Environmental Rights (?) and Development in The Niger Delta: Incongruent Life Partners Or Reconcilable Adversaries?

By
Sunday Bontur Lugard*

Abstract
The complex nature of petroleum operations makes environmental pollution inevitable, although not immitigable. The adverse effect of this activity can be minimized if due diligence and formal and self-regulating principles or standards are adhered to by the operators and other stakeholders. Pollution generally associated with petroleum operations has harmful implications on human health and the environment to an inestimable proportion. This basically takes the form of gas flaring or oil spillage that is either a result of sabotage or sheer negligence on the part of the international oil companies (IOCs) or other operators. In the case of the Niger Delta, the IOCs operate below environmental standards set even by themselves; and this is the more so due to the failure of governments to wield the big stick by enforcing laws and other regulations on environmental standards in this region.

It is the contention of this writer that this unabated pollution or environmental ‘wrongs’ constitute a severe breach of environmental ‘rights’ of the host communities; the economic substance of petroleum operations to the Nigerian economy, notwithstanding. This piece raises posers concerning whether rights connected with the environment are consequential, hence lacking their own legs, but lean on the socio-cultural, political rights; and concludes that our pursuit of development must be situated within the province of human rights protection; if corporate, human and environmental sustainability hold any value to the society.

Introduction
Petroleum operations commenced in the Delta in commercial quantity in 1958, shortly after the discovery of oil at Oloibiri, Bayelsa state by Shell two years earlier. The discovery of oil in the Niger Delta in the late 1950s and the development of the petroleum industry has over the years rendered the Nigerian economy heavily dependent on oil revenue, such that its contribution to government revenue

*LL.B, BL, LL.M; Lecturer, Department of International Law and Jurisprudence, Faculty of Law, University of Jos, Nigeria. Email: lugards@unjios.edu.ng; lugardsun@yahoo.com

1 Environmental law scholars, Stuart Bell and Donald McGillivray in support of this proposition contend that ‘It is nonsensical to talk of getting rid of pollution [in general]; pollution and harm caused thereby are, to a certain extent, necessary risks, because they accompany activities that most of us are unwilling to live without. Certain pollution processes are beneficial to our existence, so to prohibit them entirely would, arguably, cause more harm than good. Stuart Bell and Donald McGillivray, Environmental Law. (7th edn Oxford University Press, London 2008) 12.

2 Upstream oil and gas operations refers to all activities entered into for the purpose of finding and developing crude oil or natural gas and includes all activities involved in exploration up to the production and transportation of crude oil and natural gas from the area of production – N Ayoola-Daniels, Nigerian Laws, Cases and Materials on Oil and Gas Law, 1 (Petgas Global Consulting Ltd and Institute of Oil and Gas Law, 2008 Lagos) 15.

rose from 23.6 per cent in 1970 to 82.1 per cent in 1974\(^4\) and at present, it is 80 per cent.\(^5\) The Niger Delta is also reputed to be one of the ‘10 most important wetland and coastal marine ecosystems in the world’ with an estimated population of about 31 million people.\(^6\)

A study undertaken by the United Nations Environmental Programme (UNEP) from 1981 to 2005 shows that the global Gross Domestic Product (GDP) more than doubled during this period, but leaving in the wake of such economic expansion about 60% of the world's ecosystems being degraded or used in an unsustainable manner.\(^7\) The question is, is it impracticable to attain or aspire to achieve sustainable development? Is it not feasible to achieve development without necessarily destroying nature which sustains the development in the first place? The development of a sustainable global economy would not be attainable without weaving the interest of business and human rights (environmental rights in particular), the more so that business and environmental rights interests are not necessarily at cross-purposes. It has been further established through empirical evidence that ‘environmental sustainability can be compatible with maximization of shareholder value.’\(^8\) By striving to address the interests of the major stakeholders (human and environmental rights issues inclusive), business would realise they are better positioned to concurrently advance their goals of profit making\(^9\) and also help the host communities’ and other stakeholders actualise their interest of environmental sustainability,\(^10\) and human rights protection, thus building a sustainable symbiotic platform for the enthronement of Elkington’s triple bottom line principle: people, planet, profit.\(^11\)

Are Environmental Rights Human Rights?

There is no universally accepted definition of the concept ‘human rights’ because it means different things to different people, classes, groups, states or even generations. For the purpose of this discourse, however, human rights include:

---


\(^6\) Niger Delta Technical Committee (Report) (November 2008) 102. Figure is based on the 2006 Census, cited in Amnesty International 9 (note 3)


\(^10\) The expression was first used by the World Commission on Environment and Development (WCED) (Brundtland Commission) in 1987 which means ‘that development which meets the needs of the present generation without compromising the ability of the future generations to meet their own needs’ – WCED, Our Common Future (Oxford University Press, London 1987); The 1992 UNDP Reports states that ‘sustainable development is a process in which economic, fiscal, trade, energy, agriculture and industrial policies are all designed to bring about a development that is economically, socially and ecologically sustainable.’

...claims, which are invariably supported by ethics and which should be supported by law, made on society, especially on its official managers, by individuals or groups on the basis of their humanity. They apply regardless of race, colour, sex distinction and may not be withdrawn or denied by governments, people or individuals ... They are those rights which every individual claims or aspires to enjoy irrespective of his colour, race, religion, status in life, etc.\(^{12}\)

Similarly, Black’s Law Dictionary\(^{13}\) defines human rights as: ‘… freedoms, immunities, and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live.’ This definition though apt, does not accommodate collective or group rights, and since environmental rights belong to the group rights category, it is obvious that such rights are left out by this definition. This is also the case with the judicial definition of human rights as attempted by the Ghanaian Supreme Court. It considered human rights as: ‘universally regarded as inalienable and constitute the birth right of the individual as human being.’\(^{14}\) Judge Weeramantry of the International Court of Justice, recognizing the importance of such rights stated in an opinion thus: ‘The protection of the environment is ... 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. It is scarcely necessary to elaborate this, as damage to the environment can impair all the human rights spoken of in the Universal Declaration and other human rights instruments.’\(^{15}\) In addition, a French Jurist, Karel Vasak advanced the concept of three generations of human rights, viz:

1. **First Generation: Civil and political rights**

2. **Second Generation: Economic, social and cultural rights and**

3. **Third Generation: Solidarity rights including the right to peace, development, and the right to good healthy environment.**\(^{16}\) This generation of rights basically embraces six claimed rights namely: the right to economic, social, political and cultural self determination; the right to economic and social development; and the right to participate in and benefit from the common human heritage such as shared earth-space resources, scientific, technical, cultural traditions, sites and monuments. Others are the right to peace; the right to healthy and balanced environment; and the right to humanitarian disaster relief.\(^{17}\)

International law scholars are generally divided on whether environmental rights constitute part of human rights. The *human rightism* doctrine popularised by A. Pellet,\(^{18}\) for instance, considers human

---


15 Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia), 1997 ICJ Rep 7 (separate opinion of Justice Weeramantry) 4, quoted in Amnesty International, (note 3) 12


17 SS Shikyil, (note 16)

rights as a self-concluded discipline situated within the province of formal international standards hinged on its traditional doctrine of human rights as rights of the individual and not that of the community. This argument is faulty in many fronts, and this writer fears that the perception of human rights as a self-contained discipline may be a requiem for this well thought-out concern awaiting burial; because whatever thing that does not grow dies quickly.

Another pack of human rights scholars strongly holds the view that the consideration of human rights as the rights of an individual incapable of being extended to embrace community rights is but a stagnation of international law, ‘remains blind to the intrinsic linkage between the individual and collective interests of society.’ Bob Evans similarly contends that ‘The recognition of “human environmental rights” has led to an overlap of international environmental and human rights law’. He further refers to the 1999 Aarhus Convention on Access to information, public participation in decision-making and access to justice in environmental matters as being the first to ensure citizens’ rights in the field of the environment. It states, as the objective of Article 1 that ‘in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights of access to information, public participation in decision making and access to justice in environmental matters in accordance with the provisions of this Convention. The African Charter, as we shall soon show, also accords human rights recognition to environmental violations on the community. This postulation flies in the face of the human rightism scholars’ holding. The postulation of the subsequent school of thought that believes environmental rights are human rights appear to be an argument with a human face. As Francesco Francioni argues, there is need to expand the jurisprudence on the field of human rights that acknowledges the ‘collective dimension of the right to a decent and sustainable environment as an indispensable condition of human security and human welfare.’

Furthermore, the contention of the human rightism philosophers that human rights are stricto senso individual rights may hold true in the ideal European setting, but not in Africa where the doctrine of communal living far surpasses any individualistic consideration. In this case however, the reading of a society’s value system into decision making and other social or filial political activities as it pertains to environmental rights should be greatly espoused; even though this may raise problems concerning evolving a universal regulatory and enforcement structures on environmental rights issues.

The ascription of individualistic flavour into environmental rights readings merely places it as an evolving private law concern concerned with addressing private injury to life and property rights, as

---

19 Francesco Francioni, ibid
20 Ibid at 44
22 Francesco Francioni (note 18) 44.
23 Africans still believe in being our brothers’ keepers. In this writer’s Taroh community of Plateau state - Nigeria, for instance, it is a taboo to address one’s father’s brother as an uncle; such relation must be addresses as ‘father’; Cousins similarly call themselves ‘brothers’ or ‘sisters’, just to maintain the filial connection that could be watered down by the ideal description.
24 Private law basically concerns itself with the remedying of harm to the individual or a group through damages and other forms of compensation. However, in the case of environmental rights claims, especially when some aspects of the ‘unowned’ environment have been violated, compensation is not its cardinal drive. As has been rightly observed that ‘... the objective of the protection of the environment is not always best served by the legal mechanisms available, because these other areas were not developed with the particular problems of environmental protection in mind. For example, the private law concentrates on the protection of private interests and has difficulties when it comes to protecting common or public interests in the unowned environment. No damages are payable for harm to
against being a public law discipline centred on addressing societal or community rights over their natural resources and the ecosystem.

Similarly, an English Judge (Lord Scarman) once commented on the viewing of environmental rights in terms of property thus: ‘for “environment” a traditional lawyer reads “property”: English law reduces environmental problems to question of property.... the judicial development of the law, vigorous and imaginative though it has been, has been found wanting.’

There is need to urgently find a solution to environmental degradation at national, regional and international levels. Mere academic arguments on how and where to place it alone will not address the environmental hazards that are fast negatively affecting humanity in gargantuan proportion.

In Nigeria, it is obvious that it is not whether environmental rights are recognised as human rights, but the degree of their justiciability or enforceability. Though these rights are not fundamental rights, they have found statutory expression in the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act and other statutes. Thus, a victim of environmental rights violations can seek redress within the framework of the African Charter. In the case of Social and Economic Rights Action/Center for Economic and Social Rights v. Nigeria, although this case was not redressed within the framework of the Nigerian domestic judicial system, but by the African Court, it was declared that Article 24 of the African Charter requires the State to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and sustainable use of natural resources. The Court found the Federal Republic of Nigeria to be in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter, and appealed to it to ensure the protection of the environment, health and livelihood of the people of Ogoniland by investigating and prosecuting government officials and NNPC for any form of violation of human rights. However, up till now, no action has been taken concerning the decision of the African Court, but for the recent collation of the Federal Government with the United Nations Environmental Programme (UNEP) which undertook a comprehensive and scientific study and analysis of the impact of oil pollution in Ogoniland.

the environment as such and only those with personal or property rights may bring an action... No value is placed on the environment itself and environmental protection is simply an incidental by-product of the protection of other interests’ – Stuart Bell and Donald McGillivray (note 1). Peter Cane has similarly posited that ‘natural resource damages are designed to make the environment better, not to compensate for harm. In constructing regimes of liability and compensation for environmental harms, it is important to appreciate the limits of compensation law for achieving our environmental goals for the future.’ See Peter Cane, ‘Are Environmental Harms Special?’ (2001) 13/1 Journal of Environmental Law 17. Furthermore, in the recent case of Shell Petroleum Development Company Limited v. Edamkue & Ors. (2009) 14 NWLR (Pt. 1160) 1 at 40-41 the Nigerian Supreme Court relying on the precedent it laid in Machine Umudje v. Shell – BP Petroleum Development Company (Nig.) Ltd. & Anor. (1975) 9-11 SC 155 found Shell culpable of environmental pollution, being an outcome of a group action. However, this action was not a community one, but a tortuous action hinged on the common law rule in Rylands v. Fletcher.

26 Cap. A9 Laws of the Federation of Nigeria, 2004
27 Case No. Achpr/Comm/ A044/1, African Commission On Human And Peoples' Rights, May 27, 2002
28 SERAC and CESR v. Nigeria, supra.
From the above state of affairs, it is worthy of note that the problem of oil pollution and allied environmental degradation in the Niger Delta is caused and encouraged by a weak and ill-equipped enforcement and regulatory regime, and worse still, the regulatory agencies sometimes rely on the oil companies for technical evaluation and prescription of remediation activities, and environmental restoration. It is for this reason that the UNEP report indicts government agencies with the responsibility for regulating and monitoring compliance with the law thus:

the Department of Petroleum Resources (DPR) and the National Oil Spill Detection and Response Agency (NOSDRA) have differing interpretations of EGASPIN [The DPR regulation christened ‘Environmental Guidelines and Standards for Petroleum Industry in Nigeria’ (EGASPIN) which was first issued in 1992 and reissued in 2002, forms the basis for most environmental regulation of the oil industry]. This is enabling the oil industry to close down the remediation process well before contamination has been eliminated and soil quality has been restored to achieve functionality for human, animal and plant life. The Nigerian Government agencies concerned lack qualified technical experts and resources. In the five years since NOSDRA was established, so few resources have been allocated that the agency has no proactive capacity for oil-spill detection. In planning their inspection visits to some oil spill sites, the regulatory authority is wholly reliant on the oil industry for logistical support.\(^{30}\)

The UNEP report also shows that it would take an average of twenty-five to thirty years to remedy or clean up the environment in Ogoniland at the cost of about a billion $1 billion, being the world’s largest clean up ever. The report further shows that: “Control and maintenance of oilfield infrastructure in Ogoniland has been and remains inadequate: the Shell Petroleum Development Company (SPDC) own procedures have not been applied, creating public health and safety issues.”\(^ {31}\)

Conversely, however, the Nigerian constitution only recognises the first generation rights in chapter four (civil/political rights) as fundamental rights, hence giving the citizens the right to seek redress in the event of their violation unlike environmental rights. That means, whenever there is a violation of such rights, it is basically enforceable as tortuous wrong or under the African Charter (whether before Nigerian courts or the African Commission), or crime – where it has a criminal flavour. Where they are brought as tortuous wrong, the major problem would be to establish the specific damages that the victim has suffered, since they are not actionable _per se_.

Similarly, the Nigerian government has long ratified the African Charter on Human and Peoples’ Rights (African Charter) and has further domesticated the provisions of the same. The African Charter recognises certain environmental rights, and based on the Supreme Court’s decision in _Abacha v. Fawehinmi_\(^ {32}\), it invariably means the provisions of the charter are enforceable in Nigeria to the extent of their consistency with the Nigerian constitution. Another advantage of the domestication of the African Charter by Nigeria is that it accords citizens the opportunity of making collective claim for environmental pollution before our domestic courts given that Article 23 recognises the right of the community to a healthy environment.

\(^{30}\) Ibid at 12.
\(^{31}\) Ibid at 15.
\(^{32}\) (2000) 6 NWLR (pt. 660) 228
The continuous and sometimes unabated environmental pollution in the Niger Delta as shown in the case of Social and Economic Rights Action/Center for Economic and Social Rights v. Nigeria constitutes a serious breach of the communities’ right to clean environment as enshrined in Articles 16 and 24 of the African Charter – the right to attainable mental and physical health and good environment, suitable for human habitation. In addition, Nigerian courts can enhance the attainment of the provisions of the Charter by according community representatives the locus standi to institute the suit on behalf of the victim communities as it concerns the pollution of environment in the same manner as the African Court did in the above case. This would seriously abate the resort to foreign platforms for the redress of the indigenous peoples’ grievances as it affects the environment.

In 1972, a United Nations (UN) Conference at Stockholm on the Human Environment declared that ‘man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.’ It was in recognition of the essence of environmental rights that the United Nations appointed a World Commission on Environment and Development – the ‘Brundtland Commission’ – which found out in 1987 that ‘one of the most serious threats to our civilisation is the accelerating deterioration of our environment’. It therefore called for a new approach to the environment and development which ‘meets the needs of the present without compromising the ability of future generations to meet their own needs.’

Awareness has increased since the mid-1980s on the problem caused by oil exploration activities and the resultant environmental pollution that add to the challenge of climate change, also known as global warming or the greenhouse effect. The warming gases (known as greenhouse gases) given off when fossil fuels are burnt are increasing in the atmosphere, leading to rises in global temperature and sea levels. Concentrations of carbon dioxide in the atmosphere today are already about 30 per cent higher than the levels which existed before the Industrial Revolution.

**Development and The Environment: Strangers or Partners?**

Development implies the transformation and distribution of economic resources in favour of a socially and economically underdeveloped segment of society or region. Transformation here entails the harnessing of the renewable and non renewable natural resources for the economic and industrial advancement of society. However, the ‘over-exploitation’ and ‘indiscriminate’ use of these resources over the years results in irreversible environmental degradation that affects human, plant and animal lives. The urge for development and the necessity of environmental sustainability raise a big question:

---

33 (supra)
34 The above case of of Social and Economic Rights Action/Center for Economic and Social Rights v. Nigeria was brought before the African Court due to the failure of the internal legal mechanism to address the concerns of the victims of environmental pollution.
39 Ibid.
‘Do we want development or do we want a clean environment?’ In response to the above question, this writer strongly believes we do not just want but need both and can have both, if we are cautious enough to be mindful of each concern while working to achieve the other.

Environmental pollution in monumental proportion has resulted in climate change which has evolved as the most pertinent of global environmental issues, and for good reason; none other is as connected to economic growth and the environment at such an expansive scale and detailed scope.

Majorly, greenhouse gases (GHG) emissions lie with the industrialized countries; though some of the worst impacts manifest in developing countries, as seen in the case of tsunami, flooding, global warming. Worse still, the developed countries, especially the leading ones, are not ready to make any commitment that would lead to the making of a binding law as against the ‘soft law’ that presently shows intent instead of a binding and hence enforceable legal regime on environmental sustainability at the global level. The discrepancy in terms of the quantum of contribution to climate change has the potential to worsen existing tensions and to raise new disputes between industrialized and developing nations.

The two biggest polluter countries, US and China, have shown lackadaisical attitudes towards supporting the further reduction of GHG emissions from their industries in the name of advancing their domestic economies; the impact of such unmitigated economic activities on the global environment, notwithstanding.

Oil Operations and Environmental Concerns in The Niger Delta

Nigeria has been suffering the inestimable negative environmental consequences of oil exploration and exploitation since it commenced in commercial quantity in the Niger Delta in the late 1950s. In view of this development, environmental sustainability being a core principle of Corporate Social Responsibility (CSR) requires some serious examination – especially as it relates to the Niger Delta; considering the fact that the triple bottom-line principle of CSR also recognises the place of the planet as one of the three major considerations of business. Self-regulation on environmental protection and sustainability, especially by Multinational Corporations (MNCs) is perverse and in consonance with global best practices. However, it is still the case that for MNCs on a global level, in general, and in Africa, in particular, environmental rights protection are mere political slogans expressed in the media without any visible compliance in their daily operations. In the Niger Delta,

---

40 Ibid.
42 Environmental and economic interests are seen to be in conflict as shown in the USA withdrawal of support by the Bush administration for the Kyoto Protocol. Similarly, Bush’s withdrawal was underscored by his claim that the Kyoto protocol was economically damaging and did not sufficiently impose responsibility on the developing nations – see H Bulkeley ‘The Governing Climate Change: The Politics of Risk Society?’ (2001) 26/4 Transactions of the Institute of British Geographers, New Series 43.
45 The triple bottom-line recognizes people, profit, and planet as the main focus of business
the operations of International Oil Companies (IOCs) and their relationship with their host communities are fraught with disagreement on issues relating to environmental protection and sustainability, human rights, the dearth of infrastructures, among other challenges. It has, for instance, been asserted that multinational companies working in the extractive industry in sub-Saharan Africa apply lower environmental standards than they do in Europe or North America and have shown established complexities in human right violations in the course of their operations.46

The environmental damage caused by oil spillage and gas flaring, being consequences of oil operations have resulted in waste of arable land, as well as economic crops and trees.47 Varying degrees of oil spillage as a result of ruptured pipelines, tanks, tankers, drilling operations, etc is not an unusual occurrence in this region. It causes water and land pollution with grave consequences on both aquatic and terrestrial life, and even results in groundwater pollution which contaminates potable water – well water is covered with a harmful thin oil film.48 The implication and complexities of Chevron49 and Shell50 among other oil majors in human right abuses through the use of state security apparatus constitute a sever affront to environmental and human right protection in the Niger Delta – Chevron Corporation is charged with serious human rights abuses in Nigeria, including complicity in abuses and killings which took place in 1998 and 199951. Their complexities are ignoble of Multinationals of their standing. This has set the host communities against the oil companies as demonstrated by the recent threat by a community leader in Ogoniland that despite the payment of $15.5m as settlement in the case of the Ogoni nine, they will not allow Shell to resume oil exploration in the area.52

Gas Flaring

Gas flaring is the practice of burning off natural gas when it is brought to the surface in places where there is no infrastructure to make use of it. Gas flaring has been found to discharge about 110 million metric tonnes of carbon dioxide into the atmosphere, each year — constituting about 0.5 per cent of the world's carbon dioxide emissions.53

According to Chris Cragg, an independent oil and gas expert who undertook the environmental impact of oil pollution in the Niger Delta, ‘It [gas flaring] is one of the largest single pointless emissions of

46 B Manby, ‘Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis’ (Carnegie Council on Ethics and International Affairs, New York) 1-2
48 Ibid. p. 35
51 D Bustany and D Wysham (note 49)
52 Thisday (Lagos 10 June 2009) 1, 6.
greenhouse gas on the planet, with obvious implications for climate change that will not only affect Nigeria, but also the rest of the world.\textsuperscript{54}

The separated gas which is wasted through flaring could be harnessed for use as liquefied natural gas, re-injected into the earth. In Nigeria, over 50\% of the gas associated with crude oil extracted is flared.\textsuperscript{55} Worse still, Nigeria is the second largest offending country, after Russia, in terms of the total volume of gas flared.\textsuperscript{56}

In addition, a satellite-enhanced research shows that worldwide about 168 billion cubic meters of natural gas is flared yearly. Nigeria accounts for 23 billion cubic meters (about 13\%).\textsuperscript{57} In 2004, for instance, the volume of gas flared in Nigeria was estimated to be equivalent to one-sixth of total gas flared in world.\textsuperscript{58}

Medical studies indicate that gas flaring forms part of the basis of low life expectancy age in the Niger Delta region that is pegged at forty-three years. Similarly, in the Niger Delta, 12 per cent of new born babies don’t survive their first birthday.\textsuperscript{59} In the same vain, gas flaring has been established to have caused the local communities diseases like cancers, asthma, chronic bronchitis, blood disorders, and others.\textsuperscript{60}

In view of the hazardous nature of gas flaring on the environment, the Federal Government in 1979 promulgated the Associated Gas Re-Injection Act No. 99 of 1979 in order to guarantee zero flares by January 1, 1984, but that has not been achieved till date, despite repeated adjustments. The IOCs prefer flaring gas and paying the paltry fine associated with violating this law.\textsuperscript{61} The penalty for gas flaring as at January 2008 is US $3.50 for every 1000 standard cubic feet of gas flared.\textsuperscript{62} This is still considered meagre and not a deterrent for companies which prefer paying the fine than complying with the law.\textsuperscript{63} As at January 2010, the Nigerian National Assembly was proposing a new deadline of 2012.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{54} Ibid.
\item \textsuperscript{58} Ibid.
\item \textsuperscript{59} D Howden (note 53) 2
\item \textsuperscript{60} Environmental Rights Action/Friends of the Earth Nigeria (note 56)
\item \textsuperscript{61} Ibid.
\item \textsuperscript{62} Ibid.
\item \textsuperscript{63} Ibid.
\item \textsuperscript{64} Ibid.
\end{itemize}
Oil Spillage

Oil spillage is sometimes caused by negligence on the part of the oil companies through corrosion, or sabotage of pipelines, among others. However, the most important challenge is the response to such occurrence. The Gulf of Mexico spillage that lasted a few months in 2010, for instance, took longer than expected period of time to be fully curbed, but the interesting thing was the proactive response of the oil company involved, British Petroleum (BP), and American environmental agencies. The publicity this pollution generated made the oil company lose over 30% of its market share value.65 The American president responded swiftly by constituting presidential committees to find a solution to it in view of its imminent threat to human, animal and aquatic life. However, in Nigeria, response to oil spill and clean up actions, if taken at all, takes too long and sometimes comes too late.

Some major oil spill incidents in the Niger Delta include:

1. Between 1976 and 1996 approximately 6%, 25%, and 69% of total oil spilled in the Niger Delta area, were in land, swamp and offshore environments respectively;66
2. The GOCON’s Escravos spill in 1978 of about 300,000 barrels, SPDC’s Forcados Terminal tank failure in 1978 of about 580,000 barrels, Texaco Funiwa-5 blow out in 1980 of about 400,000 barrels. The most publicised of all oil spills in Nigeria occurred on January 17 1980 when a total of 37.0 million litres of crude oil got spilled into the environment. This spill occurred as a result of a blow out at Funiwa 5 offshore station67;
3. Nigeria's largest spill was an offshore well-blow out in January 1980 when an estimated 200,000 barrels of oil (8.4million US gallons) spilled into the Atlantic Ocean from an oil industry facility and that damaged 340 hectares of mangrove;
4. The Abudu pipeline in 1982 resulted in the spillage of about 18,818 barrels of oil;
5. The Jesse Fire Incident which claimed about a thousand lives and the Idoho oil spill of January 1998, spilled about 40,000 barrels68;
6. From January 2006 to June 2009, NOSDRA estimates that a total of 66697.2975 barrels of crude oil was spilled in the Niger Delta69.
7. Between 1976 and 1996 a total of 4647 incidents resulted in the spill of approximately 2,369,470 barrels of oil into the environment. In addition, between 1997 and 2001, Nigeria also recorded a total number of 2,097 oil spill incidents.70 In 1998, 40,000 barrels of oil from Mobil platform off the Akwa Ibom coast were split into the environment causing severe damage to the coastal environment.71

Sabotage is another major cause of oil spillage in the country. Some Nigerians collaborate with foreigners to engage in oil ‘bunkering.’ They damage and destroy oil pipelines in order to steal oil from

65 CNN News, (Washington DC, 5 July 2010) 2PM GMT News
67 Ibid.
68 Ibid
69 Statistics On Reported Oil Spill Incidents From Oil Company Operators From January, 2006 To June, 2009 NOSDRA Report Obtained From Their Office on 05/07/2010
70 Ibid.
71 Ibid.
them. Shell for instance claimed in 1996 that sabotage accounted for more than 60 percent of all oil spilled at its facilities in Nigeria, stating that the percentage has increased over the years both because the number of sabotage incidents has increased and because spills due to corrosion have decreased with programs to replace oil pipelines.\(^{72}\) NOSDRA however reports that sabotage accounts for 53% of oil spilled between 2006 – 2009, equipment failure was responsible for 30%, corrosion 10%, and operational maintenance error 6%, and yet to be determined causes accounted for 1%, during this period.\(^{73}\)

Another statistics show that fifty percent (50%) of oil spills is due to corrosion, twenty eight percent (28%) to sabotage and twenty one percent (21%) to oil production operations. One percent (1%) of oil spills is due to engineering drills, inability to effectively control oil wells, failure of machines, and inadequate care in loading and unloading oil vessels.\(^{74}\)

As earlier noted, IOCs operating in the Niger Delta do not apply the same environmental standards in the region with the one upheld in their home countries. For instance, the case of the Brent Spar of 1995 comes in handy. Shell UK decommissioned a large floating oil storage buoy in the North Sea area of the United Kingdom. It sought the consent of various local authorities and further consulted with various interest groups to dispose of it through the deep-water disposal option as the Best Practicable Environmental Option (BPEO). Greenpeace, an NGO, spearheaded protest and opposition to the planned disposal of this oil buoy despite the UK government’s approval of the deep-water option. This pressure led to massive boycott and even attack on Shell facilities in continental Europe, and particularly Germany, because of the inherent environmental implications of such action. Shell at this point was left with no option than to dispose it off the coast of Norway.\(^{75}\) It is the desire to protect further damage to the environment that motivated the protest by environmental right activists to protest the planned deep water disposal of the Brent Spar buoy in the North Sea region by Shell UK.

**Recommendations and Conclusion**

**The Imperative of a Codified International Framework and Policing System**

As it stands, there presently exists no effective mechanism to hold MNCs accountable for their actions. As long as governments can avoid compliance with international environmental standards by evoking national sovereignty and use national security claims as a means to prevent the monitoring and detection of environmental trouble spots, any serious attempt at an international system to ensure environmental rights is doomed to failure.\(^{76}\) When dealing with multinationals whose size and spread give them so much power as to even compete with local governments in the third world, it is imperative to curb their excesses through evolving an international framework that would regulate and ensure compliance with internationally agreed environmental standards, especially those that are outcomes of functional-convergence approaches to rules and standard setting. Rio+20 summit planned to hold in Brazil in 2012

---


\(^{73}\) Ibid. at p. 5

\(^{74}\) PC Nwilo and OT Badejo (note 66)


would be a plausible success, if it ends with a binding convention beyond the present system that only expresses intent without any legal bite.

**The Use of Environmentally Friendly Technologies**

The use of environmentally friendly technologies is a means of curbing the excesses of environmental degradation that results from activities like petroleum operations. Environmental technologies have evolved to reduce some of the environmental pollution problems such as oil spillage and gas flaring. The issue of the use of environmentally friendly technology is one of the ten principles adopted by the UN Global Compact policy on Corporate Social Responsibility. The ninth principle stipulates a policy that will ‘Encourage the development and diffusion of environmentally friendly technologies.’

A Nigerian scientist, Onwukwe, for instance worked on gas to liquid technology in Nigeria. His work examined the prospect of Gas-to-Liquid (GTL) conversion technology as a sustainable natural gas utilization option. He noted that this technology will make possible the chemical conversion of natural gas into clean diesel, naphtha, kerosene and light oils, as marketable liquid products. According to him this conversion will contribute to the elimination of flared gas and reduce the country's overdependence on imported refined petroleum products.

The experience of Saudi Arabia in the Middle East is quite worthy of emulation. There, gas flaring emissions fell from 38 billion cubic meters per year in the early 1980s to a mere 120 million cubic meters per year in 2004. The associated gas was used to provide the basis of a successful petrochemicals industry. As a result, Saudi Arabia is now one of the world’s largest producers of urea—a widely used agricultural fertilizer. The BBC World satellite news TV documentary programme revealed that Canada and Norway had effectively controlled their gas flaring and venting. Norway in particular was shown to have invested hugely in the technology for this purpose, and to have recouped the entire cost of its investment in just 5 years from the proceeds of the gas gathered and marketed.

Nigeria can also achieve this feat if it makes the oil companies accountable and make it mandatory for them to engage the use of environmentally friendly technologies in their operations and put to economic use the gas that is regularly flared, hence reducing GHG emissions into the environment. And better still, the IOCs can make it a strategic corporate social responsibility to encourage the mass production of the above forms of technology in the interest of the stakeholders. The use of this kind of technology though a CSR issue, is in the long run in the interest of the MOCs because it reduces the cost of operations and production.

---


79 The Earth Report, shown on 13 May 2007 (3.30-4.00am) on Gas Flaring, quoted ibid


81 Ibid.
Furthermore, the Kyoto text emphasizes the obligation of the richer countries to encourage technology transfer to developing countries. But little or nothing is said about the need for new technology to deal with emissions mitigation within the developed world. In fact, if nations ever do commit to deep emissions reductions, the only way to preserve healthy economic growth will be through low-carbon technologies that at present either do not exist or at high cost. Thus an important advance that could be achieved now is a commitment by developed countries, individually or jointly, to increase research and development (R&D) funding substantially and promote technology diffusion.82

It is at this point obvious that environmental rights are human rights and environmental sustainability is for the interest of mankind as a whole hence the need for sustainable use of the planet with a view to minimising the negative impact of economic and industrial activities in the interest of this generation and those yet unborn. The mere existence of the concept of human rights conversely relates to the recognition of human wrongs. There would be no framework for the recognition of the former and invariably curtailing the latter, if the latter does not exist at all.

The field of modern international environmental law has its origins in a dispute between the United States and Canada over air pollution damages in Washington State from an ore smelter in Trail, British Columbia. The resolution of this dispute established the norm of customary international law that it is the state’s duty to avoid letting its activities produce harm in other states. Failing that duty, a state is liable to compensate for environmental damages. International environmental law in the 1950s and 1960s proceeded almost exclusively in the form of such customary laws. In the 1970s, treaties began to codify the customary norms of international environmental law. The 1980s and 1990s witnessed a proliferation in the magnitude, complexity, and scope of international environmental law treaties. No longer content to merely codify existing norms, these new treaties imposed new duties and standards on states and other actors.83

Accountability, Assessment and a Reward System for Environmentally Friendly Operations.

There are federal government agencies mandated to regulate environmental issues in Nigeria in general and the Niger Delta in particular. These include: National Oil Spill Detection and Response Agency (NOSDRA), National Environmental Standards Regulations Enforcement Agency (NESREA). These agencies can monitor oil operations and engage the IOCs to make CSR ethics as it relates to the environment. Compliance with such ethics should be monitored and a reward system in terms of tax waivers and publicised commendation be given to the most compliant oil company. This form of engagement (a government-monitored self-regulating system) will make enforcement easier than the formal convergence approach that has failed due to poor enforcement mechanism and corruption.

The Environmental Justice Approach

Environmental justice84 approach to solving environmental degradation cases is best solved through the stakeholder engagement approach, as against the top-down approach, whereby laws, policies and

84 Environmental justice is defined by the US Environmental Protection Agency (EPA) as the ‘fair treatment and meaningful involvement of all people, regardless of race, colour, national origin, culture, education or income, with respect to the development, implementation and enforcement of environmental laws, regulations and policies.’ See
regulations are made without involving the stakeholders like communities, corporations etc in the policy or law making process.

**Overhaul of the Law Enforcement System**

As discussed above, it is imperative to expose personnel of the agencies (NOSDRA, DPR, NESREA, etc) involved in monitoring and enforcing the rules/regulations concerning the environment. There is serious need for retraining of such staff and all the necessary equipment/tools of operation should be provided to enhance their undertaking their responsibilities; since the problem is not whether the legal framework for environmental protection and remediation has been provided, by way of legislation, but that of poor enforcement mechanism.

A combination of all or some of the above recommendations would greatly make the quest for environmental and corporate sustainability, human and environmental rights protection, etc a reality, and hence usher in a new regime for the better use of the ecosystem and other natural resources - in the interest of the present generation without compromising the future generation’s needs.