rights as suggested by the Ksentini report, Human rights system has been strengthened by the incorporation of environmental rights protection and concerns. This has expanded the scope of human rights protection with an important consequence of providing victims of environmental degradation a route to court to protect their rights. Rashad Kaldany, Director of the Oil, Gas, Mining and Chemicals Department at the World Bank Group and Chairman of the Global Gas Flaring Reduction Initiative (GGFR) Steering Committee linked the persistent problem of gas flaring to governance.