IMPROVING ACCESS TO ENVIRONMENTAL JUSTICE UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE ROLES OF NGOS IN NIGERIA

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I. INTRODUCTION

Nigeria is a signatory to the African Charter on Human and Peoples' Rights ('African Charter'). The African Charter was domesticated into Nigerian law via the instrumentality of the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act 1983.[1] The abundance of case law in Nigeria on the African Charter suggests that the domestication of the charter has broadened the domestic enforcement rights. Accordingly, the charter has both international and human rights ramifications for environmental justice in Nigeria.

Despite the importance of the charter to human rights enforcement, environmental justice is still very much a pipe dream in Nigeria. The reasons for this conundrum include the weak regulatory regime in the oil and gas industry, the lack of political will by regulatory agencies to enforce oil and gas laws and regulations, the endemic corruption and judicial obstacles amongst others.

This paper will focus on the various strategies used by non-governmental organisations (NGOs) to improve access to environmental justice by stakeholders via the instrumentality of the African Charter. Furthermore, it will provide a critique of the oil and gas industry in Nigeria where environmental injustice or degradation arising mainly from the activities of the oil multinational corporations (oil MNCs) are localised.

Notwithstanding the institutional barriers to environmental justice in Nigeria, NGOs have utilised the provisions of the African Charter to improve access to environmental justice for victims of the activities of the oil and gas multinational corporations (oil MNCs) operating in the Niger Delta region of Nigeria.

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1 Formerly Cap 10 LFN 1990 now Cap A9, LFN 2004 (African Charter Act).

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This paper is divided into six sections. The first section is the introductory section. The second section traces the history of the environmental justice paradigm from the United States of America. The third section focuses on the oil and gas industry in Nigeria and the various laws that accentuate environmental injustice in the oil and gas industry. The fourth section focuses on the status of the African Charter in Nigeria. The fifth section focuses on litigation and other strategies used by NGOs in Nigeria to address environmental injustice in Nigeria. In conclusion, this paper highlights the challenges that NGOs may face in the future to access environmental justice before the African Court of Justice and Human Rights.

II. OVERVIEW OF ENVIRONMENTAL JUSTICE PARADIGM

Environmental justice is a new paradigm for achieving a healthy and sustainable environment or communities and it is a culmination of more than 500 years of struggle by people of colour in the USA.[2] The environmental justice paradigm was a fundamental departure from the prevailing idea of environmentalism which appeared to favour the protection and sustainability of ecology whilst neglecting humanity. According to Obiora, 'many faulted mainstream environmentalism for indulging the idiosyncrasies of the affluent instead of exposing inequity and injustice'.[3]

Flowing from this premise, environmental justice emerged as a counter measure to the discontent and inherent racism entrenched in government policies in the Deep South of the USA in the 1960s and 1970s.[4] After the successful civil rights movement by African Americans in the 1960s, their attention was turned to environmental problems plaguing the black communities. For example, environmental justice served as a buffer to the indiscriminate and deliberate siting of hazardous and dangerous (noxious) wastes in the areas predominately inhabited by ethnic minorities in the USA.[5] Poor environmental practices were said to be discriminatory on the poor and black communities and this led to a number of studies[6] which indicated that there was link between the 'minority and environmental harms'.[7]

2 C. Lee, 'Developing the Vision of Environmental Justice: A Paradigm for Achieving Healthy and Sustainable Communities', 14 *Virginia Environmental Law Journal* (1994–5): 571–8.

3 A. Obiora, 'Symbolic Episodes in the Quest for Environmental Justice', *Human Rights Quarterly* (1991): 465.

4 O. W. Pedersen, 'Environmental Justice in the UK: Uncertainty, Ambiguity and the Law', *Legal Studies* (2010): 1–26.

5 See Lee, *supra* note 2; R. T. Ako, 'Nigeria's Land Use Act: An Anti-thesis to Environmental Justice', 53(2) *Journal of African Law* (2009): 289–304, at 292.

6 These studies include General Accounting Office, *Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surrounding Communities*, GAO/RCED-83-168 (1983); Commission for Racial Justice, United Church of Christ and Public Data Access, Inc., *Toxic Waste and Race in United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*, Public Data Access (1987); United Church of Christ Justice and Witness Ministries, *Toxic Wastes and Race at Twenty 1987–2007*, United Church of Christ Justice and Witness Ministries (2007).

7 Pedersen, *supra* note 4.

The environmental justice doctrine has flourished and it has spread to all corners of the world, especially areas with a history of environmental abuse or degradation. Countries to which the doctrine has diffused include Nigeria, South Africa and India, amongst others. Thus, it can be argued that the environmental justice paradigm is now a global movement which is no longer localised to the experiences of the ethnic minorities in the USA.

The next part of the paper will focus on the contextual basis of environmental justice.

III. DEFINING ENVIRONMENTAL JUSTICE

The significance of the doctrine varies depending on the context or the country in focus. For example, 'environmental justice in Africa emphasizes access to natural resources, while in the USA and UK the focus is on maintaining the planet's well-being via active public participation'.[8] Thus in the African (or Nigerian) context, a distinct connotation of environmental justice will suffice. Here, access or control and ownership of natural resources by the inhabitants of the Niger Delta region (where the oil and gas industry is located) are the underlying factors in the environmental justice paradigm in Nigeria.

In the African or developing country context, in which access to resources is paramount, Obiora defines environmental justice as 'the equitable distribution of environmental amenities, the rectification and retribution of environmental abuses, the restoration of nature, and the fair exchange of resources'.[9] Also flowing from this premise, Adeola defines environmental justice as 'any undue imposition of environmental burdens on innocent bystanders or communities not parties to the activities generating such burdens'.[10]

In essence, environmental justice is premised on right to a healthy and safe environment; an equitable share or allocation of natural resources; the right not to suffer disproportionately from environmental policies, regulations and laws; and reasonable access to environmental information coalesced with participation and environmental decision making.[11]

Furthermore, environmental justice is akin to environmental rights; the concept of environmental rights has attained some level of international recognition and there is an international recognition of the concept of environmental rights.[12]

8 Ako, *supra* note 5, at 292.

9 Obiora, *supra* note 3, at 477.

10 F. O. Adeola, 'Cross-national Environmental Injustice and Human Rights Issues: A Review of Evidence from the Developing World', 43 *American Behavioral Scientist* (2000): 686–706, at 688.

11 Scottish Parliament, available at http://scotland.gov.uk/Publications/2006/05/23091323/12 (accessed 10 October 2013). Generally see International Covenant on Economic, Social and Cultural Rights, article 3, which states: 'the State Parties to the present Convention undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Convention'.

12 O. Odigie, 'Environmental Justice and Poverty Alleviation: Roadmap to Sustainable Development in Nigeria', 1 *NIALS Journal of Law and Public Policy* (2012): 152–82, also available at http://www.nials-nigeria.org/journals/Omoyemen%20Lucia%20Odigielawp.pdf (accessed 12 November 2013).

The African Charter and the Constitution of the Federal Republic of Nigeria (CFRN) 1999 are no exceptions in promoting or recognising environmental rights. A major innovation of the 1999 constitution is that it was the first constitution in Nigeria to expressly provide for the protection of the environment.[13] Section 20 of the constitution 1999 states that 'the state shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria'. This section of the constitution has been the subject of numerous criticisms, a major one being that it does not provide or contain provisions for the right to a clean or healthy environment.[14] The section has also been criticised on such other grounds as the wording being very broad; also that the provision 'falls under chapter II of the Constitution, which is non-justiciable'.[15] Non-justiciability robs the provisions of judicial enforceability.

The gamut of economic, cultural and social (socio-economic) rights[16] are provided for in chapter II of the Nigerian constitution. Chapter II deals with fundamental objectives and directive principles of state policy, which are not enforceable against the State by Nigerian citizens by virtue of section 6(6)(c) of the constitution. This undermines section 13 of the constitution, which states that it shall be the duty of the State and its organs to observe and apply the provisions of chapter II. On the other hand, civil and political rights are enforceable against the State and citizens under chapter IV of the Nigerian constitution. These rights include the right to privacy, the right to fair hearing and the right to dignity, amongst others.

Due to the non-justiciability of environmental promotion and protection in Nigeria, NGOs have made recourse to the African Charter as a means of improving access to environmental justice in Nigeria. The African Charter is the culmination of a process that started in the 1960s by the newly independent African states. The African Charter establishes a system or mechanism for the promotion and protection of human rights in Africa within the framework of the Organization of African Unity (now the African Union, AU). It was heavily influenced by the various human rights instruments of the United Nations and African traditions. The African Charter promotes a plethora of human rights such as civil and political, social economic and cultural, individual and collective

13 O. Fagbohun, 'Reappraising the Nigerian Constitution for Environmental Management', 1(1) *Ambrose Alli University Law Journal* (2002): 24–47.

14 R. T. Ako, 'The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India', 3 *National University of Juridical Sciences Law Review* (2010): 423–45.

15 G. Ogbodo, 'Environmental Protection in Nigeria: Two Decades after the Koko Incident', 15(1) *Annual Survey of International and Comparative Law* (2009): 1–18.

16 Ebobrah defines socio-cultural rights as 'the body of human rights that are essential for the promotion of conditions necessary for the advancement of economic, social and cultural well being of people'. S. Ebobrah, 'The Future of Economic, Social and Cultural Rights Litigation', 1 *CALS Review of Nigerian Law and Practice* (2007): 108–24, at 111. Furthermore, Nigeria has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and it 'has not entered a reservation, declaration or objection to any of the provisions of CESCR'. H. O. Yusuf, 'Oil on Troubled Waters: Multinational Corporations and Realising Human Rights in the Developing World, with Specific Reference to Nigeria', 8 *African Human Rights Law Journal* (2008): 79, at 81.

rights.[17] The African Charter is the first regional mechanism to integrate the different classes of human rights in a single document.[18] Article 1 of the African Charter enjoins member states to give effect to the rights, duties and freedoms enshrined therein.

Pursuant to that undertaking, Nigerian enacted the African Charter into its municipal legal system in 1983 via the instrumentality of the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act 1983. Article 24 of the African Charter recognises the right of all people to a general satisfactory environment favourable to their development. It can be contended that due to the domestication of the African Charter under Nigerian law, 'Nigeria has imbibed the substantive right to a healthy environment'[19] as provided for under article 24 of the African Charter.

Notwithstanding the incorporation of the African Charter into municipal law in Nigeria, some laws and regulations still restrict the access of victims of environmental injustice in Nigeria. The next section of this paper will briefly highlight some of the laws that accentuate environmental injustice in Nigeria.

A. Laws that restrict access to justice in the oil and gas sector in Nigeria

The various laws that regulate[20] the oil and gas industry in Nigeria include the Constitution of Nigeria 1999, Land Use Act,[21] Petroleum Act[22] and the Associated Gas Re-injection Act,[23] the various gas flaring laws[24], Environmental Impact Assessment Act (EIA) 1992, the Harmful Waste (Special Criminal Provisions) Act 1988 and the Oil in Navigable Waters Act 1968, amongst others.

A law that promotes public participation or access to environmental justice in the oil and gas sector of Nigeria is the Environmental Impact Assessment Act (EIAA) of 1992,[25] which serves as a guide on the procedures to be undertaken in considering the likely impacts of any project whether private or public on the environment. Under the EIAA, oil companies or multinational corporations (MNCs) (and other relevant project developers) shall not embark on projects

17 See M. Ssenyonjo (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights*, Martinus Nijhoff (2012) for an extensive analysis of the different categories of human rights encapsulated in the African Charter.

18 Ebobrah, *supra* note 16, at 114.

19 Ako, *supra* note 14, at 433.

20 For an in-depth analysis of Public Regulation of the Oil and Gas Sector in Nigeria see K. Ebeku, *Oil and the Niger Delta, People in International Law: Resource Rights, Environmental and Equity Issues*, Köppe (2006); and E. Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study*, University of Toronto Press (2009).

21 Now Land Use Act Cap 202, Laws of the Federation of Nigeria (LFN) 2004.

22 Petroleum Act, CAP P10, LFN 2004.

23 Associated Gas Re-injection Act, CAP 20, LFN 2004.

24 See A. Sinden, 'An Emerging Human Right to Security from Climate: The Case Against Oil Flaring in Nigeria', in W. C. G. Burns and H. M. Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches*, Cambridge University Press (2009), pp. 173–92; also available as Temple University Legal Studies Research Paper No. 2008-772008 (2008) at http://ssrn.com/abstract=1280934 (accessed 12 November 2013).

25 Environmental Impact Assessment Act, CAP E12, LFN 2004.

without considering the environmental impacts at the early stages except as permitted by law.[26]

Section 7 of the EIAA encourages public participation in environmental impact assessment in Nigeria. It further provides that before any project is undertaken, opportunities must be given to interested groups, governmental agencies, experts in relevant disciplines and members of the public to comment on the environmental impact assessment of such projects. However, these provisions on public participation in environmental impact assessment are readily breached by the oil companies operating in the Niger Delta. One example will suffice at this juncture. In *Oronto Douglas v Shell Petroleum Development Company Ltd*,[27] the court held that the plaintiff (a well-known environmental activist) lacked the standing to sue Shell with regards to Shell's failure to observe the provisions of the Environmental Impact Assessment Act. This was undermining the fact that the plaintiff was an indigene of that local community affected by the intended project.

To redress the inherent anomalies in the regulatory regime in the oil and gas sector of Nigeria, civil society or activist groups have risen to the challenge. For example, due to the systemic failure of the regulatory agencies to seek justice for victims of oil pollution, the individuals and communities have undertaken the burden to seek redress via civil action negotiated settlement.[28] However, seeking redress in Nigerian courts is not problem free. Some of the problems associated with litigation in Nigeria include limited resources of litigants, delays in the judicial process, the strict requirement of *locus standi*[29] proof, and the over-reliance on common law torts such as trespass, negligence and nuisance in suits by litigants[30] (in the absence of an effective framework on oil pollution control or litigation), amongst others. These factors have hindered access to justice, especially environmental justice in Nigeria.[31] Furthermore, oil MNCs institute

26 *Ibid.*, section 2(1)(4).

27 *Oronto Douglas v Shell Petroleum Development Company Ltd*, Suit No. FHC/L/CS/573/96 [Unreported].

28 E. Emeseh, 'The Niger Delta Crisis and the Question of Access to Justice', in C. I. Obi and S. A. Rustad (eds), *Oil and Insurgency in Niger Delta: Managing the Complex Politics of Petro-violence*, Zed Books (2011), pp. 55–70.

29 Under Nigerian Law, it is a mandatory requirement for claimants or plaintiffs to be embellished with *locus standi* (sufficient interest) as a pre-requisite to institute public interest suits in regards to environmental damage in the oil industry where direct wrong or harm to the plaintiff or litigant has not occurred. See *Senator Adesanya v The President of Nigeria*, 2 NCLR 258 (1981), where the Supreme Court held that 'standing will only be accorded to a plaintiff who shows that his civil rights have been or are in danger of being violated or adversely affected by the act complained of'.

30 For extensive analysis of the problems inherent in using common law torts to regulate the activities of companies operating in the oil and gas industry in Nigeria see J. Frynas, 'Legal Change in Africa: Evidence from Oil-related Litigation in Nigeria', 43(2) *Journal of African Law* (1999): 121–50; A. Ekpu, 'Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria', 24 *Denver Journal of International Law* (1995): 55–108.

31 See N. Okogbule, 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects', 3 *International Journal on Human Rights* (2005): 95–113.

frivolous objections or cases, at times in collusion with the federal government, thereby depriving the communities of justice via the judiciary.[32]

Furthermore, when litigants obtain favourable decisions against the State or oil MNCs, the decisions are either appealed or ignored outright. Here, the Nigerian government and Shell refused to abide by the decision of a federal High Court in the case of *Gbemre v Shell*,[33] declaring that gas flaring by oil MNCs is tantamount to an abuse of the right to a clean environment as enunciated in the African Charter in Nigeria. Furthermore, contrary to the recent United Nations Environment Programme (UNEP) environmental assessment report[34] (during a case instituted by an NGO in the ECOWAS Community Court of Justice against some oil MNCs operating in Nigeria), which established a nexus between oil and poverty in the Niger Delta, the Nigerian government averred that 'there is no direct nexus between oil and exploration and poverty in the Niger Delta'.[35] This position taken by the Nigerian government undermines the overwhelming evidence establishing the links between oil exploration and poverty in Niger Delta, and brings to the fore the relationship between oil MNCs and the State and the institutional disregard of the plight of the Niger Delta and its people.

The next section of the paper will dwell on the status of the African Charter in Nigeria and the controversies emanating from the domestication of the African Charter.

IV. STATUS OF THE AFRICAN CHARTER IN NIGERIA

Nigeria has ratified and domesticated the African Charter on Human and Peoples' Rights. Section 1 of the African Charter (Ratification and Enforcement) Act states that the African Charter is to be applied and given full recognition by relevant authorities in Nigeria.

32 See *Pere Ajunwa (on behalf of Ijaw Aborigines) v Shell Nigeria*, SC 290/2007, a Supreme Court of Nigeria judgment delivered on 16 December 2011. Here, a federal High Court held Shell was legally bound to pay the sum of US$1.5 billion that the Nigerian National Assembly ordered it to pay as compensation for damages arising from its activities and deposit the said amount in the custody of the Central Bank of Nigeria. Shell appealed and sought an unconditional stay of execution of the judgment pending the appeal. The Supreme Court held for Shell and remitted the case to the federal High Court for determination of the substantive suit. It can be argued that instead of Shell paying the compensatory sum to the plaintiffs, it continued to institute procedural objections and claims against the judgment of the federal High Court.

33 *Gbemre v Shell*, Suit No. FHC/B/CS/153/05 delivered on 14 November 2005, available at http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-decision.pdf (accessed 10 October 2013).

34 UNEP, *Environmental Assessment of Ogoniland Report* (2011), available at http://www.unep.org/nigeria/ (accessed 10 October 2013).

35 In papers filed on 10 March 2011 and signed by T. A. Gazali responding to the case instituted by the Socio-Economic Rights and Accountability Project (SERAP, which is a Nigerian NGO), at the ECOWAS Court of Justice in Abuja Nigeria. Available at http://sahara reporters.com / news - page / unep - report - nigerian - government-files-court-papers-ecowas-dispute-nexus-between-oil-and-po (accessed 10 October 2013).

Nigeria operates a dualist system wherein treaties are not applied domestically unless domesticated via the machinery of legislation.[36] This is by virtue of section 12(1) of the Nigerian Constitution 1999, which states that 'No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.' To date the African Charter (Ratification) Act is the only treaty that has been domesticated in Nigeria.[37] However, there are other approaches wherein international treaties are domesticated in Nigeria. One approach relates to treaties entered into by the British colonial administration and extended to Nigeria by virtue of the colonial authority,[38] for example the Warsaw Convention made applicable to Nigeria by virtue of the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953. Another approach for domesticating treaties into Nigeria is when provisions of treaties are used as templates for Nigerian statutes without the necessity of making obvious reference to the treaties,[39] for example the Carriage of Goods by Sea Act and the Child Rights Act enacted by some states in Nigeria.

The Nigerian Supreme Court had the opportunity to decide on the status of the African Charter in Nigeria in the case of *General Sani Abacha v Chief Gani Fawehinmi*.[40] The court held that the African Charter is part of Nigerian law and courts must enforce it. Thus, there is an obligation on Nigeria as a member of the African Union (then the OAU) to enforce its international obligations. Furthermore, the African Charter is superior to municipal legislation and below the constitution and whenever there is conflict between the African Charter and the constitution, the constitution will prevail.[41]

A major conundrum exists in Nigeria due to the non-justiciability of socio-economic rights in the Constitution: the question is, how can the provisions of the African Charter which promotes socio-economic rights (especially article 24 on the right to a healthy and clean environment) be enforced in Nigeria? This is especially relevant because section 20 of the Nigerian constitution, which seeks to promote and protect the environment is in chapter II of the constitution and therefore neither justiciable nor enforceable. This is a major hindrance to access to

36 See E. Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria', 51(2) *Journal of African Law* (2007): 249–84; A. Enabulele, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?', *African Journal of International and Comparative Law* (2009): 326–41.

37 C. Odinkalu, 'The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights', in V. Gauri and D. M. Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press (2008).

38 Enabulele, *supra* note 36, at 332.

39 *Ibid*.

40 *General Sani Abacha v Chief Gani Fawehinmi*, (2000) SC No. 45/1997.

41 The basis for this point in the judgment is that in Nigeria, the Constitution is the Supreme Law of the land by virtue of section 1(1). Also, section 1(3) of the constitution states that 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.'

environmental justice by victims, stakeholders or NGOs. Although the prevailing view is that chapter II of the constitution is non-justiciable, there are some writers who contend that this is not the case and that chapter II can be made justiciable.[42] It must be pointed out here that Nigerian courts have consistently held that socio-economic rights are not justiciable. For example, in *Archbishop Olubunmi Okogie and Others v The Attorney General of Lagos State*,[43] the Court of Appeal held that under section 13 of the constitution, it is the duty of the judiciary to conform and apply provisions of chapter II and it 'makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II and it is clear that section 13 has not made chapter II justiciable'.[44]

However, by virtue of item 60(a) of the Exclusive List of the constitution, only the National Assembly can enact laws to enforce and promote the socio-economic rights in the constitution.[45] This was the view of the Supreme Court in *A. G. Ondo State and A. G of Nigeria and Others*,[46] where the court held that the National Assembly is competent to enact laws on corruption by the creation of a national anti-corruption body to tackle the menace.

Furthermore, it can be argued that due to the influence of the African Charter on human rights jurisprudence in Nigeria, courts are becoming more activist by pronouncing on the justiciability of socio-economic rights without necessarily waiting for the National Assembly to enact laws to that effect. For example, in the case of *Odafe and Others v Attorney General of the Federation*,[47] the right of prisoners to medical care was held to be enforceable by the federal High Court in Nigeria. Here, Justice Nwodo held thus: 'The Charter entrenched the socio-economic rights of person[s]. The Court is enjoined to ensure the observation of these. A dispute concerning socio-economic rights such as the right to medical attention requires the Court to evaluate State policies and give judgment consistent with the Constitution.'[48] This decision is not binding on the higher courts of records in Nigeria; however, it opens up possibilities for an activist judiciary to interpret cases on the justiciability of socio-economic rights in Nigeria in a more liberal fashion.

The next part of the paper will focus on the impacts of NGOs in the environmental discourse in Nigeria

42 See Ebobrah, *supra* note 16; F. Falana, *Fundamental Rights Enforcement in Nigeria*, 2nd edn, Legaltext Publishing (2010); S. Ibe, 'Beyond Justiciability: Realising the Promise of Socio-economic Rights in Nigeria', 1 *African Human Rights Law Journal* (2007): 225.

43 *Archbishop Olubunmi Okogie and Others v The Attorney General of Lagos State*, (1981) 2NCLR 337, at 350.

44 *Ibid*.

45 Ebobrah, *supra* note 16.

46 *A. G. Ondo State and A. G of Nigeria and Others*, (2002) 9 NWLR (Pt 772) 222.

47 *Odafe and Others v Attorney General of the Federation*, (2004) AHRLR 205 at 211; (2005) CHR 309 at 323–4; also cited in Falana, *supra* note 42, p. 17.

48 *Ibid*.

V. NGOS AND ENVIRONMENTAL JUSTICE IN NIGERIA

NGOs play major roles in the environmental justice movement or cause in Nigeria. In Nigeria, environmental justice is seen as access to justice, and NGOs' activism or activities bring this premise to the fore. Professor Ikelegbe in his study of civil society in the Niger Delta states that civil groups 'have reconstructed the [Niger Delta] agitation into a broad, participatory, highly mobilised and coordinated struggle and redirected it into a struggle for self-determination, equity and civil and environmental rights'.[49]

NGOs have played major roles in the awakening of the international community to the plight of victims of environmental degradation in the Niger Delta region of Nigeria. This was especially evident in the Ogoni crisis, where an NGO, Movement for the Survival of the Ogoni People (MOSOP), (in coalition with both local and international NGOs) brought to the attention of the world the human rights violations and environmental degradation in that part of Nigeria. This action by MOSOP also had an effect on the major oil MNC (Shell) operating in Ogoniland. Shell revised its code of conduct to include human rights and now it (and other MNCs) regularly organises training and consultation with stakeholders in the oil and gas sector in Nigeria.[50]

Furthermore, NGOs' influence in Nigeria can be exerted by the use of litigations, publication, lobbying of the MNCs and the State, and public awareness campaigns, amongst other strategies[51]. NGOs have been very proactive in litigations especially in areas dealing with oil pollution, environmental degradation and human rights in Nigeria. The African Charter has been one such strategy NGOs have utilised in Nigeria. Two NGOs Social and Economic Rights Action Centre (SERAC) and the Center for Economic and Social Rights (CESR)/Nigeria) petitioned the African Commission on Human and Peoples' Rights in the case of the Ogoni people of the Niger Delta who were alleged to be victimised by the Nigerian government and oil multinational companies operating in the Niger Delta.[52] The African Commission held that the Nigerian government and its agencies (and not the MNCs) were in violation of the African Charter; however, recommendations by the African commission are non-binding on states.

NGOs in Nigeria have also relied on the West African regional court (Economic Community of West African States (ECOWAS) Court of Justice) to seek redress for victims of environmental injustices in Nigeria. Article 4(g) of the Revised ECOWAS Treaty of 1993 enjoins member states of the regional group to adhere to the 'recognition, promotion and protection of human rights

49 A. Ikelegbe, 'Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle', 39(3) *Journal of Modern African Studies* (2001): 437–69.

50 E. Oshionebo, 'Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria's Oil and Gas Industry', 15(1) *African Journal of International and Comparative Law* (2007): 107–29.

51 *Ibid*.

52 *Ibid*.

in accordance with the provisions of the Human and Peoples' Rights'. This obligation is also reflected in the preamble to the Revised Treaty as well as in article 56(2), where member states commit themselves to cooperate for the realisation of the mandates or aims of the African Charter.[53] In pursuance of these laudable objectives, NGOs have instituted cases at the ECOWAS Community Court of Justice.

ECOWAS is a regional group of fifteen states founded in 1975 and its mission is the attainment of regional and economic integration of the member states.[54] One of the major institutions of the ECOWAS is the Community Court of Justice (ECCJ). A major aim of the ECCJ is the promotion and protection of human and peoples' rights in accordance with the tenets of the African Charter on Human and Peoples' Rights.[55] By virtue of article 76(2) of the Revised ECOWAS Treaty, the decisions of the ECCJ are final and not subject to appeal. These decisions or judgments are binding on member states, the institutions of the Community and on individuals and corporate bodies who are subject to the jurisdiction of the ECCJ.[56] Parties that can institute actions at the ECCJ include member states, by Authority of Heads of State or Government.[57] By virtue of articles 4(g) and 9(4) of the Supplementary Protocol, the ECCJ can entertain claims by individuals and corporate bodies for relief for violation of their human rights.

In 2009, SERAC (Socio Economic Rights and Accountability Project), a Nigerian-based NGO, filed a claim in the ECCJ against the federal government of Nigeria, the Nigerian National Petroleum Corporation and some oil MNCs.[58] The Court held that it has jurisdiction to entertain the case brought by SERAP and that SERAP has the requisite *locus standi* to institute the claim; however, the ECCJ held that only the Nigerian government and its agency (NNPC) can be held accountable or liable for the extant human rights violations in the Niger Delta region of Nigeria and declined jurisdiction over the oil MNCs.[59] The major reason for this decision by the Court was that under international law, only states and individuals can be held accountable, while companies cannot. Also, the Court stated that it could not exercise jurisdiction over the oil MNCs because they are not parties to the ECOWAS treaties. This judgment of the ECCJ can be criticised on the basis that it declined jurisdiction over oil MNCs involved in the suit.

53 S. Ebobrah, 'Human Rights Realisation in the Africa Sub-regional Institutions', in Ssenyonjo, *supra* note 17, p. 287.

54 ECOWAS website, available at http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en (accessed 12 November 2013).

55 Article 4(g) of the Revised ECOWAS Treaty.

56 Article 15(4) of the Revised ECOWAS Treaty.

57 Article 76(2) of the Revised ECOWAS Treaty. See also ECOWAS Community Court of Justice, Protocol A/P.1/7/91 (adopted 6 July 1991, came into force 5 November 1996, amended by Supplementary Protocol A/SP.1/01/05 in 2005), article 9(1).

58 ECW/CCJ/APP/08/09. See 'Niger Delta: FG, NNPC Can Be Sued but not Shell, ELF, Chevron & Total, Rules the ECOWAS Court', at http://serap-nigeria.org/n-delta-fg-nnpc-can-be-sued-but-not-shell-elf-chevron-total-rules-ecowas-court/ (accessed 21 September 2012).

59 'Niger Delta', *ibid*.

A major development occurred in the ECCJ jurisprudence in December 2012 in the case of *SERAP v Federal Republic of Nigeria.*[60] This case originated from the complaint instigated by SERAP against the federal government of Nigeria and some oil MNCs[61] where the ECCJ held that it had no jurisdiction over the oil MNCs and struck out their names from the suit. Here, the federal government of Nigeria became the sole defendant in the suit. Thus, in *SERAP v Federal Republic of Nigeria*, the plaintiffs averred that federal government of Nigeria has been culpable for environmental degradation in the Niger Delta. It posited that:

> the government's obligation to protect the right to health requires it to investigate and monitor the possible health impacts of gas flaring and the failure of the government to take the concerns of the communities seriously and take steps to ensure independent investigation into the health impacts of gas flaring and ensure that the community has reliable information, is a breach of international standards.[62]

The core of the reliefs sought by the applicant (SERAP) was a declaration that the Nigerian government had violated the tenets of the African Charter (and other relevant international standards) and that the Niger Delta communities should have a right to a clean or generally satisfactory environment. The ECCJ held that the Nigerian government has violated articles 1 and 24 of the African Charter on Human and Peoples' Rights and ordered that the Nigerian government take effective measures within the shortest possible period to restore or remediate the environment of the Niger Delta.[63] The ECCJ further held that the Nigerian government must take steps to prevent the occurrence of damage to the environment in the Niger Delta and take measures to hold the architects of environmental damage responsible for their actions. The ECCJ posited that the Nigerian government is expected to comply and enforce this decision by virtue of article 15 of the Revised Treaty and article 24 of the ECCJ Supplementary Protocol.[64]

This decision of the ECCJ will serve as one strategy by which NGOs can promote and improve environmental justice in the Niger Delta region of Nigeria. In pursuance of this objective, SERAP in conjunction with Amnesty International has filed a freedom of information request to Nigerian government 'seeking information on the measures the government is taking to fully implement the

60 *SERAP v Federal Republic of Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, available at http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf (accessed 12 November 2013).

61 ECW/CCJ/APP/08/09, *supra* note 58.

62 *SERAP v Federal Republic of Nigeria*, *supra* note 60, at 4.

63 *Ibid.*, at 29.

64 *Ibid*., at 30.

judgment'[65] by the ECCJ. At the time of writing this article, however, the federal government of Nigeria is yet to respond to this request.

A major conundrum inherent in the ECCJ is the enforceability of its decisions in the member states. There are conflicting views on the enforceability of the ECCJ's rulings, including that decisions are advisory or persuasive,[66] enforceability depends on the legal structure or the mode of domesticating international treaties in the different member states,[67] that decisions are directly enforceable[68] or that they are not enforceable in the member states. Notwithstanding the conundrum involving the implementation or domestication of the ECCJ judgments in Nigeria, the recent decisions by the ECCJ have created opportunities for victims of environmental injustice or abuses in Nigeria to by-pass the extant justice machinery and attempt to obtain justice. For example, NGOs and individuals who are victims of environmental injustice in Nigeria can apply directly to the ECOWAS court for redress and orders against the Nigerian government.

Such litigations have added to a growing jurisprudence on protection of the environment and access to justice in Nigeria. This is also evident in human rights protection in Nigeria. Here, the courts have produced 'pro-human rights alterations and reformations'.[69] Thus, the Nigerian State has 'become more sensitive to the environmental and social responsibilities of oil companies'[70] and MNCs are expected to 'negotiate and reach memoranda of understanding with host communities, honour agreements, and be more responsive to [their] problems'.[71] Here, Nigerian courts have become pro-active in using the provisions of the African Charter to hold the government and oil MNCs culpable for environmental injustice (such as oil pollution and gas flaring, amongst others) in the Niger Delta region. At this juncture, a case will suffice to buttress this assertion. In the case of *Gbemre v Shell*,[72] the plaintiff (on behalf of himself and

65 SERAP, 'FOI: Amnesty International, SERAP Task FG over Implementation of ECOWAS Oil Pollution Judgment', available at http://serap-nigeria.org/foi-amnesty-international-serap-task-fg-over-implementation-of-ecowas-oil-pollution-judgment/ (accessed 10 October 2013). Furthermore, SERAP has posited that on the basis of article 77(1) of the Revised ECOWAS Treaty, the Authority of Heads of State and Government of ECOWAS can impose sanctions on the Nigerian government for the non-implementation of the aforementioned ECOWAS judgments. See http://serap-nigeria.org/fg-risks-regional-sanctions-over-continuing-failure-to-implement-ecowas-judgments-serap/ (accessed 10 October 2013).

66 *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission*, No. ECW/CCJ/APP/0808. In this case in 2009, the ECCJ held that children have a right to education in Nigeria and that the right to education is justiciable; however, the Nigerian government has refused to implement this decision.

67 A. Enabulele, 'Reflections on the ECOWAS Community Court Protocol and the Constitutions of the Member States', 12 *International Community Law Review* (2010): 111–38.

68 E. Nwauche, 'Enforcing ECOWAS Law in West African National Courts', 55(2) *Journal of African Law* (2011): 181–202.

69 O. C. Okafor, 'Modest Harvests: On the Significant (but Limited) Impact of Human Rights NGOs on Legislative and Executive Behaviour in Nigeria', 48(1) *Journal of African Law* (2004): 24.

70 *Ibid.*

71 Ikelegbe, *supra* note 49, at 460.

72 *Supra* note 33.

his community) filed a suit against Shell, the Attorney General and the Nigerian National Petroleum Corporation (NNPC) to end the practice of gas flaring. The plaintiff argued that the extant gas flaring law,[73] which permitted gas flaring subject to ministerial approval, contravene the plaintiff's right to a healthy and clean environment. The court held that the extant gas flaring law 'was inconsistent with the Applicant's right to life and/or dignity of human person' as enshrined in the Nigerian constitution and the African Charter[74]. The court further held that the Attorney General should fashion out a bill and send it to the National Assembly to amend the offending sections of the extant gas flaring law which permits gas flaring in Nigeria. This judgment has been criticised by some writers, however;[75] this was a decision of the federal High Court and it does not bind other higher courts (such as the Court of Appeal and Supreme Court) in the hierarchy of courts in Nigeria. Thus, the judgment might be overturned on appeal and it can be argued that it is on shaky ground because it is by no means law.[76] The federal government has declined to enforce the judgment and Shell has appealed.[77] NGOs have utilised the judgment as a basis for social activism and to apply pressure on the government, its agencies and oil MNCs operating in the Niger Delta region of Nigeria.

It can be argued that NGOs have tested the laws and broadened the limits of law, especially environmental justice in Nigeria and internationally. NGOs have played major roles in the aforementioned litigations. For example, in *Gbemre v Shell*,[78] involvement of NGOs such as Climate Justice Programme (CJP) and Environmental Rights Action (ERA)/Friends of the Earth Nigeria (FoEN) contributed to the success of the case.[79] Thus, it can be argued that without the financial backing and expertise of the NGOs involved in the *Gbemre case*, it would have been unlikely to succeed.[80]

More recently, an NGO, Friends of the Earth Netherlands, and some farmers from Nigeria filed a civil law suit against Shell in the Netherlands on the basis of years of oil pollution allegedly perpetuated by Shell in three villages in the

73 Associated Gas Re-injection Act, A25, 1 Laws of the Federation of Nigeria and the Associated Gas Re-injection Regulations.

74 *Supra* note 33 Oshionebo, at para. 3.

75 K. Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v. Shell* Revisited', 16(3) *Review of European Community and International Environmental Law* (2007): 312–20, at 319; R. T. Ako, 'Enforcing Environmental Rights under Nigeria's 1999 Constitution: The Localisation of Human Rights in the Niger Delta Region', in K. de Feyter (ed.), *The Local Relevance of Human Rights*, Cambridge University Press (2011); Ako, *supra* note 14, at 437; E. Egede, 'Human Rights and the Environment: Is there a Legally Enforceable Right to a Clean and Healthy Environment for the People of the Niger Delta under the Framework of the 1999 Constitution of Nigeria?', 19(1) *Sri Lanka Journal of International Law* (2007): 51–83, at 68.

76 Ebeku, *ibid*.

77 Ako, 'Enforcing Environmental Rights under Nigeria's 1999 Constitution', *supra* note 75, at 287–8.

78 Suit No. FHC/BC/135/05.

79 See Ako, *supra* note 75, at 287–8.

80 *Ibid*.

Niger Delta.[81]This case is unique for the following two reasons: it is the first time the headquarters of any European oil MNC has been compelled to appear in court for atrocities committed in developing countries;[82] also, it is the first time a Dutch oil company has been taken to the civil court in the Netherlands in respect of damage committed abroad.[83] The court absolved Shell of liability for oil compensation in four out of the five allegations and held its Nigerian subsidiary, Shell Petroleum Development Company (SPDC), culpable for the oil pollution in one of the communities in the Niger Delta region of Nigeria.[84] The court ordered Shell to pay compensation to the affected Nigerian farmer.[85] Thus, it can be argued that this is a partial victory for the fight for environmental justice in the Niger Delta region because Shell was exculpated from liability in the other pollution incidents in the case. Shell has been reported to be 'happy'[86] with the decision reached in this case. This case is a landmark and a precedent in the international plane in the fight against the excesses of oil MNCs in developing countries, and it might open up avenues for communities and people affected by the activities of oil MNCs to claim compensation for these activities in the Netherlands (and Europe).

The next part of the paper will focus on the impact of the African Charter on public interest litigation in Nigeria.

A. Fundamental Rights Enforcement Procedure Rules (FREP) 2009 as a mechanism of improved access to environmental justice in Nigeria

Another strategy used by NGOs in Nigeria is anchoring public interest litigation on the basis of the African Charter by relying on the recent Fundamental Rights Enforcement Procedure Rules (FREP) 2009. The FREP rules were made by the former Chief Justice of Nigeria (Justice Kutigi) in 1999 by virtue of the powers conferred on him by section 46(3) of the Constitution of Nigeria 1999. The new FREP rules replaced the former FREP rules of 1979, which were an obstacle to public interest litigation in Nigeria.[87] Some of the innovations in the 2009 FREP rules include preamble 3(d), which enjoins courts to improve access to justice in Nigeria for all categories of litigants, especially the poor, vulnerable, illiterate, unrepresented, uninformed and incarcerated. Also, preamble 3(b) of the FREP rules states that the courts should respect municipal, regional and international

81 For details of this case see BBC News, 'Nigeria Oil Spills: Shell Rejects Liability Claim', available at http://www.bbc.co.uk/news/world-africa-19905694 (accessed 12 November 2013); Friends of the Earth Netherlands, 'Dutch Legal Case against Shell', available at http://www.milieudefensie.nl/english/shell/news/11-october-dutch-legal-case-against-shell-legal (accessed 12 November 2013)

82 Friends of the Earth Netherlands, *ibid*.

83 BBC News, *supra* note 81.

84 BBC News, 'Shell Nigeria Case: Court Acquits Firm on Most Charges', available at http://www.bbc.co.uk/news/world-africa-21258653 (accessed 10 October 2013).

85 *Ibid*.

86 *Ibid.*

87 See A. Sanni, 'Fundamental Rights Enforcement Procedure Rules 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The Need for Far-reaching Reform', 11(2) *African Human Rights Law Journal* (2011): 511–30.

treaties or bills of rights of which the court is aware. Some of these treaties include the African Charter, African regional human rights jurisprudence, and the Universal Declaration of Human Rights and other instruments in the United Nations human rights systems. Order 1 of the FREP rules defines 'fundamental right' to mean any of the rights provided for in chapter IV of the Nigerian Constitution and in the African Charter. A major contribution of the FREP rules is in the area of *locus standi.* It is contended that the FREP rules have abolished the draconian *locus standi* rule in Nigeria,[88] which was elucidated upon in *Senator Adesanya v The President of Nigeria*[89] wherein the Supreme Court held that 'standing will only be accorded to a plaintiff who shows that his civil rights have been or are in danger of being violated or adversely affected by the act complained of'.[90] Preamble 3(e) of the FREP rules 2009 abolishes the *locus standi* rule in Nigeria and encourages public interest litigations from a diverse range of people and bodies. The FREP rules have revolutionised environmental justice in Nigeria by opening up frontiers or access to justice, thus aggrieved victims or NGOs and other stakeholders can utilise these rules in environmental issues.

VI. CONCLUSION

NGOs play an integral role in the environmental governance mechanism or environmental justice paradigm in Nigeria and regionally on the basis of the African Charter, which seeks to promote the right to a clean and healthy environment. In Nigeria, NGO participation in environmental governance prior to the domestication of the African Charter was abysmal; however, the domestication of the African Charter in Nigeria and regional (including sub-regional) adjudicatory mechanisms have improved access to environmental justice by NGOs, communities, individuals and other stakeholders. Thus NGOs will continue to play major roles in environmental protection and the access to justice paradigm in Nigeria. In 2008, the AU via a new Protocol[91] merged the African Court on Human and Peoples' Rights and the African Court of Justice into one court, the African Court of Justice and Human Rights.[92] Under the merged court, individuals do not have direct access to the courts. Here countries' declaration recognising the jurisdiction of the courts grants direct access to individuals and

88 Falana, *supra* note 42, p. 38. For an analysis of *locus standi* in Nigeria see E. A. Taiwo, 'Enforcement of Fundamental Rights and the Standing Rules under the Nigerian Constitution: A Need for a More Liberal Provision', 9 *African Human Rights Law Journal* (2009): 546–75, at 552–8.

89 *Senator Adesanya v The President of Nigeria*, (1981) 2 NCLR 258.

90 *Ibid*.

91 Protocol on the Statute of the African Court of Justice and Human Rights. Adopted at the Eleventh Ordinary Session of the Assembly, held in Sharm El-Sheikh, Egypt, 1 July 2008, available at http://www.african-court.org/en/images/documents/Court/Statute%20ACJHR/ACJHR_Protocol.pdf (accessed 12 November 2013).

92 See T. F. Yerima, 'Comparative Evaluation of the Challenges of African Regional Human Rights Court', 4(2) *Journal of Politics and Law* (2011): 120–7; M. Ssenyonjo, 'An Introduction to the Development of the African Regional Human Rights System: 30 Years after the Adoption of the African Charter on Human and Peoples' Rights', in Ssenyonjo, *supra* note 17, pp. 3–26.

NGOs in such countries to institute cases before it. Likewise, by virtue of article 9 of the Protocol to the African Court of Justice, the Protocol will come into force thirty days after the deposit of the instruments of ratification by fifteen countries. As of October 2012, only five countries (Benin, Burkina Faso, Congo, Libya and Mali) have ratified the protocol; Nigeria is yet to ratify it. Thus, the African Court of Justice and Human Rights is still in abeyance.

Furthermore, under the African Court on Human and Peoples' Rights, individuals do not have direct access to the court. Countries make declaration recognising the jurisdiction of the court and thereby granting direct access to individuals in such countries. Nigeria is yet to make such a declaration. This will be an obstacle to the access to environmental justice by interested stakeholders in Nigeria. However, the African Court on Human and Peoples Rights may receive complaints or applications from the African Commission, state parties to the protocol and African intergovernmental organisations.[93] In addition, NGOs with observer status before the African Commission and individuals from countries which have made declaration recognising the jurisdiction of the court can also file or institute cases directly before the court.[94]

The African Court of Justice and Human Rights being still in the moot stage and the African Court on Human and Peoples' Rights will be an obstacle to the access to environmental justice by interested individuals (especially from countries without a Declaration) who are victims of environmental injustice. As of March 2013, only seven countries have made the declaration (Burkina Faso, Ghana, Malawi, Mali, Rwanda, Côte d'Ivoire and Tanzania);[95] Nigeria is yet to make a declaration recognising the jurisdiction of the African Court on Human and Peoples' Rights, thereby restricting direct access to environmental justice by individuals in Nigeria.

93 'African Court in Brief', African Court on Human and Peoples' Rights, available at http://www.african-court.org/en/index.php/about-the-court/brief-history (accessed 10 October 2013). See also D. Olowu, 'The African Charter on Human and Peoples' Rights, Its Regional System, and the Role of Civil Society in the First Three Decades: Calibrating the "Paper Tiger"', 34(1) *Obiter* (2013): 29–48.

94 'African Court in Brief', *ibid.*

95 'African Court in Brief', *supra* note 93.