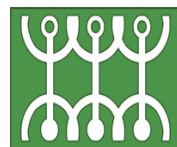




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Access to Environmental Justice in Nigeria: The Case for a Global Environmental Court of Justice

october 2016



ENVIRONMENTAL RIGHTS ACTION
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chapter 1: introduction

There is no denying that natural resource governance in a weak state results in transnational oil corporations neglecting or watering down lax environmental laws. In Nigeria's Niger Delta oil companies such as Texaco, Chevron, Elf, Eni and Shell are extracting oil and gas with corporate impunity resulting in catastrophic environmental degradation and gross human rights violations.

Pressure from civil society for reform in the oil sector to bring the corporations in line with an international benchmark are met with stiff opposition and collusion by the state and the oil companies to sidetrack the existing laws. The result is non-enforcement as well as non-compliance which benefits the companies involved.

This study supports the actualisation of the United Nations Human Rights Council Resolution 26/09 in 2014 which calls for a legally binding Treaty for transnational corporations to account for their human rights violations.¹ Since most of industrialised countries and indeed developing countries such as Nigeria are unable to hold transnational corporations to account for their excesses in the production process it becomes imperative to establish a World Environmental Court to address this lacuna.

This study focuses on Shell Oil Company. It discusses the environmental degradation and the impacts of its activities in

Nigeria's oil and gas extractive sector. The impacts of oil spills and gas flaring are far reaching with severe environmental disaster plaguing rural livelihoods where people are impoverished.

The focus is also on civil society and impacted communities' struggle for access to justice using the courts of law within and outside Nigeria. It concludes that access to justice in a warped judicial system stacks up a lot of odds against the victims. Some of these include the exorbitant legal costs for seeking redress, burden of proof, and such other juridical technical provisions that often result in cases being dead on arrival. To hold transnational corporations to account for their human rights violations it is essential that a World Environment Court (WEC) with international jurisdiction be established to take on cases of victims against such corporations.

chapter 2: the impact of transnational oil companies on local communities

All the oil transnational corporations extracting oil in Nigeria's Niger Delta are guilty of extracting oil in their areas of operations with impunity. Several factors account for this. Nigeria's dependence on revenue from oil accounts for about 90% of foreign exchange earnings and this comes with a heavy price of catastrophic environmental degradation through lax environmental laws and non-compliance², culminating in violent environmental conflicts in the midst of poverty and neglect.

¹ <http://www.foei.org/press/archive-by-subject/economic-justice-resisting-neoliberalism-press/foei-celebrates-an-agreement-on-internationally-legally-binding-rules-to-stop-human-rights-violations-by-transnational-corporations>

² See the report ERA/FoEN (2016) "Challenges of access to justice in Nigeria: A case for global Environment Court of Justice." Benin City.

2.1 persistent gas flaring

The impact of Shell Oil Company, Chevron, Eni, Total and other transnational oil companies operating in Nigeria's Niger Delta is severe on the people and the environment. Gas flaring continues unabated since 1956 when oil production in commercial quantities began in Nigeria. Nigeria is now the fifth largest natural gas flaring country in the world down from its second position in 1995 according to an assessment by the 1995 World Bank report.

According to the United Nations Environment Programme environmental assessment report on Ogoni (2011), the cumulative impacts of the environmental degradation "exerts a significant environmental stress on Ogoniland".ⁱⁱⁱ Furthermore, about 1.8 billion cubic feet of gas is flared daily resulting in about 45.8 billion kw of heat released into the atmosphere. Recent statistics^{iv} from the Nigeria National Petroleum Corporation recorded that a total of 271.38 billion standard cubic feet of gas, valued at US\$518.33 million was flared in 2015 despite an official zero gas flaring policy instigated and clearly abandoned by the oil companies.^v In 2014, a whopping US\$868.8 million was lost to gas flaring.

Gas flaring has been illegal in Nigeria since January 1984. Since then, the effort to end gas flaring has been like a child's play since a variously agreed date to end gas flaring has changed over a dozen times and is clearly never intended to be kept. The latest pledge by the state and the oil companies to end gas flaring by 2020 has again been shifted to 2030 at the behest of the World Bank acting in favour of the oil companies.

2.2 frequent oil spills

In the Niger Delta oil spills are now a daily occurrence with over 1000 spills per annum from obsolete crude oil pipelines that are corroded and frequently giving way and spewing oil into the rivers, streams, farmlands and neighbourhoods. For example, between 1976-2001 at least a total of 6,817 oil spills were recorded (UNDP 2006)^{vi}. An estimated average of one Valdez per year which amounts to about 500,000 barrels is spilled annually.

The clean up process remains spade and bucket technology for scooping and setting ablaze recovered hydrocarbons. Mangroves, swamps, forests and rivers are polluted. The UNEP report 2011 recorded that soil contamination by hydrocarbon was found to a depth of 5 metres in areas purportedly cleaned up by Shell. Also, some dangerous substances such as benzene, a cancer causing substance found in drinking water was 900 times above WHO standards.

2.3 impact on drinking water and rural livelihoods

Clearly, environmental pollution from oil and gas extraction has resulted in lowering farm yields and depleting fish catch which are the mainstay occupations of the people. The local people are impoverished, and are helpless as oil companies continue extraction with impunity. The cumulative effects of gas flaring and oil spills are severe on the people and the environment and means that clean up and remediation which according to UNEP will last between 25-30 years cannot be realised. Although a paltry sum of US\$ 1 billion has been recommended by UNEP in the initial stages, the actual cost of

clean up, remediation, and compensation for lost livelihoods remains unknown.

2.4 Human Rights violations

Beyond the issue of clean up and remediation are far more important issues of human rights violations and crimes of ecocide. The use of force by the state in connivance with the oil companies has resulted in hundreds of deaths in the oil drilling communities. Oil is drilled behind military shields. Impacted communities's grievances stem from decades of environmental degradation and destruction of livelihoods, which are often the root cause of these conflicts. Since the extra-judicial killing of Ken Saro Wiwa and other eight activists on November 10 1995 for daring to challenge Shell, over 5,000 other Ogonis have been murdered. Thousands more have lost their lives in oil instigated violent conflicts and insurgency against the state and the transnational oil companies.

Renewed militant actions in 2016 in the form of bombings of oil facilities had serious consequences on national revenue, the environment and livelihood losses including an increasing death toll from the military and the insurgents alike. This is

ⁱⁱⁱ United Nations Environmental Programme (2011). Environmental Assessment of Ogoniland. See also: www.unep.org

^{iv} Source: <http://theeconomyng.com/?p=8197>. Accessed September 21, 2016.

^v See the federal Government legislation: Associated Gas Reinjection Act, 1979 which stipulates that flaring of gas ceases from 1 January 1984 except with permission from the Petroleum Minister.

^{vi} United Nations Development Programme (2006). Source: <https://www.eia.gov/beta/international/analysis.cfm?iso=NGA>



all the more challenging because there is hardly any viable means of conflict resolution. Hence the appeal for a global environmental law court of international jurisdiction.

Community protests, civil disobedience, picketing, have been met with state repression and brutal force resulting in a spiral of conflicts in a cyclical pattern. Militant groups are mushrooming to take on the state and the oil companies with even more devastating impact, blowing up oil pipelines and facilities almost on a daily basis. While government and the oil companies appear helpless the business risk is high with reduced daily oil production dropping by about 40% and reducing state revenue.

3. lack of access to environmental justice

Access to justice on a national level is narrowed by lax environmental laws, a lack of independent judicial institutions and the lack of political will to enforce compliance of extant legal provisions. This section focuses on the challenges of victims accessing justice to argue for the need for a globally legally binding mechanism to hold corporations accountable for their human rights violations. It explores multiple case studies involving transnational oil companies and describes and analyses how they undermine state power and the law courts by their refusal to obey court orders, warped laws that protect companies and thus deny the people justice.

^{vii} Environmental Laws of Nigeria: A Critical Review Ed. By Godwin Uyi Ojo & Jayeoba Gaskiya (2003) P. 36
^{viii} Unreported Suit No. FHC/2CS/573/93. Ruling was delivered on the 17th February 1997.

3.1.1 locus standi or right to sue

In Nigeria although environmental degradation impacts severely on the people, the lack of access to justice ensures that the status quo is maintained. For example, there are scientific data and some extant laws to curtail such environmental crimes yet these cases rarely get to court due to technical juridical hurdles such as high cost of litigation especially the high legal fees, the problem of *locus standi*, “right to sue”, or *sleeping on your right* which means non-enforcement of rights within a stipulated period usually short and to the advantage of oil companies.^{vii} In Nigeria, in order to have standing to sue, the plaintiff must exhibit “sufficient interest”, that is an interest which is peculiar to the plaintiff and not an interest which he shares in common with general members of the public.

In *Oronto Douglas V. Shell Development Company Ltd & 5 Ors*, the plaintiff sought a compliance with the provisions of the Environmental Impact Assessment (EIA) Act in relation to the Liquefied Natural Gas (LNG) project at Bonny being executed by the defendants. The court held that the plaintiff had no standing to institute the action since he had shown no prima facie evidence that his right was affected or any direct injury caused to him, or that he suffered any injury more than the generality of the people.^{viii}

3.1.2 burden of proof

The preponderance of the *burden of proof* or evidence is placed on the victims who may not have the means to hire technical experts to testify on their behalf while the TNCs are



able to afford these costs and services to defend themselves and minimise damage. In order to succeed in an action for negligence, the burden of proof lies with the plaintiff. The plaintiff may not have the financial resource to procure the services of much needed experts while the defendants in environmental litigation are usually rich individual or corporations who can easily procure experts who can testify in a manner indicative of their non-negligence.^{ix}

3.1.3 subject matter jurisdiction:

In Nigeria, the law confers jurisdiction on oil spillage cases on the Federal High Court. Thus by virtue of Section 251 (1) (n) of the 1999 Constitution of the Federal Republic of Nigeria, the exclusive jurisdiction to entertain claims pertaining to Mines and minerals, including oilfields, oil mining, geological surveys and natural gas rests on the Federal High Court. Consequently some litigants ignorantly institute their cases in State High Courts with the resultant effect of being struck out for lack of jurisdiction.

A court will only deal with cases referred to it. In dealing with such cases the court first assumes jurisdiction. Assumption of jurisdiction by the court entails the fulfilment of certain requirements.

3. 2 cases and outcomes

There is a structural difficulty in redressing Environmental Justice in Nigeria. The Environmental Rights Action/Friends of the Earth Nigeria (ERA/FoEN) and its allies including rural poor communities adopted several strategies to bring the oil companies to account for their environmental crimes through the law courts within and outside Nigeria. The result showed that much resources and energy are dissipated with minimal results. National laws and court systems that are by no means independent are also not respected by the transnational oil companies.

Three case studies are presented to illustrate the difficulty of using the legal option in a weak state with lax environmental laws and lacking political will to enforce compliance.

3.2.1 Iwherekan community vs shell

Shell is the operator of the joint venture partnership with the Nigerian National Petroleum Corporation (NNPC), an agency of the Nigerian government that has been engaged in oil exploration and production activities for several decades in Iwherekan community, Niger Delta region. Iwherekan is host to the Otorogu Gas Plant that is the largest in West Africa. The occupation of the village people is predominately subsistence farming and fishing.

In the case of Jonah Gbemre (for himself and as representing Iwherekan community) Vs. Shell Petroleum Development Company & 2 Ors^x to put an end to gas flaring, the prayers upheld by the court included:

- (i) That continued flaring of gas in the Iwherekan community by Shell violates the people's rights to life and dignity of their human persons which are rights protected by the constitution of the Federal Republic of Nigeria and the African Charter on Human and Peoples Rights.
- (ii) It also averred that burning gas by flaring by Shell in the Iwherekan community poisons and pollutes the environment in the community as it leads to the emission of carbon dioxide, the main greenhouse gas. The flares contain a cocktail of toxins that affect the health, lives and livelihood of local citizens.
- (iii) It also exposes them to health issues through an increased risk of premature death, respiratory illness, asthma and cancer. The health issue causes painful breathing, chronic bronchitis, decreased lung function and death in their community. It also contributes to adverse climate change in their community as it emits carbon dioxide and methane which cause warming of their environment.
- (iv) It also pollutes their food and water and reduces their production and adversely impacts their food security.
- (v) It also causes acid rain evidenced by their corrugated roofs that are corroded by the composition of the rain that falls as a result of flaring.
- (vi) The primary causes of acid rain are emissions of sulphur dioxide and nitrogen oxides which combine



^{ix} Ojo, G.U. & Jayeoba Gaskiya eds. (2003) Environmental Laws of Nigeria: A Critical Review. Kraftbooks: Ibadan, p.36.

^x See the Federal High Court of Nigeria Benin Judicial Division judgment in the case Between Mr. Jonah Gbemre and Shell Petroleum Development Company Nigeria Ltd, Nigeria National Petroleum Corporation, Attorney general of the Federation, in suit No: fhc/b/cs/53/05 (Judgment of 14 November, 2005). Available at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-pleadings.doc>



with atmospheric moisture to form sulphuric acid and nitric acid, respectively. Acid rain acidifies their lakes and streams and damages their vegetation.

The High Court of Justice^{xi} ruled on the relief sought^{xii} in 2003 that gas flaring was illegal and a fundamental violation of human rights and ordered it to be stopped forthwith.^{xiii} To date, neither the oil companies nor the government have complied with the subsisting court ruling hence gas flaring continues with mere paltry fines.

Shell's Response

Ordinarily this would be seen as a landmark judgment in the sense of application of fundamental human rights to an environmental case for the first time in Nigeria consistent with the trend in other jurisdictions.

That said Shell's response was to apply legal stalling in order to evade justice. Despite the laudable decision since 2003, Shell has displayed a total disregard for the Nigerian justice system as it continues to hide under the cloak of appeal to evade court order and thus refuses to comply with the court Order to end gas flaring in Iwherekkan. It is to be noted that a Federal High Court Order to end gas flaring in Iwherekkan community should be applicable to states of the federation but the reverse is the case as gas flaring continues unabated. Efforts by the Legal Resource Department of ERA/FoEN to ascertain the veracity of Shell's claim of appeal were not fruitful as the court registry could not locate the case file. This is a damaging testimony that erodes confidence in the judicial system.^{xiv}

3.2.2 Four Fishermen Versus Shell

Two separate oil spills from a Shell facility occurred in 2004 and 2008 polluting several fishing communities in the Niger Delta. Four fishermen from the impacted villages of Ikot Ada Udo, in Akwa Ibom state; Goi in Rivers state, and Oruma in Bayelsa state sued Shell in the Netherlands. In this case of four fishermen/farmers and Milieudefensie vs. Royal Dutch Shell and Shell Petroleum Development Company Limited, relief sought included a declaration of Shell liability to the spills and destruction of fishponds being the source of income for the litigants.^{xv} They sought a declaratory judgment for clean up and compensation for loss of fishing ponds, income and livelihoods, and preventive measures to stop oil spills from Shell's aged pipelines from destroying their farmlands and fishponds in the future.

Since 2008 when the court case commenced, Shell has used delay tactics including raising objections on the court jurisdiction and argued that the actions committed in Nigeria should not be brought to justice in the Netherlands and that Shell in Nigeria is different from Shell in the Netherlands.^{xvi} However, the court sitting in The Hague ruled in an appeal against Shell in December 2015 that the company has a case to answer over its human rights violations in Nigeria.^{xvii} Yet the substantive case is yet to be dispensed since 2004 and 2008 when the incident occurred and nine years since the court case began.

^{xi} See the Federal High Court of Nigeria Benin Judicial Division judgment in the case Between Mr. Jonah Gbemre and Shell Petroleum Development Company Nigeria Ltd, Nigeria National Petroleum Corporation, Attorney General of the Federation, in suit No: fhc/b/cs/53/05 (Judgment of 14 November, 2005). Available at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-pleadings.doc>

^{xii} Some of the reliefs sought in the case that were granted included: (a) A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34 (1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean, poison-free, pollution-free and healthy environment. (b) AN ORDER of perpetual injunction restraining Shell by themselves or by their agents, servants, contractors or workers or otherwise howsoever from further flaring of gas in the applicant's said community.

^{xiii} Jonah Gbemre (For himself and as representing Iwherekkan community) Vs. SPDC & 2 Ors (Suit No. FHC/ B/ CS/ 53/05).

3.2.3 Justice Delayed Is Justice Denied: The Case of Ekeremor Zion vs Shell

A classic example of how transnational oil companies escaped from the arm of the law by using the cumbersome legal system that is time wasting to frustrate litigants. In Nigeria delays significantly plague the course of litigation against the poor rural communities. The delay in getting judgment in the courts discourages the prospective litigants to institute any environmental action in court.

Some cases are illustrative^{xviii}. According to records, a spill at Peremabiri, Bayelsa State, in January 1987 came to the High Court in 1992, and to the Court of Appeal in 1996^{xix}; a case heard in High Court 1985 in relation to damages suffered on a continuous basis since 1972 was heard in Court of Appeal in 1994; a case heard in 1987 in relation to damages suffered since 1967, was heard in the Court of Appeal in 1990, and in the Supreme Court in 1994.

As a result of this protraction, TNCs prefer an out of court settlement. The case of Isaiah Ogar V. Chevron sought relief of N100 million but was settled in an out of court settlement of a paltry sum of N20 million after nearly a decade of litigation with no end in sight.

In the case of Ekeremor Zion versus Shell the lower court after more than three decades of legal battle granted compensation of about N30 million (US\$200,000) for oil spills that destroyed local farmlands.^{xx} The case first commenced in the then Bendel State High Court in 1995 in a consolidated suit. The court delivered judgment on the 27th May, 1997 in favour of the plaintiffs and awarded damages.

The following were the consolidated suits:

- (i) Suit No. W/16/83 - N4,095,085.00
- (ii) Suit No. W/17/83 - N13,278,306.00
- (iii) Suit No. W/72/83 - N7,392,589.00
- (iv) Suit No. W/80/83 - N5,522,701.00

From the court records, four separate actions were instituted by the Plaintiffs seeking damages from Shell Development Company of Nigeria Limited for oil spillage. The said suits were instituted for and on behalf of Obotobo, Sokebolo, Ofogbene (Ezon Burutu) and Ekeremor Zion (Ezon Asa) communities respectively. The suits were consolidated by Order of the then Bendel State High Court on 21/3/85, now Edo State. At the end of the trial in which parties called witnesses, the trial court in a judgment delivered on 27th May, 1997 in favour of the Plaintiffs awarded damages.

The defendant was dissatisfied and appealed against the judgment to the Court of Appeal, Benin City in CA/8/255/97. The Court of Appeal delivered its judgment on 22nd May, 2000 dismissing the appeal. The appellant was still not satisfied and appealed to the Supreme Court. In 2000, the Supreme Court unanimously dismissed the appeal, affirmed the judgement of the court of Appeal and awarded costs of N500, 000.00 to each set of respondents in the consolidated suits against the appellant^{xxi}.

Shell's Response

Shell refused to obey the court order and instead appealed against the judgment to the Court of Appeal in 1997. The Supreme Court upheld the decisions of the Court of Appeal in 2015 in which judgment was delayed until after 30 years of legal battle. In this way, Shell is more than happy to have used the weak court system to its own advantage and minimised damage to its business while seeking to wear down the local people by a delayed judgment. Eventually, the national court system is manipulated in the process. But justice delayed is justice denied hence the need for a world environmental court that can dispense cases with enforcement mechanisms in a timely manner.

chapter 4: conclusion Environmental Court of International Jurisdiction

To seek environmental justice, ERA/FoEN along with its allies have instigated court cases working with communities within and outside Nigeria. The effort has been highly frustrating since very little is achieved in the process because of the lax judicial system. In most developing countries as in the case of Nigeria, the fact that the judiciary is not totally independent is not in doubt hence the need for a World Environmental Court to guarantee access to justice for all.

The global Treaty should include all aspects of human rights including the right to basic necessities such as basic health, food, and water as well as recognising criminal activities of transnational corporations and their CEOs consistently making decisions that are harmful to the environment.

The gaps in existing jurisprudence suggest where future legal development would be most effective. With respect to treaties, the most helpful development for victims of environmental harms would be a binding environmental rights treaty that creates a corresponding judicial forum with enforcement authority. That forum would have jurisdiction over not only state parties, but also non-state petitioners and defendants.



^{xviii} In spite of the longstanding laws against gas flaring in Nigeria, and shifting deadlines to end the practice, the activity continues, with serious health consequences for people living nearby hence the need for a higher order to restrain Shell and compel it to end gas flaring.

^{xix} See Court of the Hague in the matter with case number/docket number C/09/337050/HAZA09 – 1580 of Friday Alfred Akpan & the Association with corporate personality Vereniging Milieudefensie Vs. The legal entity organized under foreign law Royal Dutch Shell Plc & the Legal entity organized under foreign law Shell Petroleum Development Company Ltd.

^{xx} See the judgment on jurisdictional question delivered on 24th February 2010, and published at: www.

^{xxi} See Dutch courts to judge Shell in landmark oil spill case. Source: www.dailymail.co.uk/wires/afp/article-3365552/Dutch-courts-competent-judge-shell-environment-case.html

^{xxii} Human Rights Watch (1999) The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities. London.

^{xxiii} See SPDC v. HRH Chief GBA Tiebo VII and four others (1996) 4 NWLR (Part445), p657.

^{xxiv} <http://askthelawyeronline.com/version2/members/judgments/details.php?id=1874>. Available on this link as at 9/6/2016.

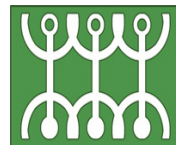
^{xxv} <http://askthelawyeronline.com/version2/members/judgments/details.php?id=1874>. Available as at 9/6/2016.

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Friends of the Earth International is the world's largest grassroots environmental network with 75 member groups and over two million members and supporters around the world.

Our vision is of a peaceful and sustainable world based on societies living in harmony with nature. We envision a society of interdependent people living in dignity, wholeness and fulfilment in which equity and human and peoples' rights are realised. This will be a society built upon peoples' sovereignty and participation.

The pictures in this publication are available at friends of the earth international photo gallery: Ken Saro Wiwa 20 year anniversary 2015, Shell Court case 2012



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