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2019

This is an Author's Accepted Manuscript of an article accepted for publication by Edinburgh University Press in African Journal of International and Comparative Law. The Version of Record is available online at: <http://www.eupublishing.com/doi/abs/10.3366/ajicl.2019.0270>

Environmental Protection in the Nigerian Oil and Gas Industry and *Jonah Gbemre v Shell PDC Nigeria Limited: Let the Plunder Continue?*

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Subject: Environment

Keywords: Environmental degradation; Environmental protection; Oil and gas operations; Nigeria; Oil and gas industry

Legislation:

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act- Chapter A9, Volume 1, Laws of the Federation of Nigeria 2004

Associated Gas Re-Injection Act- Chapter A25, Volume 1, Laws of the Federation of Nigeria 2004

Associated Gas Re-Injection (Continued Flaring of Gas) Regulations- Section 1.43 of 1984

Environment Impact Assessment Act, Chapter E12 Volume 6, Laws of the Federation of Nigeria, 2004

The Constitution of Nigeria 1999 (as amended)

National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (Nigeria)

Cases

Jonah Gbemre v Shell Petroleum Development Company of Nigeria Limited Unreported Suit No. FHC/CS/B/153/2005

Abstract

The case of *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria Limited* made an historic deviation from the usual trend of seeking for monetary compensation by host communities in oil rich regions in Nigeria. Rather, it seeks to correct regulatory shortcomings which were upheld by the court but was never enforced. This article argues that the failure to enforce the judgment of the court is a missed opportunity to strengthen the environmental regulatory framework in the Nigerian oil and gas industry. It further argues that if the judgment had been enforced, it could have contributed to the reduction of the militant activities in the region and also encourages a significant change in the pattern of redress sought by litigants whose communities have been affected by the operations of oil Multinational Corporations in the region.

I. Introduction

For Nigeria's economy, the oil and gas industry has always maintained its foremost place in revenue generation. Understandably, it will be difficult to relegate an industry that accounts

for over 95 percent of her foreign exchange earnings,¹ and over 85 percent of her gross domestic product (GDP).² Even with the clamour that other means of income should be explored or other sectors should get equal attention, it is doubtful if the industry could be easily displaced. For investors, the discovery of rich natural resources has turned the continent of Africa into a hotspot for the exploration and production of oil and gas with Nigeria as one of the centre points.³ As elsewhere, the concern is how to reconcile exploration and production of such resources without depleting or destroying the environment. There has been a history of hostility against multinational oil companies who have been accused of corporate irresponsibility and carelessness in the conduct of their business by host communities. In Nigeria, the Niger Delta Region (NDR) where most exploration is carried out has always found itself embroiled in debates and conflicts which are predicated on environmental degradation that has resulted in the loss of income and destruction of ancestral home by exploration activities.

The NDR is situated in the South-South geo-political zone of Nigeria and covers an estimated area of about 70,000 square kilometres⁴, with a population of more than 15 million residents.⁵ The zone is regarded as the largest wetland in Africa, and it is renowned for its abundance of both renewable and conventional sources of energy.⁶ Since the discovery of oil in commercial quantities, the region is reported to have generated about US\$600billion from oil and gas.⁷ Unfortunately, the colossal revenue is also the reason why successive central governments have consistently paid lip service to other sectors. There has been a

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¹ Report of the Technical Committee on the Niger Delta, November 2008, available at http://www.waado.org/NigerDelta/niger_delta_technical_com/NigerDeltaTechnicalReport.pdf [accessed last 22 February 2018], p. 6.

² M .O Ameh, Too Much Hype about Nigeria's Oil available at <http://www.hollerafrica.com/showArticle.php?artId=157&catId=2&page=3> [accessed 31 May 2016].

³ L. Atsegbua, *Oil and Gas law in Nigeria: Theory and Practice*, 3rd edn, (First Lane Publishers, 2012) 3

⁴ See www.shellnigeria.com

⁵ European University Center for Peace Studies (EPU Research Papers), "Nigeria's Niger-Delta Crises: Root Causes of Peacelessness", available at http://epu.ac.at/fileadmin/downloads/research/rp_0707.pdf [accessed 31 May 2016].

⁶ European University Center for Peace Studies (EPU Research Papers), "Nigeria's Niger-Delta Crises: Root Causes of Peacelessness", available at http://epu.ac.at/fileadmin/downloads/research/rp_0707.pdf [accessed 31 May 2016].

⁷ G. Wurthmann, 'Ways of Using the African Oil Boom for Sustainable Development' African Development Bank, Economic Research Working Paper Series, No. 84, March 2006.

disproportionate reliance on oil and gas for economic development, thereby turning the economy of Nigeria into a monolithic economy,⁸ inflicted with the "Dutch disease".⁹

Ordinarily, when natural resources are discovered in any region, with proper management, such discovery should be accompanied by economic development and significant progress in the region of discovery. The development in this regard is not measured by fiscal gain only, it includes the protection and effective management of the area of discovery. Environmental protection will constitute an integral part of the development process. According to the Rio Declaration, "To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies."¹⁰ However, in the case of Nigeria, it appears that that oil and gas exploration and governmental policies are oblivious of this international mandate.

Apparently, the NDR, for more than four decades of exploration and production operations, has experienced severe environmental degradation.¹¹ Oil spills and gas flaring have been identified as the major sources of environmental problems in the region,¹² with links to the oil Multinational Corporations (oil MNCs) as those responsible for over 95 percent of the harm done to the region's environment.¹³ The social effect of these environmental problems in the region has taken the form of increased militant activities accompanied by incessant violence and conflict, civil unrest, poverty, exposure to health hazards and under-development of the region.¹⁴ These effects, particularly the activities of different militant groups have had a major impact on the overall economy of Nigeria as the oil MNCs are sometimes forced to cut down production due to the insecurity of expatriates working for them in the region.

⁸ N. E. Ojukwu-Ogba, 'Legislating Development in Nigeria's Oil-Producing Region: The NDDC Act Seven Years On' 17 *African Journal of International and Comparative Law* (2009): 136-149, at 136.

⁹ T. L. Karl, *The Paradox of Plenty: Oil Booms and Petro-States*, (University of California Press, 1997) 5. Where Dutch disease is defined as 'a process whereby new discoveries or favourable price changes in one sector of the economy - for example, petroleum - cause distress in other areas - for example agriculture or manufacturing'.

¹⁰ UNEP Rio Declaration on Environment and Development (1992) Principle 8

¹¹ V. T. Jike, 'Environmental Degradation, Social Disequilibrium, and the Dilemma of Sustainable Development in the Niger-Delta of Nigeria', 34 (5) *Journal of Black Studies* (2004) 686-701, at 688.

¹² United Nations Environment Programme (UNEP), *Environmental Assessment of Ogoniland Report* (July 2011), available at <http://www.unep.org/nigeria/> [accessed 31 May 2016]

¹³ E. Duruigbo, O. Wozniak and M. Leighton, 'Oil Development in Nigeria: A Critical Look at Chevron's Environmental and Social Responsibility', (2005) 2(2) *Environmental and Planning Law Review* 123, 132.

¹⁴ A. Babatunde, 'Environmental Conflict and the Politics of Oil in the Oil-Bearing Areas of Nigeria's Niger Delta', (2010) 5 (1) *Peace and Conflict Review* 1-13, at 1.

As a corollary to the issue of environmental degradation in the region, one would expect that with the world's attention being drawn to the Ogoni crisis,¹⁵ there would have been a sincere effort by the Nigerian Government and the regulatory agencies to step into the fray by undertaking a holistic review of the current environmental regulatory framework in the industry. This is necessary because most of the issues associated with the problem of environmental degradation in the region are attributed to inadequate environmental regulations/laws in the oil and gas industry.¹⁶ Admittedly, the present government should be commended for taking a bold step to kick-start the implementation of the United Nations Environmental Programme (UNEP) Report on Ogoni land by launching a clean-up.¹⁷ However, there remain considerable uncertainties as to how the actual clean-up process will be achieved, particularly as no funds have been released and the necessary institutions needed to supervise the process are yet to be constituted. Again, the clean-up is related to only the Ogoni region and therefore fails to address the entire NDR. In this regard, it appears that the lack of political will on the part of various Nigerian Governments might be responsible for this narrow and fragmentary approach.

The consistent lack of political will by successive Nigerian Governments to show any form of commitment to the plight of the inhabitants of the NDR has led to the birth of several militant groups and court actions instituted by those who could afford to go to court against the oil MNCs. Most of the court actions against the oil MNCs have been pursued with the intention of obtaining financial compensation for loss suffered by the claimants while the problem persists.¹⁸ Unlike previous cases, the intention of plaintiffs in *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*¹⁹ (Gbemre's case) was to initiate a momentum which would address the relegation or outright neglect of environmental protection through development of a robust regulatory framework. In other words, *Gbemre* presented the Nigerian government with an opportunity to address the problem of environmental degradation and possibly the reduction of militant activities in the region. Disappointingly, due to a seeming lack of understanding of the root causes of the crisis in the

¹⁵ United Nations Environment Programme (UNEP), Environmental Assessment of Ogoniland Report (July 2011), available at <http://www.unep.org/nigeria/> [accessed 31 May 2016]

¹⁶ See for example Section 3 (2) (a) and (b) of the Associated Gas Re-Injection Act and the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations S. 1. 43 of 1984 under which continued flaring of gas in Nigeria maybe allowed.

¹⁷ The clean-up of the Ogoni land which has been long overdue and has sparked up agitations in the Niger Delta Region was flagged off by the administration of Pres. Muhammadu Buhari on the 2nd of June, 2016.

¹⁸ See Peter Onyoh v Shell Petroleum Development Company of Nigeria Limited (1982) 12 C.A at p. 144.

¹⁹ Unreported Suit No. FHC/CS/B/153/2005 delivered on 14 November 2005 available at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-decision.pdf> [accessed 31 May 2016]

region, coupled with the desire for economic development at the expense of a safe and healthy environment, the landmark judgement in *Gbemre* case was never enforced.

To safeguard quality of life and the environment, the Constitution of the Federal Republic of Nigeria and the African Charter on Human and Peoples' Right Act impose a duty on the Nigerian government to ensure the protection and improvement of the environment in all parts of Nigeria.²⁰ Regrettably, the constitutional provision of environmental protection falls under Chapter II of the Constitution which is non-justiciable.²¹ The implication of the non-justiciability of Chapter II is that no legal enforceable right is created by any person or organisation, therefore no one can approach the court to seek the observance of the environmental provision in Chapter II of the 1999 Constitution.

It is in this context that this paper which advocates the strengthening of the Nigerian environmental regulatory framework in the oil and gas industry, explores the gains that could have accrued from the decision in *Gbemre* had it been enforced. The enforcement of this decision would be beneficial and important in demonstrating the sincerity of the government in making real efforts towards addressing both the problem of environmental degradation and by extension stemming the recurrent militant activities in the NDR. The paper starts by considering some of the environmental impacts associated with oil and gas operations in the NDR. This will be followed by a critical analysis of the decision in *Gbemre*. The paper will argue that the pattern of reliefs sought by most of the litigants in several court actions against the oil MNCs should be discouraged as this has become a source of revenue for the litigants while the problem of environmental degradation persists. The paper will then proceed to argue that the failure to enforce the judgement of the court was a missed opportunity to strengthen the Nigerian environmental regulatory framework as this has indirectly led to increased militant activities in the region. Next, the paper discusses the roles of the relevant regulatory agencies in the protection of the environment. Lastly, the paper concludes with some recommendations on measures that should be adopted to strengthen the Nigerian environmental regulatory framework in the oil and gas industry. Such regulatory strengthening will ensure an appropriate balance between oil and gas maximisation and environmental protection, thereby resolving concerns of possible conflicts of interest and regulatory compliance.

²⁰ Section 20 of the 1999 Constitution of Nigeria. See also art 21 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter A9, Vol. 1, Laws of the Federation of Nigeria 2004

²¹ See Section 6 (6) (b) of the 1999 Constitution

II. Impacts of Oil and Gas Operations in the NDR

Before the discovery and production of oil began in the 1950s, Nigeria had a nearly pristine environment. The large amount of oil reserves and the successes recorded in the oil industry led to a complete neglect by the Nigerian Government of the negative environmental impacts of the operations of the oil MNCs, as there were no Environmental Impact Assessments (EIAs) conducted despite daily operations.²² Environmental degradation in the NDR of Nigeria began almost in the same period when commercial exploration and production started.²³ This fact possibly explains why the problem of militancy and other conflict in the region has persisted in spite of efforts being made to address them.

As earlier noted, oil spills and gas flaring have been the major factors responsible for significant negative impacts on the environment of the NDR. As regards gas flaring, due to the cost of carrying out re-injection, the oil MNCs have always opted for the flaring of gas which is considered a cheaper alternative. Surprisingly, there is nothing novel about this practice. Lord Holme, the UK Secretary of State for the Colonies prior to the independence of Nigeria in 1960 once declared...."Until there is a worthwhile market and until there are facilities (e.g. pipelines and storage tanks) to use the gas, it is normal practice to burn off the by-product from the oil wells."²⁴ If this was permissible at the time considering the level of technology available at the time, it could no longer be tenable as technological advancements have provided alternatives. Besides, the commitment towards environmental protection has become core to the exploration of natural resources.

Some commentators have argued that the practice of gas flaring in Nigeria has led to global warming and other associated uncertainties in the NDR.²⁵ Studies show that Nigeria flares about 75% of the gas it produces and the only country that exceeds this in the world is Russia.²⁶ One quite significant factor responsible for the continuous gas flaring in the region is the weak policy on gas flaring. For example, apart from exempting more than fifty percent

²² E. Wifa, 'The Role of Environmental Impact Assessment (EIA) in the Nigerian Oil and Gas Industry Using the United Nation's Environmental Programme EIA on Ogoni as a Case Study: Lessons from some International Good Practices' (2014) I.E.L.R 112

²³ Climate Justice Program and Environmental Rights Action/Friends of the Earth Nigeria, Gas Flaring in Nigeria: A Human Right, Environmental and Economic Monstrosity (report), p. 24, available at <http://www.foei.org/publications/pdfs/gasnigeria.pdf> [accessed 2 June 2016].

²⁴ Nigerian Oil and Natural Gas Industry, File DO 177/33, UKJ National Archives cited in (n 23)

²⁵ S. I. Oni and M. A. Oyewo, 'Gas Flaring, Transportation and Sustainable Energy Development in the Niger Delta, Nigeria', (2011) 33 (1) Journal of Human Ecology 21-28, at 25.

²⁶ A Twelve Year Record of National and Global Gas Flaring Volumes Estimated Using Satellite Data , Final Report to the World Bank, 30 May 2007, Figure 13, available at http://siteresources.worldbank.org/INTGGFR/Resources/DMSP_flares_20070530_b-sm.pdf [accessed 8 June 2016].

of the fields from a gas flaring ban, the Associated Gas Reinjection (Continued Flaring of Gas) Regulations of 1984²⁷ imposed a paltry penalty on violators. Omorogbe argued that the existing policy lacks incentives to encourage gas utilisation and at present, the economics favour continuous gas flaring by oil MNCs.²⁸

Gas flaring in the NDR contributes significantly to greenhouse gases in the atmosphere and causes climate change which is very harmful to the environment and the health of the members of the host community.²⁹ It has been argued that gas flared into the atmosphere, as is the norm in the region, causes acid rain which acidifies lakes and streams, thereby resulting in a huge loss of biodiversity.³⁰ Acid rain has also been linked to being the possible cause for the dominance of grasses and shrubs in some parts of the region.³¹ The process also generates heat which kills vegetation around the area, destroys mangrove swamps and salt marshes, suppresses the growth and flowering of some plants, induces soil degradation and diminishes agricultural productivity.³²

In addition to gas flaring, pollution resulting from oil spillage is another catalyst of environmental degradation and destruction in the region. With constant spills which are usually left unattended by the oil MNCs, the environment of the host communities in the region has been devastated and requires immediate attention. According to a report in 2010 by the Department of Petroleum Resources (DPR)³³, there have been over 4,000 oil spill incidents over the last 50 years.³⁴ However, the oil MNCs have often denied responsibility for any of these spillages. Instead, they have attributed many of the onshore spillages to the sabotage and vandalisation of oil pipelines by members of the host communities. Even if the

²⁷ Hereinafter 1984 Regulation

²⁸ Y. Omorogbe, 'Law and Investor Protection in Nigerian Natural Gas Industry', (1996) J.E.N.L.R 181

²⁹ According to the International Energy Agency's (IEA) estimate, worldwide CO₂ emissions from the energy sector reached a record 30.6 gigatonnes in 2010. BBC, 'Global Carbon Emissions Reach Record, Says IEA', available at <http://www.bbc.co.uk/news/science-environment-13595174> [accessed 4 July 2016]

³⁰ M. Watts, '*Petroleum Violence: Communities, Extraction and Political Ecology of a Mythic Commodity*' in Nancy Lee Peluso, Michael Watts (ed) *Violent Environment* (Cornwell University Press: Ithaca and London, 2001) 189-212

³¹ O.C Ojukri and I.S Ibaba 'Oil Induced Environmental Degradation and Internal Population Displacement in Nigeria's Niger Delta', (2008) 10 (1) *Journal of Sustainable Development in Africa*

³² UNDP, Niger Delta Human Development Report, Abuja, Nigeria 2006 available at <http://hdr.undp.org/en/content/human-development-report> [accessed 4 July 2016]

³³ The DPR is the first statutory agency that was set up to supervise and regulate the Petroleum Industry in Nigeria. See <<http://www.dprnigeria.com/aboutus.html>> [accessed 4 July 2016]

³⁴ The DPR is the first statutory agency that was set up to supervise and regulate the petroleum industry in Nigeria.

argument of the MNCs were to be accepted, they are also complicit in their failure and a consistent pattern of unwillingness or inability to repair the leaks.³⁵

Without gainsaying, the discovery of oil and gas resources in the NDR has been of great benefit to the Nigerian state and economy. However, resultant environmental pollution has undermined this benefit through the destruction of farmland, sources of drinking water, mangrove forest, fishing grounds and declination of fish, crabs, periwinkles and birds.³⁶ The environmental degradation in the region has left significant impacts on plant growth, the aquatic ecosystem, wildlife and human health.³⁷

Social and communal life has been destabilised because of complete relocation of some communities, loss of ancestral homes, pollution of fresh water, loss of forest and agricultural land.³⁸ Apparently, when there is any incident of spills, the first visible impact is on the source of livelihood of the residents who are predominantly fishermen and farmers. The next is the effect on the health of the inhabitants who are exposed to harmful chemicals and other toxic substances.³⁹ A commentator argued that occurrences like this might have made what was supposed to be a gift from the nature to be a mythical Trojan horse. John Vidal observed that "[T] here is a constant fear that the host population of the region faces an uncertain future on the basis that the effect of the oil wealth of the area appears to have become a curse".⁴⁰

It may be argued that both the oil MNCs and the Nigerian Governments have pursued profit to the detriment of inhabitants well-being and environmental protection.⁴¹ In fact, apart from any justification which is averred no reason has been provided for the failure of the Nigerian Federal Government in enforcing the decision of the court in *Gbemre*. The next section of this paper will now be devoted to the decision in the case.

³⁵ G. P Okechukwu and I.O Ukeje "Gas Flaring and the Contours in the Mismanagement of Nigeria Niger-Delta Environment" 2016 *Mediterranean Journal of Social Sciences* Vol 7(5) pp 263 - 271

³⁶ A.O Toluope, 'Oil Exploration and Environmental Degradation: The Nigerian Experience' (2004) *International Information Archives* 2, 387-393, International Society For Environmental Information Science.

³⁷ Nigerian Oil and Natural Gas Industry, File DO 177/33, UKJ National Archives

³⁸ A.O Toluope, 'Oil Exploration and Environmental Degradation: The Nigerian Experience' (2004) *International Information Archives* 2, 387-393, International Society For Environmental Information Science.

³⁹ Greenpeace Oil Briefing No 7: Human Health Impacts of Oil (London, January 1993), quoted in Human Rights Watch Report on Nigeria, *The Price of Oil* (Human Rights Watch, London, 1999), pg 66

⁴⁰ John Vidal, 'If Oil had not come' *The Guardian*, September 13, 1999.

⁴¹ Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta (A U.S. Non-Governmental Delegation Trip Report, 6-20 September 1999) Pg. 3. [http://www.essentialaction.org/shell/Final_Report.pdf] [accessed on 4 July 2016]

III. Jonah Gbemre v Shell Petroleum Development Company of Nigeria Limited Background

It is a representative action brought Jonah Gbemre under the former Fundamental Rights (Enforcement Procedure) Rules of 1979⁴² on behalf of himself and the members of the Iwherekan Community in Delta State, Nigeria. The respondents were Shell Petroleum Development Company Nigeria Ltd, the Nigerian National Petroleum Corporation (NNPC) and the Attorney General of the Federation. On 21st July 2005, the Federal High Court sitting at Benin City granted leave to the applicant to commence the proceedings in a representative capacity for himself and other members of the Iwherekan Community in Delta State. In addition, the applicants were granted leave to apply for an order enforcing or securing the enforcement of their fundamental rights to life and dignity of the human person as provided by sections 33 (1) and 34 (1) of the 1999 Nigerian Constitution, and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.⁴³

In their statements, the applicants requested five interrelated reliefs. First, the court should declare that the constitutionally guaranteed fundamental rights to life and dignity of human persons as provided in sections 33 (1) and 34 (1) of the Constitution of 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 include the right to a clean poison free, pollution-free and healthy environment. Second, in the light of the first relief the court should further declare that the continued gas flaring by both respondents is in violation of their fundamental rights to life (including healthy environment) and the dignity of human persons guaranteed under the law. Third, that by failing to carry out an environmental impact assessment in the applicants' community concerning the effects of their gas flaring activities, the respondents acted in contravention or violated the Environment Impact Assessment Act and by implication perpetuated the violation of the applicants fundamental rights to life and dignity of the human person. The fourth declaration was targeted against the law which allowed gas flaring itself. The applicants requested the court to declare unconstitutional and void the s3(2)(a), (b) of the Associated Gas Re-injection Act and s1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulation under which the continued flaring of gas in Nigeria may be allowed as inconsistent with the applicants' right to life and/or dignity of human person as guaranteed under the Constitution. Finally, the applicant sought an order of perpetual

⁴² These have been replaced by the 2009 Rules

⁴³ CAP A9, Volume 1, Laws of the Federation of Nigeria (LFN) 2004

injunction restraining the respondents and anybody who may be acting on their behalf from further flaring of gas in the applicants' community.

The applicants alleged that the continuous gas flaring by the defendant had led to the poisoning and pollution of the environment, thereby exposing the community to the risk of premature death, respiratory illnesses, asthma and cancer. In addition, the pollution had not only affected their crop production but had also led to the deaths of many members of the communities while countless others were suffering from different illnesses, thereby leaving the community in a state of gross under-development. Therefore, they urged the court to intervene promptly and forestall further breach of their fundamental rights and the impunity of the activities of first and second respondents.

The Respondents opposed the case on several grounds. Apart from challenging the substantive jurisdiction of the court, the respondents argued that the articles of the African Charter being relied upon by the applicants did not create any enforceable rights under the Nigerian fundamental rights enforcement procedure. More importantly, the respondents argued that the interpretation of sections 33 and 34 of the Nigeria Constitution is a fundamental right within s46 (1) of the same Constitution. While s33 guarantees right to life, s34 provides that "every individual is entitled to respect for the dignity of his person..."⁴⁴

The Federal High Court's Decision

The court rejected the arguments of the respondent on the lack of jurisdiction of the court and the competence of the applicant in bringing the action. Surprisingly, the court gave a broad and creative reading to the provisions of both sections 33 and 34 of the Constitution of the Federal Republic of Nigeria, 1999. It reasoned that these rights encompass the right to a clean poison-free, pollution-free and healthy environment.⁴⁵ Furthermore, it concluded that the continuing flaring of gas by the first and second respondents during exploration and production activities in the applicants' community represent a gross violation of the latter's fundamental right to life (including healthy environment) and the dignity of human persons as enshrined in the Constitution. The respondent had also contended that it was not a requirement of its operation when it commenced business to undertake an environmental impact assessment and its operation was in no way affecting the fundamental rights of the applicant. Again, the court disagreed with the respondent. It held that the failure to undertake

⁴⁴ Constitution of the Federal Republic of Nigeria 1999

⁴⁵ *Gbemre* p 30

an environmental impact assessment by the respondents on the effects of gas flaring activities was in breach of the relevant provision of the Environmental Impact Assessment Act and had contributed to the violation of the concerned fundamental rights. Significantly, the court found s3(2) (a) and (b) of the Associated Gas Re-Injection Act⁴⁶ and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations 1984, under which gas flaring in Nigeria may be allowed to be inconsistent with the applicant's rights to life and the dignity of human persons. It therefore declared them to be unconstitutional, null and void by virtue of section 1 (3) of the same Constitution.

In ensuring the actualisation of its decision, the Nwokorie J specifically ordered the Attorney General of the Federation to initiate the necessary processes in bringing the inconsistent provisions of the Associated Gas Re-Injection Act and the Regulations made pursuant to them in tandem with the provisions of Chapter IV of the Constitution (dealing with fundamental human rights) after proper consultation with the Federal Executive Council. The court observed that this is imperative because the Associated Gas Re-Injection Act itself criminalises continuous gas flaring.

The judgment represents a significant shift in the environmental protection in Nigeria. There appears to a genuine intent on the part of the judiciary to conceptualise environmental protection in fundamental rights terms. However, the court seems to be in hurry to make its conclusions without providing any legal analysis for its conclusion.⁴⁷ While procedural obstacles might have prevented the respondents to build on its arguments, as Amao noted the judgement on its own lack of in-depth legal analysis.⁴⁸ Although no reference was made to it, the court might have been influenced by the decision of the African Commission on Human Rights held in *Social and Economic Rights Action Centre ("SERAC") and The Centre for Economic and Social Rights v Nigeria*⁴⁹ where it was held that the government of Nigeria failed to comply with the right to health (art 16) and the right to a clean environment (art 24) of the African Charter. So, Gbemre might have been decided in the shadow of *SERAC*. Probably, the enthusiasm of the judiciary was not shared by other arms of government. The

⁴⁶ Hereinafter AGRA

⁴⁷ Olufemi O. Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States', (2008) 52 Journal of African Law 89, 109

⁴⁸ *ibid.*

⁴⁹ *Social and Economic Rights Action Centre ("SERAC") and The Centre for Economic and Social Rights v Nigeria* (2001), communication no 155/96, (African Commission on Human and Peoples' Rights) available at http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf accessed 30 August 2018

Attorney General of the Federation who was supposed to represent the executive arm of the government made no representation.

IV. A New Dawn or False Hope?

The decision in *Gbemre v. SPDC* is significant because unlike other cases relating to environmental degradation, the reliefs sought did not focus on pecuniary compensation. Rather, the focus was on the establishment of a right to a clean, poison-free and pollution-free healthy environment. The judgement also aimed at bringing a total end to gas flaring in Iwherekana Community. By extension, it intended to bring about a reform of the laws relating to gas flaring in Nigeria for declaring the practice being inconsistent with the rights enshrined under sections 33 (1) and 34 (1) of the Constitution of the Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

Perhaps the reason for this difference in relief sought is based on the fact that the *Gbemre* case was brought as a fundamental human right application under the Fundamental Human Rights (Enforcement Procedure) Rules of 1979. Indeed the judgment in *Gbemre* was a watershed in the annals of environmental protection considering that it was the first time environmental protection has been conceived in human rights terms.⁵⁰ It was also the first judicial authority in Nigeria to declare gas flaring to be illegal, with the judgment focusing more on the environment rather than the potential loss of investment and revenue of the host community. This contrasts with the other cases that had come before the Courts before the *Gbemre* case which had been decided under the common law as tort claims.⁵¹

Still on the nature of the reliefs sought, the decision in *Gbemre* demonstrated the growing consciousness among Nigeria citizenry about the importance of environmental protection. The applicant was unequivocal in requesting the court to outlaw gas flaring outrightly. The departure from the practice seeking financial compensation through the court for loss of earnings with little or no mention of the environmental degradation caused by exploration activities is novel. It is appropriate and permissible within the law to seek damages as a result of harm occasioned by oil and gas operations. However, court actions that are limited to

⁵⁰ Rufus Akpofurere Mmadu, 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel', 2 *Journal of Sustainable Development Law and Policy* 149, 163.

⁵¹ For example, See the case of *R. Mon and B Igara v Shell B.P Petroleum Company of Nigeria (174) 2 R.S.L.R* where the plaintiffs brought an action for damage to their fish pond as a result of the operations of the defendant. The plaintiffs asked for the sum of N200, 000 (Two Hundred Thousand Naira) as compensation for damages to their fish pond.

compensation seem shortsighted and of temporal benefit to the community.⁵² Such an approach ignores the root cause of the problem and perpetuates the problem of environmental degradation and accompanied effect. Thus, *Gbemre* symbolizes a new dawn in environmental protection in Nigeria. It is the first and strong intervention by the judiciary to curb the excesses of the oil MNCs and order the enactment of law which will compel environmental friendly practice in the oil and gas sector.

Be that as it may, has *Gbemre* raised a false hope? Unfortunately, *Gbemre* has been turned into a pyrrhic victory by the Nigerian Federal Government when it failed to implement the decision of the court. While the court may have the power to declare unconstitutional any law made by the legislative arm of the government, this power does not include law making.

Some factors have militated against the implementation of the judgment in *Gbemre*. When the first and second respondents failed to comply with the order compelling them to stop gas flaring in the community, the applicant filed for contempt of court against the respondent. The Federal High Court of Nigeria granted a conditional stay of execution of the order to stop gas flaring on the 10th of April 2006. The stay of execution order contained three conditions. The relevant condition was the order requiring both Shell Petroleum Development Company of Nigeria (SPDC) and the Nigeria National Petroleum Corporation (NNPC) to submit a detailed scheme aimed at achieving zero gas flaring by 30th April 2007. This order was not obeyed by either party. This was further complicated by the sudden transfer of the judge to another judicial division and the mysterious disappearance of the case file. Subsequently, SPDC was granted a further stay of execution order with no known condition attached.⁵³ More than ten years after *Gbemre* was decided, no cogent action has been undertaken either by the executive or legislative arm of the government in actualising its spirit, it may be argued that the so-called landmark case has shrunk into oblivion.

Ukala posited that the victory on the stoppage of gas flaring was only short-lived.⁵⁴ The events which played out in the aftermath of the decision suggests a high level of state

⁵² This is in contrast with the decision in *Shell v. Farah* where the reliefs sought were for remediation in addition to compensation.

⁵³ Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*, (Amnesty International Publications 2009) 77

⁵⁴ Eferiekose Ukala, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices' (2011) 2 Washington and Lee Journal of Energy, Climate and the Environment, 97, 108 <<http://scholarlycommons.law.wlu.edu/jece/vol2/iss1/4>> accessed 27 July 2016

interference and complicity.⁵⁵ Peter Roderick, then a co-Director of the Climate Justice Program vehemently criticised the position taken by the government.

[the] fact that the judge has been removed from the case, transferred to the north of the country, and there have been problems with the court file for a second time, suggests a degree of interference in the judicial system which is unacceptable in a purported democracy acting under the rule of law.⁵⁶

The complicity of the Federal Government might have been motivated by the conflict of interest. The Nigerian Government is a joint venture partner with the oil MNCs and any implementation of the decision would also require that government contribute its share towards ending the harmful practice of gas flaring. This further calls into question the structure of oil and gas regulation in Nigeria.

It should be noted that the decision in *Gbemre* was not never appealed to either in the Nigerian Court of Appeal or the Supreme Court. It would have been beneficial to find out whether these appellate courts would have adopted the position of the Federal High Court. Considering the decision was a product of innovative judicial reasoning, it might be possible that SPDC could be successful on appeal if the appellate courts gave a strict and narrow reading to ss33 and 34 of the Constitution. From all indications, however, it appears that the government and the oil MNCs were unwilling to take that chance and would rather result in executive arm-twisting and interference. It appears that there was a concern that the recognition of a right to a clean, poison-free and pollution-free healthy environment by the higher courts ‘will lead to an avalanche of cases that will result in huge compensation payouts that will be detrimental to the Federal Government and its partner oil-multinationals’.⁵⁷ There was no evidence that the applicant sought any enforcement at the higher court.

Inasmuch that the judgment was never enforced, the relevant sections of the AGRA 1979 and its regulations remain unaltered. According to s3(2)(a) and (b) AGRA provides that:

⁵⁵ Rhuks Temitope, ‘Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India (2010) 3 NUJS Law Review 423, 438.

⁵⁶ Friends of the Earth International Press Briefing, Shell fails to obey gas flaring court order, May 2, 2007 available at <http://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007> accessed 26 July 2016.

⁵⁷ Rhuks Temitope, ‘Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India (2010) 3 NUJS Law Review 423, 439.

3(2) Where the Minister is satisfied after 1 January, 1984 that utilization or reinjection of the produced gas is not appropriate or feasible in a particular field or fields, he may issue a certificate in that respect to a company engaged in the production of oil or gas-

- (a) specifying such terms and conditions, as he may at his discretion choose to impose, for the continued flaring of gas in the particular field or fields; or
- (b) permitting the company to continue to flare gas in the particular field or fields if the company pays such sum as the Minister may from time to time prescribe for every 28.317 Standard cubic meters (SCM) of gas flared

The above provision is further qualified by the 1984 Regulations which state that

- (a) where more than 75 per cent of the produced gas is effectively utilized or conserved;
- (b) where the produced gas contains more than fifteen per cent impurities, such as N₂, H₂S, CO₂, etc., which renders the gas unsuitable for industrial purposes;
- (c) where an on-going utilization programme is interrupted by equipment failure: Provided that, such failures are not considered too frequent by the Minister and that the period of any one interruption is not more than three months;
- (d) where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or possible utilization point is less than 50,000 SCF/KM: Provided that, the gas-to-oil ratio of the field is less than 3,500 SCF /bbl, and that it is not technically advisable to reinject the gas in that field;
- (e) where the Minister, in appropriate cases as he may deem fit, orders the production of oil from a field that does not satisfy any of the conditions specified in these Regulations.⁵⁸

These provisions do not intend to outlaw flaring of gas rather to make them permissible subject to the aforementioned conditions. In fact, there is no evidence that the ongoing gas flaring had been undertaken in compliance with these regulations. Certificates evidencing the right to flare by oil and gas companies are not publicly available. Therefore, there appears to be a conspiracy of silence between the government and the oil companies on the issue of gas flaring.⁵⁹

As mentioned above, the enforcement of the judgment in *Gbemre* would definitely have a ripple effect. Many other host communities in NDR would have also made case cessation of gas flaring on fundamental rights ground. The amendment of the relevant provisions of the AGRA 1979 and its regulations would have transformed the regulatory framework for gas flaring. The effect of the enforcement of the *Gbemre* judgment could also have cut across

⁵⁸ Associated Gas Re-Injection (Continued Flaring of Gas) Regulations 1984, Section 1

⁵⁹ Eferiekose Ukala, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices' (2011) 2 Washington and Lee Journal of Energy, Climate and the Environment, 97, 105 <<http://scholarlycommons.law.wlu.edu/jece/vol2/iss1/4>> accessed 27 July 2016

other areas of environmental degradation caused by oil and gas operations mainly oil pollution. The failure to enforce this decision has only shown that the government missed the opportunity to recognise that economic growth and environmental protection are inextricably linked.

Another benefit that might have been gained in the implementation of the decision is the reduction or eradication of militancy in the region. Militant activities have had significant deleterious effects on the NDR, and have led to a loss of revenue for the Federal Government.⁶⁰ Militant groups in the region have always justified their action by referring to the destruction of the environment by the MNCS. Despite the fact that the NDR produces the oil which is the mainstay of the Nigeria's economy, most of the inhabitants of the villages and creeks live in appalling conditions⁶¹ and a vast majority of the people are poor.⁶² Host communities had always explored alternative and peaceful means of putting their concerns forward but they had been forced to embrace forceful and aggressive methods by disenchantment with the actions of the government. Owugah charted the paths of the agitations in the NDR and categorised them into four phases:

The first phase could be roughly put between the early and mid 1980's. The dominant strategy in this phase was that of legal action by the communities against the oil companies to pay adequate compensations for damages to their property... The second phase was characterized by peaceful demonstrations and occupation of flow stations to get the oil companies to pay 'adequate' compensations or to fulfill their promises to provide certain amenities and to employ indigenes of the community... the oil companies responded by calling in the police and military. The intervention of these state operatives often resulted in the destruction of lives and property... The resistance, thus assumed a desperately militant form in the third phase...mid 1990's to 1998... characterized by the militant strategy of forceful occupation and shutting down of flow stations, kidnapping of workers, seizure of tug boats and other vessels belonging to the oil companies... The fourth phase is the demand for resource ownership and control.⁶³

Although militancy in the NDR was not a recent occurrence, it became sophisticated and more organised with the formation of the Niger Delta People Volunteer Force (NDPVF) by

⁶⁰ Fidelis Esira Arong and Egbere Michael Ikechukwu, 'The Effect of the Cost of Militancy and Unrest or Peace Accounting on the Productivity of Private Organisations in Nigeria' (2013) 2 International Journal of Public Administration and Management Research 87, 94

⁶¹ V. T. Jike, 'Environmental Degradation, Social Disequilibrium, and the Dilemma of Sustainable Development in the Niger-Delta of Nigeria', (2004) 34 (5) Journal of Black Studies 686-701, at 688.

⁶² Nwogwugwu Ngozi, Alao Olatunji Emmanuel and Egwuonwu Clara, 'Militancy and Insecurity in the Niger Delta: Impact on the inflow of foreign direct investment to Nigeria', (2012) 2 Kuwait Chapter of Arabian Journal of Business and Management Review 23, 25

⁶³ Owugah, Lemmy, 'Local Resistance and the State' (1999) Paper presented at Oil Watch African General Assembly, Port Harcourt, February 9-14, 1999

Mujahid Dokubo Asari in 2004.⁶⁴ The group claimed its mission was to fight the injustices being meted out to the people in the region. Another group known as the Movement for the Emancipation of the Niger Delta (MEND) also emerged in 2006. While MEND shared some of the objectives of NDPVF, it also advocates resource control by the government of the region in which they are found.⁶⁵ The modus operandi of these groups includes hostage taking, and disruption of oil exploration activities through blowing up of pipelines.⁶⁶ The severity and the effects of these acts prompted the issuance of a presidential shoot-on-sight order in 2006.⁶⁷ However, a cessation was agreed with the government under the Amnesty Programme initiated in 2009.⁶⁸ Despite this ceasefire, there was a resurgence of militant activities in the NDR in 2016.⁶⁹

From the above, militancy in the NDR was a product of the systemic failure of government. Its genesis is in the failure of the peaceful means adopted by the Niger Delta people in fighting for their rights and the desperation of people seeking remedy. Ibaba explained that conflict and violence in the NDR was caused by alienation resulting from ‘ethnicity based political domination, *oil based environmental degradation*, corruption and parental neglect’.⁷⁰

It will amount to exaggeration to conclude that the implementation of *Gbemre* would totally resolve the problem of militancy in NDR. In fact, some scholars have argued that the provenance of militancy agitation transcends environmental degradation.⁷¹ The paper posits that a show of commitment by the government in ensuring that inhabitants of this region have

⁶⁴ Ben Wuloo Ikari, ‘Niger Delta Oil Conflict: The Reason, Current Status; the Demands and Western Influence etc’, 1 April 2010 <www.thenigerianvoice.com/news/16219/topic-niger-delta-oil-conflict-the-reason-current-status.html> accessed 21 February 2018

⁶⁵ Ben Wuloo Ikari, ‘Niger Delta Oil Conflict: The Reason, Current Status; the Demands and Western Influence etc’, 1 April 2010 <www.thenigerianvoice.com/news/16219/topic-niger-delta-oil-conflict-the-reason-current-status.html> accessed 21 February 2018

⁶⁶ Nwogwugwu Ngozi, Alao Olatunji Emmanuel and Egwuonwu Clara, ‘Militancy and Insecurity in the Niger Delta: Impact on the inflow of foreign direct investment to Nigeria’, (2012) 2 Kuwait Chapter of Arabian Journal of Business and Management Review 23, 29

⁶⁷ Ibaba S Ibaba, ‘Alienation and Militancy in the Niger Delta: Hostage Taking and the Dilemma of the Nigerian State, *African Journal on Conflict Resolution* Vol. 8 (2) 2008: pp. 11, 20

⁶⁸ F. E. Arong and E. M Ikechukwu, ‘The Effect of the Cost of Militancy and Unrest or Peace Accounting on the Productivity of Private Organisations in Nigeria’ (2013) 2 International Journal of Public Administration and Management Research 87, 88

⁶⁹ Freedom C Onuoha, ‘The Resurgence of Militancy in Nigeria’s Oil-Rich Niger Delta and the Dangers of Militarisation’ <<http://studies.aljazeera.net/en/reports/2016/06/resurgence-militancy-nigerias-oil-rich-niger-delta-dangers-militarisation-160608065729726.html>> accessed 21 February 2018

⁷⁰ Ibaba S Ibaba, ‘Alienation and Militancy in the Niger Delta: Hostage Taking and the Dilemma of the Nigerian State, *African Journal on Conflict Resolution* Vol. 8 (2) 2008: pp. 11 (emphasis added)

⁷¹ Nwogwugwu Ngozi, Alao Olatunji Emmanuel and Egwuonwu Clara, ‘Militancy and Insecurity in the Niger Delta: Impact on the inflow of foreign direct investment to Nigeria’, (2012) 2 Kuwait Chapter of Arabian Journal of Business and Management Review 23, 25-28

access to a clean environment would have a considerable effect in mitigating some of the challenges in the region.

It is hoped that in the near future, a bold set of litigants will take up the challenge and institute an action in line with *Gbemre*. To improve chances of success, such a case would have to be brought under fundamental human rights. This is important because there are relaxed *locus standi* rules under the Fundamental Rights Enforcement Procedure Rules 2009.⁷² While it may be argued that sections 33 and 34 include a right to a clean environment, the fact remains that such a right is not expressly provided for in the 1999 Constitution. The only constitutional provision in this regard is s20 and disappointingly, it is a classified part of the non-justiciable rights in the constitution. However, the Fundamental Rights (Enforcement Procedure) Rules 2009 recognises the African Charter on Human and Peoples' Rights which expressly includes the right to a clean environment. One note of caution is that being a decision of the Federal High Court, *Gbemre* may not have a full weight of established law. The authors, however, believe that if another *Gbemre*-like case should make its way to the Supreme Court, then a positive decision in favour of any affected community could have significant benefits in reforming the law and entrenching the right to a clean environment.

The next section of this paper will consider the statutory role of the relevant regulatory agencies saddled with the responsibility of enforcement and monitoring of the environmental regulatory paradigm in the oil and gas industry.

V. The role of regulatory agencies in enforcement and monitoring of the environmental regulations

The Department of Petroleum Resources

The Department of Petroleum Resources (DPR) is saddled with the responsibility of enforcing and monitoring environmental regulations and standards in the Nigerian oil and gas industry. Other regulatory agencies are the National Environmental Standards and Regulations Enforcement Agency (NESREA) and the National Oil Spill Detection and Response Agency (NOSDRA).

The DPR as a department in the Ministry of Petroleum Resources has multiple responsibilities which, amongst others include issuing and supervising leases and licenses as

⁷² The Preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009 provides in para 3 (e) that no human rights case may be dismissed or struck out for want of locus standi.

well as ensuring environmental protection.⁷³ This concentration and combination of both economic and environmental regulatory functions in a single authority could lead to possible conflicts of interest which could compromise the independence and objectivity of the regulator. In the absence of an environmental focused corporate governance policy, economic development and profit maximisation would thrive to the detriment of environmental protection. The implication of this conflict of interest was brought to the fore during the Macondo disaster.⁷⁴ The development culminated into the EU Offshore Safety Directive (EU). According to its Article 20 such conflict of interest can be resolved by a clear separation between regulatory function and associated decision relating to safety and environment and regulatory function relating to economic development of natural resources.⁷⁵

A United Nations Environment Programme Report (UNEP report) identifies a possible conflict of interest as a significant factor for the weak enforcement of environmental regulations.⁷⁶ The conflict of interest in the industry is as a result of the administrative and commercial interconnection between the Nigerian Government (through its ministry, NNPC) and the oil MNCs. In such a situation, it will be difficult for a regulator to maintain its independence and objectivity. The argument being made is that if such conflict of interest could lead to weak enforcement of environmental standards and regulations, this might provide a reason for the failure of the government in the non-enforcement or compliance with the decision in *Gbemre*.⁷⁷ In this regard, it is suggested that to achieve the independence and objectivity of the regulator, relevant environmental regulatory functions should be transferred to the National Environmental Standards and Regulations Enforcement Agency, while the DPR should be left with issues concerning economic development.

⁷³ Department of Petroleum Resources (DPR) online at <https://dpr.gov.ng/index/functions-of-dpr/> accessed on the 3rd August, 2016

⁷⁴ The Deepwater Horizon incident which occurred on 20 April, 2010 in the Gulf of Mexico and left eleven people dead. It is considered as the worst environmental disaster in the US history.

⁷⁵ Directive 2013/30/EU of the European Parliament on Safety of Offshore Oil and Gas Operations

⁷⁶ UNEP Report on Ogoniland available on line at https://wedocs.unep.org/bitstream/handle/20.500.11822/25282/ogoniland_chapter1_UNEP_OEA.pdf?sequence=1&isAllowed=y

⁷⁷ Although DPR was not a defendant in the case, it is department of the Ministry of Petroleum and with the interconnection between Ministry and NNPC (defendant), the argument that such conflict of interest and the resultant weak enforcement is convincing. In fact, with the interconnection between the Ministry and NNPC it is hard to distinguish its leadership. This all the more so, in situations where the president is the minister for petroleum and his minister of state for petroleum would at some point double as the GM for NNPC.

The National Environmental Standards and Regulations Enforcement Agency

In 2007, the government established the National Environmental Standards and Regulations Enforcement Agency (NESREA) to ensure environmental protection and regulatory compliance in all sectors except the oil and gas sector.⁷⁸ This agency is also responsible for the development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology. Furthermore, it has the oversight to coordinate and liaise with the relevant stakeholders within and outside Nigeria in matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.⁷⁹

In terms of environmental safeguards in the Nigeria's oil and gas industry, s27 of the NESREA Act prohibits the discharge of harmful quantities of hazardous substances into the air, land, water and the shorelines of Nigeria except permitted by law. It defines "hazardous substance" as "any chemical, physical or biological radioactive material that poses a threat to human health and the environment."⁸⁰ Without doubt, the discharge of oil or gas either by way of spill or flaring respectively, or by any other means does qualify as discharge of hazardous substances. It should however be noted that the prohibition in s27 is not absolute. It subjects the statute to other laws which permit the discharge of any hazardous waste. The provision weakens the power of the agency and defeats the purpose of the legislation.

Another defect is the exclusion of environmental issues arising in the oil and gas industry from the scope of the Act. Under s8(8), the Act empowers the Agency to "conduct public investigations into oil pollution and the degradation of natural resources except investigation on oil spillage." For example, there is express omission of the oil and gas industry on the list of functions of NESREA under s. 8 (i), (k), (m), (n) and (s). Similarly, s7(k) precludes the Agency from conducting environmental audits in respect of the oil and gas industry in Nigeria. These provisions unnecessarily narrow the remit and functions of the Agency and water down its significance.

Some commentators have argued that the essence of the limitations placed on NESREA with respect to the investigation on oil spillage and the deliberate omission of the oil and gas industry on the list of their functions was to prevent any possible conflict of interest that may arise between NESREA and the National Oil Spill Detection and Response Agency

⁷⁸ See section 7 & 8 of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, No 25 of 2007, available at <http://www.nesrea.org/nesraact.php> [accessed on 11 July 2016]

⁷⁹ NESREA Act at section 2

⁸⁰ Ibid s 37

(NOSDRA).⁸¹ However, a cursory look at the purpose and responsibility of NESREA under s.2 of the Act reveals series of contradictions as to the functions of the Agency in addition to its being excessively narrowly drafted when compared to repealed law that established the Federal Environmental Protection Agency (FEPA).⁸²

On the other hand, NOSDRA has the responsibility for preparedness, detection and response to oil spillages in Nigeria.⁸³ It is mandated to implement the National Oil Spill Contingency Plan (NOSCP) for Nigeria in line with the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990.⁸⁴ Understandably, the prevalent nature of oil spills in the oil and gas industry in Nigeria warranted the establishment of NOSDRA. The causes of oil spill incidents range from old or corroded oil pipes, poor maintenance culture to human mistakes, vandalism or sabotage, oil bunkering (theft of oil) among others.⁸⁵ The duty of NOSDRA is to identify for protection, high risk areas in the oil producing communities or the environment and to ensure compliance of industry players or companies with extant environmental laws and regulations in the sector.⁸⁶ Without doubt, the mandate of NOSDRA is vital to environmental protection in Nigeria. However, this approach is reactionary rather than preventing or forestalling its occurrence.

V. Recommendations

As mentioned above, host communities and environmental protection crusaders need to test the strength of the decision in *Gbemre* by initiating their case under the Fundamental Rights (Enforcement Procedure) Rules (FREP) 2009. This is important because the rules of locus standi are relaxed in relation to fundamental right applications unlike tort claims where the claimant must justify his capacity for instituting the action. In fact, the FREP 2009 provides that no human rights case can be dismissed or struck out for want of locus standi.⁸⁷ The incorporation of the African Charter Act also helps in this regard as the right to a clean

⁸¹ E.O 'Ekhaton, Environmental Protection in the Oil and Gas Industry in Nigeria: The Roles of Governmental Agencies', (2013) 196 I.E.L.R 199

⁸²D. K. Derri & S. E Abila, 'A Critical Examination of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007' in Festus Emiri, Gowon Deinduomo (ed) *Law and Petroleum Industry in Nigeria: Current Challenges: Essays in Honour of Justice Kate Abiri* (Malthouse Press Limited: Lagos) 2009 p 10

⁸³ National Oil Spill Detection and Response Agency (Establishment) Act, No. 15 of 2006 (hereinafter NOSDRA Act) s1

⁸⁴ National Oil Spill Detection and Response Agency (Establishment) Act, No. 15 of 2006 (hereinafter NOSDRA Act)

⁸⁵ Amnesty International (2009). Nigeria: Petroleum, Pollution and Poverty in the Niger Delta, p.14 Available at <https://www.amnesty.org/en/documents/AFR44/017/2009/en/> [last accessed on 15 February 2018]

⁸⁶ *ibid*

⁸⁷ FREP Rules 2009, The Preamble

environment is not expressly recognized under the 1999 Constitution (as amended). If the right to a clean environment is successfully established through the courts, this could pave the way for the amendment or repeal of any laws which are inconsistent with the enjoyment of such a right. By implication, this would help to strengthen the regulatory framework for the environmental protection in the country.

There is also the need for the judicial arm of government to be strengthened in order to prevent interference from external sources. This is imperative because of the principal role of an independent judiciary in upholding rule of law and preserving the supremacy of the law.⁸⁸ It is trite that an independent judiciary will uphold the ethos of good governance by ensuring fairness and equity without any constraint. The development that followed the aftermath of the court's ruling in *Gbemre* exhibits a high level of interference which is simply unacceptable, particularly in a democratic setting. Judicial activism should be rewarded rather than punished.

Furthermore, as earlier noted, one major problem that contributes to the weakness and enforcement of environmental regulations/laws and standards is the fusion of the responsibility of protecting the environment and the economic development of natural resources in a single body. Apparently, this demonstrates a well-defined instance of possible conflict of interest due to the fact that DPR which is the main regulatory agency in Nigeria is responsible for both economic development and ensuring compliance with safety and environmental regulations. The implication of this anomaly is that it leaves the regulatory body in a compromising position, thus hindering any chance of effective enforcement and monitoring of environmental regulations and standards in the industry.

It should be recalled that the issue of conflict of interest on the part of the regulatory body in the United States' oil and gas industry was one of the major factors that contributed to the Macondo disaster in the Gulf of Mexico.⁸⁹ In the light of the above, it is recommended that there should be an absolute separation of the task of economic development of natural resources in the sector from the task of enforcing environmental regulations and standards. Having the DPR in charge of these two important tasks will continue to give less effect and

⁸⁸ Ibrahim Abdullahi, 'Independence of the Judiciary in Nigeria: A Myth or a Reality?' (2014) 2 *International Journal of Public Administration and Management Research* 55, 56

⁸⁹ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Report to the President: Deepwater, The Gulf of Disaster and the Future of Offshore Drilling 1, 55 (2011) available at <http://www.oilspillcommission.gov/final-report> [accessed on 10 August 2016] The report of the commission pointed out that the regulatory context for leasing procedures and safety and environmental oversight contributed to Macondo disaster in 2010.

focus to enforcement of environmental regulations and standards. Otherwise, environmental protection will continue to be relegated while revenue generated from the industry becomes the government's utmost priority.

Furthermore, it is suggested that the Nigerian Government should consider the recommendations made in the UNEP report which underscores the need to divide the duty of economic development and environmental protection between two agencies. It is common knowledge that the Nigerian Government is being represented in a joint venture by the NNPC with some of the oil MNCs. The role of the NNPC as a joint venture partner and a regulator simultaneously resuscitates the fairness principle of *nemo iudex in causa sua*. Both the DPR and NNPC work are working for the interest of the same government. While it is not impossible, it is doubtful that a governmental agency will impose a fine on another agency of the government. It therefore becomes imperative at this point for the Nigerian government to access the role that it plays in the exploration of oil in Nigeria.

The government must demonstrate sincerity of purpose and a clear political will towards strengthening the environmental regulatory framework in the industry. The idea of shielding its agency from proper regulatory compliance symbolises a conspiracy against the people of the NDR. Such a practice has already had an internecine effect on Nigeria's oil and gas industry and the host community. Apart from its duty to enact laws which will safeguard the environment, the government must avoid any form of interference, whether directly or indirectly with the powers of both the regulatory body and the judiciary to carry out their functions.

VI. Conclusion

The above discussion has considered, among others, gains that could have accrued from the judgment of the court in *Gbemre v. SPDC* if it had been enforced. It recognised the missed opportunity that was presented to the Nigerian government to strengthen the Nigerian environmental regulatory framework in the oil and gas industry. Clearly, the failure to enforce the judgment by the relevant authority has proven to be more costly to the economy of Nigeria than the option of looking the other way. The other option being to fully maximize Nigeria's natural resources in the oil and gas sector for economic development at the expense of the safety of human health and the environment.

The truth remains that the government may not be interested in the establishment of the right to a clean environment. As earlier stated, there would be an avalanche of cases from

litigants,⁹⁰ due to the fact that the government is involved in joint venture operations with the oil MNCs. It may however be in the best interests of the government to do so considering the fact that the militancy problem in the NDR is partly due to the problem of environmental degradation. While it will not be an easy task, the government must display the necessary political will to clean up the environment and not merely pay lip service to environmental issues. The intention of Federal Government to start the process of implementing the UNEP Report for Ogoni land is a step in the right direction but much more needs to be done. We believe that a genuine show of concern for the plight of the Niger Delta people, evidenced by the recognition of a right to a clean environment and the necessary amendments to extant laws will make a positive contribution towards resolving the militancy situation in the NDR.

As environmental degradation persists and the regulator lacks the requisite enforcement capability owing to conflicts of interest, the issue of environmental protection will remain a recurring debate. The failure to enforce or comply with the decision in *Gbemre* and other intrigues surrounding the case will always make the Nigerian government complicit in the plundering of the Nigerian ecosystem in defiance of intergenerational equity. Therefore, only a clear political will and commitment by the government could change this perception.

⁹⁰ Rhuks Temitope, 'Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India (2010) 3 NUJS Law Review 423, 439.