

COMBATING CLIMATE CHANGE IN NIGERIA: AN APPRAISAL OF CONSTITUTIONAL AND LEGAL FRAMEWORKS

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ABSTRACT

The challenges of global climate change transcend international boundaries, which was primarily caused by industrialization in developed countries and, to a lesser extent, by natural factors. Its consequences are experienced more in developing countries in the South, particularly in Sub-Saharan Africa, which unlike affluent Western countries, can ill-afford the cost of mitigation. The Constitution, being the supreme and fundamental law of a state, constitutes the grundnorm, which gives validity to other laws while regulating the relationship between the citizens and the state. It guarantees the citizens' basic fundamental rights. The Constitution of the Federal Republic of Nigeria (CFRN) 1999 does not expressly provide adequate measures by the state and the citizens to curtail climate change. Its provisions on the environment suffer a major setback of non-justiciability, creating no legally enforceable rights and obligations for the citizens and the government; rather, it has to be aided by other Sections of the Constitution to provide enjoyment of rights. The environment is humanity's only sustenance, with which any undue interference or adverse dealing brings a threat to life and continued human existence. It thus behooves the state to protect and improve the environment to combat climate change, failing which results in a catastrophe. The Constitution sought to create a right in Section 20 but simultaneously abrogated the same right in Section 6(6)(c) thereof. This has engendered plagues by way of drought and desertification, oil pollution, soil erosion, flooding, land degradation, air pollution, and biodiversity loss, resulting in poverty in diverse parts of the country. As a mark of concern for the environment and its people's enjoyment of a safe environment, the

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country has been actively participating in global efforts aimed at preventing dangerous anthropogenic interference with the climate system by way of its membership in the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, the Paris Agreement, and the addition of a Climate Change Department in its Federal Ministry of the Environment. This article will attempt to examine the relevant provisions of the Constitution in relation to combating climate change in Nigeria. Though no express provisions relating thereto exist, the existing provisions suffer inexorably from major setbacks, a situation that must be rescued to settle once-for-all the perennial denial of rights of the Niger Delta region be spotlighted in this article.

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INTRODUCTION

As the Nigerian environmental situation began to attract local and international attention,¹ more information began to surface regarding the extent of environmental damage in the Niger Delta (ND). From

¹ The Koko toxic waste scandal in 1988 by Rafaelli Gianfranco and Desiderio Perazzi, two Italian nationals, formally birthed environmental concerns in Nigeria. See Oluwafemi A. Ladapo, *The Contribution of Cartoonists to Environmental Debates in Nigeria: The Koko Toxic Waste-Dumping Incident*, in 1 *ECO-IMAGES: HISTORICAL VIEWS AND POLITICAL STRATEGIES*, 61, 61 (2013).

scholarly writings and documentaries to court cases and reports of non-governmental organizations, details of the nature and scope of environmental damage in the ND shot to the limelight.² While these developments re-shaped the discourse on the environmental situation in Nigeria's oil-producing region, many challenged the veracity of these accounts, alleging that they were overly exaggerated.³ The position of these skeptics notwithstanding, affected communities in the ND capitalized on these expositions and began to demand governmental attention to the environmental degradation in the region and its impact on human life. The mix of these reactionary and precautionary measures notwithstanding, the severity of the environmental contamination remains a source of great concern not only in the region but beyond, as the pollution in the region has been attributed largely to oil spillage and gas flaring for which government actors seem unenthusiastic to find any lasting solution.⁴ The fact that the people of the ND have not benefitted adequately from oil wealth is only part of the story. Widespread and unchecked human rights violations related to the oil industry have pushed many people deeper into poverty and deprivation,⁵ fueled conflicts,⁶ and led to a pervasive sense of powerlessness and frustration.⁷ Climate change has led to multi-dimensional crises driven by the actions

² WILSON AKPAN & DAWOOD MAMOON, WHEN FOREIGN INTERVENTIONS IN DOMESTIC ECONOMY LEADS TO EXPLOITATION: A CASE STUDY OF OIL PRODUCTION IN NIGERIA'S NIGER DELTA, Munich Personal RePEc Archive Paper No. 83099 (Dec. 4, 2017), https://mpra.ub.uni-muenchen.de/83099/1/MPPA_paper_83099.pdf [<https://perma.cc/G5WM-DEKX>].

³ See, e.g., Chukwuemeka Chuks-Ezike, *Environmental Crime Liability of the Nigerian Government in Its Oil Pollution*, 2 ENV'T RISK ASSESSMENT & REMEDIATION, No. 2, 1, 1 (2018).

⁴ Olof Lindén & Jonas Pålsson, *Oil Contamination in Ogoniland, Niger Delta*, 42 AMBIO 685, 685 (2013); UNITED NATIONS ENV'T PROGRAMME, ENVIRONMENTAL ASSESSMENT OF OGO NILAND, 30–49 (2011); Nick Nuttall & Julie Marks, *UNEP Ogoniland Oil Assessment Reveals Extent of Environmental Contamination and Threats to Human Health*, UNITED NATIONS ENV'T PROGRAMME (Aug. 7, 2017), <https://www.unenvironment.org/news-and-stories/story/unep-ogoniland-oil-assessment-reveals-extent-environmental-contamination-and> [<https://perma.cc/PH5P-2P78>]; GLOBAL GAS FLARING TRACKER REPORT, WORLD BANK 8 (2020).

⁵ Sola Fajana, *Industrial Relations in the Oil Industry in Nigeria* 1–2 (Int'l Lab. Off., Working Paper No. 237, 2005).

⁶ Nonye Opara, *Meeting Environmental Challenges of Oil Production in Nigeria: A Case for Environmental Restoration Funds* 28 (Sept. 29, 2014) (Master's thesis, University of Calgary) (PRISM); Okechukwu Ibeanu, *Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria*, 6 ENV'T CHANGE & SEC. PROJECT REP. 23–24 (2000).

⁷ See generally Richard E. Benedick, *Human Population and Environmental Stresses in the Twenty-First Century*, 6 ENV'T CHANGE & SEC. PROJECT REP 9 (2000); see Ibeanu, *supra* note 6, at 23–28.

of security forces against militant groups, extensive pollution of land and water, high-level corruption, corporate failures, and bad practices, with serious government neglect.⁸

Under Nigerian law, local communities and states have no legal rights to oil and gas reserves in their territory; rather, the Federal Government solely allocates permits, licenses, and leases to survey, prospect for, and extract oil to the oil corporations, who are then automatically granted access to the land covered by their permit, license, or lease.⁹ This unilateral authority led the Federal Government to contribute to gross violations of human rights through unsound environmental management and unethical actions of its military forces in the ND region.¹⁰ Just as the State has the sovereignty to explore its resources, so do the people have the right to an unfettered healthy and productive life in harmony with nature. Hence, at the United Nations Conference on Human Environment (UNCHE) in Stockholm, 1972, it was stated that

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.¹¹

This grand statement provides the basis for a subsequent elaboration of a human right to environmental quality. Nations like

⁸ See *Conviction of Admirals Confirms Navy Role in Oil Theft*, NEW HUMANITARIAN (Jan. 6, 2005), <https://www.thenewhumanitarian.org/news/2005/01/06/conviction-admirals-confirms-navy-role-oil-theft> [<https://perma.cc/2QVL-PFKN>]; *NEITI: \$42B Lost to Crude Oil and Products Theft in Ten Years*, NIGERIA EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE (Nov. 6, 2019), <https://neiti.gov.ng/index.php/media-center/news/487.neiti-42b-lost-to-crude-oil-and-products-theft-in-ten-years>; *The Destruction of Odi and Rape in Choba*, HUM. RTS. WATCH (Dec. 22, 1999), <https://www.hrw.org/legacy/press/1999/dec/nibg1299.htm> [<https://perma.cc/VE9K-NRYG>].

⁹ Olajumoke Akinjide-Balogun, *Nigeria: Legal Framework of the Nigerian Petroleum Industry*, MONDAQ.COM (Apr. 3, 2001), <https://www.mondaq.com/nigeria/corporatecommercial-law/10726/legal-. . .1> [<https://perma.cc/6F63-DYC2>]; Udo Udoma & Belo-Osagie, *Oil and Gas Exploration and Production Laws in Nigeria*, LEXOLOGY.COM (Jan. 7, 2019), <https://www.lexology.com/library/detail.aspx?g=af6b69c4-fdf2-496c-92ab-d5c5bcc65e77> [<https://perma.cc/HL6U-KD3T>].

¹⁰ *Human Rights and the Environment*, ICELANDIC HUM. RTS. CTR., www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-the-environment [<https://perma.cc/DD7H-7CG2>] (last visited Jan. 11, 2021).

¹¹ United Nations Conference on the Human Environment, Rep. of the United Nations Conference on the Human Environment, 10, A/CONF.48/14/Rev.1 (June 5, 1972).

Nigeria are still grappling with the failure to give greater emphasis to human rights because of the uncertainty and debate about the proper place of human rights in the development of international environmental law.¹² Among several human rights treaties, the 1981 African Charter on Human and Peoples' Rights proclaims environmental rights in broadly qualitative terms.¹³ It seeks to protect the right of the people to the best attainable standard of health and to assert their right to a generally satisfactory environment favorable to their development.¹⁴ But unfortunately, the reverse arguably has been the case, as with the rate at which society is being significantly degraded, degradation unaccounted for, development is simply incorrectly measured.¹⁵ It is simply not sufficient just to explore our natural resources but to make productive use of them to eliminate poverty and improve human welfare and quality of life. In recent times, there has been growing awareness of and fears about environmental degradation affected by industrialization, increasing pressure on resource demands resulting from alarming population growth in the developing regions of the world, and increasing levels of consumption in the developed regions of the world.¹⁶

It is only in recent times that concerted efforts are being made by the government, which is bowing to pressure from NGOs and local communities alike to address the severe problems resulting from environmentally deleterious and unequal development suffered in the ND, a major cause of agitation and militarization of the region.¹⁷ These

¹² INTERNATIONAL COUNCIL ON HUMAN RIGHTS, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE 1–2 (2008); see also Alan Yanovich & Claus Zimmermann, *Global Problems and Global Solutions: Towards Better Global Governance*, in WTO PUBLIC FORUM 2009: GLOBAL PROBLEMS, GLOBAL SOLUTIONS (WTO, 2010).

¹³ Org. of African Unity [OAU] Charter arts. 21, 23 (1963).

¹⁴ *Id.* at arts. 16, 24.

¹⁵ Nicolas Bouleau, *The Environmental Violence of Volatility: How Neoliberal Economy Obscures Information About the State of the Planet* (June 19, 2013), <https://halshs.archives-ouvertes.fr/halshs-00835669> [<https://perma.cc/VW2V-DZ7C>]; Gideon E.D. Omuta, *Transitioning to Sustainable Development and a Green Economy in the Niger Delta of Nigeria: Challenges and Prospects*, 6 CPED MONOGRAPHS SERIES, no. 9, 2014, at iii.

¹⁶ Rahul Mittal, *Impact of Population Explosion on Environment*, 1 WESCHOOL "KNOWLEDGE BUILDER" 1, 1 (2013); J. Van Bavel, *The World Population Explosion: Causes, Backgrounds and Projections for the Future*, 5 FACTS VIEWS & VISION 4, 289 (2013).

¹⁷ Cyril Obi & Siri Aas Rustad, *Introduction: Petro-Violence in the Niger Delta – the Complex Politics of an Insurgency*, in OIL AND INSURGENCY IN THE NIGER DELTA 1–2 (Cyril Obi & Siri Aas Rustad, eds., 2011); Engobo Emeseh, *The Niger Delta Crisis and the Question of Access to Justice*, in OIL AND INSURGENCY IN THE NIGER DELTA 55, 63 (Cyril Obi & Siri Aas Rustad, eds., 2011); Samuel Ibaba, *The Ijaw National Congress and Conflict Resolution in the Niger Delta*, in OIL AND INSURGENCY IN THE NIGER DELTA 71 (Cyril Obi & Siri Aas Rustad, eds., 2011).

efforts, however, would require a multi-disciplinary approach to understand the ways in which environmental degradation has contributed to the entrenchment of poverty in the ND region.¹⁸ Hundreds of oil spills happen in Nigeria annually, wreaking severe devastation on the environment, grievously affecting livelihoods, and causing serious human health risks.¹⁹ For instance, in 2012, as many as 474 spills were recorded from Agip's operations alone. Shell reported 207 for the same period,²⁰ and nine operational oil spills of more than 100 kilograms in volume in 2017, up from the 2016 record.²¹ According to the National Oil Spill Detection and Response Agency (NOSDRA), from 2006 through March 2020, a total of 13,091 spills were recorded, resulting in 692,761 barrels of crude oil released. Recent studies in 2019 confirmed the appalling impacts of oil spills on human health in the ND region, as articles in the Proceedings of the National Academy of Sciences showed a causal relationship between oil spills and neonatal mortality in the region.²² However, Shell's data should be taken with a pinch of salt, as they may not be a reliable basis for any meaningful assessment of the company's impacts as a result of serious flaws in their compilation.²³ Records indicate that Shell's carbon dioxide (CO₂) emissions have been growing lower on average at about 70 percent in the last ten years.²⁴ Fifty percent of oil spills in Nigeria are due to corrosion, 28 percent to sabotage; 21 percent to oil production operations; and 1 percent to engineering drills, inability to effectively control oil wells, machine

¹⁸ Kate Higgins, *Regional Inequality and the Niger Delta* OVERSEAS DEV. INST. (Nov. 2007), <https://www.odi.org/publications/2507-regional-inequality-and-niger-delta> [<https://perma.cc/EVB2-RCRY>].

¹⁹ Amnesty Int'l, *Bad Information: Oil Spill Investigations in the Niger Delta*, 5, 10–12, AI Index AFR 44/028/2013 (Nov. 2013).

²⁰ *Id.* at 13.

²¹ *Oil Spill Data*, SHELL NIGERIA, <https://www.shell.com.ng/sustainability/environment/oil-spills.html> [<https://perma.cc/4BKD-MSAP>] (last visited Jan. 18, 2021).

²² *Id.*; Anna Bruederle & Roland Hodler, *Effect of Oil Spills on Infant Mortality in Nigeria*, PROC. NAT'L ACAD. SCI'S U.S. (Mar. 5, 2019), (pdf available at <https://www.pnas.org/content/116/12/5467>) [<https://perma.cc/9MWZ-Y6Q4>]; see also Bukola Adebayo, *Major New Inquiry Into Oil Spills in Nigeria's Niger Delta Launched*, CNN (Mar. 26, 2019, 8:18 PM), <https://www.cnn.com/2019/03/26/africa/nigeria-oil-spill-inquiry-intl/index.html> [<https://perma.cc/35B9-NLJQ>]; Nuttall & Marks, *supra* note 4.

²³ Amnesty Int'l, *supra* note 19, at 18.

²⁴ Vasanthi Vara, *BP vs Shell – Whose Business is Better and More Efficient?*, OFFSHORE TECH. (June 12, 2019), <https://www.offshore-technology.com/features/bp-vs-shell/> [<https://perma.cc/5T3G-MHML>].

failure, and inadequate care in loading and unloading oil vessels.²⁵ While oil spills are a significant problem themselves, the impact on human rights is exacerbated by the failure to clean up and remediate affected areas properly and swiftly, thereby causing serious harm to the soil and human, as well as animal, lives. Sabotage and theft of oil are serious problems in the ND. Multinational corporations (MNCs) are overstating the case in an effort to deflect attention away from the many spills that are due to corrosion and equipment failure.²⁶ The human rights impacts are serious—both the cause of a spill and the volume spilled affect the compensation a community receives in damages. If the spill is recorded as being by sabotage or theft, the community affected gets no compensation,²⁷ regardless of the damage done to their farms and fisheries. This is based on a provision in Nigeria's oil legislation, which Amnesty International and the Centre for Environment, Human Rights and Development believe needs to be amended.²⁸ Oil companies should be held responsible for a spill that is due to sabotage or theft if they have failed to take sufficient measures to prevent tampering with their infrastructure.

By National Oceanic and Atmospheric Administration (NOAA) satellite monitoring, in data collected starting in 2012, the year 2018 had been the highest for gas flaring, despite a dip in global gas flaring

²⁵ S.O. Oladipupo et al., *Review of Some Impacts of Oil Exploration and Production in Niger Delta, Nigeria*, 1 INT'L CONF. SCIS. ENG'G & ENV'T TECH. 13, 90 (2016); T.I. Mohammed et al., *Determination of the Effects of Oil Exploration on Galvanized Steel in Niger Delta, Nigeria*, 10 J. SCL. RSCH. & REP. 1, 1 (2016).

²⁶ Bill Corcoran, *Amnesty Accuses Shell of Wrongly Reporting Cause of Oil Spills in Nigeria*, IRISH TIMES (Nov. 7, 2013), <https://www.irishtimes.com/news/world/africa/amnesty-accuses-shell-of-wrongly-reporting-cause-of-oil-spills-in-nigeria-1.1586184> [<https://perma.cc/7RBP-3XEL>]; Jodi Rosenstein, *Oil, Corruption and Conflict in West Africa: The Failure of Governance and Corporate Social Responsibility*, KAIPTC MONOGRAPH, Oct. 2005, at 1, 29; Nelson Cabán, *The Famished Road: Oil Dependency and Socioeconomic Underdevelopment in the Niger Delta*, ACADEMICWORKS (May 10, 2018) (Master's thesis, City College of New York).

²⁷ AMNESTY INT'L, *Negligence in the Niger Delta: Decoding Shell and Eni's Poor Record on Oil Spills*, at 13, AI Index AFR 44/7970/2018 (2018); *Shell to Pay \$83.5M for Nigeria Oil Spill*, AL JAZEERA AM. (Jan. 7, 2015), <http://america.aljazeera.com/articles/2015/1/7/shell-nigeria-villagersagree835millioncompensationforoilspl.html> [<https://perma.cc/FLB9-MKAP>]; Rebecca Ratcliffe, *'This Place Used to be Green': The Brutal Impact of Oil in the Niger Delta*, GUARDIAN (Dec. 6, 2019), <https://www.theguardian.com/global-development/2019/dec/06/this-place-used-to-be-green-the-brutal-impact-of-oil-in-the-niger-delta> [<https://perma.cc/5VVQ-9VLW>].

²⁸ AMNESTY INT'L, *Nigeria: Are Human Rights in the Pipeline?*, at 2, AI Index AFR 44/020/2004 (Nov. 9, 2004); Amnesty Int'l, *The True 'Tragedy': Delays and Failures in Tackling Oil Spills in the Niger Delta*, at 10, 42, AI Index AFR 44/018/2011 (Nov. 2011).

records.²⁹ Nigeria is flaring gas that could be converted to power—in other words, burning money. A London-based research non-profit, On Our Radar, estimated that in 2016 alone, about \$770 million in income was lost in flares, based on a gas price of \$2.49 per gallon.³⁰ This is in a country where an estimated 43.5 percent of the population lacks access to electricity.³¹ According to the World Bank's Global Gas Flaring Reduction Partnership, Nigeria is now the world's seventh-largest gas flaring nation.³² The United States Environmental Protection Agency (EPA) estimates that Nigeria's flares for 2016 were the equivalent of or more than 3.5 million passenger vehicles driven for one year. In 2018, the World Bank reported that Nigeria flared an equivalent of 7.4 billion cubic meters (bcm) of gas, to rank 7th in the world's highest gas flaring countries.³³ The World Bank's Global Gas Flaring Reduction Partnership (GGFR) reported Nigeria still contributes immensely to climate change by releasing millions of tons of carbon into the atmosphere; but for the Nigeria Liquefied Natural Gas (NLNG),³⁴ Nigeria would have flared approximately 180.5 bcm or 6.37 trillion cubic feet (tcf), of associated gas into the atmosphere in the last twenty years.³⁵ In the face of all this, the government's determination to stop gas flaring is anything but firm enough. As of 2020, globally more than 350 million tons of CO₂-

²⁹ *New Satellite Data Reveals Progress: Global Gas Flaring Declined in 2017*, WORLD BANK (July 17, 2018), <https://www.worldbank.org/en/news/press-release/2018/07/17/new-satellite-data-reveals-progress-global-gas-flaring-declined-in-2017> [<https://perma.cc/L3TP-7DHP>].

³⁰ *Gas Flaring Continues to Scorch Nigeria's Niger Delta*, BLUEPRINT (Nov. 21, 2018), <https://www.blueprint.ng/gas-flaring-continues-to-scorch-nigerias-niger-delta/> [<https://perma.cc/64FP-YEF5>].

³¹ *Access to Electricity (% of Population) – Nigeria*, WORLD BANK, <https://data.worldbank.org/indicator/EG.ELC.ACCS.ZS?locations=NG> [<https://perma.cc/D6GF-6PHM>].

³² GLOBAL GAS FLARING TRACKER REPORT, *supra* note 4, at 5.

³³ *Id.*

³⁴ The Nigeria Liquefied Natural Gas Co. was incorporated in May 1989 to produce LNG and natural gas liquids for export. It accounts for approximately 7 percent of the world's total LNG supply, currently working on its Train 7. See Chike Olisah, *NLNG Signs Construction Contract for Train 7*, NAIRAMETRICS (May 13, 2020), <https://nairametrics.com/2020/05/13/nlng-signs-epc-contract-for-train-7/> [<https://perma.cc/Y4ZV-TH9L>]; Oluyemi A. Akintoye et. al., *Socio-Economic Implication of Nigeria Liquefied Natural Gas (NLNG) Project in Bonny Local Government Area, Rivers State, Nigeria*, J. GEOSCIENCE & ENV'T PROT. 4, 63–79 (2015).

³⁵ Chineme Okafor, *Between NLNG and Nigeria's Global Warming Challenges*, THIS DAY NEWSPAPER (Nov. 12, 2019), <https://www.thisdaylive.com/index.php/2019/11/12/between-nlng-and-nigerias-global-warming-challenges/> [<https://perma.cc/4PQS-2JQW>].

equivalent is flared annually, of which Nigeria accounts for more than 16.5 million tons.³⁶

Gas flaring is so concerning because it is a significant contributor to global warming, causing climate change through the emission of tons of CO₂ into the atmosphere.³⁷ Qatar, which ranks as the fourth-highest natural gas producer globally, has about 34.00 billion kilowatt-hours (kwh), averaging 15,056 kwh,³⁸ while Nigeria had about 5,000 megawatts in 2016.³⁹ The former has a population of 2.6 million, and the latter has about 200 million.⁴⁰ Nigeria's resolve to again end gas flaring in 2020 is not seen as attainable from all parameters, having officially done so since 1984 but continuing business as usual.⁴¹ Mere statements and rhetoric without adequate measures of enforcement will not stop flaring. The heat from gas flaring is fierce and prickly with constant noise, which causes wild animals to migrate away from their natural habitats and makes people shout to be heard while speaking. It causes low yields in agriculture, if the plants even survive. The ND is home to more than 30 million people, with an average of 2 million people living within four kilometers of a gas flaring site. In some cases, a gas flaring site is about one kilometer from human settlements in villages or communities, causing severe damage to human health.⁴²

Contemporary human rights scholars have extended the classical notions of liberty and justice by contending that the inalienable right to life will be meaningless and undermined if man is unjustifiably exposed

³⁶ Press Release, Anita Rozowska & Clare Murphy-McGreevey, *Global Gas Flaring Jumps to Levels Last Seen in 2009*, WBG (July 21, 2020), <https://www.worldbank.org/en/news/press-release/2020/07/21/global-gas-flaring-jumps-to-levels-last-seen-in-2009> [<https://perma.cc/4B3U-XVXT>].

³⁷ Olusanya Anjorin, *Gas Flaring in Nigeria*, THE PUNCH NEWSPAPER (Jan. 1, 2020), <https://punchng.com/gas-flaring-in-nigeria/> [<https://perma.cc/7ZQM-ZYBM>].

³⁸ World Energy Council, *World Energy Resources 2016* p. 16 (2016), <https://www.worldenergy.org/assets/images/imported/2016/10/World-Energy-Resources-Full-report-2016.10.03.pdf> [<https://perma.cc/8AA7-VYGL>].

³⁹ *Id.*; see also OECD & IEA, OECD GREEN GROWTH STUDIES ENERGY 77 (2011).

⁴⁰ WBG, Data, *Population, total* – Nigeria, (2019), <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=NG> [<https://perma.cc/5Y2U-JNEC>].

⁴¹ Okafor, *supra* note 35, at 7.

⁴² *Gas Flaring Continues Scorching Niger Delta*, DW (Nov. 14, 2018), <https://www.dw.com/en/gas-flaring-continues-scorching-niger-delta/a-46088235#:~:text=In%20Nigeria's%20Niger%20Delta%2C%20gas,water%20and%20damaging%20human%20health.&text=In%20the%20oil%20rich%20Niger,flames%2C%20oil%20is%20being%20extracted> [<https://perma.cc/TB3F-W4HD>].

to environmental pollution.⁴³ Governmental intervention through sustainable environmental regulation is necessary for furtherance of its social contract function to prevent diseases, loss of lives, and property. Much modern risk regulation reflects a view of social harms, including environmental harms as violations of moral rights of the citizens.⁴⁴ If it is deemed appropriate for the government to be involved in environmental protection, how intensive should that activity be? How stringent should environmental goals and targets be? What choice of specific policy instrument must be employed by the government to secure compliance and enforcement? How should environmental responsibilities be allocated among various levels of authorities within the State to promote optimal environmental performance? How should State authorities engage with Federal authorities on environmental policing and enforcement? As stated above, although governmental regulation may be necessary to improve social welfare or even environmental quality, governmental regulation itself may not be efficient; that is, the government may under-regulate or over-regulate, or it may regulate in ways that require unnecessarily large costs of compliance.

I. CLIMATE CHANGE IN NIGERIA

Nigeria, like other countries of the world, has its own experience with climate change disasters. Some twenty-five years ago, in the northeastern region presently comprising Borno and Yobe states, the southern part of Lake Chad (the section of it that lies inside Nigerian territory) dried up.⁴⁵ Some four decades ago, the Lake covered an area of over 40,000 square kilometers, whereas it now encompasses a mere

⁴³ Human rights activists and scholars in support of a right to health have invoked the inalienable right to life. See A. Boyle, *The Role of International Human Rights Law*, in PROTECTION OF THE ENVIRONMENT, HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 643, 643 (M. Anderson & A. Boyle, 1994); see also, Sheetal B. Shah, *Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India*, 32 VAND. J. TRANSNAT'L L. 435, 437 (1999); see also, Timothy J. Schorn, *Drinkable Water and Breathable Air: A Livable Environment as a Human Right*, 4 GREAT PLAINS NAT. RES. J. 121 (2000).

⁴⁴ George G. Brenkert, *Google, Human Rights, and Moral Compromise*, 85 J. BUS. ETHICS 453–78 (2009); James Fieser, *The Social Contract*, UNIV. TEXAS-MARTIN (Oct. 1, 2017).

⁴⁵ Jumoke Beyioku, *Climate Change in Nigeria: A Brief Review of Causes, Effects and Solution*, FED. REPUBLIC NIGERIA MINISTRY OF INFO. & CULTURE (Sept. 19, 2016), <https://fmic.gov.ng/climate-change-nigeria-brief-review-causes-effects-solution/>; see also, R.E. Miller et al., Report, U.S. DEP'T INTERIOR, *Ground Water Hydrology of the Chad Basin in Borno and Dikwa Emirates, Northeastern Nigeria, with Special Emphasis on the Flow Life of the Artesian System* 14 (1968).

1,300 square kilometers. While the negative trend continues unabated, land is laid to waste by rising temperatures leading to the rapid southward expansion of the Sahara Desert.⁴⁶ Farmlands and surrounding villages became barren and were swallowed up by advancing desertification, which led to a massive migration of people in search of more fertile terrain from the northeast towards the greener plateau and middle belt regions.⁴⁷ Growing desertification forced thousands of Fulani herdsmen to move to the south and middle belt leading to clashes with crop farmers culminating in the death of hundreds, according to reports of residents and activists.⁴⁸ Nigeria's Guinea Savannah region was not spared either. Excessive logging and overdependence on firewood for cooking have stripped a greater part of this area of its vegetation cover. The situation is similarly replicated in the south, where the tropical forest around Oyo has long been reduced to grassland.⁴⁹

The southeastern part of the country has gully-erosion to contend with, devastating many settlement areas and farmlands⁵⁰ and leading to poverty among local populations. Just as desertification is devastating vast areas of the north, rising sea levels are threatening Nigeria's coastal regions.⁵¹ Although a source of oil wealth, the Niger Delta's low-lying terrain and crisscross of waterways make it extremely vulnerable to

⁴⁶ Hajara Grema-Mallum, *Climate Change Taking a Toll on Nigeria, Immediate Action is Needed*, CLIMATEEDUCATE (July 5, 2018), <http://climateducate.weebly.com/ceblog/climate-change-taking-a-toll-on-nigeria-immediate-action-is-needed> [https://perma.cc/BLN3-5PB9].

⁴⁷ As against transhumance practiced decades back, the Fulani herdsmen are now relocating from the rapidly drying north down south – particularly the Middle Belt and further South – leading to significant cultural, social, economic and psychological harms to the host communities. Cattle herders encroach on farmlands eating up entire farmlands of communities and everything on their path. This has resulted in communal strifes and severe clashes between the settlers and so-called invaders, with raping and killings and reprisals, wiping out entire settlements and communities, causing unwarranted exacerbation of already fragile security situations in the whole region. Besides, herding in farming regions has no other end result than aggravating deforestation leading to rapid advancing of the Sahara down south. It also threatens food security in the nation whose larger chunk of scarce foreign exchange is spent on food importation. See generally Calvin Bryne, *Climate Change and Human Migration*, 8 U.C. IRVINE L. REV. 761 (July 2018).

⁴⁸ *Id.*

⁴⁹ Federal Ministry of Environment, *Third National Communication (TNC) of the Federal Republic of Nigeria Under the United Nations Framework Convention on Climate Change (UNFCCC)*, FED. REPUBLIC NIGERIA 35 (Mar. 2020).

⁵⁰ See Boniface C.E. Egboka et al., *Gully Erosion and Landslides in Southeastern Nigeria: Causes, Consequences and Control Measures*, 2 GLOB. J. ENG'G SCI'S. 1 (2019).

⁵¹ Nkwunonwo U.C., et al., *Flooding and Flood Risk Reduction in Nigeria: Cardinal Gaps*, 5 J. GEOGRAPHY & NAT. DISASTERS 1, 1–12 (2015).

flooding.⁵² Apart from being at risk of rising sea level, it has fallen victim to extreme oil pollution. Furthermore, in southern Nigeria, climate change is reflected in the massive flooding experienced in 2012: houses, farms, farm products, properties, and even human beings were swept away.⁵³ Also, the statistics released by the southwest zonal office of the National Emergency Management Agency (NEMA) about two years ago show that no fewer than 141 thousand persons were displaced and 13 thousand houses were destroyed in floods that occurred in four states in the region.⁵⁴ Negligence and a failure to tackle the issue of climate change by successive governments have largely contributed to the rise of insurgency groups across the country.⁵⁵ No doubt, the need to preserve, protect, and promote the environment constitutes a headache to many nations and dominates discussions and activities of government and non-governmental organizations across the globe. This is because the nature and prospects of the future are determined by the safety of the environment, and this fact has increased the need for a healthy and functional plan to preserve and protect the environment.

In line with the above, a two-day south/south-regional intensive training workshop to strengthen stakeholders' capacity towards mainstreaming climate change into state development plans was recently held in Calabar, Cross River state recently.⁵⁶ It was organized by the Department of Climate Change under the Federal Ministry of Environment and the National Planning Commission (NPC) in collaboration with the United Nations Development Programme (UNDP), where it was agreed generally that climate change had become a threat to the environment and economy in ways that will affect and

⁵² *Flood Dynamics Inner Niger Delta*, OBSERVATOIRE, <https://onisdin.info/en/hydrology/flood-dynamics> [<https://perma.cc/39T3-CGQ4>] (last accessed March 2, 2021).

⁵³ Beyioku, *supra* note 45.

⁵⁴ Richard Davies, *Nigeria – Floods Affect Half a Million as Death Toll Rises*, FLOODLIST (Sept. 25, 2018), <http://floodlist.com/africa/nigeria-floods-september-2018-update> [<https://perma.cc/Z6ZS-Q85N>].

⁵⁵ Angela Ajodo-Adebanjoko, *Towards Ending Conflict and Insecurity in the Niger Delta Region*, RELIEFWEB (Sept. 12, 2017), <https://reliefweb.int/report/nigeria/towards-ending-conflict-and-insecurity-niger-delta-region> [<https://perma.cc/M2HH-9ESK>]; John Campbell, *Significant Rise of Insecurity in the Niger Delta Through 2019*, COUNCIL ON FOREIGN RELS. (Feb. 26, 2020), <https://www.cfr.org/blog/significant-rise-insecurity-niger-delta-through-2019> [<https://perma.cc/ZJU2-3USK>].

⁵⁶ See Global Summit on Climate Change and Green Entrepreneurship Conference, Calabar, (June 5–9, 2007).

impact various aspects of the nation's life if left unchecked.⁵⁷ It stated further that climate change is a developmental issue that should be mainstreamed into various sectors of national, regional, and state development plans and that climate change has disastrous consequences, which has aggravated Nigeria the more.

Some of the solutions proffered were the need to mainstream climate change into national, regional, and state development plans and adopt policies needed to be an integral part of government initiatives, given the cross-cutting nature of the impact of climate change. Another goal was to bridge the gap between development and climate change through adaptation and remediation, both of which aim to address the root causes of vulnerability.⁵⁸

Another possible strategy is raising awareness on issues of climate change, which is presently at a low ebb, especially among vulnerable groups and rural dwellers. One way to raise awareness is to revive the tree planting program to help individuals realize the importance of tree planting and the consequences of deforestation.⁵⁹

Nigeria has been actively engaged in international climate policy negotiations since it became a Party to the UN Framework Convention on Climate Change (FCCC) in 1994, ratifying its Kyoto Protocol in 2004. Nigeria submitted its First National Communication (FNC) in 2003 and a Second National Communication in February 2014. Nigeria is host to a number of Clean Development Mechanism (CDM) projects, as well as projects financed by the Adaptation Fund.⁶⁰ In September 2012, the Federal Executive Council approved the Nigeria Climate Change Policy Response and Strategy. On November 26, 2015, President Muhammadu Buhari, the President of the Federal Republic of Nigeria, approved the Nigerian Nationally Determined Contributions (NDCs). The NDCs made under the Paris Agreement embody the country's efforts to reduce national emissions and to adapt to the effects of climate

⁵⁷ Press Release, General Assembly, *Actions on Climate Change Will Define Global Legacy Left for Future Generations Says Secretary-General as High-Level Event Convenes*, U.N. Press Release GA / 10618 (Sept. 24, 2007).

⁵⁸ Beyioku, *supra* note 45.

⁵⁹ U.N. DEP'T OF ECON. & SOC. AFFS., *ACHIEVING SUSTAINABLE DEVELOPMENT AND PROMOTING DEVELOPMENT COOPERATION: DIALOGUES AT THE ECONOMIC AND SOCIAL COUNCIL*, U.N. Sales No. E.08.II.A.11 (2008).

⁶⁰ Federal Ministry of Environment, *First Biennial Update Report of The Federal Republic of Nigeria under the United Nations Framework Convention on Climate Change (UNFCCC)*, Federal Republic of Nigeria, at 35 (Mar. 2018).

change. If fully implemented, these efforts promise to pave the way for a low-carbon economy resulting in about a 50 percent reduction in emissions, while growing the economy at an average annual rate of 5 percent by 2030.⁶¹ In 2017, the country officially ratified the Paris Agreement.⁶²

Despite Nigeria's participation in these global agreements, the effects of climate change continue to plague Nigeria economically, socially, and environmentally. Environmental effects evident in Nigeria include deforestation, desertification, air pollution, ozone-layer depletion, marine pollution, and more. Socially, the unrest in Nigeria—specifically, the Fulani herdsmen crisis and the Niger-Delta militants—are largely linked to climate change.⁶³ The Fulani herdsmen crisis is linked to desertification and deforestation and the Niger Delta militant crisis is linked to extreme land degradation. All these factors adversely affect the economy, chasing away potential foreign investors and increasing the income inequality in Nigeria.⁶⁴

II. CLIMATE CHANGE LAWS AND POLICIES IN NIGERIA

The existing realities of Nigeria in respect to climate change mitigation and adaptation might make one conclude the lack of a comprehensive climate change statute is to blame. While the enactment of a climate change statute may be welcome, Nigeria does not actually require a solitary law to address climate change. This has been shown by the fact that a Department of Climate Change already exists in the Federal Ministry of the Environment. Besides, Nigeria submits NDCs to

⁶¹ WBG, *Climate-Smart Development: Adding up the Benefits of the Actions that Help Build Prosperity, End Poverty and Combat Climate Change*, WBG & CLIMATEWORKS FOUND. (2014).

⁶² *Third National Communication (TNC) of the Federal Republic of Nigeria Under the United Nations Framework Convention on Climate Change (UNFCC)*, *supra* note 49, at p.ii.

⁶³ Int'l Crisis Group, *Stopping Nigeria's Spiraling Farmer-Herder Violence*, at 4, ICG Report No. 262/Africa, Brussels (Jul. 2018), <https://www.crisisgroup.org/africa/west-africa/nigeria/262-stopping-nigerias-spiralling-farmer-herder-violence> [<https://perma.cc/6LY2-NKXK>]; *see also*, A.I. Chukwuma Okoli et al., *Herdsmen Militancy and Humanitarian Crisis in Nigeria: A Theoretical Briefing*, 27 AFRICAN SEC. REV. 2, 129-43 (Sept. 19, 2018); *see also*, Abukar Muhammad et al., *Herdsmen-Farmer's Conflicts and Rising Security Threats in Nigeria*, 7 STUD. POL. & SOC'Y (THEMATIC ED.) 1, (Dec. 2008).

⁶⁴ Nils Duquet, *Swamped With Weapons: The Proliferation of Illicit Small Arms and Light Weapons in the Niger Delta*, in OIL AND INSURGENCY IN THE NIGER DELTA: MANAGING THE COMPLEX POLITICS OF PETRO-VIOLENCE (Cyril Obi & Siri Aas Rustad eds., 2011); *Id.* at 136-149.

the UNEP and the Federal Government has previously drafted a Climate Action Plan.⁶⁵

This article will reveal the relationship between climate change and certain Nigerian statutes, regulations, and policies. The article intends to present the difficulties aggrieved citizens encounter in the enforcement of their fundamental rights against international oil corporations (IOCs) operating in consonance with the government.

A. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

The constitution plays a significant role as the major source of any law relating to the people. It is the supreme law of the state.⁶⁶ It directs the process of governance, specifies the duties and functions of different arms of government, and portrays the fundamental rights and obligations of citizens.⁶⁷ All other laws derive their relevance from it; any law inconsistent with a provision of the constitution is void to the extent of its inconsistency.⁶⁸ The constitution is an institution of government made by the people to establish the structure of a country and regulate the powers and functions of government. Additionally, a country's constitution lays out the rights and duties of the individual and provides remedies for unconstitutional acts.

Many environmentally conscious countries have handled the climate crisis through legislative action. Some countries have given the state the power to deal with climate problems by giving these problems constitutional status. Other countries, including South Africa, Spain, Chile, and Uganda, have enacted laws to minimize the menace of climate change. Nigeria has only paid lip service to the environment through its environmental programs. The CFRN 1979 enacted after the Stockholm Conference of 1972 had no provisions for the environment until the

⁶⁵ Chukwumerije Okereke, *Why FG Should Involve Public in Revision of Nigeria's NDC, Climate Action Plan*, THIS DAY LIVE (Aug. 4, 2020), <https://www.thisdaylive.com/index.php/2020/08/04/why-fg-should-involve-public-in-revision-of-nigerias-ndc-climate-action-plan/> [<https://perma.cc/ZW5Z-5JDX>].

⁶⁶ See CONSTITUTION OF NIGERIA (1999), § 1(1); see also *General Sanni Abacha v. Chief Ganni Fawehinimi*. [2000] 4 SCN 401 (Nigeria).

⁶⁷ See CONSTITUTION OF NIGERIA (1999), § 1(2).

⁶⁸ See *id.* at § 1(3).

1980s when the hazardous waste dumping incident⁶⁹ paved the way for the inclusion of environmental objectives in the 1999 Constitution, which states that “the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.” The 1999 Constitution states further that “. . . exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented. . . .”⁷⁰

This is, however, the first time that the need to protect the environment would be specifically mentioned in its constitution, a step other nations have already taken. For example, Ghana’s 1992 Constitution, particularly in Chapter Six, deals with the Directive Principles of State Policy as part of the social objectives of Ghana in Article 36(7).⁷¹ It is important to note that the Ghanaian constitutional provisions are broader than Nigeria’s 1999 constitution.⁷² Moreover, Section 15 of the Mali Constitution provides that persons have a right to a healthy environment.⁷³ Similarly, Section 46 of the Constitution of the Democratic Republic of Congo (DRC) provides “[e]very citizen shall have a right to a satisfactory and sustainable healthy environment and shall have the duty to defend it.”⁷⁴ In addition, Section 24 of the Constitution of the Republic of South Africa 1996 states that “[e]veryone has the right to an environment that is not harmful to their health or well-being and to have the environment protected through reasonable legislative measures,” which is even more elaborate than the Malian and DRC’s clauses.⁷⁵

Ensuring environmental rights in national constitutions is imperative because it allows countries to highlight that environmental rights are among the first and most essential in its hierarchy of norms. Constitutional provisions underlie national priorities and hence determine the decision and nature of future legislative policies and

⁶⁹ See Stephanie Buck, *In the 1980s, Italy Paid a Nigerian Town \$100 a Month to Store Toxic Waste—and It’s Happening Again*, TIMELINE (May 26, 2017), <https://timeline.com/koko-nigeria-italy-toxic-waste-159a6487b5aa> [<https://perma.cc/DD3P-3E7V>].

⁷⁰ CONST. OF NIGERIA (1999), § 17, 20.

⁷¹ CONST. OF GHANA (1992), § 36(7).

⁷² Compare CONST. OF GHANA (1992), with CONST. OF NIGERIA (1999).

⁷³ CONST. OF MALI (1992), art. 15.

⁷⁴ CONST. OF DEM. REP. CONGO (2006), § 46.

⁷⁵ S. AFR. CONST., 1996, § 24. Several other developing nations, among which are Brazil, Costa Rica, Colombia, Argentina, Philippines, Nepal, and others, have since made robust environmental legislation that transform their environment and citizens’ lives alike.

executive actions. The elevation of environmental concerns to constitutional status in a country has no doubt enhanced the priority to be accorded by the government on sound environmental management and sustainable development with sound human rights protection. However, the inclusion of the environmental clause in the CFRN 1999 can be said to be a milestone in the quest for the protection and sustainability of the Nigerian environment, even though the clause in Section 20 thereof is far from meeting the expectations of the people and environmentalists.⁷⁶ This is because this provision has not given clear recognition to environmental rights and a healthy environment as a fundamental right. It is even made worse by the provisions of Section 6(6)(c), which deprived the courts of the power to adjudicate on the provisions of Chapter II of the Constitution.⁷⁷

There have been many judicial interpretations of Section 20. The first test of this came in *Attorney-General Lagos State v. Attorney General of the Federation & Ors*,⁷⁸ where Kalgo JSC noted in his concurring judgment that, inter alia, the main object of Section 20 is to protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or wellbeing. He opined further that the provisions of the Section do not give the National Assembly the power to legislate on planning and development control over land in the states and local governments. A new dimension to all state responsibilities is obliging the state to protect, improve, and sustain the environment for the good of society as a whole. The state is also obliged to direct its policy towards the control of material resources of the community to observe the common good, the need to improve human life by controlling the exploitation of natural resources, and the protection of the environment. Chapter II of the CFRN 1999 remains a mere policy statement by the government, no more than a declaration of intent. This should normally form the basis of a governmental action by way of law and regulations for effective management or control of misconduct by the actors. The apparent shortcomings of this Chapter have caused the degradation of the rich

⁷⁶ See CONST. OF NIGERIA (1999), § 20.

⁷⁷ CONST. OF NIGERIA (1999), § 6(6)(c).

⁷⁸ *Lagos State v. Attorney General of the Federation* [2003] 12 NWLR 177–179 (Nigeria).

alluvium deposits and swampy forests of the ND.⁷⁹ Notwithstanding this apparent self-inflicted incapacitation, other policies and regulations derive their authority from it, among which are:

1. *The National Policy on the Environment 2016*

The first policy on the environment was drafted in 1988 by the defunct Federal Environment Protection Agency (FEPA). In 2016, the Federal Ministry of Environment (FME) revised and re-released it. This policy serves as an action plan for the federal government to “ensure environmental protection and the conservation of natural resources for sustainable development.”⁸⁰ The policy aims to reduce deforestation and promote reforestation, a key action in combatting climate change.

2. *The National Environment Standards and Regulation Enforcement Agency (NESREA) (Establishment) Act 2007*

This Act established the National Environment Standards and Regulation Enforcement Agency (NESREA) which is responsible for the enforcement of the various environmental laws and regulations, save for those that concern oil and gas. It is pursuant to this duty that the federal government, through the Agency, churned out several regulations on the environment between 2011 and 2014.⁸¹ These include regulations on ozone layer depletion,⁸² desertification control,⁸³ open bush burning,⁸⁴

⁷⁹ See Olubisi F. Oluduro & Olubayo Oluduro, *Oil Exploitation and Compliance with International Environmental Standards: The Case of Double Standards in the Niger Delta of Nigeria*, 37 J. L. POL’Y & GLOBALIZATION 67 (2015).

⁸⁰ The National Policy on the Environment, art. 3.1 (2016) (Nigeria); see generally *id.* at art. 4.

⁸¹ I.A. Ajani & I.O. Kunlere, *Implementation of the Extended Producer Responsibility (EPR) Policy in Nigeria: Towards Sustainable Business Practice*, 2 NIGERIAN J. ENV’T & HEALTH 44, 49 (2019).

⁸² See National Environmental (Ozone Layer Protection) Regulations (2009) Cap. (32) (Nigeria).

⁸³ See, e.g., National Environmental (Desertification Control and Drought Mitigation) Regulations (2011) Cap. (13) (Nigeria); National Agency for the Great Green Wall (Establishment) Act, (2015) Cap. (3) (Nigeria); Food and Agriculture Organization [FOA], *The Great Green Wall for the Sahara and Sahel Initiative*, (June 2010) <http://www.fao.org/3/ap603e/ap603e.pdf> [http://www.fao.org/3/ap603e/ap603e.pdf].

⁸⁴ See National Environmental (Control of Bush, Forest Fire and Open Burning) Regulations, (2011) Cap. (15) (Nigeria).

control of vehicular emissions,⁸⁵ and charcoal production, among others. These regulations are relevant in combatting climate change.

3. *The National Oil Spills Detection and Response Agency (NOSDRA) (Establishment) Act 2006*

This Act established the National Oil Safety Regulations Agency (NOSDRA) which is responsible for handling oil spill cases in Nigeria both on and offshore. The Agency is responsible for restoration and preservation of the environment by making sure that best practices are employed in the exploitation of oil in Nigeria. This includes the constant case of gas flaring in the ND region of the country. Oil spillage in the waters affects the ocean chemistry, and since the oceans are part of the carbon sinks required for maintaining the global temperature, this Agency and its establishing statute are incidental to climate change in Nigeria.⁸⁶

The named laws above are in addition to the various other national regulations, state, federal, and international documents to which Nigeria is a signatory and has ratified by virtue of Section 12 of the Constitution. Of course, some documents do not require domestication before being applicable in Nigeria, as they have attained the status of customary international law. Environmental standards enacted by states, developed or developing, should not fall below global adopted standards so as to ensure a uniform environmental human rights approach by the IOCs.

B. INADEQUACIES OF NIGERIAN REGULATORY LAWS

Governmental intervention to regulate environmental pollution through law, the establishment of regulatory agencies, and the imposition of sanctions to deter polluters may, to a certain extent, enhance social welfare. However, these efforts may be inadequate, resulting in failure

⁸⁵ See National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, (2011) Cap. (20) (Nigeria).

⁸⁶ See Ayoade M. Adedayo, *Environmental Risks and Decommissioning of Offshore Oil Platforms in Nigeria*, 1 NIALS J. ENV'T L. 1, 15 (2011); see also Onoriode O. Emoyan, *The Oil and Gas Industry and the Niger Delta: Implications for the Environment*, 12(3) J. APPLIED SCI. ENV'T MGMT. 29 (2008).

and suboptimal environmental results unless adequately complemented with other measures. The reasons for failure are many.

As explained by Daniel Esty, many regulatory frameworks fail because governments lack necessary information and data to regulate environmental pollution.⁸⁷ According to Esty, the Nigerian government may not have information necessary to intervene appropriately to internalize externalities or they may lack the incentive structures needed to regulate efficiently.⁸⁸ Government decisions may also be skewed by structural failures that arise because policy makers systematically exclude from their regulatory cost-benefit calculus some of those who are either causing or suffering harms, or those who might have been affected by government action. Regulatory efforts may further be distorted by public choice failure. Sometimes, outcomes of governmental intervention are manipulated by outright corruption of the decision makers. More often, special interest influence on the decision-making process causes policy choices to fail to reflect the true will of the people.⁸⁹

III. ATTITUDE OF NIGERIAN COURTS TO ENVIRONMENTAL MATTERS

Ever since 1956, when oil was first discovered in Nigeria at Oloibiri in present day Bayelsa State, exploration activities have brought grave environmental consequences. Oil spills, environmental pollution and degradation, destruction of the landscape, and species extinction, among other issues, have continued to plague the environment. This has led to loss of arable farmlands, aesthetic environment, fishing activities, revenue, and sometimes lives.⁹⁰ The people have adopted various mechanisms to protect their environment, ranging from militancy to

⁸⁷ Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1508–1515 (1999).

⁸⁸ *See id.*

⁸⁹ Esty notes that the “special interest” may be the polluters who seek to block regulation. But the problem may also be “capture” of the regulatory process by some subset of the regulated industry who would benefit from certain government restrictions by those with a “solution” to sell, or by environmental advocates who seek to burden polluters with costs as a matter of moral indignation, no matter how large or small the benefits obtained. *Id.* at 1508, 1517; *see also* Olubisi F. Oluduro, *The Legal Implications of Gas Flaring on Climate Change in Nigeria*, 29 J. L. POL’Y & GLOBALIZATION 168 (2015).

⁹⁰ John Vidal, *Niger Delta Oil Spills Clean-up Will Take 30 Years, Says UN*, GUARDIAN (Aug. 4, 2011 14:54 EDT), <https://www.theguardian.com/environment/2011/aug/04/niger-delta-oil-spill-clean-up-un> [<https://perma.cc/R6GK-6M23>].

dialogue, and from open confrontations with companies operating in the area to the institution of court actions. Technical issues of standing, both at the domestic and international levels, have been painfully exploited by certain unscrupulous multinational corporations to deny victims of environmental pollution appropriate justice.⁹¹ The need to use law as a vehicle in the regulation, management, and protection of the environment has thus become paramount.⁹² Unfortunately, the quest to attain redress for environmental problems has not been the most straightforward endeavor in Nigeria, for reasons including hesitation and reluctance.⁹³ Aggrieved parties therefore must resort to litigating environmental problems before international courts.⁹⁴

Activities of oil companies, particularly IOCs in Nigeria, may result in both civil and criminal liability.⁹⁵ As such, environmental litigation can take many forms, including civil actions based on tort, contract or property law, criminal prosecutions, public interest litigation, enforcement of fundamental human rights, or complex issues which may arise when cases involve transboundary environmental harms.⁹⁶ Under common law, actions for environmental issues may be brought under theories of negligence, nuisance, trespass to land, and under the case of *Ryland v Fletcher*.⁹⁷ These torts can be used to curb environmental pollution and promote conservation. The major problem with case law is that it depends on a willing plaintiff. Where the litigation costs are too high, litigation apathy exists, or plaintiffs lack means, these torts go unchecked. More telling is the fact that litigation cannot be used on an

⁹¹ See generally *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (dismissing plaintiffs' claims against polluters on the basis that no such claims have ever succeeded at international law, thus there is no precedent).

⁹² See UN ENV'T PROGRAMME, AFRICA ENVIRONMENT OUTLOOK (2003).

⁹³ G. UGO NWOKEJI, THE NIGERIAN NATIONAL PETROLEUM CORPORATION AND THE DEVELOPMENT OF THE NIGERIAN OIL AND GAS INDUSTRY: HISTORY, STRATEGIES AND CURRENT DIRECTIONS, (James A. Baker III Inst. for Pub. Pol'y & Japan Petrol. Energy Ctr. 2007).

⁹⁴ See generally *Access to Environmental Justice in Nigeria: The Case for a Global Environmental Court of Justice*, in ECONOMIC JUSTICE RESISTING NEOLIBERALISM (Oct. 2016), <https://www.foei.org/wp-content/uploads/2017/02/22-Environmental-Justice-Nigeria-Shell-English.pdf> [<https://perma.cc/4FBQ-QGHL>].

⁹⁵ See The National Environment Standards and Regulation Enforcement Agency (Establishment) Act (2007) Cap. (25), § 1 (Nigeria); The National Oil Spills Detection and Response Agency (Establishment) Act, (2006) Cap. (15) (Nigeria).

⁹⁶ Chuks-Ezike, *supra* note 3.

⁹⁷ See *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330 (Eng.).

efficient basis for public regulation of the environment.⁹⁸ This explains why much of environmental law is statute-based.⁹⁹

In a number of cases, litigants have been unable to obtain redress despite the fact that it was apparent that their losses had arisen as a result of oil operations. Cases in this regard include *Seismograph Service v. Onokpasa*¹⁰⁰ and *Seismograph Service v. Ogbeni*,¹⁰¹ where the Supreme Court insisted that the claimant provide expert evidence to prove the causal link between the damage alleged and oil operations. The financial burden of retaining experts to carry out scientific studies of environmental damage in order to prove damage has been highlighted as one of the issues denying claimants' access to justice.¹⁰² Inability to obtain sufficient redress is also a problem. In *Shell v. Tiebo VII*¹⁰³ and *Shell v. Isaiah*,¹⁰⁴ although the court found that Shell's oil spill had polluted the land and water, no order was made for the remediation of the polluted environment. In cases of gas flaring, where the polluting activity is ongoing, obtaining proper injunctions has proven rather difficult. As shown in *Irou v. Shell-BP*,¹⁰⁵ the court refused to grant an injunction, holding that it would negatively affect oil operations and revenues which constitute the country's main source of income. A similar decision was made in *Chinda v. Shell-BP*,¹⁰⁶ where the Court refused to grant an injunction restraining Shell-BP from flaring gas within five miles of the plaintiff's village, referring to the remedy requested as "an absurdly and needlessly wide demand."¹⁰⁷

The enforcement and enjoyment of fundamental rights is significantly influenced by judicial attitudes toward constitutional interpretation. A judiciary could be liberal, activist, strict, or passive. The strict passive court declares what the law is and does not make it, in accordance with strict separation of powers. The passive court relies on

⁹⁸ See CONST. OF NIGERIA (1999), §§ 6(6)(C), 20.

⁹⁹ See S. Gozie Ogbodo, *Environmental Protection in Nigeria: Two Decades After the Koko Incident*, 15 ANN. SURV. INT'L & COMPAR. L., 1, 15–17 (2009).

¹⁰⁰ *Seismograph Service v. Onokpasa* [1972] 1 NLR 343 (Nigeria).

¹⁰¹ *Seismograph Service v. Ogbeni* [1976] 4 NLR 85 (Nigeria).

¹⁰² E.g., *Ogiale & Ors v. Shell* [1997] 1 NWLR 180 (Nigeria).

¹⁰³ *Shell v. Tiebo VII* [1996] 4 NWLR 657 (Nigeria).

¹⁰⁴ *Shell Petroleum Dev. Co. Ltd. v. Abel Isaiah* [2001] 5 SC 1, 5 (Nigeria).

¹⁰⁵ Jędrzej George Frynas, *Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria*, 43 J. AFRICAN L. 121, 122 (1999) (citing *Irou v. Shell-BP* (Nigeria)).

¹⁰⁶ *Id.* at 123 (citing *Chinda v. Shell-BP* [1974] 2 RSLR 1 (Nigeria)).

¹⁰⁷ *Id.*

just the words used under the assumption that the legislature says what it means and means what it says. This court limits itself to interpreting and applying rules already laid down, leaving development and modification of the law to the political process where it rightly belongs.¹⁰⁸ The passive court, overly concerned with the rule book, is diametrical to doctrinal innovation.¹⁰⁹

The Nigerian court is of the passive, strict disposition.¹¹⁰ In *Okpala & Others v. Shell Petroleum Development Company (SPDC) & Others*, the applicant and others representing themselves and their communities instituted an action seeking a declaration that the fundamental rights to life and dignity guaranteed under Sections 33 and 34 of the Nigerian Constitution included a right to a clean and healthy environment. They urged the Court to declare that the action of the defendants in continuing to flare gas in the course of their oil exploration and production activities in the applicants' communities amounted to a violation of their human rights. The defendants argued that "what is permitted by law cannot amount to an infringement of a citizen's constitutional right," and that gas flaring could not constitute a human rights violation since it was permitted under Nigerian law. The court held, agreeing with the defendants, that the rights to life and dignity guaranteed under Sections 33 and 34 of the Constitution cannot be claimed by a community, but rather by each person in the community who feels that their individual rights have been infringed.¹¹¹ The court also held that the applicants could not maintain an action in a representative suit as there was no common grievance or common benefit. According to the Court:

[T]he rights and causes averred in the Verifying Affidavit in respect of the applicants of the community they represented are not common. [It] states 'that so many natives of our communities have died and countless others are suffering various sicknesses occasioned by the effects of gas flaring in our communities by the defendants' . . . it is obvious that applicants represent some natives of their community who have died, some others suffering from various sicknesses. This averment reflects that there is no common benefit therefore the

¹⁰⁸ See generally Jack D. Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563 (1976).

¹⁰⁹ *Id.*

¹¹⁰ Nsikan-Abasi Odong, *Realizing and Enforcing the Constitutional Right to a Healthy Environment in the Niger Delta: Lessons from India*, 7 INT'L J. HUMAN. & SOC. SCI. 35, 40 (2017).

¹¹¹ *Id.*

procedure is clearly incompetent on ground of non-joinder of parties. The right must be common and relief sought must be of common benefit.¹¹²

This case is a clear demonstration of the obstacles that hinder judicial enforcement of environmental rights in Nigeria. The Court refused to allow for the use of representative actions to enforce the right to a healthy environment and instead insisted that aggrieved individuals must personally and individually sue to enforce their individual human rights. Thus, where individuals in a community are generally disturbed by environmental pollution and subsequently seek to enforce their rights to a clean environment, they can only do so individually. This position is undesirable, as it will only result in the multiplication of individual suits on a particular matter. Also, such an approach is unrealistic and cannot be used to effectively enforce environmental rights mainly because severe environmental pollution has been the bane of the majority of the people in Nigeria who are ill-equipped financially to prove their case against the highly sophisticated MNCs in court.¹¹³ Also, the court's decision that the applicants could not maintain an action in a representative suit without a common grievance or benefit was an apparent adherence to rigid legal technicalities.

Another issue commonly faced by the court concerns questions about jurisdiction—whether a court has authority to preside over a case or not. This has greatly influenced the attitude of the court regarding environmental litigation. A court will only deal with cases referred to it.¹¹⁴ In dealing with such cases, the court first assumes jurisdiction. Assumption of jurisdiction by the court entails the fulfillment of certain requirements, including condition precedent or due process in the determination of a dispute. This is because where an action is not initiated by due process of law, the proceedings before the court are a nullity.¹¹⁵ It is the fulfillment of the law that gives jurisdiction to the court to try the case before it. The pre-conditions for the exercise of jurisdiction on any case are whether the plaintiff has a cause of action,

¹¹² *Id.*

¹¹³ Uchenna Jerome Orji, *Right to a Clean Environment – Some Reflections*, 42 ENVTL POL'Y & L. 285, 289 (2012).

¹¹⁴ Justus Sokefun & Nduka C. Njoku, *The Court System in Nigeria: Jurisdiction and Appeals*, 2 INT'L J. OF BUS. & APPLIED SOC. SCI. 1, 4 (2016).

¹¹⁵ S.A. Fagbemi & A.R. Akpanke, *Environmental Litigation in Nigeria: The Role of the Judiciary*, 10 NNAMDI AZIKIWE UNIV. J. INT'L L. & JURIS. 26, 30 (2019).

which is valid and enforceable by law, and whether the action is initiated by due process of the law. Furthermore, it must be shown that any condition precedent to the exercise of the court's jurisdiction has been fulfilled, and that the court is properly constituted with respect to number and qualification of its members. Equally, the subject-matter must be within the jurisdiction of the court.¹¹⁶ In other words, the plaintiff must have sufficient interest and *standing* in the matter.¹¹⁷ Where there is a time limit for commencement of the action, the victim must comply with the stated time limit.¹¹⁸

The court held in *Akibu v. Azeez* that in limitation of action, time begins to run from the date the cause of action arose.¹¹⁹ Time for commencement of action is of the essence to the successful institution of an action in court. In certain instances, the effect of the hazard does not immediately become obvious. This happens in cases of oil spills where damage to the soil, though apparent, may not be fully realized or understood.¹²⁰ Such instances may raise the issue of when the cause of action arose. In dealing with this, the Supreme Court in *Arema v. Adekanye* held that a fresh cause of action arises from time to time as often as the damage is caused.¹²¹ The Supreme Court was faced with determining the importance of the rules of proceedings and the court emphatically stated as illustrated that the rules of court procedure must be followed. A court with competence to deal with a case is said to have jurisdiction to determine the case.¹²² In *7up v. Abiola*¹²³ the Supreme Court held that "it is trite that in all matters before the court the fundamental one is the issue of jurisdiction which must first be

¹¹⁶ Ani C. Chinyere, *The Uwais Court. The Supreme Court and the Challenges or Legal Development*, NIALS 341–359 (2006).

¹¹⁷ In *ELF Nigeria Ltd. v. Opere Sillo*, [1994] 6 NWLR 258, the Supreme Court, relying on *Adeshina v. Lemour*, [1965] 1 All NLR 233 (Nigeria) held that the plaintiff had proved the existence of their common right of fishery in tidal waters and its violation and was therefore entitled to damages.

¹¹⁸ See *Sifax Nig. Ltd. V. Migfo Nig. Ltd.* [2018] 9 NWLR 138.

¹¹⁹ *Akibu v. Azeez* [2003] 5 NWLR 643.

¹²⁰ See ENV'T PROT. AGENCY, UNDERSTANDING OIL SPILLS AND OIL SPILL RESPONSE 5 (1999).

¹²¹ *Arema II v. Adeyanke* [2002] 11 MJSC 11 (Nigeria).

¹²² Odong, *supra* note 110.

¹²³ Rufus A. Mmadu, *Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel*, 2 AFE BABALOLA UNIV. J. SUSTAINABLE DEV. L. & POL'Y 149, 152 (2013) (citing *Jika v. Akuson* [2006] ALL FWLR 276).

determined before anything else otherwise all proceeding relating thereto will be a nullity and an exercise in futility.”¹²⁴

In *Shell Petroleum Development Company (Nigeria) Ltd v. Abel Isaiah*,¹²⁵ the Supreme Court, sitting in its appellate authority, was called upon to decide the following: whether the Court of Appeal’s decision was correct in holding that the High Court had jurisdiction, the defendant was negligent in not constructing an oil trap, and the oil spillage was in fact massive spillage of crude oil from the appellants’ pipeline. The Supreme Court was also asked whether the damages confirmed by the lower court were a proper estimate of the losses suffered by the plaintiffs/respondents, whether the court was right in upholding the damages awarded based on the unchallenged expert evidence of the respondents, whether the court was right in affirming that the case was properly litigated in a representative capacity, and whether the case is challenged under the rule in *Rylands v. Fletcher*.¹²⁶

The Supreme Court stated that the main issue in the case was whether the Court of Appeal was correct in holding that the trial court had jurisdiction to try the case.¹²⁷ In the reasoning of the Supreme Court, the question of whether the court has jurisdiction to try the case can be raised at any stage of the trial. It was important to consider the issue of jurisdiction first because if that succeeds, that decision will determine the appeal.¹²⁸ In July 1988, an old tree fell on the defendant/appellant’s oil pipeline and dented it. The dent hindered the free flow of crude oil through said pipelines which ran across the plaintiff/respondent’s swamp land and surrounding farmlands. It became necessary to install a new one. The defendant/appellant engaged the services of a contractor to repair the dented pipeline. In the course of the repairs, the defendant neglected to construct an oil trap (a device constructed in the soil for the purpose of trapping oil in the course of such repairs) so that crude oil freely spilled onto the plaintiff/respondent’s swampland and polluted the surrounding farmlands, streams, and fishponds. The plaintiff claimed from the defendant at the High Court sitting at Isiokpo, Rivers State the sum of ₦22 million for damages resulting from the defendant’s negligent activities. The trial court awarded ₦22 million to the plaintiff for the

¹²⁴ *Id.*

¹²⁵ *Shell Petroleum Dev. Co. Ltd. v. Abel Isaiah* [2001] 5 SC 1, 5 (Nigeria).

¹²⁶ *Rylands v. Fletcher* [1865] 159 Eng. Rep. 737 (UK).

¹²⁷ *Sifax Nig. Ltd. V. Migfo Nig. Ltd.* [2018] 9 NWLR 138 (Nigeria).

¹²⁸ See Odong, *supra* note 110.

damage and loss caused by the defendant's oil pipeline repair activities. Defendant appealed unsuccessfully to the Court of Appeal. The defendant/appellant then came to the Supreme Court contesting the decision of the court below. At the Supreme Court, the issue presented was whether the State High Court has jurisdiction in claims pertaining to mines and minerals including oil fields etc, by virtue of the Federal High Court (Amendment) Act¹²⁹ and Section 230 (1)(O) of the Constitution (Suspension and Modification) Decree No. 107 of 1993. The Supreme Court was therefore called to determine whether the facts of the case fell within the definition of matters connected with or pertaining to mines and minerals, including oil fields, oil mining, geological surveys, and natural gas. The court set aside the decision of the High Court on the ground that it was a nullity for want of jurisdiction.

The problem of jurisdiction in oil pollution cases also arose in *Shell Petroleum Development Company of Nigeria Ltd v. Chief G.B.A Tiebo VII and Others*.¹³⁰ In that case, the Supreme Court had to determine whether the Court of Appeal acted *ultra vires* in upholding jurisdiction of the high court. The Supreme Court referred to the *Isaiah* case. It considered that the cause of action accrued on January 16, 1987, the suit was commenced on June 6, 1988 and judgment was delivered on February 27, 1991. On these various dates, the court held that the State High Court had jurisdiction over cases in oil spillage because the law applicable to an action is the law existing when the cause of action arose. The court held that the provision of Decree 107 of 1993 and Section 251(1)(n) of the 1999 Constitution related only to cases arising after December 30, 1991. The Supreme Court also stated that it ventured into the Tiebo Case because the issue of jurisdiction was raised. This is to emphasize the importance of jurisdiction in the determination of cases.

The judicial attitude in Nigeria is that a plaintiff who sues for damages arising from an environmental abuse must show that he suffered damages, notwithstanding the difficulties faced in obtaining requisite scientific evidence to establish harm, conflicts between economic and public interests, including environmental protection, and prosecutorial focus on the economic value of oil production over its environmental

¹²⁹ Federal High Court (Amendment) Act No. (60) (1991) (Nigeria).

¹³⁰ Muhammed Ladan, *Nigeria*, in *THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES*, 547 (2009) (citing *Shell Petroleum Dev. Co. v. Chief G.B.A. Tiebo VII* [2005] 9 MJSC 158 (Nigeria)).

consequences.¹³¹ In *Shell Petroleum Development Company Nig. Ltd v Chief Otoko and Others*,¹³² the respondents, plaintiffs at the Bori High Court in Rivers State, claimed the sum of ₦499, 855.00 as compensation payable to the defendants (appellants herein) for injurious affection to and deprivation of use of the Andoni Rivers and creeks as a result of the spillage of crude oil. The action was brought in a representative capacity. The Court of Appeal held that it is essential that the persons who are to be represented and the person(s) representing them should have the same interest in the cause of matter; and given common interest and a common grievance, a representative suit would be in order if in addition to the relief sought it is in its nature beneficial to all whom the plaintiff proposes to represent.¹³³ The Court rejected the purported representative action.

In *Adediran and Anor v. Interland Transport Ltd*,¹³⁴ the appellants as residents of the Ire-Akari Housing Estate, Isolo, inter alia, brought an action for nuisance due to noise, vibrations, dust, and obstruction of the roads in the estate. The Supreme Court dealt with the common law restrictions on the right of a private person to sue on a public nuisance. The Court held that in light of section 6(6)(b) of the 1999 Constitution, a private person can commence an action on public nuisance without the consent of the Attorney-General, or without joining him as a party. In *Amos v. Shell BP P.D.C. Ltd*,¹³⁵ the plaintiffs sued the defendants in a representative capacity claiming special and general damages. It was alleged that the second defendants as contractors to the first had in the course of oil mining operations built a large earth dam across the plaintiffs' creek. As a result, farms were flooded and damaged, movement of canoes was hampered, and agriculture and commercial life was paralyzed. One of the issues was whether special damages could be claimed in a representative action, when the plaintiffs suffered unequal losses, or whether the plaintiffs as general public could claim for losses suffered by them individually. In dismissing the claim, the court held that

¹³¹ *Id.*; see also Rhuks T. Ako, *The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India*, 3 NAT'L UNIV. JURID. SCI. L. REV. 423, 443–45 (2010).

¹³² Frynas, *supra* note 105, at 127 (citing *Shell Petroleum Dev. Co. Nig. Ltd. v. Chief Otoko* [1990] 6 NWLR 693 (Nigeria)).

¹³³ Mmadu, *supra* note 123.

¹³⁴ Frynas, *supra* note 105, at 134 (citing *Adediran v. Interland Transport Ltd.* [1991] 9 NWLR 155 (Nigeria)).

¹³⁵ *Id.* at 144 (citing *Amos v. Shell PDC Ltd.* [1974] 4 ECCLR 48 (Nigeria)).

since the creek was a public waterway, its blocking was a public nuisance and no individual could recover damages, therefore unless he could prove special damage peculiar to himself from the interference with a public right, and since the interest and losses suffered by the plaintiffs were separate in character and not communal, they could not maintain an action for special representative capacity.

In yet another case, Justice C.V. Nwokorie of the Federal High Court Benin City of Nigeria in *Jonah Gbemre v. Shell PDC Ltd and Ors* (2005),¹³⁶ the court granted leave to the applicant to institute proceedings in a representative capacity for himself and for each and every member of the Iweherekan Community in Delta State of Nigeria. The proceedings sought an order enforcing or securing the enforcement of their fundamental human rights to life and human dignity as provided by Sections 33(1) and 34(1) of the 1999 Constitution of Nigeria, and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights.¹³⁷ The Court held that these constitutionally guaranteed rights inevitably include the rights to a clean, poison and pollution-free healthy environment. The judge further declared that the actions of the respondents (Shell PDC and NNPC) in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community were a violation of the community's fundamental rights. Furthermore, the judge ruled that the failure of the companies to carry out an Environmental Impact Assessment in said community concerning the effects of their gas flaring activities is a clear violation of the E.I.A. Act and has contributed to a further violation of their environmental rights. The judge's order restrained the respondents from further gas flaring and forced them to take immediate steps to stop the further flaring of gas in the community. The judge advised that the Attorney-General should ensure the speedy amendment after due consultation with the Federal Executive Council to make sure that the Associated Gas Re-Injection Act is in line with Chap. 4 of the Constitution on Fundamental Human Rights. But the Judge made no award of damages, costs, or compensation whatsoever.

An important aspect of these cases is the realization that environmental rights and their enforcement are heavily dependent on the

¹³⁶ *Gmbere v. Shell PDC Ltd*. [2005] (Nigeria).

¹³⁷ African Charter on Human and People's Rights (Ratification and Enforcement) Act (2004) Cap. (A9) § 4-5 (Nigeria).

judiciary and on the initiative of citizens who approach the judiciary, given the presence of an apathetic administration.¹³⁸ Environmental justice may only be realistically achieved in Nigeria when there is ample opportunity for victims of environmental problems to obtain redress in the courts. When victims are unable to obtain redress either due to technical or substantive barriers, it breeds apathy on the part of the people in the area of environmental litigation, and this is never a good situation for a nation. In order to awaken belief in the judicial systems as arbiters of redress and justice, the Nigerian judiciary must take more proactive roles, which involves widening *locus standi* requirements, not allowing technicalities to stand in the way of substantive environmental issues, and also preventing gold digging applications that stand on the path of serious environmental cases.

It is indeed heartwarming to note that after all, the Nigerian judiciary is gradually moving away from the disenfranchisement of litigants on environmental matters with mere technicalities, if the decision in *Centre for Oil Pollution Watch v. NNPC*¹³⁹ is followed by other courts. The Supreme Court in this case laid aside *locus standi* and held that any person with genuine and public-spirited intention should be permitted to approach the court with respect to public interest matters such as the one in the instant case. It further held that there is nothing in the Constitution that says the Attorney-General is the only proper person clothed with standing and/or power to enforce the performance of a public duty or institute public interest litigation such as the instant suit.

IV. RECOMMENDATIONS AND CONCLUSION

Under conventional international human rights law, states are obliged to ensure that each of their citizens enjoy basic rights and freedoms, not only so far as states must not breach such rights or freedoms acting in their own capacity, but also by ensuring that the legal and political conditions exist which will promote and protect the

¹³⁸ See *Almitrah H Patel v. Union of India* (1998) 2 SCC 416, NLS ENLAW, <http://nlsenlaw.org/waste-management-law/domestic-legal-framework/supreme-court-cases-2/almitra-h-patel-v-union-of-india-1998-2-scc-416/> [https://perma.cc/EFM3-EGNZ].

¹³⁹ See Ayodele Babalola, *Better Late than Never: Locus Standi for NGO's in Public Interest Environmental Actions in Nigeria*, ENVIROMEMOS (Nov. 6, 2019), <http://enviromemos.com/2019/11/06/better-late-than-never-locus-standi-for-ngos-in-public-interest-environmental-actions-in-nigeria/> [https://perma.cc/V9ML-FXX6].

enjoyment of such rights and freedoms.¹⁴⁰ This general obligation also includes the need to safeguard the rights of citizens against the conduct of non-state actors.¹⁴¹ While it is recommended that Chapter II, more particularly Section 20, of the Constitution be incorporated into that of Chapter IV so as to make the former justiciable, it would take more than this to combat climate change. It would require making express provisions for actions to undertaken to protect the environment, thus giving climate change the required constitutional backing. This would send a clear message that climate change is very important to Nigeria as a country and should not be taken for granted. In addition, this would pave the way for a better legal framework for combating climate change. It would also ensure that existing as well as future laws attempt to limit the level of greenhouse gases. Although constitutional amendments might appear to be a cumbersome way to enact change, they remain the best way, if the peoples of the ND should heave a sigh of relief from the long tortuous way they have come in the hands of the IOCs and successive Nigerian governments. To avoid addressing this issue through constitutional amendments is to continue to keep the people in a perpetual state of agony and anguish, which might lead to the unexpected with passage of time. Other than this, negotiation, environmental disputes, and alternative dispute resolution, among other extra-legal approaches, may be adopted. But none of these would assuage the aspirations of these people in the long run.

Nigeria is a crude oil exporting nation with high incidences of gas flaring. The government seems unwilling to put an end to it, despite the reoccurring energy shortages which impede economic growth. If the gas being flared amounting to revenue wastage is channeled to energy generation, this would be of immense benefit to the citizens and also enhance the revenue of the nation. Adopting this policy could also remove Nigeria from the list of large emissions-producing countries. On this note, it is recommended that policy makers and citizens alike should be proactive in harnessing technology to achieve this end so that the nation's climate change vulnerability might be minimized. Strident

¹⁴⁰ See Andrew Clapham & Mariano Garcia Rubio, *The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health* 8 (WHO, Health and Human Rights Working Paper Series No. 3, 2002).

¹⁴¹ Olubisi F. Oluduro, *Mitigating the Effects of Climate Change in Sub-Saharan Africa via an Effective International Legal Standard: A Case Study of Nigeria* (2014) (Doctoral thesis, Ghent University) (on file with Ghent University Library system).

efforts need to be made to reduce deforestation by reigning in the IOCs' level of oil spillage, which put Nigerian flora and fauna in serious jeopardy. The Supreme Court's recent decision in the *Centre for Oil Pollution Watch* case is welcome. Even though it came rather late, it promises to change the whole gamut of litigation on environmental matters in Nigeria.