Human Rights and the Environment: Is there a Legally Enforceable Right to a Clean and Healthy Environment for the “Peoples” of the Niger Delta under the Framework of the 1999 Constitution of Nigeria?

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ABSTRACT:

This article looks at the environmental problem in the Niger Delta, the main oil and gas producing area in Nigeria, with its attendant health problems for the local communities therein. It examines the issue of whether a legally enforceable fundamental human right to a clean and healthy environment exists under the framework of the 1999 Constitution, which is the current constitution of Nigeria. Although the 1999 Constitution does not expressly incorporate, under its human rights provisions the right to a clean and healthy environment, this article by examining the practice in certain States, both developed and developing, argues that such a right can be inferred. Further, the article examines the African Charter Act, a domestic law deemed to be an existing law under the Constitution, which incorporates the African Charter domestically in Nigeria, and argues that such right to a clean and healthy environment is enforceable in Nigeria. In addition, it is argued that under the 1999 Constitution a claim in respect of the violation of this right can be brought not only against the government of Nigeria, but also against Multinational Oil Companies (MNOCs) directly engaged in activities resulting in environmental pollution in the Niger Delta. The case for the liability of MNOCs, it is pointed out, is in line with certain interesting trends under the auspices of the United Nations (the Human Rights Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights) and the United States of America (the Aliens Torts Claims Act).

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I. INTRODUCTION

The 1999 Constitution of Nigeria came into force on 29 May 1999 with the transfer of power from the military regime of General Abdulsalam Abubakar to the democratically elected government of President Olusegun Obasanjo. Substantially this Constitution embraced the same approach as the previous Constitutions adopted in Nigeria by having a separate chapter dedicated to fundamental human rights. Like the previous Constitutions, the present 1999 Constitution appears to be more focused on traditional civil and political rights and does not specifically mention the right to a clean and healthy environment.

Although there are common law and statutory remedies in damages for injury caused by environmental degradation under Nigerian domestic laws, these remedies are fraught with complications. The common law remedies incorporate technicalities as regards burden and standard of proof, whilst a number of the statutory remedies are based on outdated statutes, some of which were enacted

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1 This Constitution came into force on the 29th of May 1999 when the Military Regime of General Abdulsalam handed over power to the democratically elected government of President Olusegun Obasanjo. Ever since the Nigeria became an Independent nation on the 1st of October 1960 after many years of British colonial rule it has had various Constitutions – the 1960 Constitution, the 1963 Constitution, 1979 Constitution, 1989 Constitution, 1995 Constitution and the current 1999 Constitution. The 1989 and 1995 Constitution never came to force. The various Constitutions are as a result of military intervention in governance at various times since the independence of Nigeria.


3 Human rights is sometimes categorised into three generations of human rights – the traditional civil and political rights are first generation rights, while economic, social and cultural rights are second generation rights and solidarity rights are third generation rights. The right to a clean and healthy environment falls under the category of solidarity rights. See Farooq Hassan, “Solidarity Rights: Progressive Evolution of International Human Rights Law?” 1 New York Law School Human Rights Annual, 51-74 (1983).

4 E.g. under Negligence; the Rule in Rylands v. Fletcher; Trespass to Land and Nuisance.

as far back as the 1960s and are out of touch with modern realities of environmental degradation, in many ways, including the issue of compensation of aggrieved parties. Some other more recent statutory remedies are faced with the problem of enforcement on the part of the government.\(^6\) The need for reform of the common law and statutory remedies is not in doubt.\(^7\) However, this article does not purport to examine this point, but rather it restricts itself to the issue of whether a legally enforceable right to a clean and healthy environment exists in favour of the local communities of the Niger Delta, under the current 1999 Constitution of the Federal Republic of Nigeria and the African Charter Act,\(^8\) an existing law under the Constitution, which specifically incorporates the African Charter as part of Nigerian domestic law. The necessity for a right to a clean and healthy environment under the Nigerian Constitution, as will be subsequently shown in this paper, is especially important as a result of the grievous life threatening health issues in the Niger Delta area of Nigeria arising from massive environmental pollution.

The article starts by identifying the precarious environmental situation in the Niger Delta which result not only in ecological damage in the area but also constitute a serious heath hazard for the local communities. Thereafter, it briefly looks at the


\(^8\) Cap. 10, Laws of the Federation of Nigeria 1990.
trend in Africa as regards the interrelation between human rights and the environment. Further, it proceeds to examine whether a legally enforceable human right to a clean and healthy environment exists under the domestic laws of Nigeria, with a focus on the 1999 Constitution and the African Charter Act. In looking at this the article will also examine the practice in certain other jurisdiction. The article thereafter concludes with a brief closing remark.

II. POSITION IN NIGER DELTA

The Niger Delta is occupied by such local communities as the Ijaws, Urhobos, Itsekiris, Ogonis, Isokos, Ilajes, Etches, Ndonis, Ikwerres, Andonis, Edos, Efiks, Ibibios, and, to some extent, the Ibos, who are located mainly in seven States in Nigeria, namely, Delta, Bayelsa, Rivers, Cross Rivers, Akwa Ibom, Edo and Ondo States of Nigeria. It is located in the southern part of Nigeria along the coast and is one of the largest wetlands in the world, probably the largest in Africa.

9 Human Rights Watch, The Price of Oil, Corporate Responsibility and Human Rights Violations in Nigeria’s Oil Producing Communities (New York/Washington/London/Brussels, Human Rights Watch 1999), 91-92. Apart from the Ibos, which are one of the three major tribes, the other tribes are minority tribes in Nigeria.

10 There are thirty-six States in Nigeria. See S.3 (1) and Part 1 of the First Schedule of the 1999 Constitution listing out the States in Nigeria. See also the Niger Delta Development Commission Act No.2 of 1999, which sets up the Niger Delta Development Commission (NNDC) to deal with the environmental problems in the Niger Delta, where S.30, the interpretation section, after listing out 9 States (Abia, Akwa Ibom, Bayelsa, Cross Rivers, Delta, Edo, Imo, Ondo and Rivers) as member States, goes on to add that any other State in Nigeria which produces oil may be a member State. The Act therefore does not seem to make a distinction between “Niger Delta” and “Oil Producing” States. Certain States included as member States, such as Imo and Abia, which are Oil Producing States, are strictly speaking not under the Niger Delta area. This Commission is another in a series of government established organizations, such as the now defunct Oil, Mineral Producing Areas Commission (OMPDEC), to seek to ameliorate the deplorable conditions in the Niger Delta. See Eaton, op.cit, pp. 287-288(see note 6). The previous government established organizations have not had any significant success in dealing with the immense environmental problems in the Niger Delta and therefore many are skeptical about the ability of the Niger Delta Development Commission to tackle these environmental problems.

11 See Human Rights Watch, op.cit, 53(see note 9) which estimates the Niger Delta area as covering over 20,000 square kilometres.
Over 60% of the mangrove forest found in Nigeria is located in the Niger Delta. This area, which consists of extensive freshwater swamp forests, is rich in biodiversity with numerous and diverse species of fauna and flora. Further, it is blessed with numerous tidal creeks and rivers with some flowing into the Atlantic Ocean. These creeks and rivers, prior to the extensive pollution, contained vast quantities of fish and other marine species that served as a main source of the diet of the local communities. In addition to the tremendous biodiversity in the Niger Delta, the area is the main source of crude oil and natural gas in Nigeria.

1. History of Oil and Gas Exploration in Nigeria.

The history of the search for oil in Nigeria can be traced back to 1907 when the British colonizers filed a report on the nation’s oil potentials. In 1908 a German company called Nigerian Bitumen Corporation was given a licence to explore for oil at the Araromi area, located in the present day Ondo State. However as a result of the outbreak of the First World War this company did not get very far with its exploration. Thereafter, the interest in oil exploration in Nigeria appeared to have been suspended. By 1937 the then British colonial government granted various oil exploration licences, in respect of virtually the whole territory of Nigeria, to Shell D’ Arcy, a consortium owned by Royal Dutch Shell and British Petroleum.

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13 See Okonmah, op. cit.43-46 (See note 6); Eaton, op. cit., 264-271(see note 6) and G. Etkikerentse, Nigerian Petroleum Law, (London/Basingstoke, Macmillan Publishers Ltd, 1985),1-23

14 Nigeria came into being with the Amagamation of the North and South in 1914 by the British colonialists who were in power. Prior to this Nigeria was divided into the Southern and Northern Protectorates. The British ruled Nigeria until October 1st, 1960 when Nigeria gained independence.


17 See Olisa, Ibid. Also see Isabella E. Okagbue, The Law and Development of Natural Gas in Nigeria. (Lagos, Nigerian Institute of Advanced Legal Studies (NIALS), 1985), 4
the predecessor to Shell Petroleum Development Company of Nigeria. The company discovered in 1956 crude oil in commercial quantities at Oloibiri, located in the present day Bayelsa State. Ever since this discovery, various companies from different parts of the world have joined in prospecting, exploration and exploitation of oil and natural gas in Nigeria, especially in the Niger Delta area. Multinational Oil Companies (MNOCs), which are the major exploiters under specialised agreements with the State Petroleum Corporation of Nigeria, the Nigerian National Petroleum Corporation, dominate the oil and gas industry in Nigeria.

From an initial production rate of 5,100 barrels of crude oil per day upon the discovery of crude oil in Oloibiri, the average production per day has steadily grown to about 1.787 million barrels per day. The Nigerian crude oil, which has been described as light and sweet, with low sulphur content, is of similar quality to the North Sea varieties as a result it has a ready market in Western Europe and the United States of America. It is therefore a major revenue earner for Nigeria where the petroleum sector constitutes more than 40 per cent of Gross Domestic Product (GDP) and provides more than 95 per cent of Nigerian exports. This,

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19 Human Rights Watch, op.cit., 25 (see note 9)
20 These companies include foreign companies such as Shell Petroleum Development Corporation (SPDC); ExxonMobil; Chevron Texaco; TotalElfina; Agip; Phillips Oil, Ashland, Statoil, Du Pont and indigenous companies such as Amni International Petroleum Development Company; Allied Energy Resources; Atlas Petroleum International Limited; Consolidated Oil Limited; Dubri Oil Company Oil Limited; Yinka Folawiyo Petroleum Company Limited.
22 Nigeria is estimated to have crude oil reserves of about 25 billion barrels with new offshore discoveries likely to push it to about 30 billion barrels. http://www.nigerianoilgas.com/industryprofile/index.htm
23 Human Rights Watch, 25-26(note 9)
24 Ibid, 25
coupled with the natural gas,\textsuperscript{25} associated and non-associated, found in Niger Delta show the area as blessed with extensive natural resources.

Although the discovery of oil and gas has greatly increased the revenue base of the Federal Government of Nigeria,\textsuperscript{26} it has also brought critical and fundamental environmental problems, having far reaching adverse socio-political and economic implications for the local communities in the Niger Delta.

2. \textit{Environmental problems}.

The extensive oil and gas prospecting, exploration and exploitation activities in the Niger Delta, has adversely affected the environment.\textsuperscript{27} The environmental degradation has had far reaching negative effects, extending not only to the tidal creeks, rivers and Atlantic Ocean, but also to the land and the air.

It has been estimated that approximately 2,300 cubic metres of oil are spilled in 300 separate incidents every year.\textsuperscript{28} Also, the statistics from the Nigerian Department of Petroleum Resources (DPR)\textsuperscript{29} show that between 1976 and 1996,

\textsuperscript{25} Nigeria is estimated to have 104.7 trillion cubic feet of natural gas reserves the tenth largest in the world. In fact Nigeria has been described as a gas province with some oil in it. See R. Lukman, “Nigeria Allocates Resources to LNG Project”, Vol. XIX No. 1, \textit{OPEC Bulletin}, of February 1988, 20. and http://www.nigerianoil-gas.com/naturalgas/index.htm

\textsuperscript{26} In Nigeria ownership of petroleum vests in the Federal government of Nigeria by virtue of s. 44(3) of the 1999 Constitution of the Federal Republic of Nigeria. S.44 (3) says: “Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.”


\textsuperscript{28} See Human Rights Watch, op.cit, 59-68(note 9 above).

\textsuperscript{29} This is the department of government charged with the responsibility of supervising all operations been carried out under licences and leases in the petroleum industry in
a total of 4,835 reported incidents resulted in spillage of at least 2,446,322 barrels (102.7 million U.S. gallons), with about 1,896,930 barrels (79.7 million U.S. gallons) being lost to the environment.\textsuperscript{30} An example of this spillage is the offshore well blowout in January 1980 at one of Texaco’s facility. Here about 200,000 barrels of oil (8.4 million U.S. gallons) was spilled into the Atlantic Ocean, resulting in the destruction of about 340 hectares of mangroves in the Niger Delta.\textsuperscript{31} Also, in November 1982 there was the Abudu pipeline oil spillage caused by a pay loader of a construction company, which accidentally ripped a hole in an underground crude oil pipeline. The spillage resulted in pollution of lands, resulting in its infertility and the destruction of crops, and waters, with the resultant destruction of marine life.\textsuperscript{32} In July 1984 there was also the oil spillage in the Ughelli local government area of Delta State by the Shell Petroleum Development Company (SPDC), which took about six days to discover, and resulted in massive pollution of rivers and lands of neighbouring villages.\textsuperscript{33} Further, in January 1998 there was the spillage from Mobil’s Iddo platform at Akwa Ibom State with about 40,000 barrels of crude oil (1.7 million U.S. gallons) released into the environment. In addition, the March 1998 spillage from Shell’s Jones Creek facility in Delta State resulted in 20,000 barrels of crude oil (840,000 U.S. gallons) being released into the environment.\textsuperscript{34} Spillages as a result of MNOCs activities are ongoing even till the present time,\textsuperscript{35} and has resulted in massive pollution of rivers, streams, creeks and other sources of drinking water, thereby depriving the local communities of drinking water. Also, fishes and other aquatic animals have either died or are unhealthy to consume as a result of the oil spillages. This deprives the local peoples

\footnotesize{Nigeria. They set standards for the control and regulation of the operations in the industry from exploration to production and even marketing of the crude oil and other refined products. See S. 10 of the NNPC Act Cap. 263, Laws of the Federation of Nigeria 1990.}

\textsuperscript{30} Human Rights Watch, op.cit, 53-90(see note 9).

\textsuperscript{31} Ibid, 59-60

\textsuperscript{32} K.M. Mowoe, op.cit, 174 (see note 27).

\textsuperscript{33} Ibid.

\textsuperscript{34} Human Rights Watch,op.cit, 61(see note 9)

of this nourishing source of protein. The large scale oil pollution has also been identified as cause of the following health complaints rampant amongst the peoples in the area – headaches, nausea, vomiting, diarrhea, sore eyes, running nose, cough, itching skin, skin rashes and blisters, as well as short breathe and weakness, with the consequent high rate of human mortality.36

Apart from the health implications for human life, the pollution has resulted in economic dislocation for the people of the area. According to the Human Rights Watch publication:

"Whatever the long term impact on the environment, spills can be devastating for those directly affected, especially in the dry land or freshwater swamp areas, where the effects are concentrated in particular locations. Oil leaks are usually from high pressures pipelines, and therefore spurt out over a wide area, destroying crops, artificial fishponds used for fish farming, “economic trees” (that is, economically valuable trees, including those growing “wild” but owned by particular families) and other income-generating assets. Even a small leak can thus wipe out a year’s food supply for a family, with it wiping out income from products sold for cash”.37

In addition to oil spills, the prospecting, exploration and exploitation activities of the oil companies create other environmental problems. The cutting down of vegetation to make room for site preparation, seismic surveys and oil pipelines result in destruction of trees and other plants, including certain rare species. Dredging and dumping of dredged materials also destroy the ecology of the area. For example, the dredged materials in mangrove areas become acidic once exposed to oxygen and this decreases the productivity of the farm lands.38 Further, the drilling for crude oil produces waste products, mainly mud, which when produced in large quantities causes problems of changing acidity or saline levels of the soil and water.39 The use of explosives and vibrator trucks cause sound pollution,

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37 Human Rights Watch, op.cit. p.66(See note 9)
38 Ibid.pp.71-72
39 Ibid.
which end up adversely affecting fauna and flora, but also cause cracks to houses, and in addition constitute a health hazard to those who reside in the area.\textsuperscript{40}

There is also the environmental problem arising from gas flaring. Nigeria is known to flare about 75 per cent of the total gas produced, the bulk of which is produced in the Niger Delta.\textsuperscript{41} The flaring is believed to produce 35 million tons of carbon dioxide and 12 million tons of methane annually,\textsuperscript{42} and therefore contributes to the world’s total emissions of greenhouse gases.\textsuperscript{43} This makes the low-lying Niger Delta vulnerable to the effects of sea levels rising.\textsuperscript{44} The acid rains in this area have also been attributed to gas flaring.\textsuperscript{45} Further, it has serious health implications for human life and has been reported to be a significant factor for the growing cases of cancer and stroke amongst the local communities.\textsuperscript{46} In addition, when the gas flames are put off the thick smoke that comes forth results in grave air pollution.\textsuperscript{47}

The environmental problems in the Niger Delta area are indeed enormous. The deprivation, hardship, destruction of the environment by the oil and gas mining activities, with its attendant effect on the health of the local peoples has led to agitation on the part of the communities against MNOCs.\textsuperscript{48} The agitation, sometimes

\textsuperscript{40} Ibid pp.69-70.

\textsuperscript{41} Ibid. p. 72. The government appears to be pursuing a policy to stop gas flaring by the year 2008. See “Gas Flaring: FG, Masari Differ on 2008 Deadline”, \textit{This Day} (Nigerian Newspaper) of 25 July 2003.


\textsuperscript{43} Human Rights Watch, op.cit. 72 (note 9 above).

\textsuperscript{44} Ibid.

\textsuperscript{45} Festus Iyayi, (See note 15), 174.

\textsuperscript{46} Ibid.

\textsuperscript{47} Ibid.

\textsuperscript{48} The most popular being the activities of the movement for the survival of Ogoni People (MOSOP) lead by the late Ken Saro-Wiwa. The activities of MOSOP spiraled into violence, which led to the killing of certain pro-government Ogoni leaders in 1994. This in turn led to the arrest and trial of Ken Saro-Wiwa and eight (8) other MOSOP members before a military tribunal established by the then Federal Military Government, under the late General Sani Abacha. Ken Saro-Wiwa and the others were sentenced to death
violent, is still a regular feature in the Niger Delta. The violence, it is suggested, is indicative of the shortcomings of the existing legitimate remedies available to victims of environmental harm. While in no way stating that a right to a clean and healthy environment would be a quickwork panacea to eliminate the agitation and violence, it is suggested that its existence would expand the legal remedies available to aggrieved victims of environmental pollution, and thereby reduce the need for them to take the laws into their hands.

III. HUMAN RIGHTS AND THE ENVIRONMENT IN AFRICA

An attempt to maintain a linkage between human rights and the environment has on several occasions been made in various international fora. These attempts

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50 See the third preamble of the Universal Declaration of Human Rights (UDHR) which states: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” Also see Shedrack C. Agbakwa, “A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa,” 47(1) Journal of African Law, 38, 42(2003), where the writer posited that “Denial of socio-economic rights (or any rights at all) is hardly conducive to peaceful co-existence. It is usually a wellspring of popular discontent and violent conflicts.” See also the same writer in “Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights”, (2002) 5 Yale Human Rights and Development Law Journal, 177, 181(2002) where he said: “the greatest benefit of guaranteeing enforceable [or justiciable] rights is the assurance it gives people that effective mechanisms for adjudicating violations or threatened violations of their rights are available.”

have resulted in various endeavors to put forward a right to a healthy or clean environment, thereby leading to a healthy academic debate about whether a right to a clean or healthy environment exists under international law. So far there have been a sparse number of Conventions that endorse a right to a clean and healthy environment.

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53 See for example A. Boyle and M. Anderson (eds.), Human Rights Approaches to Environmental Protection (England, Oxford University Press, 1988); D. Shelton, “What Happened in Rio to Human Rights?” 3 Yearbook of International Law, 75 (1992) and Human Rights, Environmental Rights and the Right to Environment, 28 Stanford Journal of International Law, 107(1991); S. Giorgetta, “The Right to a healthy Environment, Human Rights and Sustainable Development”, 2 International Environmental Agreements: Politics, Law and Economics, 173(2002). In the case of Flores v. S. Peru Copper Corp. (SPCC), 253 F. Supp.2d 510 at 525, the United States of America federal court in July 2002 granted the SPCC’s motion to dismiss the claim brought under the Alien Tort Claims Act (ATCA) and concluded that the “Plaintiffs have not demonstrated that high levels of environmental pollution, causing harm to human life, health, and sustainable development within a nation's borders, violate any well-established rules of customary international law.” This decision was in August 2003 affirmed by the Second Circuit Court of Appeals. See case reported in 343 F.3d 140, 172 (2d Cir.2003) and case note on these cases titled, “Environmental Torts Do Not Violate Customary International Law”, 98(1) AJIL, pp.175-177(2004).

Africa has not been left out in the attempt to promote a linkage between human rights and the environment. This region, where the state of underdevelopment makes environmental protection, in real terms, less of a priority than in developed States, has in its regional treaty, the African Charter, declared the right of peoples to “a general satisfactory environment favourable to their development.”\textsuperscript{55}

The treaty recognizes that the right to a clean or healthy environment is a necessary prerequisite for the healthy development of the peoples within a society. The Protocol to the African Charter on the Rights of Women in Africa, in Article 18(1) also provides that: “Women shall have the right to live in a healthy and sustainable environment”.\textsuperscript{56} In addition, by the 1999 Grand Bay (Mauritius) Declaration and Plan of Action, the defunct Organization of African Unity (OAU)\textsuperscript{57} Ministerial Conference on Human Rights affirmed that “the right to a generally satisfactory healthy environment” is a “universal and inalienable” right and forms an integral part of fundamental human rights.\textsuperscript{58} This declaration went on to state in paragraph 8(n) that, “.... Violations of Human Rights in Africa are caused among others by... Environmental degradation....”\textsuperscript{59}

The African Charter, along with the Protocol on the Rights of Women and the Grand Bay Declaration, point to a commitment on the part of African States to put forward the essential and necessary linkage between human rights and the environment. It is therefore expected that African States would take steps towards domestic implementation of a right to a clean and healthy environment by


\textsuperscript{55} Art. 24.


\textsuperscript{57} The O.A.U has since 2001 been replaced by the African Union (AU) established by the Constitutive Act of the African Union, which was adopted 11 July 2000 and came into force on 26 May 2001. See http://www.africa-union.org/root/au/index/index.htm

\textsuperscript{58} Paragraph 2 of Declaration and Plan of Action of the First OAU Ministerial Conference on Human Rights, meeting from the 12\textsuperscript{th} to 16\textsuperscript{th} April 1999 in Grand Bay, Mauritius. http://www.africanreview.org/docs/rights/grandbBay.pdf

\textsuperscript{59} Ibid.
incorporating the right into their municipal laws, especially their fundamental law, the Constitution. Quite a number of African States, especially those which adopted their constitution in the 1990s, when there emerged a growing awareness of the need to protect the environment, have specifically included a legally enforceable human right to a clean and healthy environment in their Constitution.\footnote{Art.24 of the 1992 Angolan Constitution (a right to a “healthy and unpolluted environment”); Art.24 (a) of 1996 South African Constitution (a right to “an environment which is not detrimental to[ a person’s] health or well-being”); Art. 46 of the Congo Constitution 1992(a right to “a healthy, satisfactory and enduring environment”); Art.44 (1) of the Ethiopian Constitution (a right to “a clean and healthy environment”); Art. 39 of the Madagascar Constitution 1992(imposing a duty for everyone to “respect the environment”); Art.39 of the Ugandan Constitution 1995(a right to “a clean and healthy environment”); Art. 70(1) of the Constitution of the Republic of Cape Verde 1992(a right to “a healthy life and ecologically balanced environment”); Art.15 of the Constitution of Mali 1992(a right to “a healthy environment”); Art.72 of the Constitution of Mozambique 1990(a right to “a balanced natural environment”); S.38 of the Constitution of the Republic of Seychelles 1993(a right to “a clean, healthy and ecologically balanced environment”); Preamble to the Constitution of the Republic of Cameroon, 1972 as amended by Law No. 96-06 of 1996, ( a right to “a healthy environment”) and S.63(1)(a) of the Draft Constitution of Kenya of 27 September 2002,( a right to “an environment that is safe for life and health”). For links to the various constitutions see http://confinder.richmond.edu/#B and http://jurist.law.pitt.edu/world/index.htm}

IV. HUMAN RIGHTS, THE ENVIRONMENT AND NIGERIA

1. Relevant Municipal Laws.


An indication of the awareness of the significance of the protection of the environment is reflected in the fundamental objectives and directive principles of state policy of the constitution of the Federal Republic of Nigeria 1999.\footnote{See chapter II of the Constitution 1999.} Section 20 of the Constitution states that: “The State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria”.

\footnote{See also s. 17(2) (d) of the 1999 Constitution which says: “exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented”.

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Human Rights and the Environment Peoples of Niger Delta

However, although this is couched in an obligatory manner, the constitution makes it clear that this provision is not enforceable in court. Is there therefore a legally enforceable right to a clean and healthy environment under the 1999 Constitution? Chapter IV the Nigerian Constitution provides for the fundamental human rights, which are enforceable in the courts. The rights, which are the traditional civil and political rights, are the right to life; to dignity of human person; to personal liberty; fair hearing; privacy and family life; freedom of thought, conscience and religion; freedom of expression and the press; to peaceful assembly and association; freedom of movement; freedom from discrimination and freedom from compulsory acquisition except in a manner prescribed by law. The Supreme Court of Nigeria explained the incorporation of fundamental human rights in the Nigerian Constitution in the following words:

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63 See s. 6(6) (c). See Olubunmi Okogie –v- A-G of Lagos State (1981) 2 NCLR 337; Uzoukwu –v- Ezeonu II [1991] 6 N.W.L.R. (Part 200) p.708 at 761 per Nasir P.C.A. See however the decision of the Philippines Supreme Court of the 30th July, 1993 in Minors Oposa- v- Secretary of the Department of Environment and natural Resources, 33 I.L.M.173, 187-188(1994) where the Court was of the view that the fact that the right to “a balanced and healthful ecology” is found under the Declaration of Principles and State Policies and not the Bill of Rights did not make it any less important than the civil and political rights in the latter. As far as the Court was concerned a right to “a balanced and healthful ecology” need not even be written in the Constitution as “they are assumed to exist from the inception of humankind.”

64 See ss. 6(6) (b) and 46. In the case of Bakare –v- Lagos State Civil Service Commission & Anor. [1992] 4 N.W.L.R. (Part 262) p. 641 at 689 per Karibi-Whyte JSC, the Supreme Court of Nigeria pointed out that “The Constitution is the source of our laws. The rights, privileges and the protection of the citizens are derived from its provisions”.

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65 See S. 33.
66 See S.34.
67 See S. 35.
68 See S. 36.
69 See S. 37.
70 See S. 38.
71 See S. 39.
72 See S. 40.
73 See S. 41.
74 See S. 42.
75 See S. 44.
"Human Rights ... mark a standard of behaviour which we share with all civilised countries of the world since the United Nations Universal Declarations of human Rights in 1948, though it still left for various member nations to determine which rights from the plethora of rights then declared they would wish to incorporate into their domestic laws". 76

While the recent Nigeria Constitution was adopted on 29 May 1999, it does not expressly incorporate the right to clean environment under chapter IV. This is because the Constitution, though adopted in 1999, is merely a rehash of the traditional civil and political rights provisions of the previous Nigerian Constitutions, to the exclusion of social and economic rights, as well as solidarity rights. 77 More modern African Constitutions, such as the 1996 South African Constitution, have included the right to a clean environment. Section 24(a) of the South African Constitution says: "Every person shall have the right to an environment which is not detrimental to his or her health or well-being." Also the 1992 Angolan Constitution in Article 24 provides for the right to clean environment, by stating that, "All citizens shall have the right to live in a healthy and unpolluted environment". 78

However, although the right to a clean and healthy environment is not specifically stated in the Nigerian Constitution, it can be inferred from certain fundamental rights stated in chapter IV. For example, it can be deduced from the right to life. 79


77 See note 1 above for the various Constitutions in Nigeria since independence. All the Constitutions in the Human rights chapter have always adopted basically the same kind of traditional civil and political rights. The 1999 Constitution is substantially a copy of the 1979 Constitution.

78 For example the South African Constitution was adopted on the 8th of May 1996 and amended on the 11th of October 1996 by the Constitutional Assembly. See http://www.info.gov.za/documents/constitution/1996/96cons2.htm. The Constitution of Angola was adopted in August 1992. Generally the Constitutions of African States, which includes the right to a clean and healthy environment, were adopted in the 1990s. See note 8 above.

79 See S.33 of the Nigerian Constitution 1999 and the High Court of India case of T. Damodhar Rao v. Municipal Corp. of Hyderabad AIR 1987 AP 171 at 181. See also Okonmah, op.cit, 53-54 (See note 6)
Judge Christopher Weeramantry, rightly in this writer's view, pointed out in the case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) that: "The protection of the environment is likewise a vital part of contemporary human rights doctrine. For it is a sine qua non for numerous human rights such as the right to health and the right to life itself."  

The degradation of the environment, as a result of massive pollution of the land, water and air in the Niger Delta, results in a slow and gradual death of the peoples of the area. There is no reason why the peoples in the Niger Delta cannot claim that the infringement of their right to clean environment, which has a grave effect on their health and life, is an infringement of their right to life. Recently in the case of Jonah Gbemre v. Shell Petroleum Development Corporation & 2 Ors., the Federal High Court of Nigeria examined the issue of a right to a clean and healthy environment vis-à-vis the traditional civil and political rights contained in the Constitution. In this case the applicant on behalf of himself and as a representative Iwherekan Community in Delta State, Nigeria, brought an application before the Court to enforce his fundamental human rights in respect of the gas flaring activities of Shell Petroleum Development Corporation. The Court made a declaration that the applicant's constitutionally guaranteed right to life and dignity of human person, included the "right to clean, poison-free, pollution-free and healthy environment."  

In this case the Court founded its decision on the Constitutional basis of rights to life and human dignity as well as the provisions of the African, including the solidarity right to a clean environment under Article 24. The Court held that the provisions of legislation that permitted continued gas flaring was "inconsistent with the Applicant's rights to life and/or dignity of human "

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81 See the Minors Oposa Case, supra at 184-185(see note 63), where the Supreme Court of Philippines held that an action to enforce the environmental right to a clean environment could be brought as a class action by those affected not only for their generation but even for the succeeding generation based on the concept of intergenerational responsibility. See also the African Charter on Human and Peoples' Rights, which confers rights on "peoples".  
82 Suit No. FHC/B/CS/153/05  
83 See Paragraph 3 of decision in Suit No. FHC/B/153/05.
person enshrined in Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act ... and are therefore unconstitutional, null and void..."  

This decision appears to be a rather isolated decision of a Nigerian Court on this issue. Also, it is a decision of the Court of first instance which has so far not been tested before the appellate Courts. It is however hoped that if this comes up before the Nigerian appellate courts, the courts would adopt a liberal interpretation to the various civil and political rights in chapter IV of the constitution and infer a right to a clean and healthy environment. Such liberal approach to the interpretation of the Nigerian Constitution, to bring it in line with modern needs of the citizens, has been encouraged by the Supreme Court of Nigeria. The Supreme Court has said that:

"... it is the duty of this court to bear constantly in mind the fact that the present Constitution has been proclaimed the Supreme Law of the Land: that it is a written, organic instrument meant to serve not only the present generation but also several generations yet unborn ... it is my view that the approach of this court to the construction of the Constitution should be, and so has been one of liberalism..."  

Courts in certain other jurisdictions where there is no specific inclusion of the right to a clean environment in their Bill of Rights, have taken the view that such right could be inferred from certain traditional civil and political rights, contained in such Bill of Rights, and are justiciable. For example, although in India there is no specific provision in the fundamental human rights chapter of the Constitution bestowing a right to clean environment, this right has been inferred as a result of judicial activism.  

The Supreme Court of India in the case of Subhash Kumar v.

84 See Paragraph 6 of decision in Suit No. FHC/B/153/05. The relevant legislation referred to by the Judge as being null and void are the Associated Gas Re-injection Act, A25, Vol.1, Laws of the Federation of Nigeria 2004 and the Associated Gas Re-injection (Continued Flaring of Gas) Regulations, Section 1.43 of 1984, which permitted gas flaring during exploitation subject to the payment of financial penalty into the coffers of the Federal Government of Nigeria.

85 Nafiu Rabiu v- the State (1980) NSCC, 291 at 300-301 per Udoma JSC.

86 See M. Anderson, “Individual Rights to Environmental Protection in India”, in: Boyle and Anderson (eds.) (see note 53), 199-225.
*Bihar* 87 ruled that the right to life provided in Article 21 included the right to "enjoyment of pollution free water and air." Also in Bangladesh, where the Constitution does not expressly provide for a right to clean environment, the same liberal approach has been adopted by the Courts to determine that the right to life includes the right to a clean and healthy environment. In the Bangladesh case of *Dr. M. Farooque v. Secretary, Ministry of Communication, Government of the Peoples' Republic of Bangladesh & 12 ors*, a petition was filed against various government agencies for not fulfilling their statutory duties to mitigate air and noise pollution caused by motor vehicles in the city of Dhaka. The Supreme Court of Bangladesh accepted the argument that the constitutional right to life in the constitution includes a right to a clean environment.88 Further, in Pakistan, the same liberal interpretation to the right to life, as including a right to a clean environment, was adopted by the court in *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v. The Director, Industries and Mineral Development, Punjab, Lahore*.89 In addition, the Argentinean court in the 1993 case of *Margarita v. Copetro SA*, decided that pollution arising from a coal burning industry, from which cancerous substances emanated, constituted a violation of the right to life of the applicant.90

Further, the European Court of Human Rights, in certain recent cases, has gone further to interpret other traditional civil and political rights, such as the right to private and family life, as being affected when there is environmental degradation.91

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89 1994 SCMR, 2061. See Razzaque, Ibid.


91 Article 8(1) of the Convention provides that “Everyone has the right to respect for his private and family life, his home and his correspondence”. See S.37 of the 1999 Constitution of the Federal Republic of Nigeria, which gives the right to privacy and family life.
In *Lopez Ostra v. Spain*, a waste treatment plant was built close to the applicant’s house. In the course of its operation the plant released fumes and smell causing health problems to the local residences, including Mrs. Lopez Ostra and her family. The European Court of Human Rights, upon an application by Mrs. Ostra against the Spanish government, held that the severe environmental pollution from the plant was a breach of the applicant’s right to private and family life, under Article 8 of the European Convention on Human Rights (ECHR). Also, in the case of *Hatton & Ors v. United Kingdom*, the applicants, who lived near Heathrow airport, complained, amongst other things, that with the introduction of a new scheme in 1993 by the United Kingdom government night time noise increased, especially in the early morning, and this interfered with their right under Article 8 of ECHR. The Chamber of the European Court of Human Rights held that the increased night time noise, especially in the early morning, was a violation of the applicants’ right under Article 8. While this decision has been overturned by the Grand Chambers on the peculiar facts of the case, the Grand Chamber agreed, in principle that a claim against noise pollution could be brought under Article 8, in appropriate cases, as an interference with the right to private and family life.

The environmental pollution in the Niger Delta with its attendant health implications could therefore be inferred to be a violation of the right to life of the individuals residing there under section 33 of the Constitution. In addition the gas flaring releasing unhealthy gases into the atmosphere and again its severe adverse health implications for the residents of the area, could be inferred to be a deprivation of such residents of their right to privacy and family life under section 37 of the Nigerian Constitution. The right to privacy and family life could also be said to be violated by the frequent use of explosives and vibrator trucks causing sound pollution and causing cracks and damage to homes.

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94 See case of Hatton and others v. the United Kingdom (Hatton II) (Application no.36022/97), Grand Chamber Judgement, Strasbourg, 8 July 2003, paras.116-130. See also the joint dissenting opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner which was of the view that upon the peculiar facts of the case Art.8 had been breached.
There is no reason, in the light of the practice in other jurisdictions, why more Nigerian court decisions would not deduce a right to clean and healthy environment from the provisions of Chapter IV of the Constitution.95


The African Charter, to which Nigeria became a party on the 19th of January 1981,96 was incorporated into Nigerian domestic law on the 17th of March, 1983 as the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act[hereinafter called the African Charter Act].97 This Act which has not been repealed is deemed to be an existing law enacted by the National Assembly, the federal legislative organ of Nigeria.98 The African Charter Act states as follows:

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95 See the Report of the Global Judges Symposium on Sustainable Development and the Role of Law, 18-20 August, 2002, Johannesburg, South Africa. In this Symposium attended by 122 Senior Judges from 60 States, including 19 African States(Angola, Egypt, Ethiopia, Lesotho, Malawi, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe) the judges after emphasizing their commitment to the Universal Declaration of Human Rights and the UN Human Rights Conventions and recognizing their close connection with sustainable development and upholding the Rule of Law proceeded amongst other things to recognize that “...the rapid evolution of multilateral environmental agreements, national constitutions and statutes concerning the protection of the environment increasingly requires the courts to interpret and apply new legal instruments in keeping with the principles of sustainable development.” http://www.unep.org/dpd/symposium/Documents/FINAL_REPORT.doc

96 See Art. 26 of the Vienna Convention on the Law of Treaties (VCLT) 8 I.L.M. 679, which incorporates the time-honored principle in international law of pacta sunt servanda Charter.

97 See S. 12(1) of the 1999 Constitution of the Federal Republic of Nigeria, which is in pari materia with S. 12(1) of the defunct 1979 Constitution of Nigeria. This section says: “No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.”

98 S. 315(1) (a) of the 1999 Constitution says: “Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall

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"As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria." 99

The Act which comprises merely of two sections, lists out the full provisions of the African Charter in its Schedule, including Article 24, which states: "All peoples shall have the right to a general satisfactory environment favourable to their development." The Supreme Court of Nigeria, commenting on the African Charter Act, said:

"...the African Charter on Human and Peoples' Rights, having been passed into our own municipal law, our domestic courts certainly have the jurisdiction to construe or apply the treaty. It follows then that anyone who felt (sic) that his rights as guaranteed or protected by the Charter, have been violated could well resort to its provisions to obtain redress in our domestic courts".100

In 2001, the African Commission made a finding against the Nigerian government with regard to its obligations under, amongst other provisions, Article 24 of the Charter. At its 30th Ordinary Session held in Banjul, the Gambia, from 13th to 27th October 2001, the African Commission entered a decision on the complaint filed on behalf of the Ogoni community of Niger Delta by two NGOs.101 In its decision

be deemed to be – (a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws.”

99 See S.1

100 See Abacha-v- Fawehinmi [2000] 6 N.W.L.R. (Part 660) 228 at 357 per Ejiwunmi JSC. Also s. 12(1) of the 1999 Constitution which states that a Treaty which has not been enacted as law by the National Assembly cannot be enforced in Nigeria. The Court also made it clear that a claim under this Act can be brought before the domestic courts in the usual way by which an action is normally instituted through the relevant court procedures. See Ogugu v. the State [1994] 9 N.W.L.R. (366) 1 at 26-27 per Bello CJN. Also Abacha v. Fawehinmi, Supra, pp. 293-294 per Ogundare JSC.

101 The Social and Economic Rights Action Center (SERAC), an NGO based in Nigeria, and the Centre for Economic and Social Rights (CESR), a New York based NGO, based inter alia on Article 24 of the Charter filed Communication 155/96, The Social and Economic
in the Social and Economic Rights Action Center (SERAC) and the Centre for Economic and Social Rights (CESR)/Nigeria, the Commission found that the then Federal Military Government of Nigeria, had violated, amongst other provisions of the Charter, Article 24 through the oil production activities of the NNPC and its joint venture partner, the Shell Petroleum Development Corporation (SPDC), which resulted in environmental degradation and health problems for the Ogoni people. The Commission stated as follows:

"The right to a general satisfactory environment, as guaranteed under Article 24 of the African 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."

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Rights Action Center and the Center for Economic and Social Rights/Nigeria. For copy of the complaint see http://www.cesr.org/text%20files/nigeria.PDF. Under the Charter the African Commission on Human and Peoples' Rights is empowered, inter alia, to entertain complaints by persons who allege that a right under the Charter has been breached in relation to him/them. However such complaints can only be entertained if they indicate the authors; are compatible with the OAU and the African Charter; are not written in a disparaging or insulting language; are not based on news disseminated through the mass media; are sent after exhausting local remedies (or when it is impossible or impracticable to exhaust local remedies); are submitted within a reasonable time after the local remedies are exhausted and do not deal with cases which have been settled by States inter se, in cases involving States, through peaceful settlement procedures under the United Nations, OAU and African Charter See Arts 45(2), 55 and 56 of the African On the practice and procedure of the Commission See generally E.,Ankumah, The African Commission on Human and Peoples' Rights: Practice and Procedures (The Hague/Boston, Martinus Nijhoff Publishers,1996). On the role of NGOs in the African Commission see R. Murray, The African Commission on Human and Peoples' Rights and International Law (Oxford-Portland Oregon, Hart Publishing,2000), 87-95


103 Para. 52 of Decision regarding Communication 155/96. See also Inter-Am.C.H.R. Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc.10 rev.1 (1997) where the Inter-American Commission on Human Rights took the view that oil exploration activities in the Oriente, Ecuador which led to environmental degradation and pollution resulting in a persistent threat to human life and health was a violation of the right to life and personal security.
The Commission went on to emphasise that the mere fact that the environmental degradation was perpetrated by private parties, in this case the SPDC, an MNOC, did not excuse the Government of Nigeria from their duty to protect the right under Article 24. In the words of the Commission: "Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties."  

While the decisions of the Commission merely have a recommendatory effect and therefore are non-binding, such decisions amount to an authoritative interpretation of the provisions of the Charter. It is expected that the Nigerian Courts when faced with a decision concerning the interpretation of the Charter will be guided by the decision of the Commission. This is more so, since the Charter has been incorporated into domestic law of Nigeria. The Commission in SERAC and CSER/Nigeria took cognizance of the fact that the African Charter had been incorporated into the domestic law of Nigeria, and was of the view that "all the rights contained therein can be invoked in Nigerian Courts including those violations alleged by the Complainants." As regards this particular communication, the Commission chose to hear the present complaint, without the exhaustion of local remedies before the domestic courts, because of the peculiar problem of Nigeria being governed, at the time the complaint was made, by a military dictatorship, which had the tendency to enact legislation ousting the jurisdiction of the domestic courts, and thereby deprive people of redress in the

104 Para.57 of Decision regarding Communication 155/96. The Commission on this point referred to its earlier decision in Union des Jeunes Avocats/Chad, Communication 74/92.

105 See Arts. 52, 53 and 58 of African Charter.

106 See Art.45 (3) of the African Charter which says that the African Commission, as one of its functions, shall: "Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU." See also Frans Viljoen and Lirette Louw, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation", 48(1) Journal of African Law, 1-22(2004).

107 S.1 of the African Charter Act, Cap.10.

108 Para.41 of Decision regarding Communication 155/96.
domestic courts against government violation of human rights. In view of the
close of guard from the military regime to the present civilian regime in Nigeria,
there is no reason why an action cannot be validly maintained before the Nigerian
domestic courts under Article 24 of the African Charter on Human and Peoples’
Rights (Ratification and Enforcement) Act. Recently, the Federal High Court of
Nigeria in the Gbemre Case appears to indicate an inclination of the Nigerian
Courts to enforce Article 24 of the African Charter. Although, the Court inferred
such a “right to clean, poison-free, pollution-free and healthy environment,”
from the traditional civil and political rights contained in the Nigerian Constitution,
it also expressly acknowledged that this right was also legally enforceable under
Article 24. It is hoped that more Nigerian Courts, including the Appellate Courts,
would specifically hold that the environmental pollution in the Niger Delta is a
breach of the treaty obligations under the African Charter, as domesticated by the

2. Justiciability of the Right to a Clean and Healthy Environment before
the Nigeria Courts.

Most of the cases dealing with human rights abuses that have come before the
Nigeria Courts have been generally related to the traditional civil and political
rights, rather than social, economic and cultural rights and solidarity rights.
However, there are the exceptional cases such as the Gbemre case and Gunme
& Ors. V. Attorney General of the Federal Republic of Nigeria, both Federal
High Court cases, which both show that the Nigerian Courts are not averse to

109 Ibid.
110 See Suit No. FHC/B/CS/153/05 and notes 83 and 84 above.
111 See for example the Abacha v Fawehinmi Case, Supra; Comptroller of Nigerian Prisons v. Adekanye [1999] 10 NWLR (part 623) 400 and Ubani v. Director, State Security
Service, SSS [1999] 11 NWLR 129, all dealing with the right to liberty.
112 Suit No. FHC/ABJ/CS/30/2002. See Nelson Enonchong, “Foreign State Assistance in
Enforcing the Right to Self-Determination under the African Charter: Gunme & Ors v.
113 See Sections 6(5) (c) and 249-254 of the 1999 Constitution under which the Federal
High is deemed to be established as one of the federal courts.
adjudicating on violations of human rights going beyond the traditional civil and political rights. The latter case was filed in 2002 by 12 Cameroonians acting for themselves and the people of Southern Cameroon. The court was asked to make a declaration that, under Article 1 and 20(1) (2) and (3) of the African Charter, contained in the schedule to the African Charter Act, Nigeria had a legal duty to place before the International Court of Justice and the United Nations General Assembly, as well as ensure diligent prosecution to the end, the claim of the peoples of the Southern Cameroon to self-determination and independence. The Attorney-General filed a preliminary objection to the jurisdiction of the Court to hear to case on the ground, amongst other objections, that the court lacked jurisdiction to grant the relief sought by the plaintiffs, namely an injunction or specific performance of this nature against the Government. The Court, in dismissing this objection, cited section 251(1) (s) of the Constitution that states “nothing in the provisions of paragraphs (p), (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance, where the action is based on any enactment, law or equity”. As far as the Court was concerned the action of the plaintiffs were based on an enactment since all the claims of the plaintiffs are provided for in the African Charter Act.\(^{114}\) Although this case was eventually settled by the parties, upon grounds outside the scope of this article,\(^{115}\) the point to note is that the Court was disposed to hear a claim in respect of the right to self-determination, a right that has been tagged as a solidarity right, based on the ground that it is a claim provided for by the African Charter, which has force of law in Nigeria through the African Charter Act.

Although, so far there has been no specific appellate decisions of the Nigerian Courts on this issue, there is no reason why an appellate Court decision would not acknowledge that the right to a clean and healthy environment is justiciable, especially under Article 24 of the African Charter which has been incorporated into Nigerian domestic law as the African Charter Act.

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\(^{114}\) See Enonchong, Ibid, 249-250.
3. Liability of Government alone or joint liability of Government and Multinational Oil Companies (MNOCs) operating in Nigeria?

The massive environmental pollution and degradation in the Niger Delta is as a result of the operations of MNOCs operating under various contractual arrangements with the Federal Government of Nigeria. This raises the issue of the joint liability of both the Government and the offending Companies for the violation of the right to a clean and healthy environment.

Section 46(1) of the 1999 Constitution provides that: "Any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State in relation to him may apply to a High Court in that State for redress." Thereafter if dissatisfied with the decision of the High Court, such claimant is allowed to appeal to the Court of Appeal and if still dissatisfied to the Supreme Court, which is the highest Court in the land. This provision, which provides a right to any person to seek redress from the Courts for actual or imminent contravention of his human rights, does not in any way restrict the claim to one against the government or its agencies. It does not in any way preclude a claim against a private person, whether natural or juridical, for the violation of human rights. The way and manner section 46(1) is couched points to the fact that a

115 Ibid, 250-251. The Parties arrived at terms of settlement which were filed before the Federal High Court and entered as an order of the Court in which the Federal Republic of Nigeria agreed to institute a case before the International Court of Justice and take any other measures as may be necessary to place the case of the self-determination of the peoples of the Southern Cameroons before the United Nations General Assembly and any other relevant international organisations. To the knowledge of this writer there has been no active step by the Federal Government of Nigeria to comply with the terms of settlement although Enonghong speculates that there may be a connection between this case and the Cameroon v. Nigeria case, at that time before the International Court of Justice. See Ibid, 255-256.

116 See Part II of this article dealing with the problem in the Niger Delta.


118 The provision of Section 46(1) can be contrasted with, for instance, with section 7 of the United Kingdom Human Rights Act 1998 which specifically requires such claim to be against a public authority by providing: A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act."
claim for a violation of human rights provisions under Chapter IV can be brought against the government and its agencies, as well as a private person, whether natural or juridical. Further support for this view can be derived from section 6 of the Constitution, vesting judicial powers upon the Nigerian Courts, which states that such powers “shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.” ¹¹⁹ There is judicial support for this position in the Court of Appeal decision in the case of Uzoukwu v. Ezeonu II.¹²⁰ In this decision the Court of Appeal held that the fundamental human rights provisions of the Constitution were enforceable against not only the government and its agencies but also against private persons. Persons in Nigeria under the Constitution, includes MNOCs operating in Nigeria, which are required to be incorporated as Nigerian limited liability companies under the relevant companies legislation.¹²¹ There is no reason therefore, why a claim for the breach of the right to clean and healthy environment cannot be brought against, not only the Nigerian government and its agencies, but also against the various MNOCs that are actually engaged in the activities resulting in environmental pollution in the Niger Delta. This was the situation in the Gbemre case where the order of the Court in respect of the violation of the right to a clean environment was also made against the SPDC, a TNC that was included in the case as a Respondent.

Support for the position of Nigerian law in applying human rights provisions to MNOCs is in line with the trend in the United Nations circles and the United States of America in respect of the extension of liability for human rights violations to Corporations.

¹¹⁹ Section 6(6).


¹²¹ See the Nigerian Companies and Allied Matters Act 1990.

The United Nations Sub-Commission on the Promotion and Protection of Human Rights by a resolution approved the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights on 13 August 2003[the Norms]. The Norms are a product of the long overdue realisation that corporations, especially transnational corporations, are crucial actors in the field of human rights and should therefore be held accountable for their human rights violations. Although recognizing that States remain the principal actors having the primary responsibility “to promote, secure the fulfillment of, respect, ensure respect of and protect human rights”, the Norms acknowledge the significance of the role of the corporations in this regard. As a result the Norms provide for a wide range of responsibility for corporations to promote, secure the fulfillment of, respect and protection of human rights. Apart from the general obligation, upon such corporations and other business enterprise, to promote, secure the fulfillment of, respect, ensure respect of and protect, within their spheres of activity and influence, human rights recognized in international and national law, including the rights and interests of indigenous peoples and other vulnerable


123 Principle I(20) of the Norms define the term “transnational corporation” as referring to “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries-whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.” The Norms are also meant to apply to “other business enterprise” which includes “any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.” See Principle I (21) of the Norms.


125 See Preamble 3 and Principle A (1) of the Norms.
groups, the Norms contain specific obligations in ensuring equality of opportunity and non-discriminatory treatment; right of security; rights of workers; respect for national sovereignty and human rights as well as obligations with regard to consumer and environmental protection.\(^{126}\) In respect of the obligations with regard to environmental protection the Norms provides:

"Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development."\(^{127}\)

Whilst the Norms is not treaty law, therefore not technically binding on States, they do represent "soft" law reflecting the current leaning of the international community towards a secondary, but nonetheless crucial responsibility of corporations for human rights violations.\(^{128}\) It therefore suggested that the Nigerian Courts should be guided by the Norms in applying the relevant provisions of the Constitution and the African Charter Act, with a view to holding not only the Federal government and its agencies but also MNOCs engaged in environmental degradation in the Niger Delta, responsible for human rights violation of the right to a clean and healthy environment.\(^{129}\)

\(^{126}\) See Principles A (1) to G (14) of the Norms.

\(^{127}\) Principle G (14) of the Norms. In the Commentary on the Norms, U.N.Doc.E/CN.4/Sub.2/2003/38/Rev.2 (2003), it is said in respect of Principle G (14) that "Transnational corporations and other business enterprises shall respect the right to a clean and healthy environment in the light of the relationship between the environment and human rights..."

\(^{128}\) Weissbrodt and Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," op.cit. 913-915(see note 123)

\(^{129}\) See ibid.pp.919-920 where the authors suggest that regional human rights commission and the courts should make use of the Norms. They even go as far as suggesting that the African Commission in the SERAC and CSER/Nigeria Case could have cited the

The ATCA, which reads simply that the American “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”, after a long period of obscurity has since the Filartiga v. Pena-Irala,\(^\text{130}\) assumed significance as a tool for aliens to bring action before the United States courts for human rights violations committed in foreign lands. With the recent cases of Doe v. Unocal,\(^\text{131}\) Wiwa v. Royal Dutch Petroleum Company and Shell Transport and Trading\(^\text{132}\) and Bowoto v. Chevron\(^\text{133}\) the liability under ATCA for human rights violations on foreign soil have clearly been extended to include corporations.\(^\text{134}\) Although the case of Flores v. Southern Peru Copper Corporation(SPCC),\(^\text{135}\) decided under the ATCA, determined that environmental torts do not violate the law of nations since the plaintiffs had not established that “high levels of environmental pollution, causing harm to human life, health, and sustainable development within a nation’s borders, violate any well-established rules of customary international law,”\(^\text{136}\) this nonetheless does not detract from the fact that liability of corporations for human rights is acknowledged by the American Courts. In any event, in the case of Nigeria, such high levels of environmental pollution, causing harm to human life, health and sustainable development, within the Nigerian borders,

\(^{130}\) 630 F.2d 876(2d Cir. June 30, 1980).

\(^{131}\) No. 00-56603, 00-56628, 00-57195 CIV.A. 2002 WL 31063976.


\(^{136}\) See 253 F. Supp.2d 510, 525.
should be regarded by the Nigerian Courts as a violation, especially since Article 24 of the African Charter as domesticated by the African Charter Act, incorporates a legally justiciable right to a clean and healthy environment.

V. CONCLUSIONS

It is unfortunate that Nigeria, as one of the leading States in Africa, has not at this point, specifically included the right to a clean and healthy environment under chapter IV, the human rights chapter, of its Constitution. There is however latitude to infer a legally enforceable right to clean and healthy environment from the traditional civil and political rights enunciated in Chapter IV of the 1999 Constitution. However, for this to be a reality the Nigerian Courts need to adopt a bold, liberal, people-oriented, activist interpretative approach to the Constitution. Examples of such an approach abound in certain other jurisdictions. This is even more so, since the African Charter, as incorporated by the African Charter Act, under Article 24 recognizes a right to a clean and healthy environment. From the decision of the African Commission in SERAC and CESR/Nigeria, the oil and gas exploration activities of the Nigerian government and its partners, the MNOCs, resulting in environmental pollution is a violation of Article 24 of the African Charter. There appears to be an indication, especially with the Gbemre case, that the Nigerian Courts when faced with a case brought under Article 24 would hold that the right to a clean and healthy environment is a legally enforceable right. It is urged that a combined effect of the provisions of the 1999 Constitution, the African Charter Act, along with the trends reflected in the Norms and the ATCA clearly point to the fact that the liability for the violation of the Niger Delta peoples' right to a clean and healthy environment involves a joint liability of the government and its relevant agencies, as well as MNOCs.

The environmental devastation in the Niger Delta is very critical since it not only destroys the atmospheric and territorial environment, but is a serious health hazard to the human occupants of the area. A human rights milieu in Nigeria without

137 See the Legality of the Threat of Use of Nuclear Weapon Case, Advisory Opinion, ICJ Rep. 1996, p.226 at 241-242, para.29 where the Court said that, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”
such specific and clearly stated legally, enforceable right to clean and healthy environment under chapter IV of the 1999 Constitution is out of line with what appears to be the trend in a number of Africa states’ Constitution which were adopted in the nineties.

Certainly a legally protected right to a clean and healthy environment is required if the peoples of the Niger Delta people are to enjoy the dignity of human persons. There is therefore a need to ensure that the right to a clean and healthy environment exists in Nigeria not only through the interpretative role of the Courts of the Constitution and the African Charter Act, but by a specific inclusion of this right in the fundamental human rights chapter of the Nigerian Constitution, the supreme law of land.\(^{138}\)

\[^{138}\text{Presently in Nigeria there is a National Political Reform Conference, which is amongst other things to take a fresh look at the 1999 Constitution with a view to recommending certain adjustments. See http://www.nigeriafirst.org/article_3702.shtml}\]