

## Gas Flaring In Nigeria: An Abridgment Of Human/ Fundamental Rights

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Accepted 24 July, 2016.

### ABSTRACT

Nigeria's oil wealth has been exploited for more than 45 years. While various Oil companies like Shell, ExxonMobil and TotalFinaElf, have profited from the resource, local communities in the oil rich but conflict-raven areas live with the daily pollution, caused by non-stop gas flaring, where the gas associated with oil extraction is burnt off into the atmosphere. More gas is flared in Nigeria than anywhere else in the world. In Western Europe 99 percent of associated gas is used or re-injected into the ground<sup>1</sup>. But in Nigeria, despite regulations introduced more than 20 years ago to outlaw the practice, most associated gas is flared, causing local pollution and contributing to climate change. This article looks at the background to gas flaring and the environment and health risks.

**Keywords:** Gas flaring, Oil Company, environmental pollution, ExxonMobil, TotalFinaElf.

### 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.<sup>2</sup> The Organisation of Petroleum Exporting Countries (OPEC)'s statistical report for the year 2007<sup>3</sup> states that Nigeria flares an estimated 22,000 billion standard cubic meters (bcm) of its total reserve<sup>4</sup> which is estimated to be over thirty-six billion barrels (36,220mb).<sup>5</sup> The global carbon IV oxide otherwise known as carbon dioxide (CO<sub>2</sub>) emissions from flaring amount to nearly 13% of the emissions that countries have committed to reduce under the Kyoto Protocol for the target period 2008-2012<sup>6</sup>. According to the World Bank and the Energy Sector Management Assistance Program (ESMAP) report entitled 'Strategic Gas Plan for Nigeria';<sup>7</sup> Nigeria has more gas reserves than oil reserves. Gas reserves found while exploring for oil are conservatively put at 150 trillion cubic feet (tcf)<sup>8</sup>, 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.<sup>9</sup>

Gas flaring is the process by which excess natural gas is released from oil field and burned. The excess gas can be produced during drilling and extraction of oil. This "associated gas" a waste by product under these circumstances, can be used to generate electricity. Gas flaring is implemented at oil drilling sites (on and offshore), refineries, natural gas plants, chemical plants and landfills. The process releases gas from pipes in wells, or through smoke stacks at plants and burns it. Under these circumstances, gas flaring is done to release unsafe pressure and is considered minimal. Under different

scenarios, mostly in Africa and middle east, gas flaring is done for higher volumes, because the oil is of greater value and flaring is an inexpensive way of dealing with waste.

Gas flaring is also said to be the burning of natural gas that is associated with crude oil when it is pumped up from the ground<sup>10</sup>. In petroleum- producing areas where insufficient investment was made in infrastructure to utilize natural gas, flaring is employed to dispose of this associated gas. In Nigeria, when oil companies began production in the 1960's, the cheapest way to separate the identified product, crude oil, from the associated natural gas was to burn the gas.

Gas flaring is problematic because it is associated with high carbon dioxide emissions into the atmosphere contributing to global warming. Vegetation burns, crops cease to grow and nearby villagers complain of lung ailments<sup>11</sup>. Gas Flaring not only wastes a potentially valuable source of energy (natural gas), it also adds significant carbon emission to the atmosphere. Moreover, flaring combustion is typically incomplete, releasing substantial amounts of soot and carbon II oxide known as carbon monoxide, which contribute to our pollution problems.

#### What are the Local Impacts of Gas Flaring?

In Nigeria, oil companies engage in gas flaring, as a 24 hours-a-day, 365 days-a-year practice. Some of these flares have burned without cessation for 40 years<sup>12</sup>. People live literally next door to the roaring, ground-level flares that leap as high as a several-story building and produce black clouds of toxic smoke in the middle of, or next door to their villages. Gas flaring harms local health through emissions that have been linked to cancers, asthma, chronic bronchitis, blood disorders, and other diseases<sup>13</sup>. These human health problems affect the people of oil-producing communities such as the Niger Delta, where 30 million people live with little or no health care access<sup>14</sup>.

1. [www.foe.co.uk/campaigns/climate](http://www.foe.co.uk/campaigns/climate) accessed on 14/12/11.
2. Manby, B., *The Price of Oil: Corporate Responsibility and Human Rights Violation in Nigeria's Oil Producing Communities* New York, Human Rights Watch 1999.
3. OPEC Annual Statistical Report 2007 available at <http://www.opec.org/library/Annual%20statistical%20Bulletin/pdf/ASB2007.pdf> accessed on 14/12/11.
4. Nigeria is currently rated as the highest gas flaring nation in the world, second to Russia.
5. OPEC's 2007 statistical report *Ibid* note 2.
6. Factsheet: Global Gas Flaring Reduction Partnership. Available at [www.worldbank.org/ggfr.site](http://www.worldbank.org/ggfr.site) accessed on the 14/12/11.
7. Nigeria Strategic gas plan ESM279/04 available at [http://www.esmap.org/filez/pubs/58200861713\\_strategicgasplanforNigeria.pdf](http://www.esmap.org/filez/pubs/58200861713_strategicgasplanforNigeria.pdf) accessed on 14/12/11.
8. Nigeria strategic gas plan *Ibid*. note 6.
9. *Ibid*. note 6.
10. *Ibid*. note 6.
11. Nigeria strategic gas plan *Ibid*. note 6.
12. S. Obasi, "Gas Flaring without End" in *NewsWatch a Way of Life*, 14th October, 2010, [lobinAfrica.com](http://lobinAfrica.com). accessed on 14/12/11.
13. *Ibid*
14. *Ibid*

Gas flaring causes acid rain, which impacts negatively on soil fertility and is associated with reduced crop yields, causing hunger in the Niger Delta where fish populations have declined due to pollution by oil companies. Acid rain eats through village roofs that protect local residents from rain. Impoverished villages have little means to replace their roofs more frequently.<sup>15</sup>

### What are the Environmental Impacts?

According to the World Bank<sup>16</sup>, by 2002, flaring in the country had contributed more greenhouse gases to the Earth's atmosphere than all other sources in sub-sahara African combined. Yet this gas is not being used as a fuel. Nobody benefits from the energy it contains. As such, it is a serious but unnecessary contributor to climate change, the impact of which are already being felt in the region with food insecurity, increasing risk of disease and rising costs of extreme weather damage. Local communities living around gas flares rely on wood for fuel and candles for light. The flares also contain widely recognized toxins such as benzene, toluene, xylene and hydrogen sulfide, which pollute the air<sup>17</sup>. Local people also complain about the roaring noise and the intense heat from flares. They live and work alongside the flares with no protection.<sup>18</sup>

### Who are the culprits in the Flare Game?

All oil prospecting companies in Nigeria are guilty of gas flaring. The biggest culprits however are Shell PDC, ExxonMobil and Chevron. These three companies are the operators of most of Nigeria oil production while Total and Agip are minor players.

The above listed companies recently cited insecurity in the Niger Delta and poor funding among others as factors militating against achieving zero-flares in the Niger Delta<sup>19</sup>. Shell had previously said that it would end flares in all its production facilities by 2007 but did not have any concrete plan of action to this effect except the expansion of its liquefied Natural Gas Project, the principal avenue to be used to monetize the associated gas currently being flared. ExxonMobil had said that it would end flares in 2004 and earmarked the East Area Gas Project (EAGP) as the principal profit to achieve this. Like Shell, nothing concrete has come out of this. Chevron said it would achieve zero flares in its facilities by 2006, hinging its attainment on the Escravos Gas Project Phase 2 and 3. Like its partners it has also come up with lame excuse of insecurity for failing to meet its target.<sup>20</sup>

### Is Gas Flaring Legal in Nigeria?

Flaring gas is illegal in Nigeria. The first order/deadline by the Nigerian Head of State relating to flaring, was in 1969, when President Yakubu Gowon ordered that within five years of set up, a company must cease flaring. This order was ignored. Through the Associated Gas Re-injection Act N0.99 of 1979, the Nigerian government required oil corporation operating in Nigeria to guarantee zero flares by January 1,1984. The Act allowed some conditions for specific exemptions (Gas flaring was only allowed in specific circumstances on a field by field basis, pursuant to a ministerial certificate) or the payment of a fee of US\$0.003(0.3 cents) per million cubic feet which

increased in 1988 to US\$0.07 per million cubic feet and in January 2008 to US\$ 3.50 for every 1000 standard cubic feet of gas flared. This is still considered meager and not a deterrent for companies, which find it easier to pay the fine. Oil companies nonetheless have continued to flare gas, merely paying nominal fines for breaking this law.

Subsequent Federal Nigerian Legislation repeatedly, pushed back the deadline to end gas flaring to 2007, then 2008, then 2010. In January 2010, the National Assembly proposed a new deadline of December 31, 2012 it remains to be seen if the deadline would be adhered to.<sup>21</sup>

### Gas Flaring is a violation of Human/Fundamental Right

Gas flaring exposes people who live near flares to a cocktail of toxins, which threaten their health and livelihoods. The psychological and physical effects of roaring sounds and intense heat are also significant, as well as damage of properties. These matters constitute violations of human rights.

Under the 1999 Constitution,<sup>22</sup> section 20 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. This is so because by virtue of section 6 (6) (c) of the Constitution<sup>23</sup>, the judicial powers vested in accordance with the provisions relating to the fundamental objectives and directive principles<sup>24</sup> of which section 20<sup>25</sup> a part, shall not, except as otherwise provided by the constitution, extend to any issue or question as to whether any act or 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 Principle of State Policy set out in chapter II of the Constitution.

However, the 1999 Constitution<sup>26</sup>, guarantees the fundamental right to life, and in section 34, right to the dignity of the human person. The right to life can be said to be the most fundamental of all rights because without it, all other rights are not enforceable. This right is protected in various ways under national, regional and international instruments and is often among the first few rights to be protected. Thus it can be said that there is an obligation on the part of all members of the United Nations to protect it in one way or the other. For example, Article 2 of the Universal Declaration of Human Rights provides: "Everyone has the right to life, liberty and security of person".

Moreover, Nigeria has incorporated into its law<sup>27</sup> the African Charter on Human and Peoples' Right which provides, in Article 16 that:

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 24 provides that:

15. *Ibid*  
 16. [www.friendsofearthinternational.com](http://www.friendsofearthinternational.com), accessed on 14/12/11.  
 17. *Ibid*.  
 18. *Ibid*.  
 19. S. Obasi, *op cit*.  
 20. [www.friendsofearthinternational.com](http://www.friendsofearthinternational.com). *Op.cit*.  
 21. S. Obasi, *op.cit*.  
 22. of the Federal Republic of Nigeria as amended in 2011.  
 23. 1999 CFRN as amended.  
 24. chapter ii of the 1999 constitution  
 25. 1999 CFRN  
 26. section 33  
 27. African Charter on Human and Peoples' Rights Ratification Enforcement Act, 1990

All people shall have the right to a general satisfactory environment favourable to their development.

Article 25 provides that:

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedom contained in the present Charter and to see to it that these freedom and rights as well as corresponding obligations and duties are understood.

The African Commission on Human and Peoples' Rights has set out its views on the relationship of human rights and environmental protection in the landmark case of the Social and Economic Rights Action Center for Economic and Social Rights v Nigeria.<sup>28</sup>

This case concerned mainly SPDC operations in Ogoni land which had resulted in environmental degradation and health problems; in illegal disposal of toxic wastes, poisoning land and water; and in the government putting its military and legal powers at the disposal of the oil companies, which had led to several crimes, including the killing of Ogoni leaders and other civilians.

Nigeria was found to have breached the rights: to environment under Article 24, to enjoy the rights guaranteed by the Charter without discrimination (Article 2), to life (Article 4), to property (Article 14), to health (Article 16), to housing (implied in Article 18), to food (Articles 4,16,22), and the right of people to freely dispose of their wealth and natural resources (Article 21).

The writer cites below two extensive extracts from the Decision in this case, in order for readers to appreciate the far-reaching obligations of the Nigerian government and the companies in relation to human rights violations from gas flaring, both generally and specifically in respect of Articles 16 and 24<sup>29</sup>.

The following extract from the commission's Decision gives a general indication of the obligations<sup>30</sup>:

*The present Communication alleges a concerted violation of a wide range of rights guaranteed under the African Charter for Human and Peoples' Rights. Before we venture into the inquiry whether the Government of Nigeria has violated the said rights as alleged in the complaint, it would be proper to establish what is generally expected of governments under the Charter and more specifically vis-à-vis the rights themselves.*

*Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights both civil and political rights and social and economic generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the Africa Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.*

*At a primary level, the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is*

*obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.*

*At a secondary level, the state is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.*

*The last layer of obligation requires the State to fulfill the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realization of the rights. This is also very much intertwined with the duty to promote, mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).*

*Thus States are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasising the all embracing nature of their obligations, the International Covenant on Economic, Social, and Cultural Rights for instance, under Article 2 (1), stipulates exemplarily that States undertake to take steps... by all appropriate means, including particularly the adoption of legislative measures. "Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties".*

The Commission went on to consider the requirement arising out of the rights in Articles 16 and 24:

*These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, 'an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibrium is harmful to physical and moral health.'*

*The right to a general satisfactory environment, as guaranteed under Article 24 of the Africa Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Right (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial*

28. Decision Regarding Communication No. 155/96, African Commission on Human and Peoples' Right(ACHPR/COMM/A044/1,27 May 2002) and <http://www1.umn.edu/humanrts/africa/comcases/155-html> accessed on 14/12/11.

29. African Charter on Human and Peoples' Rights.

30. Decision Regarding Communication No. 155/96, African Commission on Human and Peoples' Right(ACHPR/COMM/A044/1,27 May 2002) and <http://www1.umn.edu/humanrts/africa/comcases/155-html> accessed on 14/12/11.



hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16 (1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16 (3)) already noted, obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely noninterventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual.

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities".

The Decision of the African Commission is in line with many other decisions of tribunals and constitutional and legal instruments around the world, that have consistently recognised the importance of human rights in an environmental context, such as the UN Human Rights Committee, the Indian-American Commission and Court of Human Rights, the European Court of Human Rights, the Indian Supreme Court, the Bangladesh Supreme Court, the South Africa Constitution and the Aarhus Convention.<sup>31</sup> It is also worth noting that in its decision, the Commission stated at paragraph 42 that the Nigerian government had said that:

*In their Note Verbale referenced 127/2000 submitted at the 28th session of the Commission held in Cotonou, Benin, (it) admitted to the violations committed then by stating, "there is no denying the fact that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area".*

Not only does gas flaring amount to a breach of several human rights, but taking these human rights into account when issuing ministerial certificate to flare, and in Environmental Impact Assessment approvals, is also legally necessary.

#### **Regulatory framework for Environmental Protection: How far have they been successful in Nigeria**

The development of environmental regulation in Nigeria was hurried in the late 1980's by the Koko incident that occurred in the country. Environmental legislation in Nigeria has been described as a product of national emergency.<sup>32</sup> The dumping of toxic waste at Koko in Delta State jostled the Federal Government and awakened the environmental consciousness of the State. The regulatory framework discussed below would be those relevant for the environmental protection and gas flaring in Nigeria.

##### **1. Federal Environmental Protection Agency Act of 1988 (FEPA).**

The FEPA ACT<sup>33</sup> creates the Federal Environmental Protection Agency (now Federal Ministry of Environment) in Nigeria with the responsibility of preparing a comprehensive national policy for the protection of the environment and conservation of

natural resources including the procedure for environmental impact assessment for all development projects.<sup>34</sup> At the State level the State Environmental Protection Agency (SEPA) now Ministry of Environment was established. In 1999 FEPA produced the country's Agenda 21 document. It emphasized the rational use of oil and gas resources, industrial pollution management and natural resources conservation. The Agency was also instrumental in getting industrial emission and effluent discharge standards promulgated in order to control air, water and land pollution. Today, FEPA Act has been repealed and replaced by NESREA Act, 2007.<sup>35</sup>

##### **2. The Petroleum Act and the Petroleum (Drilling and Production) Regulations 1969<sup>36</sup>.**

Regulation 43 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 have been discovered in the relevant area<sup>37</sup>.

##### **3. Associated Gas Re-injection Act 1979 and Associated Gas Re-injection (Continued Flaring of Gas Regulations 1984).<sup>38</sup>**

Section 2 (1) of the Act provides that not later than 1<sup>st</sup> 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 utilization of all produced associated gas. It set the limit of October to April 1980 for the oil companies to develop gas utilization 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 fulfill 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(s). This was further strengthened in 1985 with another amendment that fixed a fine of 2 kobo (equivalent of US\$ 0.0009 IN 1985) against the Oil companies for each 1000 standard cubic feet of gas flared. Oil companies have continued to flare gas, paying nominal fines for breaking the law.

##### **4. Environmental Impact Assessment Decree 1992**

To aid assessment management and protection, the environmental impact assessment studies was introduced. The Decree was enacted which required an environment impact assessment to be carried out in all developmental projects, planning and implemented. If the Act had been effectively utilized and implemented, it would have been of immense assistance to environmental protection and management in the Niger Delta, but in reality the impact was not felt on ground.

##### **5. The Oil Mineral Producing Area Development Commission Decree 1992.**

This Decree established the Oil Mineral Producing Area Development Commission (OMPADEC), charged with the objectives spelt out in section 3 of the Decree, basically to receive monthly sums from allocation of the Federation

31. Decision Regarding Communication No. 155/96, African Commission on Human and People's Right (ACHPR/COMM/A044/1,27 May 2002) and <http://www1.umn.edu/humanrts/africa/comcases/155.html> accessed on 14/12/11.

32. Obi Ogbalu 'Environmental regulation in Nigeria' Oil and Gas Law & Taxation Review Vol. 10 issue 6.

33. Cap F10 Laws of the Federation of Nigeria, 2004.

34. S.4 FEPA Act (now repealed).

35. Section 36 NESREA Act, 2007.

36. Cap P10 Laws of the Federation of Nigeria (LFN) 2004.

37. *Ibid*

38. Cap A 25, Laws of the Federation of Nigeria LFN, 2004.

Account for the rehabilitation and development of the mineral producing area and essentially taking ecological problems that have arisen from the exploration of oil minerals. The duty of the commission is generally geared towards the development of oil mineral producing areas. OMPADEC became a drain pipe and was unable to perform its statutory duties and the peoples' plight continued.

6. **Niger Delta Development Commission Act, 2000** The NDDC Act, 2000, repealed the OMPADEC Act of 1992. This Act set up the Niger Delta Development Commission (NDDC) in place of OMPADEC. NDDC inherited all the assets and liabilities of OMPADEC. Section 3 of the Act created the functions and powers of the commission which essentially is to formulate policies and guidelines for the development of Niger Delta area. The NDDC regional master plan recognizes the importance of and contains recommendation for, managing the natural environment and resources. Significantly, it provides for stakeholders participation in key areas such as land, fisheries and forest management, water supply, flood control, waste management and public health. The NDDC has an essential role in promoting investment that increase sustainable livelihoods, especially through the removal of obstacles such as lack of infrastructure. Since infrastructural development is an area of major preoccupation of the commission, accounting for a significant share of its capital budget, it can make a meaningful contribution by sustaining and increasing the tempo of its work. The local people had for years hoped for protection and improvement of their environment. That never came from either the Federal or State Governments. Attempts to fight back have at times compounded their environment challenges. The local people view the NDDC and the agencies before it with suspicion. They see the Commission as an agent of Federal Government with no loyalty to the Delta region. The Commission on their own, have not fared well. Massive corruption and ineptitude has bedeviled it, making its impact on the people very minimal. The bane of the commission is corruption. If curbed and money allocated judiciously expended with proper accountability and transparency, the people's plight will be drastically reduced and all these agitation and militancy will be a thing of the past<sup>39</sup>.
7. **Criminal Code Act.**<sup>40</sup> The pollution of the nation's atmosphere has been recognized by the criminal code<sup>41</sup> as a criminal act. Section 247, for instance prohibits any activity "that vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood, or passing along a public way....." Any offender is liable to imprisonment for six months.

This provision has its own loopholes. For instance, the culprit can only be penalized if the vitiation is injurious to human health. The emphasis is therefore on human health rather than the atmosphere. This indicates that as far as human health is not affected, no offence is

committed irrespective of the extent the atmosphere is destroyed.

This provision needs to be undated to conform with the global call for the protection of the atmosphere. Again, there is no option of fine in this provision whereas almost 80% of this offence is committed by corporate bodies like the multinational oil companies and it is difficult to subject them to any form of imprisonment.<sup>42</sup>

8. **National Environmental Standards and Regulation Enforcement Agency (NESREA) Act of 2007**<sup>43</sup>. This Act is the most recent of all the environmental legislation in Nigeria. The Act established the National Environment Standards and Regulations Enforcement Agency with a view to establishing a basic institutional machinery for environmental management in Nigeria, in line with the emerging global efforts in preserving the environment, particularly the atmosphere.

By virtue of Section 7 (c) of the Act, the Agency shall "enforce compliance with the provisions of international agreements, protocols, conventions and treaties on environment including climate change, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wild life, pollution, sanitation and such other environmental agreements as may from time to time come into force. The Agency is also mandated to conduct field follow-up compliance with set standards and to punish the offenders in conformity with the provisions of this Act<sup>44</sup>. In this regard therefore, the Agency is as well empowered to establish mobile courts to expeditiously dispense cases of violation of environmental regulations<sup>45</sup>. This particular provision is so imperative and commendable in view of the fact that the Nigeria cases overstay in the courts.

To facilitate its achievement of these functions, the Agency has zonal offices in the six geopolitical zones of the country<sup>46</sup>. It is also empowered to create such other departments, units or offices in any part of the federation as may be required for this purpose.<sup>47</sup>

In this regard therefore, the Agency has from time to time issued regulations which mandate the industries concerned to install anti-pollution equipment and other strategies that will help protect the environment and peoples' live and properties. Outside this, it has also organized workshop, seminars, conferences and publications for creating public awareness and for other information pertaining to environmental standards.

### Some Human And Environmental Protection Cases In Nigeria

In the oil sector where environment 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 hazard created by the companies have made the enforcement of environmental laws ineffective. What the judges fail to realize is that economic development can be compatible with environmental conservation.<sup>48</sup> 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,

39. N.G.Ezeabasili, "Corporate Social Responsibility (CSR): A Tool in Environmental Enhancement in the oil industry in Nigeria" *Journal of Public & Private Law*, Unizik Awka vol.4 2011 P. 197-198.

40. Cap C 38 LFN 2004.

41. *Ibid*.

42. J. Nwazi, "Assessing the Problems of climate change: using law as an Instrument of control in Nigeria" *Journal of Public & Private Law*, Unizik Awka, Vol. 4. 2011, p 270-271.

43. Established 31<sup>st</sup> July, 2007 vol. 94 No. 25.

44. Section 8 (e) of the Act.

45. Section 8 (f) of the Act.

46. Section 10 (5) of the Act

47. Section 10 (6) of the Act

48. MA Ajomo, 'An Examination of Federal Environmental Laws in Nigeria,' M.A Ajomo and O. Adewale (eds), *Environmental Law and Sustainable Development in Nigeria* (Nigeria Institute of Advanced Legal Studies, 1994

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 complained of.<sup>49</sup> The consideration of the potential loss of revenue and investment outweighs considerations for the protection of the environment<sup>50</sup>. This is due largely to the fact that the Nigerian economy is dependent on the revenue from the sale of crude oil.<sup>51</sup> 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 disease etc.

In the cases of *Shell v Tiebo VII*,<sup>52</sup> *Shell v Isaiah*,<sup>53</sup> *Seismograph services v Mark*,<sup>54</sup> *Ogiale v Shell*,<sup>55</sup> *Shell v Ambah*,<sup>56</sup> the general characteristics that run 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 claim 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 judgments 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*,<sup>57</sup> 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 in 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.<sup>58</sup> It is fair to say that there has been a definite shift in the attitude of the Nigerian judiciary. Frynas is of the opinion that there has been a radical change in the approach of Nigerian judges to the law in the sense that have come to attach greater importance to the substance of the law by exercising their powers favourably in favour of plaintiff victims in deciding oil related environmental damage cases.<sup>59</sup> 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,<sup>60</sup> while Kaniye Ebeku<sup>61</sup> is a bit skeptical, 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*<sup>62</sup> signifies the readiness of the Nigerian judiciary to interpret the constitutional right to life expansively to include the right to a healthy/clean environment.

### ***Gbemre v Shell*:<sup>63</sup> The Beginning of the End of Gas Flaring in Nigeria**

The order of a Nigerian Federal High Court on the 14<sup>th</sup> 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 State Nigeria brought an action 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 provide in section 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) 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 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 applicants 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 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Shell Nigeria and NNPC were to be restrained from further flaring of gas in the applicants' community and were to take immediate steps to stop the further flaring of gas in the applicants' community.

The Court made the following declaratory order.

- That the constitutionally guaranteed fundamental right to life and dignity of human person provided by sections 33 (1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Article 4, 16 and 24 of the African Charter On Human and Peoples' Rights (Ratification and Enforcement) 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 1<sup>st</sup> and 2<sup>nd</sup> 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 the fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the

49. K Ebeku, "Judicial Attitudes to Redress for Oil Related Environmental Damage in Nigeria", *RECIEL* 12 (2) 2003, 199-208.

50. *Ibid* 207.

51. J Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities*, Transaction Publishers, 2000 34-36.

52. 1996 4 NWLR (Pt 445) 657 Culled from Ebeku, S. n 42 above at 204

53. 1997 6 NWLR (Pt 508) 236.

54. 1993 7 NWLR (Pt 304) 203 at 206

55. 1997 1 NWLR (Pt 480) 148

56. 1999 3 NWLR (Pt 593) 1

57. 1995 3 NWLR (Pt. 382) 148 *Ibid* at 205

58. *Ibid*

59. J Frynas *Ibid.*, at 219

60. MT Okorodudu, "law of Environmental Protection Materials and Text, Ibadan", 1998, p. 607 Culled from K. Ebeku, *Judicial attitudes to Redress for Oil Related Environmental Damage in Nigeria*, *RECIEL* 12 (2) 2003, 207

61. *Ibid*

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 may be 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 thereof unconstitutional, null and void by virtue of Section 1 (3) of the Nigeria Constitution.

- That the actions of the 1<sup>st</sup> and 2<sup>nd</sup> 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 the 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 may be 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 thereof unconstitutional, null and void by virtue of Section 1 (3) of the Nigeria 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)<sup>64</sup> and Kyoto Protocol<sup>65</sup> and it has obligations as a party to the protocol.<sup>66</sup> The Kwale CDM<sup>67</sup> project 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 I countries (developing). The project is sponsored by 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 emission reduction targets under the protocol and to assist non-annex I countries in achieving sustainable development.<sup>68</sup> 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).

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) which can be traded, the associated gas will be refined and sold, and thus promote sustainable development in Nigeria. This will transfer technology to Nigeria, improve 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.

Although the right to a clean environment was not included as one of the third generation rights, 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 important consequence of providing victims of environmental degradation en route to court to protect their rights.

## Recommendation

Climate change is global in nature as it affects the entire human race as a burden. No Country is immune. It cannot be solved by Nation States acting individually. Therefore the international community should take the enforcement of environmental laws as a responsibility. This is so because a lot of laws, both municipal and international, have been put in place but the desired results are not forthcoming rather things are getting worse. A good example is as regards gas flaring. Gas flaring has been outlawed internationally since 1984, but the multinational oil companies operating in Nigeria have continued the activity with impunity<sup>69</sup>. There should be adequate enforcement of these laws. The pneumatic system of waste control can also be borrowed in the control of green house gases emissions. This refers to a system whereby the wastes are entirely transported underground.<sup>70</sup>

There is need for Nigerian Government to develop and implement a National Strategy for Sustainable Development (NSSD)<sup>71</sup>. 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.

Nigeria government can also tackle this environmental problem by first making the provision of section 20 of the 1999 Constitution<sup>72</sup> justiceable so that actions can lie against it in case of its failure in this respect.

62. 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> accessed 14/12/11.

63. <http://www.climatelaw.org/media/gas.flaring.suit.nov20005/ni.shell.nov05.decision.pdf>

64. This convention was opened for signature at the Rio Summit.

65. The protocol came into force in 2005.

66. See Article 10 the Kyoto Protocol, available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf#page=12>

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

68. 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 1 in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.

69. L Usigbo, "Etteh Decries Gas Flaring" in the *Vanguard* 17 September, 2007 at 13.

70. M Attah, "Problems of Domestic Waste Management in Nigeria: Any Repressions?" *University of Benin Law Journal*, Vol .11 Nos. 1 and 2 2008 at 201.

71. The United Nation Sustainable Development Commission website at <http://www.un.org/esa/sustdev/csd/review.htm> site visited on the 14th December, 2011.

72. as amended.