THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT AS A TOOL FOR SEEKING REDRESS FOR DAMAGES CAUSED BY ENVIRONMENTAL POLLUTION IN NIGERIA, WITH PARTICULAR REFERENCE TO THE NIGER DELTA REGION: A CASE STUDY OF JONAH GBEMRE vs. SPDC (2005) AHRLR 151 (NgHC 2005)

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ABSTRACT

The right to a healthy environment is a right which has not received much approval from different facets. Nigeria is a country blessed with crude oil or in some other parlance, ‘cursed’ with crude oil. The attitude of companies engaged in crude oil exploration, the Government of Nigeria and the host communities has resulted in serious damage to the environment in the Niger Delta. Victims of this harm have failed to get justice most times due to the absence of a clearly defined right to a healthy environment in the Nigerian Constitution. This paper proposes that the existence of this right would defeat a major hurdle faced by victims of environmental harm caused by oil spillage and gas flaring, in seeking redress.

1.0 DESCRIPTION OF KEY TERMS

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“Environment” has been defined as the totality of physical, economic, cultural, aesthetics and social circumstances which surround and affect the desirability and value of property and which also affects the quality of peoples’ lives.\(^1\) Section 37 of National Environmental Standards and Regulation Enforcement Agency Act\(^2\) provides that:

Environment includes water, air, land, and all plants and human beings or animals living therein and the inter-relationships which exist among these or any of them.

The above definitions regard the environment as a state of affairs which is based upon the activities of man in his natural habitat and the relationships he has with his immediate environment in terms of water, air, animals, etc. This definition indicates the need to protect human health, safety and interest. It requires the maintenance of a certain standard for the environment for human use and enjoyment of nature. Therefore, a healthy and clean environment becomes a human right.\(^3\)

“Right” refers to moral standards, righteousness and moral rectitude. It may also refer to the legal entitlement of a person; the special title one has to a good or opportunity.\(^4\) Right in an abstract sense, means justice, ethical correctness, or harmony with the rules of law or the principles of morals. In a concrete legal sense, it means power,


\(^4\) Ibid at p.129
privilege, demand, or claim possessed by a particular person by virtue of law. Each legal right that an individual possesses relates to a corresponding legal duty imposed on another. For example, when a person owns a home and property, he has the right to possess and enjoy it free from the interference of others, who are under a corresponding duty not to interfere with the owner's rights by trespassing on the property or breaking into the home.\(^5\) The UN General Assembly Resolution 45/94 on the need to ensure healthy environment for the well-being of individuals\(^6\) declared that, “all individuals are entitled to live in an environment adequate for their health and well-being.” The Right to a healthy environment requires States to refrain from activities harmful to the environment, adopt and enforce policies promoting conservation and improvement of the quality of the environment.\(^7\) The requirement of a healthy and balanced environment and of the environmentally sound management of natural resources is a condition for the implementation of other fundamental rights. It has been argued\(^8\) that, environmental rights, if made justiciable, would grant the public a right to healthy environment and introduce a series of reforms to increase the powers of the private citizens to protect themselves and their environment from the effects of pollution. Also, such right would increase power to sue in civil courts for

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\(^7\) Nickel, J.W., *The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification* 18/1 Yale J. of Int'l L. 1993, pp. 282-295, at p. 286

damages caused by pollution and to initiate private suits or claims for pollution where government has refused to act. It would also grant increased access to participate on standard setting and other processes. It would also obliterate the legal hurdle of locus standi currently standing in the way of many environmental litigants. “Host community” is a community where crude oil is exploited from and houses production facilities of companies engaged in oil exploration, mining and production. “TNCs” - Transnational Corporations are multinational oil companies with parent companies in foreign jurisdictions. “Pollution” can be defined in different ways. According to the World Health Organization (WHO) in 1974,

The environment is considered polluted when it is altered in composition or condition, directly or indirectly, as a result of activities of man, so that it becomes less suitable for some or all of the uses for which it would be suitable in its natural state.

The NESREA Act also defines pollution to mean,

Man-made or man-aided alteration of chemical, physical, or biological quality of the environment beyond acceptable limits and "pollutants" shall be construed accordingly.

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9 Supra note 3 at p. 131
The United Nations Convention on Law of the Sea (UNCLOS) defines Pollution as the:

Introduction by man, directly or indirectly, of substances or energy, into the marine environment, coastal zones, and related inland waters, resulting in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairments of quality use of sea water and reduction of amenities.\textsuperscript{13}

Pollution can also be illustrated with three differing points of view which are:\textsuperscript{14}

- Pollution is the addition to the natural environment of any substance or energy form at a rate that results in higher than natural concentrations of that substance or energy form.
- Pollution is caused when a change in the physical, chemical or biological conditions in the environment harmfully affects the quality of human life, including effects on other animals and plants, industries, cultural and aesthetic assets.
- Pollution is the addition of any substance or form of energy (e.g., heat, light, sound, radiation, etc.) at a rate faster than the environment can accommodate by dispersion, breakdown, recycling or storage in some harmless form.

Pollution affects human health and the environment in many ways, of which four types are recognizable:\textsuperscript{15} Damage to human health

\textsuperscript{13} UNCLOS III, 1982. Art. 1 (4).
\textsuperscript{14} Supra note 10 at p. 32.
\textsuperscript{15} Ibid at 33.
caused by specific chemical substances present in the air, food, water and radioactivity; Damage to the natural environment which affects vegetation, animal, crops, soil and water; Damage to the aesthetic quality of the environment caused by smoke, fume, dust and dereliction; and long term pollution which effect is not immediate and apparent especially in personal injury cases.\textsuperscript{16}

“Jurisdiction” is the right of a court to hear a particular case, based on the scope of its authority over the type of case and the parties to the case.\textsuperscript{17} In \textit{Amaechi v. INEC},\textsuperscript{18} the court stated as follows:

\begin{quote}
Jurisdiction is a term of comprehensive import embracing all kinds of judicial action. It is basically the legal right by which judges exercise their authority to hear and determine the subject matter in controversy between the parties to a suit.
\end{quote}

It is the basis, foundation and the conduit of access to court in adjudication under the Nigerian legal system.

\textit{Locus Standi} is the right to bring an action or to be heard in a given forum.\textsuperscript{19} The term ‘locus standi’ denotes the legal capacity to institute proceedings in a Court of law. Standing to sue is not dependent on the subject or merits of a case; it is a condition precedent to the determination of the merits.\textsuperscript{20}

\textsuperscript{16}Margereson & Ors vs. J. W. Roberts Ltd; Hancock vs. J. W. Roberts Ltd; Hancock vs. T &N.Plc (1996) Env. L.R. 304; Croners Environmental Case Law Special Reports, May 1996 (the plaintiffs were exposed to asbestos while growing up and mesothelioma disease did not manifest itself until the adulthood of the plaintiffs.)

\textsuperscript{17}http://www.thefreedictionary.com/jurisdiction. (Assessed 3rd June 2016).

\textsuperscript{18}(2008) 5 NWLR Pt. (1080) SC 227

\textsuperscript{19}Supra note 1.

2.0 INTRODUCTION

The discovery of oil in commercial quantities in 1956 at Oloibiri placed Nigeria among the oil producing nations. However, sixty years after this discovery, the Niger Delta area of Nigeria has not developed much. The waters, farmland and landscape of the people have been destroyed beyond any beneficial use. Fishing and farming, the main occupations of the people can no longer be practiced. Income is unsteady and poverty rampant. These and more are largely due to the degraded state of the environment caused by Oil Producing Companies (OPCs) in the region. OPCs failure to respond swiftly to oil spillage either by accident, faulty maintenance, obsolete materials used by the oil companies or by sabotage, in combination with inadequate safety measures. Sabotage is often committed to steal oil or to receive compensation from oil companies for the oil pollution in the form of cash or paid orders for the remediation work to be performed following an oil spill.21 Transnational Oil Companies (TNCs) flare gas continuously without regard for the effects these activities have on the environment. They feel they can always pay their way by settling top government officials and look the other way while their business environment continues to threaten the lives of the host communities. Members of the community have tried to seek justice for the wrong done to them through dialogue, negotiation, mediation, litigation, public hearings, etc. Where the above failed, some members resulted

21 Friday Alfred Akpan & anor vs. Royal Dutch Shell Plc & anor Filed at the District Court in Hague, Netherlands. C/09/337050 / HA ZA 09-1580 2. Judgment delivered on 30 January 2013. PARA. 2.1
to confrontation, kidnapping of oil workers, pipeline vandalism and sabotage. Nowhere in the world has violence ever brought about sustainable change. It is argued that in other oil producing countries which are more developed than Nigeria, TNCs do not carry out their exploration activities with a culture of impunity and disregard for the state of the environment. The government of Nigeria has not done much to protect its citizens from this wrong or the effects of these heinous acts. The reason why litigants fail in getting compensation for damages most times is because the right to a clean and healthy environment is not a Fundamental right under the 1999 Constitution of the Federal Republic of Nigeria as amended. Perhaps, if this right were removed from chapter II of the Constitution and given a justiciable outlook, victims would be able to get compensation when able to prove their case. The culture of impunity and degradation by TNCs would stop because they are likely to be held accountable for their actions once victims prove their case, especially as the right to a clean and healthy environment would then be a fundamental right, breach of which cannot be waived. This paper seeks to discuss how the right to a clean and healthy environment can give justice to victims of environmental degradation especially that caused by oil pollution. It discusses how extra-territorial litigation might not be such a good idea in seeking relief. It calls on the judiciary to be flexible in the interpretation of the constitution and laws whenever issues of environmental abuse are before judges.

3.0 THE RIGHT TO A HEALTHY ENVIRONMENT AND HUMAN RIGHTS
Human rights refer to the ‘rights’ available to the individuals inhabiting an environment. They include those liberties, immunities, and benefits which by accepted contemporary values, all human beings should be able to claim, as rights of the society in which they live. They are those rights held by every person merely because they are human beings, irrespective of their ideological leanings. These rights are protected by national and international laws or instruments. These include the right to life, fair hearing, liberty, freedom of movement, etc.

The right to a clean and healthy environment is not internationally accepted as a fundamental human right. Whilst some scholars have tried to justify the existence of this right as a derivative of civil and political rights, thereby becoming a socio-economic right, others have argued that it should be seen as an independent right on its own, and not a right derived from other rights or without which other rights would not subsist. The right to a healthy environment should nevertheless not be classified as a synthesis right, because it embodies specific characteristics that can be distinguished from other rights, and does not constitute a 'shell-right' aimed at

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24 A synthesis right is a right embodying a number of elements that may also be found in other rights and whose recognition is often seen as a precondition of the enjoyment of all other human rights. Alleged synthesis rights (like the right to development) have often been rejected because of their tentacular and imprecise nature.
enhancing the realization of the other rights. Three theoretical approaches to the relationship between human rights and the environment have been identified. The first sees the environment as a ‘precondition to the enjoyment of human rights’. The second views human rights as ‘a tool to address environmental issues, both procedurally and substantively’. The third integrates human rights and the environment under the concept of sustainable development. It identifies also, ‘the call from some quarters for the recognition of a human right to a healthy environment’ and notes the alternative view that such a right, in effect, already exists.

3.1 Why should environmental protection be treated as a human rights issue?

There are several possible answers. A human rights perspective directly addresses environmental impact on the life, health, private life, and property of individual humans rather than on other States or the environment in general. It may serve to secure higher standards of environmental quality, based on the obligation of States to take measures to control pollution affecting health and private life. Above all, it helps to promote the rule of law in this context: governments become directly accountable for their failure to regulate and control environmental nuisances including those

25 Contra Downs, J.A., A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right, 3 Duke J. Comp. & Int'l'L.1993, pp. 351-385, who asserts that a right to environment is being proposed to facilitate the exercise and enjoyment of the other human rights (pp. 358-362).
27 Ibid at para. 12
caused by corporations, and for facilitating access to justice and enforcing environmental laws and judicial decisions. Lastly, the broadening of economic and social rights to embrace elements of the public interest in environmental protection has given new life to the idea that there is, or should be, in some form, a right to a decent environment.²⁸

Proponents of the right to a healthy environment have expanded and re-interpreted the civil and social rights in the Universal Declaration of Human Rights (UDHR),²⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁰ and other human right instruments³¹ to suggest that the right to a clean environment is an integral part of the fundamental rights of every citizen.³²

Principle 1 of the Stockholm Declaration³³ states,

Man has a fundamental right to freedom, equality and adequate conditions of life, in environment of quality that permits a life of dignity and well-being. It also places a duty of ensuring that the environment is

²⁹ United Nations Declaration on Human Rights, GA Res. 217A (III)
³² Supra note 10 at p. 590.
protected and improved squarely by man, for his and future generations.

Article 17 of the ICESCR guarantees respect for private and family life and home. Article 25(1) of the UDHR states; “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.” Article 3 further states, “everyone has the right to life, liberty and security of person.” Using these derivative rights principle, human right scholars argue that the civil and social rights to life, health and personal liberty guaranteed by many international treaties and municipal legislation would be meaningless if the environment was continually degraded to the detriment of the people. The State has a positive obligation to take steps to promote life expectancy of the citizens. Therefore, any person whose environment is degraded can rely on these civil and social rights to enforce his right to a healthy environment. Critics of this right have argued that the right is not justiciable and the concept of right to a healthy environment is vague and subject to divergent interpretations. There is no actual definition or a universally acceptable definition for the right to a healthy environment. The imprecise nature of the right would make it difficult to enforce if given legal recognition. Since the nature of this right is imprecise, Courts may give interpretations which conflict with what the legislature has in mind. The right to a healthy environment imposes economic obligations on States. Most times,

34 Supra note 10 at p. 590  
35 Supra note 23 at p. 30  
36 Supra note 10 at p. 591.
States are limited with economic resources to carry out civil and political obligations, which results in fewer resources being annexed to socio-economic objectives. States would rather make vague laws which are not enforceable in this area, and ratify treaties which they have no intention to domesticate, than take concrete steps to enforce this right.

4.0 THE RIGHT TO A HEALTHY ENVIRONMENT IN NIGERIA

The right to healthy environment is not expressly guaranteed by the 1999 Constitution of the Federal Republic of Nigeria.\(^{37}\) Section 20 of the Constitution states:

> the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.”

Section 13 of the Constitution provides;

> It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observes and apply the provisions of this Chapter of the Constitution.

Though, Section 20 of the Constitution might appear to confer the right to a healthy environment, the right is not justiciable as a result of the provisions of Section 6(6) (c) of the Constitution which provides that the ‘judicial powers’ vested in the Courts enumerated in the Constitution;

shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

Therefore, a litigant cannot institute an action in a Nigerian Court for a violation of her/his right to a healthy environment pursuant to Section 20 of the Constitution. However, it is worth noting that the African Charter\(^{38}\) which Nigeria has ratified and domesticated\(^{39}\) recognizes this right. The African Charter links the right to a healthy environment with the right to development. Article 22 states,

> All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in their equal enjoyment of the common heritage of mankind, and States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 24 provides, “All peoples shall have the right to a general satisfactory environment, favourable to their development.” It may be deduced from the foregoing that the international recognition of


\(^{39}\)African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act CAP. 10 LFN 1990; Act CAP. A 9 LFN 2004. Section 1 of the Act provides: “As from the commencement of this Act, the provisions of the African Charter on Human and Peoples’ Rights which are set out in the schedule of this Act shall, subject as there under provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria”.

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the right to a healthy environment entails both a right for everyone to benefit from the environment, as well as an obligation for all to manage it sustainably and enforce its sustainability.\textsuperscript{40} It is possible to canvass alleged breaches of the Charter before Nigerian courts since it has been domesticated. Thus, the rights embodied in the charter are ‘legal rights’, the alleged breach of which - a High Court has jurisdiction to entertain, under the constitution.

In \textit{Social and Economic Rights Action Centre (SERAC) and Another vs. Nigeria\textsuperscript{41}}, the Claimant, a Non-Governmental Organization (NGO), instituted an action at the African Commission on Human and Peoples’ Rights against Nigeria. The complaint concerns the consequences of environmental degradation in Ogoni land (in the Niger Delta region of Nigeria), caused by Shell Corporation in collusion with the Nigerian government. The military government of Nigeria was directly involved in oil production through the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium, with Shell Petroleum Development Corporation (SPDC), whose operations caused environmental degradation and health problems resulting in the contamination of the environment of the Ogoni people. The oil consortium exploited oil reserves in Ogoni land with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways, in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting

\textsuperscript{40} Supra note 3 at p. 132.

\textsuperscript{41}(2001) AHRLR 60 (ACHPR 2001)
contamination of water, soil and air had serious short and long term health impacts including skin infections, gastrointestinal and respiratory ailments, increased risk of cancers, and neurological and reproductive problems. The government condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies. The government neither monitored the operations of the oil companies nor required safety measures that are standard procedure within the industry. The government withheld from the Ogoni communities, information on the dangers created by oil exploration and production activities. Ogoni communities were not involved in the decisions affecting the development of Ogoni land. The government did not require oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production despite the obvious health and environmental crisis in Ogoni land. The government refused to permit scientists and environmental organizations to enter Ogoni land to undertake such studies. The government also ignored the concerns of Ogoni communities regarding oil development and responded to protests with massive violence and executions of Ogoni leaders. The Nigerian government did not require oil companies to consult communities before beginning operations even when the operations posed direct threats to community or individual lands. The government participated in irresponsible oil development, which poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces destroyed crops and killed farm animals. The
security forces created a state of terror and insecurity that made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farm lands, rivers, crops and animals created malnutrition and starvation among certain Ogoni communities. The applicant claimed violations of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.

The African Commission stated that States which have ratified the African Charter have a duty to respect, protect, promote and fulfil the rights contained in the African Charter. Firstly, the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio-economic rights, the State is obliged to respect the free use of resources owned or at the disposal of the individual alone, or in any form of association with others including the household or the family, and with regard to a collective group, the resources belonging to it should be respected as it has to use the same resources to satisfy its needs.\(^{42}\)

Secondly, the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights, against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. The State should make sure

\(^{42}\text{Ibid at para. 45, p.341}\)
that individuals are able to exercise their rights and freedoms, by promoting tolerance, raising awareness, and building infrastructures.\footnote{Ibid at Pgh. 46.}

The last obligation requires the State to fulfil the rights and freedoms it freely undertook under various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realization of socio-economic rights.\footnote{Ibid at Pgh. 47.}

The African Commission found Nigeria in violation of the \textit{African Charter} and made recommendations to the Nigerian government. However, it must be noted that these were mere recommendations with no sanction bearing the force of law for any of the rights violated.

This decision was however followed by the Benin Judicial Division of the Federal High Court of Nigeria in \textit{Jonah Gbemre vs. Shell Petroleum Development Company Nigeria Limited and Others.}\footnote{Mr. Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) vs. Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation and Attorney-General of the Federation. Suit FHC/B/CS/53/05, 14 November 2005 (2005) AHRLR 151 (NgHC 2005) \footnote{CAP. A 9 LFN 2004}}

The applicants applied to the Federal High Court for an order to enforce and secure the enforcement of their fundamental rights to life and dignity of human person as provided by \textit{Sections 33(1) and 34(1)} of the \textit{Constitution of the Federal Republic of Nigeria, 1999}, and \textit{Articles 4, 16 and 24} of the \textit{African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act}.\footnote{CAP. A 9 LFN 2004} The applicants claimed that the activities of the 1st and 2nd respondents,
in continuing to flare gas in their community, seriously polluted the air, causing respiratory diseases and generally endangering and impairing their health. No form of Environmental Impact Assessment (EIA) whatsoever was undertaken by any of the 1st and 2nd respondents to ascertain the harmful consequences of their gas flaring activities in the area to the life, environment, health, food, water, development, infrastructure etc. The constitutional guarantee of right to life and dignity of human person available to them as citizens of Nigeria includes the right to a clean, poison free and pollution free air and healthy environment conducive for human beings to reside in for the development and full enjoyment of life; and that these rights to life and dignity of human person had been, and was being wantonly violated and continuously threatened with persistent violation by these gas flaring activities; and the respondents had no right to continue to engage in gas flaring, in violation of their right to life and to a clean, healthy, pollution free environment and dignity of human person.

The judgment of the Court was more in the nature of specific declarations. There was no award of damages, costs or compensations. An important feature of the judgment in this case is that it links the right to life, popularly conceived of as a ‘civil’ right, with the right to a healthy environment, a ‘social’ right. In that way, the Court lends itself to the progressive conception of the indivisibility of all human rights.47

In December 2005, Mr. Gbemre filed a suit against Shell on the grounds that Shell failed to comply with the court’s previous order. However, Gbemre’s lawsuit was unsuccessful in effecting positive changes because the court was not able to administer the constitutional principle guiding the case after November 2005, the date the court issued an injunction to Shell. The court failed to implement the principle behind its decision, "the rights to clean poison free, pollution free healthy environment." The court’s inability to implement its decision is evidenced by the fact that, in April 2006, the court released Shell of its obligation to stop flaring gas on the condition that Shell met the quarterly step-by-step reduction in gas flaring. By adopting a step-by-step approach, the goal was to end gas flaring by April 30, 2007. However, the

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49 See Gbemre, Suit No. FHC/B/CS/53/05 at 30 (stipulating that clean environment is a constitutional guaranteed right).
50 See Climate Justice Press Release II, supra note 48 ("In April 2006 . . . [Shell] was granted a conditional stay of execution, releasing it from the duty to comply with a court order in November 2005 to stop flaring, on three conditions. One year on, two of these conditions have not been met."). The first condition was that Shell was “allowed a period of one year…to achieve a quarterly phase-by-phase stoppage of its gas flaring activities in Nigeria under the supervision of the trial Court”. The second condition was that “a detailed phase-by-phase technical scheme of arrangement, scheduled in such a way as to achieve a total non-flaring scenario in all their on-shore flow stations by 30th April 2007” must be submitted to the Court personally by the managing Director of Shell Nigeria and Group Managing Director of Nigerian National Petroleum Corporation. The scheme was never implemented nor submitted to the court by the defendants, and the defendants failed to attend court sitting on 30th April, 2007.
Nigerian court of appeal restrained the *Gbemre* court from sitting on May 31, 2006, the date set for personal appearances regarding Shell's step-by-step proposal to halt gas flaring.\(^{52}\) Sadly, by April 30, 2007, Shell failed to present the quarterly step-by-step gas-flaring reduction proposal and was still flaring gas.\(^{53}\) Between April 2006 and April 2007 Shell did not reduce the amount of gas flared. Moreover, after Shell violated the orders and a contempt case was filed, the trial judge who originally heard the case was transferred to a different district and the case file was reported lost. Since then, no actions have been taken against Shell. The *Gbemre* case events illustrate that the *Gbemre* case did not lead to any immediate social change because after the trial judge ruled in favour of Gbemre, the court failed to implement the constitutional principle on which the case was grounded: the right to a pollution free and healthy environment.\(^{54}\) This shows that the judiciary is not free from manipulation by the executive Arm of Government, which should not be the case. Each Arm of Government is to work harmoniously with other Arms and not oppressively.

In *Ijaw Aborigines of Bayelsa State vs. SPDC*,\(^{55}\) a group of Ijaw people from Bayelsa State instituted an action against SPDC, before the Federal High Court sitting in Port Harcourt. The plaintiffs sought an order of the court to enforce the payment of the sum of US $1.5 billion awarded in damages for pollution, made to the oil-producing communities in the state by the Nigerian legislature after a public

\(^{52}\) Ibid
\(^{53}\) Ibid
\(^{54}\) Ibid
\(^{55}\) Unreported case, judgment delivered by Justice Okechukwu Okeke, Federal High Court Port Harcourt, Rivers State, Nigeria on 24 February 2006.
hearing by both parties before the National Assembly. In its judgment of 24 February 2006, the Court held that SPDC was bound to pay the sum which had been awarded by a resolution of the National Assembly. The Court stated that the resolution arose from a consensual attendance at the committee hearings of the National Assembly. SPDC’s lawyers had argued unsuccessfully that the Joint Committee of the National Assembly lacked the power to compel the company to pay damages. This award is significant, in that it constitutes formal recognition of the right to a clean, pollution-free environment, an important subset of economic, social and cultural rights.\textsuperscript{56} SPDC has however appealed this decision. We await the decision of the Court of Appeal on this matter.

However, in the case of \textit{Barr Ikechukwu Opkara \& 4 Ors (for themselves and as representing Rumuekpe, Eremah, Akala-Olu and Idamah communities of Rivers State) vs. Shell \& 5 Ors},\textsuperscript{57} the court upheld the objection that under Nigerian law, human rights were personal and a representative action could not be maintained for its enforcement, specifically rejecting the precedent set in \textit{Gbemre}. This decision has however been appealed by the plaintiffs.

Bringing an action under the \textit{African Charter (Ratification and Enforcement) Act} will decrease over reliance on onerous tort rules, as litigants or victims do not necessarily have to prove fault or causation but only the creation of an unhealthy environment. It also obviates the need for the reinterpretation and mobilization of existing human rights for environmental protection, which is riddled

\textsuperscript{56} Supra note 47 p. 95
\textsuperscript{57} Suit FHC/PH/CS/518/05, Federal High Court of Nigeria, and Port-Harcourt (unreported, judgment delivered on 29 September 2006).
with procedural limitations. Under the Act, the claimant only needs to establish that the degradation resulted or will result in the creation of an environment that is unfavourable to his health and wellbeing or socio-economic development.\textsuperscript{58} The 2009 Fundamental Rights (Enforcement Procedure) Rules, which came into force on 1 December 2009, was promulgated by the Chief Justice of Nigeria in exercise of powers under section 46(3) of the Nigerian Constitution. The Rules replaced the 1979 Procedure Rules,\textsuperscript{59} and seeks to improve access to judicial remedies for persons whose rights, including the right to a healthy environment, were threatened or infringed. Paragraph 3 of the Preamble states;

The overriding objectives of these Rules are as follows:
(a) The Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them. (b) For the purpose of advancing but never for the purpose of restricting the applicant’s rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute


instruments in themselves or form parts of larger documents like constitutions.

Paragraph 4 (e-g) of the preamble states;

The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following: (i) Anyone acting in his own interest; (ii) Anyone acting on behalf of another person; (iii) Anyone acting as a member of, or in the interest of a group or class of persons; (iv) Anyone acting in the public interest, and (v) Association acting in the interest of its members or other individuals or groups. (f) The Court shall in a manner calculated to advance Nigerian democracy, good governance, human rights and culture, pursue the speedy and efficient enforcement and realization of human rights. (g) Human rights suits shall be given priority in deserving cases.

*Order 1(2) of the Fundamental Rights (Enforcement Procedure) Rules, 2009* expressly defines fundamental right as including ‘any of the rights stipulated in the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act.’ This goes to
show that the rights enshrined in the charter, both civil and political, as well as socio-economic, are justiciable and enforceable in Nigerian Courts.\(^6\)

5.0 THE RIGHT TO A HEALTHY ENVIRONMENT IN OTHER JURISDICTIONS

In Canada, the province of Ontario enacted an environmental Bill of Rights which provides for the right to a healthy environment.\(^6\) In the USA, there is a statutory rule of strict liability for oil pollution under the *Federal Water Pollution Control Act 1972*.\(^6\) The Supreme Court of India in *Minerva Mills vs. Union of India*\(^6\) elevated the constitutional status of the Directive Principles. The Indian Supreme Court began interpreting fundamental rights under Part III in the light of the provisions of Part IV.\(^6\) In the area of environmental protection, the court recognized the right of every Indian to live in a healthy, pollution-free environment by utilizing the environmental provisions of Part IV to flesh out the constitutional right to life.\(^6\)

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\(^6\) As amended in 1977 and under the comprehensive *Response Compensation and Liability Act*, 1989, as well as the *Oil Pollution Act 1990*, all of which make liability strict whether or not the defendant was negligent.


recognizing the right to a clean environment, the Indian Court drew inspiration from Article 48A of the *Indian Constitution* enjoining upon the state a duty to protect the environment and a similar fundamental duty of every citizen under *Article 51A of the Constitution*. The recognition of the right to a clean environment, and consequently the right to clean air and water, was a culmination of the series of judgments that recognised the duty of the state and individuals to protect and preserve the environment.\(^{66}\)

It is expected that the appellate courts in Nigeria will seize on the gauntlet provided by *Ijaw Aborigines* and *Gbemre* to toe the line of the Supreme Court of India and entrench economic, social and cultural rights as justiciable rights in Nigeria. India, like Nigeria and many other developing countries also has non-justiciable provisions in respect of economic, social and cultural rights. However, the Court has utilized its interpretative powers to extend the frontiers of enforceable rights in the country. Using the example of the right to life guaranteed and justiciable under both the Indian and Nigerian Constitutions, Indian courts have consistently held that good health is cardinal to the enjoyment of the right to life.\(^ {67}\)

5.1 Instituting actions in the home country of transnational corporations

\(^ {66}\) Supra note 64 at p. 386

\(^ {67}\) *Paramand Katra vs. Union of India* [1989] AIR 1989 SC 2039. The court stated that *Article 21* of the Indian Constitution casts the obligation on the State to preserve life. Preservation of human life is of paramount importance. Once life is lost, the *status quo ante* cannot be restored as resurrection is beyond the capacity of man. The patient whether he be an innocent person or a criminal liable to punishment under the laws of the society, it is the obligation of those who are in charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished.
Transnational corporations (TNCs), more often than not, are responsible for the damage to the environment of host communities in terms of explorations activities such as continuous gas flaring, oil spillage, improper maintenance of oil facilities, etc, which make the environment unclean and unhealthy for human life. As a result of the culture of impunity displayed by TNCs in Nigeria when actions are instituted against them for wrongful acts, in recent years, there has been an international trend to hold parent companies of multinationals liable in their home country for the harmful practices of foreign subsidiaries, in which the foreign subsidiary involved was also summoned together with the parent company on certain occasions. In *Friday Alfred Akpan & Anr vs. Royal Dutch Shell Plc & Anr*, the District Court in Hague, Netherlands dismissed the claims instituted against Royal Dutch Shell on its merits. It also found as per the defence of Shell petroleum Development Corporation (SPDC) that the said Oil spills which occurred in 2006 and 2007 on Friday’s farm and fish pond was as a result of sabotage. The court also held that, Friday couldn’t claim under fundamental right like the Gbemre’s case. It only found SPDC liable for its failure to secure the wellhead of the IBIBIO-I well which was no longer in use by SPDC for production but as an exploratory well since November 1959, because this could have prevented the act of Sabotage which resulted in the oil spill. The Court ordered SPDC to

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69 *ibid*
compensate Akpan for the damage he suffered as a result of the oil spill. In Fidelis Ayoro Oguru & Ors vs. Shell Petroleum N.V & Anr, the plaintiff didn’t get any relief from the court and lost the proceedings. A reason for the failure in the above cases is that the core of the actions was based on tort and not on the right to a clean and healthy environment.

In conclusion, it can be seen that the option of suing the parent company of a TNC for environmental damage would not provide any substantive remedy to the victim.

6.0 SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

6.1 Summary of Findings

The aim of this research paper was to draw attention on how the right to a clean and healthy environment can assist victims of oil spillage in seeking redress, which is one of the major obstacles in the way of victims when seeking compensation for environmental damage especially that caused by oil pollution. It discussed how extraterritorial litigation was not a solution to the problem. At the end of this research paper, the following were discovered;

The concept “environment” is not one which has a universally accepted definition. Man depends solely on the environment for his survival, hence, the need to protect man and the environment from environmental degradation caused by pollution. The existence of the right to a healthy environment has been universally accepted but its recognition as a fundamental human right has not been globally accepted. Some proponents have interpreted the right as constituting
part of the right to life. In India, the right to a healthy environment is understood as constituting part of the right to life. Some advocate for it to be treated as an independent right capable of being fulfilled. Critics of the right have argued that the right is not justiciable and the concept of environmental right is vague and subject to divergent interpretations. Since there is no universally accepted definition of the concept of “right to a healthy environment,” the imprecise nature of the right would make it difficult to enforce if given legal recognition. Most times, States are limited with economic resources to carry out civil and political obligations which results in fewer resources being annexed to socio-economic objectives. States would rather make vague laws which are not enforceable in this area, and ratify treaties which they have no intention to domesticate rather than take concrete steps to enforce this right. Though the right is provided for in the 1999 Constitution of Nigeria, it is contained in Chapter II of the Constitution which forms part of the non-justiciable provisions of the 1999 Constitution as provided for by section 6 (6) (c) of the 1999 Constitution. Nigerian courts have used this provision to hinder victims of environmental pollution from getting compensation in the past. However, they seem to be getting to the Era of liberalism in their interpretation of the right as was held in the case of Jonah Gbemre vs. SPDC Ltd and Ors. Article 24 of the African Charter on Human and Peoples’ Right recognizes the right to a healthy environment which has been domesticated by Nigeria as the African Charter on

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71 (2005) Suit No. FHC/B/CS/53/05
Human and Peoples’ Rights (Ratification and Enforcement) Act. Violation of the right to a clean and healthy environment should be made enforceable in Nigerian Courts. The Nigerian judiciary should be flexible in the interpretation of the constitution and other laws whenever issues of environmental abuse are before judges. The justiciability of the right to a healthy environment in Nigeria would obliterate the problem of locus standi in environmental litigation in Nigeria.

Finally, this research paper has been able to provide recommendations to the problem of right to a clean and healthy environment. The writer calls the attention of the relevant authorities to implement as soon as possible, the recommendations provided in this research paper.

6.2 Recommendations and Conclusion

Good health and environment are cardinal to the enjoyment of the right to life. Based on the findings as discussed in this paper, the following recommendations are in order:

The 1999 Constitution of Nigeria should be amended, in order to confer the right to a clean and healthy environment as a fundamental right, independent of other rights which should be made enforceable in any High Court of the Federation, as is the practice in countries such as South Africa and India.

The Government at all levels should take the protection of the environment with more seriousness than it currently is by enacting

\[\text{See section 24 of the South African Constitution (Bill of Rights)}\]
legislations which give life to the right to a clean and healthy environment pursuant to its law-making powers.\textsuperscript{73}

The Nigerian Government and TNCs should refrain from activities harmful to the environment, and adopt and enforce policies promoting conservation and improvement of the quality of the environment.\textsuperscript{74}

Trans-national Oil Companies should adopt good corporate practices and be alive to their Corporate Social responsibilities. They should place primary importance on creating a good working environment for their operations in Host communities in line with the United Nations Global Compact Initiative.

Nigeria should domesticate other International instruments which recognise the right to a healthy environment to which she is a party, such as the \textit{Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights}, etc.

Nigeria should not encourage or support non-state actors in the violation of the right to a healthy environment.

The \textit{Associated Gas Reinjection Act} should be amended to criminalize gas flaring and allow for no consent level of gas flaring.


\textsuperscript{74}Nickel, J W, \textit{The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification}, 18/1 Yale J. of Int'l L. 1993, pp. 282-295, at p. 286.
Environmental Impact Assessment (EIA) should be seen as compulsory for projects which could or are likely to have negative effects on the environment. This should be done in line with international EIA Standards.

The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures which help in realizing the right to a healthy environment.

Citizens in a community should be furnished with the necessary information about projects which could be detrimental to their health and that of their environment.

Petroleum pipelines and oil wells should not be situated close to residential areas.

Government agencies set up with the mandate of protecting the environment such as the National Environmental Standards Regulations and Enforcement Agency, National Oil Spillage Detection and Regulations Agency, etc, should be proactive in their duties. They should carry out prompt inspections and investigations of facilities, and prosecute erring individuals or corporate bodies for their wrongful acts which degrade the environment.

Legal aid fund should be set up and made accessible to victims of environmental harm who cannot afford the cost of litigation.

Specialized units should be set up within courts for environmental disputes in order for effective, efficient and expedient dispensation of justice in environmental matters.
There should be a statutory rule of strict liability for oil pollution cases as is the case in the United States of America under the Federal Water Pollution Control Act 1972.\textsuperscript{75}

Though the Nigerian economy currently depends largely on crude oil for survival, the Nigerian Judiciary should embrace judicial activism and should refrain from using the excuse of oil companies contributing to the economy as a reason for the refusal of the award of punitive damages even where damages have been proved.

Exemplary damages should be awarded by the Courts where the right to a healthy environment has been violated.

The Government should work with non-governmental organizations as well as private individuals towards realizing the right to a clean and healthy environment, and obliterate all obstacles in the course of seeking redress in environmental litigation.

\textsuperscript{75} As amended in 1977 and under the comprehensive \textit{Response Compensation and Liability Act}, 1989, as well as the \textit{Oil Pollution Act} 1990, all of which make liability strict whether or not the defendant was negligent.