

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

As a member of OPEC,¹ Nigeria contributes over two million barrels of crude petroleum per day to the global oil market. With demand for oil expected to grow² despite recent efforts to develop alternative sources of energy,³ Nigeria's output will increase⁴ together with pollution from oil industry operations, unless radical steps are taken to stem the present tide.⁵ Although the Nigerian Government has set up a National Oil Spill Detection and Response Agency⁶ to

¹ The Organization of the Petroleum Exporting Countries (OPEC), formed on 14 September, 1960 in Baghdad by five founding members – Saudi Arabia, Venezuela, Iraq, Iran and Kuwait, later joined by 8 other member countries including Qatar (1961), Indonesia (1962), Libya (1962), United Arab Emirates (1967), Algeria (1969), Nigeria (1971), Ecuador (1973) and Gabon (1975). Ecuador and Gabon later withdrew in 1992 and 1994, respectively. Its members hold 77% of the world's proven oil reserves and account for over 41% of supply. See R. Sorkhabi, "The Road to OPEC 1960" online at <http://www.geoexpro.com/history/opect1960/>, (last accessed on 09/07/2011). See also D. L. Rousseau, "History of OPEC", online at <http://www.cnre.vt.edu/lsg/intro/oil.pdf>, (last accessed on 09/07/2011).

² See OPEC, *World Oil Outlook*, (OPEC Secretariat; Vienna, 2010), 7, on line at http://www.opec.org/opec_web/32.htm, (last accessed on 11/03/2011). The International Energy Agency (IEA) believes that global energy demand will increase by 47% by 2035. A. Froggatt, "Viewpoint: Fukushima makes case for renewable energy", BBC News Asia-Pacific, online at <http://www.bbc.co.uk/news>, (last accessed on 10/05/2011).

³ It is believed that renewable technologies could supply 80% of the world's energy needs by 2050, although growth will depend on having the right policies in place. R. Black, BBC Environment Correspondent, on-line at <http://www.bbc.co.uk/news>, (last accessed on 10/05/2011). See also Reports of the 11th Session of the IPCC Working Group III and 33rd Session of the IPCC, Abu Dhabi, UAE, 5-8 and 10 May, 2011, online at <http://www.ipcc.ch/>, (last accessed on 10/05/2011). With the recent earthquake in Japan that crippled the Fukushima Nuclear Plant, expansion of nuclear technology touted by most European countries such as Britain and German has suffered a setback. S. Cooke, "After Fukushima, Does Nuclear Power Have a Future?" on-line at <http://www.nytimes.com/2011/10/11/business/After-Fukushima-Does-Nuclear-Power-Have-a-Future.html>? (last accessed on 15/10/2011).

⁴ Nigeria is the third largest oil producer in Africa and the sixth in OPEC, with proven reserves of about 37.2 billion barrels at the end of 2010, equivalent to 42.4 years at current production level of 2.4 million barrels per day. The Nigerian government plans to expand its reserves to 40 billion barrels, with most of this produced from the Niger Delta. It also has proven natural gas reserves of about 5.29 trillion cubic metres. See BP Statistical Energy Survey of June, 2011, online at http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2011_pdf, (last accessed on 19/12/2011).

⁵ O.R. Ogru, "A Review of the Nigerian Petroleum Industry and the associated Environmental Problems", (2001) 21, *The Environmentalist*, 11-21.

⁶ Hereinafter "NOSDRA".

monitor and coordinate oil spills, its impact is yet to be felt (being a relatively young agency), but more importantly, its supervision by the Federal Ministry of Environment may affect the independence and efficiency expected of such an agency, which would be susceptible as with previous agencies, to political and other influences.⁷

The dynamics of Nigeria's oil industry, especially the dominant role played by the Department of Petroleum Resources (DPR) - the agency charged with regulation and enforcement - and the Nigerian National Petroleum Corporation (NNPC) - the agency through which the Federal Government of Nigeria participates in the oil industry - bring to the fore the inadequacies of the current framework for environmental protection in Nigeria. Equipment failures, old and poorly maintained pipelines, obsolete technology and failure to observe good oil-field practices are rife, all of which are evidence of poor or inadequate regulation.⁸ The result is frequent oil spills and emission of toxic pollutants, which are not only injurious to health and a threat to life, but also affect the economic well being of oil producing communities.⁹ Yet Government's attitude over the years has been a mixture of neglect, ambivalence and human rights abuses.

⁷ E. Hutchful, "Oil Companies and Environmental Pollution in Nigeria", in C. Ake, *The Political Economy of Nigeria*, (Longman; London, 1985), 120.

⁸ See the recent report by UNEP, *Environment Assessment of Ogoniland* (UNEP; Kenya, 2011), on-line at http://www.01_fwd_es_ch01_UNEP_OEA.pdf, (last visited on 8/08/2011), 140.

⁹ World Bank, *Defining an Environmental Development Strategy for the Niger Delta*, (World Bank; Washington DC, 1995); N. Ashton-Jones, *The Human Ecosystems of the Niger Delta: An ERA Handbook* 163-169 (1998); Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, (Human Rights Watch; Washington, 1999); UNEP, *Ibid*; E. Inoni, "The Effects of Oil spillage on Crop Yield and Farm income in Delta State, Nigeria", online at <http://www.hrcak.srce.hr/26793>. (Last visited on 09/07/2011).

If the victims of oil pollution choose to go to court, their causes of action¹⁰ are based mainly on the common law torts in negligence or the rule in *Rylands v. Fletcher*,¹¹ rarely on trespass to land or nuisance.¹² To establish liability under any of these causes of action, a claimant must discharge the burden of proof with respect to causation, foreseeability and damage.¹³ Where they succeed in doing so, the quantum of damages awarded by the court is usually inadequate to compensate for all the injuries suffered, as factors such as threat¹⁴ or actual loss of life, damage to health, diminution of economic, social and cultural well-being and damage to the natural environment are not adequately, if at all considered in assessing damages,¹⁵ nor is remediation of the polluted sites ordered as a matter of course.

¹⁰ ‘Causes of action’ as used in this thesis denote the methods for commencing private action in tort or a ‘public’ action against the Government or its officials. See generally L. Tortell, *Monetary Remedies for Breach of Human Rights: A Comparative Study*, (Hart Publishing; Oxford, 2006).

¹¹ Although in theory these four causes of action are open to victims, in practice suits are often limited to actions in negligence or the rule in *Rylands v Fletcher*.

¹² The reasons for these choices are discussed in Chapter III.

¹³ Damage is limited to physical damage, as injuries to the person could only be founded in negligence and not in nuisance. See C. Pugh and B. Criddle, “Environmental Claims and Personal Injury – An Overview”, on-line at http://www.oldsquare.co.uk/pdf_articles/3100108.pdf, (last accessed on 28/09/2011). The authors quoted the dictum by Lord Bingham of Cornhill in *Transco plc v Stockport Borough Council* (2003) 3 WLR, 1467, where he stated that: “The rule in *Rylands v Fletcher* is a sub-species of nuisance, which is itself a tort based on the interference by one occupier of land with the right in or enjoyment of land by another occupier of land as such. From this simple proposition two consequences at once flow. First, as very clearly decided by the House in *Read v J Lyons & Co Ltd* [1974] AC 156, no claim in nuisance or under the rule can arise if the events complained of take place wholly on the land of a single occupier. There must, in other words be an escape from one tenement to another. Second, the claim cannot include a claim for death or personal injury, since such a claim does not relate to any right in or enjoyment of land.” *ibid*, 9.

¹⁴ It is doubtful whether the common law court would award damages for threat to life, as ‘damages at common law are not normally recoverable for future suffering.’ See R.N.D. Hamilton, “Private Recourse for Environmental Harm – England’, in S.C. McCaffrey and R.E. Lutz, *Environmental Pollution and Individual Rights: An International Symposium*, (Kluwer Deventer, The Netherlands, 1978), 19-36, 24

¹⁵ We are not here concerned with the ‘right to a subsistence lifestyle’ or ‘the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual and psychological benefits in pristine natural surroundings’, as suggested in *Alaska Native Class v Exxon Corporation*, 104 F. 3rd 1196, 17 January, 1997, but damage to the means of livelihood, which occurs when oil spills pollute and damage fish ponds, rivers and farmlands and render them uncultivable for traditional fishing and farming communities, in addition to making the environment uninhabitable. See analysis of the above case in G. Handl, “Indigenous Peoples’ Subsistence Lifestyle as an Environmental Valuation Problem”, in M. Bowman and A. Boyle, *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation*, (Oxford University Press; Oxford, 2002), 85-110.

1.2 The Aim of the Study

The aim of this study is to proffer a human rights approach as a possible option open to victims of oil pollution in the Niger Delta, for seeking redress for injuries suffered. The specific human rights element being proposed is the ‘right to a clean environment’, which remedies have the potential of addressing some of the shortcomings in common law tort actions. But the question remains, why anyone would resort to human rights proceedings, which reliefs are mainly declaratory,¹⁶ unlike common law actions, which if successful, compensate the victims? The answer lies in the fact that while human rights actions may not be the panacea for eliminating all the oil pollution problems in the Niger Delta, its existence would expand the legal remedies¹⁷ available to victims and reduce the need for the people to take the laws into their own hands.¹⁸ Moreover, the remedies provided by a human rights approach are not as limited as may initially appear, and can go to the root of the problem rather than provide limited relief on specific claims. For instance, human rights remedies may include monetary awards, declarations, injunctions and order for remediation, among others. Furthermore, other advantages include the fact that claims based on human rights are less technical to prove, faster and cheaper to institute, and could be financed both by victims or third parties in a representative capacity,¹⁹ or in the

¹⁶ In *Ho v. Abubakar* (2011) 12 NWLR, 323, the Court of Appeal held that a declaratory order or remedy is a binding adjudication of the rights and status of litigants even though no consequential relief is awarded. *Ibid*, 326.

¹⁷ ‘Remedies’ may refer to (a) access to justice or the right to lodge a complaint before a judicial, administrative or other body vested with power to redress the harm or wrong done; or (b) measures taken to make good the harm or damage caused. Whereas the former relates to the availability and form of procedure, the latter is concerned with its outcome. References will be made to either throughout this study. See A. Buyse, “Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law” (2008) 68 *Heidelberg Journal of International Law*, 129-153.

¹⁸ E. Egede, ‘Human Rights and the Environment: Is there a Legally Enforceable Right of a Clean and Healthy Environment for the “Peoples” of the Niger Delta under the Framework of the 1999 Constitution of the Federal Republic of Nigeria?’, (2007) 19(1) *Sri Lanka Journal of International Law*, 51-83, 61.

¹⁹ This is not fashionable in Nigeria as in India for instance. In the case of *Barrister Ikechukwu Okpara & ors. (for themselves and as representing Rumuekpe, Eremah, Akala-Olu and Idamu Communities in Rivers State, Nigeria) v. SPDC, Total/FinaElf, NAOCL, Chevron/Texaco and Attorney General of the Federation*, unreported Federal High Court, Port Harcourt, Judgement delivered on 29 September, 2006, the judge held that a human rights case under section 33 (right to life) of the 1999 Constitution could not be brought in a representative capacity.

public interest.²⁰ Also, common law actions are currently limited to suits mainly against the IOCs operating in Nigeria,²¹ and in the absence of a well developed system of judicial review,²² human rights law will enable victims to sue the Government itself whose responsibility it is to protect its citizens from harm,²³ prevent third parties from bringing harm or infringing their rights, and where such infringement occurs to investigate and provide access for the ventilation of any grievances. Also human rights actions have established enforcement procedures and practice, which are not as complicated or as technical as common law actions and enable claimants to link local and regional with global environmental issues. Human rights litigation, although commenced by an individual could be used to address wider grievances, which may result in a change of attitude or the law.²⁴ More importantly, reliefs could be sought under a single cause of action instead of a multiplicity of actions as would be required under the common law.²⁵

²⁰ As now available under the new Fundamental Rights (Enforcement Procedure) Rules, 2009, details of which will be discussed in Chapter VI.

²¹ Even though the Nigerian Government holds between 55-80% equity shares in each of the IOCs operating in Nigeria under their various joint venture agreements, common law actions are mainly directed at the IOCs as Operators, rather than Government. Although the Nigerian Government could not previously be sued in tort, which doctrine was effectively abolished by section 6(6)(b) of the 1979 Constitution, the habit of shying away from suing Government has not changed. See *Fela Anikulapo-Kuti v Government of Nigeria* (1985) 2 NWLR (Pt. 6), 211.

²² In *Marcic v Thames Water Utilities Limited* (2003) 3 WLR 1603, an action in nuisance failed in the court of first instance, as claimant's remedy was held to lie in persuading the Director General for Water Services to bring enforcement action against the Defendants, but succeeded on human rights grounds under Article 8 (right to respect for private and family life). Pugh and Criddle said the decision must sound a note of caution as to the readiness with which the courts will allow human rights challenges to succeed in future. *Supra* note 13, 3.

²³ For instance, in *Gbemre v Shell & Ors.*, Federal High Court, Benin City, judgement delivered on 14 November, 2005, not only Shell was sued, but also the NNPC as joint venture partner, and the Attorney General, on behalf of the Nigerian Government.

²⁴ In *Brown v. Board of Education of Topeka* 347 US 483 (1954), an action brought by a person who was denied the right to education due to his colour, had a far-reaching effect on race relations in the United States and heralded the end of official discrimination on account of race. The US Supreme Court previously upheld a policy of racial discrimination in an earlier case of *Plessy v. Ferguson* 163 US 537 (1896).

²⁵ For instance, interference with interest in land maybe made in a nuisance claim, but not in negligence, and there can be no cause of action in negligence for distress, annoyance, inconveniences and physical symptoms short of personal injury, while a claim for injunction may require determination before others. See Pugh and Criddle, *supra* note 13, 2.

1.3 Research Questions

The central question explored in this research is whether there currently exists an appropriate legal framework in Nigeria to support human rights approaches, and specifically the right to a clean environment, as the basis of a cause of action to redress injuries suffered by victims of oil pollution in the Niger Delta. If so, what is the nature and scope of this right and the benefits of using this approach, and how can it be so appropriated for environmental concerns relating to pollution by the oil industry. In order to answer this broad question, the thesis explores further the following specific questions:

- (a) Whether this right is enforceable independently or through existing human rights under Nigerian law; and
- (b) If so, whether the remedies provided would be effective to redress the injuries suffered by victims or assist generally in ameliorating or curbing the menace of oil pollution in the Niger Delta.

1.4 Human Rights as a Cause of Action

The connection between environmental damage and human rights is apparent in everyday life, for instance, when the air is polluted by toxic fumes from oil industry pollution, or water becomes contaminated by wastes being pumped into it, adversely affecting the local population. Similarly, gas flaring, while contributing to climate change and destruction of bio-diversity and economic crops,²⁶ also affects other amenities, which have provided food and nourishment for

²⁶ See Friends of the Earth report on *Gas Flaring in Nigeria: A Human Rights, Environment and Economic Monstrosity*, (Friends of the Earth International; The Netherlands, 2005), online at http://www.foe.co.uk/resources/report/gas_flaring_nigeria.pdf, (last accessed on 15/12/2011.)

the local people for millennia.²⁷ The situation in the Niger Delta was captured most vividly by Hari Osofsky,²⁸ who painted the picture:

*Of a developing country with oil resources located beneath the ancestral lands of indigenous peoples. While the country has well-developed environmental regulations, enforcement of them is minimal. Oil companies take advantage of this lax enforcement to employ less expensive but environmentally unsound practices. They create open waste pits, flare huge quantities of natural gas, and abate spills slowly. Unsurprisingly, severe land pollution results – drinking water becomes unsafe, domesticated animals die, and community members experience a variety of health problems. Beyond these direct physical impacts, the environmental harms have a massive impact on local communities, who traditionally live off the land and regard it as sacred. Its destruction fundamentally undermines their culture and way of life.*²⁹

This imagery aptly describes the dilemma of the people of oil producing communities of the Niger Delta, and sets the context for this study.

While the environment sometimes seems far removed from man,³⁰ it is evident that human beings are part and parcel of the environment,³¹ and whenever and wherever the natural environment is harmed, those who depend on it for survival are inevitably harmed and their human rights affected.³² Yet the connection between human rights and environmental protection only became more apparent after the first international conference on the human environment held in Stockholm in 1972, the preamble of the Declaration, which is one of the outcomes of this summit proclaims that:

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual moral, social and spiritual

²⁷ J. Cassel, “Enforcing Environmental Human Rights: Selected Strategies of US NGOs”, (2007) 6(1), *Northwestern University Journal of International Human Rights*, 104.

²⁸ H.M. Osofsky, “Learning from Environmental Justice: A New Model for International Environmental Rights”, (2005) 24 *Stanford Environmental Law Journal*, 71.

²⁹ *Ibid*, 73.

³⁰ A. Leopold, “The Fusion of Lines of Thought” (1935?), in G. Adelson, *et al*, (eds.), *Environment: An Interdisciplinary Anthology*, (Yale University Press; London, 2008), 13.

³¹ See K. Morrow, “Ontological vulnerability: a Viable Alternative lens through which to view Human/Environmental Relations”, (2011) 2(1) *Journal of Human Rights and the Environment*, 1-4, 1.

³² Cassel, *supra* note 27, 2.

*growth... Both aspects of man's environment, the natural and the man-made are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.*³³

Therefore, environmental protection may be considered a pre-condition to the enjoyment of internationally guaranteed human rights, such as the rights to life or health. Thus a rights-based approach to environmental protection may offer benefits in law as a foundation for public policies that conserve and protect the resource base and ecological processes on which all life depends.³⁴

To establish this link, three formulations of environmental rights have been advanced: firstly, as a new, independent and separate human right; secondly, as encompassed within previously established human rights; and thirdly, as rights inhering in the environment itself regardless of its effects on people.³⁵ Examples of the first formulation may be found in Article 11 of the San Salvador Protocol to the American Convention on Human Rights, which states that: “Everyone shall have the right to live in a healthy environment and to have access to basic public services”,³⁶ and Article 24 of the African Charter on Human and Peoples’ Rights, to the effect that: “All peoples shall have the right to a general satisfactory environment favourable to their

³³ Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June, 1972, UN Doc. A/CONF.48/14/Rev.1, 3, quoted by D. Shelton, *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration*, High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, co-organized by UNEP and OHCHR, Nairobi, 30 November – 1 December, 2009, 2, on-line at <http://www.unep.org/environmentalgovernance/LinkClick.aspx?> (last visited on 29/09/2011).

³⁴ Cassel, Id.

³⁵ Cassel, supra note 27, 2.

³⁶ Organization of American States, Additional Protocol to the American Convention On Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, 17 November, 1988, OASTS No.69, online at <http://www.cidh.org/Basicos/basic5.htm>.

development.”³⁷ Similar provisions could be found in one form or another in more than 100 national constitutions throughout the world.³⁸

The second formulation of environmental rights, which conceives of such rights as embedded in existing human rights - such as the rights to life, health, property, cultural life, privacy and family home³⁹ - has received recognition in regional human rights⁴⁰ and municipal courts, in countries such as India,⁴¹ South Africa,⁴² Argentina,⁴³ Colombia,⁴⁴ Costa Rica,⁴⁵ Nigeria,⁴⁶ and some States in the United States.⁴⁷ The third formulation, which conceives of environmental rights as inhering in the environment itself to the exclusion of human beings,⁴⁸ would rely on humans, as ‘stewards of the environment’ to enforce them. This “ecocentric” formulation is still quite tenuous, and other than in the broader sense of a State’s duty to conserve and protect the

³⁷ Art.24 of The African Charter on Human and Peoples’ Rights, adopted in Banjul on 27 June, 1981, entered into force on 21 October, 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *ILM* 58 (1982), [hereinafter African Charter].

³⁸ Earthjustice, *Environmental Rights Report: Human Rights and the Environment*, Materials for the 61st Session of the UN Commission on Human Rights, Geneva, March 14-April 22, 2005”, online at http://www.earthjustice.org/library/references/2005_ENVIRONMENTAL_RIGHTS_REPORTrev.pdf, (last accessed on 20/12/2011).

³⁹ D. Shelton, “Human Rights and the Environment: What Specific Environmental Rights have been Recognized? (2006) 35 *Denver Journal of International Law and Policy*, 129.

⁴⁰ See the *Yanomami Case*, Resolution No. 12/85, Case No. 7615 (Brazil), 5 March 1985, printed in Annual Report of the IACHR 1984-85, OEA/Ser.L/V/11.66, doc. 10 rev.1, 1 October, 1985, 24, available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.thm>; *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/11.122, doc 5, rev.1 (2005) ; *The Ogoni Case*, Communication No. 155/96, African Commission on Human and Peoples Rights, Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13-27 October, 2001.

⁴¹ *M.C. Mehta v. Union of India & Ors*, JT 1996, 631.

⁴² *Fuel Retailers Association of Southern Africa v. Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*, Case No. CCT 67/06; ILDC 783 (ZA 2007)

⁴³ *Irazu Margarita v. Copetro S.A.*, Camara Civil y Commercial de la Plata, Ruling of 10 May, 1993, available at <http://www.eldial.com>.

⁴⁴ *Fundepublico v. Mayor of Bugalagrande and Others*, Juzgado Primero superior, Interlocutorio #032, Tulua, 19 December, 1991.

⁴⁵ *Presidente de la sociedad Marlene S.A. v. Municipalidad de Tibas*, Sala Constitucional de la corte Supreme de justicia. Decision No. 6918/94 of 25 November, 1994.

⁴⁶ *Gbemre v. Shell* (2005), unreported Federal High Court, Benin City, judgement of 14 November, 2005.

⁴⁷ *Montana Environmental Information Center et al v. Department of Environmental Quality*, 296 Mont. 207, 988 P.2d 1236 (1999).

⁴⁸ See Cassel, *supra* note 27, 106.

environment, it has no precedent either in customary international or common law.⁴⁹ Therefore, the thesis would not discuss specifically this third formulation as an independent right.

Embracing aspects of the first two formulations, is the “right to a clean environment”,⁵⁰ which is chosen as the title of this thesis and specifically engages this study.

1.5 Justification:

A number of studies have been carried out and papers written about the oil pollution crisis in the Niger Delta, both by environmentalists and human rights activists.⁵¹ Legal actions have also been instituted against some of the IOCs operating in Nigeria, especially in the United States.⁵²

⁴⁹ Id. But Hancock argued forcefully for a reconstruction of human rights discourse to accommodate a naturalist ethic and the extension of rights to the natural world. See S. Hancock, “A Right to a Decent Environment: Are Human Rights Sustainable?” online at <http://www.slideshare.net/sebhancock/a-right-to-a-decent-environment-are-human-rights-sustainable>, (last accessed on 25/12/2011). See also, C. Stone, *Should Trees Have Standing? Law, Morality and the Environment*, 3rd Ed. (Oxford University Press; London, 2010).

⁵⁰ Or similar phraseology such as “right to environment”, “right to a clean and healthy environment”, “right to satisfactory environment”, “right to a decent environment”.

⁵¹ Amnesty International (AI) has published a number of Reports on Nigeria, including: *Nigeria: Time for Justice and Accountability*, AFR/44/14/2000; *Human Rights and Oil Delta*, AFR/44/23/2004; *Nigeria: Are Human Rights in the Pipeline?* AFR/020/2004; *Shell Petroleum Development Company Limited and the Community of Rukpokwu, Rivers State*, AFR/44/032/2004; *Claiming Rights and Resources, Oil and Violence in Nigeria*, AFR/20/2005; *Nigeria: Ten Years On, Injustice and Violence Haunt the Oil Delta*, AFR/44/022/2005; *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*, AFR 44/017/2009; *Annual Report Entries on Nigeria: 1968-2010*, AFR/44/018/2010, all of which are available online at <http://www.amnesty.org.uk>; Civil Liberties Organization, *Ogoni: Trials and Travails* (Civil Liberties Organization; Lagos, 1996); Constitutional Rights Project, *Land, Oil and Human Rights in Nigeria’s Delta Region*, (CRP; Lagos, 1999), Human Rights Watch, *The Niger Delta: No Democratic Dividend*, (Human Rights Watch/Africa; Washington DC, 2002); Environmental Resource Managers, *Niger Delta Survey Final Report: Environmental and Socio-Economic Characteristics*, Phase One, Volume I, (Niger Delta Environmental Survey; Lagos, 1997); Environmental Rights Action/Friends of the Earth Nigeria, *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity*, (ERA/FOE; The Netherlands, 2005); Environmental Rights Action (Friends of the Earth, Nigeria), *Lessons not Learned: The Other Shell Report 2004* (ERA/FOE, 2005); International Crisis Group, *Fuelling the Niger Delta Crisis: Crisis Group Africa Report No. 118*, 28 September, 2006, available online at <http://www.crisisgroup.org>; UNEP, *Environment Assessment of Ogoniland* (UNEP; Kenya, 2011), on-line at <http://www.01 fwd es ch01 UNEP OEA.pdf>, (last visited on 8/08/2011). While these reports provide undisputed evidence of the scale of the problem, successive Nigerian governments over the years, have paid scant attention to them, save the last report. The fact that the Federal Government is currently led by an indigene of the Niger Delta is not an insignificant factor to its commitment to look into this report.

⁵² Including *Wiwa v. Royal Dutch Petroleum*, 226 F.3rd 88 (2nd Cir. 2000), 532 US 941 (2001); 96 Cir 8386 (KMW) 2002 US Dist. Court, NY. This matter has now been settled for \$15.5 million, to include compensation to the 10 Plaintiffs and establishment of a Trust to benefit the Ogoni people and cover their legal costs. See “Shell Pays Out

Another case was brought against the Nigerian Government, this time for violating its obligations under the African Charter.⁵³ Other studies⁵⁴ include those by Frynas,⁵⁵ who examined common law tort actions; Belgore,⁵⁶ who considered access to English and American courts as a way by which victims of oil pollution in the Nigerian Delta may seek compensation for injuries suffered;⁵⁷ and Emeseh,⁵⁸ who examined corporate criminal liability as a viable option open to regulators. Scholarly articles on environmental rights with reference to the Niger Delta issue have also been written.⁵⁹ While these studies provide invaluable insight to the oil pollution problems in the Niger Delta, and whether or not environmental rights are suitable for addressing them, they did not consider in any detail how the right to a ‘clean’, ‘healthy’ or

Over Human Rights Violations”, on-line at <http://www.stwr.or/multinationalcorporations/shell-pays-out-over-human-rights-violations>, (last visited 13/07/2011) and *Bowoto v. Chevron*, recently dismissed by the US Court, online at <http://www.csrandthelaw.com/2010/09/articles/litigation/bowoto-v-chevron-appellate-court-upholds-jury-verdict/>, (last visited on 26/09/2011).

⁵³ Reported by D. Shelton, ‘Decision Regarding Communication 155/96 (Social and Economic Rights Action Centre/Centre for Economic and Social Rights v. Nigeria)’, (2002) 96(4) *The American Journal of International Law*, 937-942.

⁵⁴ M.S. Steyn, ‘*Oil Politics in Ecuador and Nigeria: A Perspective from Environmental History on the Struggles between Ethnic Minority Groups, Multinational Oil Companies and National Governments*’, PhD Thesis (University of The Free State Bloemfontein; South Africa, 2003); M. Kall, ‘*Oil-Exploitation in Nigeria – Procedures Addressing Human Rights Abuses*’, LLM Thesis, (University of Lund, Sweden; 2003).

⁵⁵ J.G. Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities*, (LITVERLAG: Hamburg, 2000)

⁵⁶ Y. Belgore, *Problems with Oil Pollution Injury Litigation in the Nigerian Legal System: Can Nigerian Litigants Gain Access to Courts in England and the USA?*, PhD thesis (University of Dundee; Scotland, 2003).

⁵⁷ It was recently that Shell admitted liability for two massive oil spills in Bodo, Ogoni and could be forced to pay up to \$410 million in damages. See A. Ma’anit, ‘Oil Spill Exposes Shell’s ticking timebomb’, *The Guardian Newspaper*, Wednesday 17 August, 2011, online at <http://www.guardian.co.uk/commentariesfree/2011/aug/17/oil-spill-shell-timebomb>, (last visited on 6/09/2011).

⁵⁸ E. Emeseh, *Regulatory and Institutional Framework for Enforcing Criminal Liability for Environmental Damage: A Study of the Oil Industry in Nigeria*, PhD Thesis (University of Dundee; Scotland, 2005)

⁵⁹ Including: R. Ako, ‘The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India’, (2010) *NUJS Law Review*, 423; R. Ako, ‘Enforcing Environmental Rights under Nigeria’s 1999 Constitution: The Localization of Human Rights in the Niger Delta Region’ in Koen de Feyter *et al.*, (eds.) *The Local Relevance of Human Rights*, (Cambridge University Press, Cambridge, 2011); H. M. Osofsky, ‘Climate Change and Environmental Justice, Reflections on Litigation over Oil extraction and Rights Violations in Nigeria’, (2010) 1(2) *Journal of Human Rights and Environment*, 189-210; K. Ebeku, ‘The Right to a Satisfactory Environment and the African Commission’, (2003) 3(1) *African Human Rights Law Journal*, 149-166; E.P. Amechi, ‘Enhancing Environmental Protection and Socio-Economic Development in Africa: A fresh look at the Right to a General Satisfactory Environment under the African Charter on Human and Peoples Right’, (2009) 5(1) *Law, Environment and Development Journal*, 58; E.P. Amechi, ‘The Need for a Holistic Approach to the Protection of the Environment and Realization of the Right to Environment’, (2009) 5(2) *Law, Environment and Development Journal*, 383.

‘satisfactory’ environment could be used as a cause of action nor delineate the parameters through which human rights remedies may assist in ameliorating or curbing the menace of oil pollution in the area. Although Amechi,⁶⁰ specifically considered the ‘right to environment’ in his study, this was based on how the Millennium Development Goals could be used to realize this right in Africa. Therefore, this study provides a broad perspective to the right to a clean environment as well as the parameters for its enforceability under Nigerian law. As legal rules are normative in character,⁶¹ this research also evaluates the effectiveness of current regulation, with a view to affecting future changes either to the regulatory framework or in the manner of its administration.⁶²

1.6 Methodology

Babbie and Mouton define a research design as a plan or structured framework of how one intends to conduct a research, solve a research problem or answer a research question, while methodology refers to the methods, techniques and procedures employed in the process of implementing the research plan or design.⁶³ This study adopts a qualitative approach for appraising the regulatory and institutional structures of Nigeria’s oil industry, through analysis and legal deductive reasoning, based on information from primary sources, previous empirical studies and other secondary sources. Abundant literature exists on the incidents, causes and effect of pollution in the Niger Delta exists, including work carried out by organizations such as UNEP, Amnesty International and Human Rights Watch over the years. These works are relied

⁶⁰ E.P. Amechi, *The Millennium Development Goals and National and International Policy Reform: Realising the Right to a Healthy Environment in Africa*, PhD Thesis (University of the Witwatersrand; Johannesburg, 2009).

⁶¹ H. Kelsen (1967) in M. Knight (trans.) *The Pure Theory of Law*, (University of California Press; Berkeley, 1967), quoted by P. Chynoweth, “The Epistemology of Legal Scholarship”, in A. Knight and L. Ruddock, (eds.) *Advanced Research Methods in the Built Environment*, (Wiley-Blackwell; Oxford, 2008), 28-37.

⁶² *Ibid*, 32

⁶³ E. Babbie and J. Mouton, *The Practice of Social Research* (Oxford University Press; Oxford, 2001).

on for providing information on current state of affairs in the area, especially as Government and other official sources are not very reliable. Also, a number of academic and other research have been carried out, which provide data on the oil pollution problems there, whose conclusions are validated by recent studies by UNEP on the incidents of pollution, causes and impact on the people and the natural environment. As a result, the researcher did not carry out any field work, as the data from these works and academic research are authoritative enough to be relied on, as any other research approach adopted, would not affect the conclusions reached.

Regulatory failures are identified as a major contributor, coupled with limitations inherent in the legal framework by which victims of pollution may seek to redress the injuries suffered. This study therefore, examines and analyses the current common law methods of seeking redress, and finds that although the outcome have been favourable for a few claimants, the majority of those who have suffered damage are not recompensed while pollution continues. While military and political struggles appear to have made little impact on the problems, there appears to be very few options open to the victims within the law for addressing these problems. This study therefore, proffers a human rights approach, which appears to have made considerable impact in mitigating the incidents of environmental degradation in India.⁶⁴ Although India is not specifically plagued by oil pollution as in Nigeria, but is a federal state which has experienced pollution on a large scale in other areas, and whose courts have been very active in using the human rights approach to address the environmental problems there. India is also a federal state

⁶⁴ See L. Rasjamani, 'The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?' (2007) 16(3), *RECIEL*, 274; A. Desai, *et al*, 'Public Interest Litigation: Potential and Problems', in B. N. Kirpal, *et al* (eds.) *Supreme but not Infallible – Essays in Honour of the Supreme Court of India*, (Oxford University Press; New Delhi, 2000), 159.

with the same constitutional provisions as Nigeria, including the Directive Principles of State Policy which influenced the inclusion of similar provision in the Nigerian constitution. These Directive Principles provide for a duty on Government to protect and improve the environment.

References are also made to other jurisdictions such as the European Union, the Inter-American and African regional human rights systems as well as other national legal systems which have utilized the human rights approach to address environmental problems. The result is that the human rights approach appears less technical, perhaps cheaper and faster, which makes it accessible to a larger number of victims rather than the few who can afford to sue under current mechanisms and do so successfully, and which remedies inure not only to them, (thereby leaving the majority without any remedy), but to the community at large.

This research is also exploratory. As Babbie and Mouton also pointed out, exploratory research is conducted either to “explore a topic or to provide a basic familiarity with that topic,” or where a researcher examines a new interest in a topic, or the subject matter itself is relatively new, or appropriate for more persistent phenomena.⁶⁵ This research meets all the attributes of an exploratory research. While the researcher is familiar with the topic, which is not new,⁶⁶ the phenomenon of oil pollution in the Niger Delta has persisted (and in the last few years, resistance has assumed a more militant stance),⁶⁷ indicating that existing common law remedies have failed

⁶⁵ Babbie and Mouton, *supra* note 63, 80.

⁶⁶ The researcher had written an article on this topic and published in 1997, see P. Okonmah, “Right to a Clean Environment: A Case for People of the Oil Producing Communities of the Nigerian Delta”, (1997) 41(1), *Journal of African Law*, 43.

⁶⁷ C. Obi and S.A. Rustad, (eds.), *Oil and Insurgency in the Niger Delta: Managing the Complex Politics of Petro-violence*, (Zed Books; London, 2011); E.E. Courson, *The Burden of Oil: Social Deprivation and Political Militancy in Gbaramatu Clan, Warri South West LGA, Delta State, Nigeria*, 2007, online at <http://www.oldweb.geog.berkeley.edu/ProjectsResources/ND%20Website/NigerDelta/WP/15-Courson.pdf>; (last accessed on 19/10/2011).

over the years to minimize or deter polluters. This development renewed the researcher's interest in the topic.

1.7 Limitation

Discussions will focus mainly on pollution from onshore⁶⁸ rather than off-shore sources,⁶⁹ although both are prevalent in the Niger Delta and may not be easily distinguishable. The reason is that onshore pollution is immediately visible and has direct effect on the people and their communities hence this study takes an anthropogenic stance.⁷⁰ While appreciating the effect of pollution on the natural environment, the study will not discuss or ascribe any rights to trees or inanimate objects.⁷¹ Also, this thesis is not a study on human rights per se, but on how human rights law (in this case, the right to a clean environment) could be used as alternative mechanism for redressing injuries suffered by victims of oil pollution. Therefore, discussions on human rights generally or the right to a clean environment in particular, is not intended to engage in a theoretical debate on human rights, or the desirability or otherwise of this right,⁷² but on whether

⁶⁸ On-shore as used here denotes pollution on land and in shallow waters as against deep-seas.

⁶⁹ Off-shore as used here refers to pollution in the deep-seas, as happened in the Funiwa-5 blow-out from a Texaco oil platform in 1980. See P.C. Nwilo and O. T. Badejo, "Impacts and Management of Oil Spill Pollution along the Nigerian Coastal Areas", on-line at http://www.fig.net/pub/figpub/pub36/chapters/chapter_8_pdf, (last accessed on 16/08/2011). Also S.O. Aghalino and B. Eyinla, "Oil Exploitation and Marine Pollution: Evidence from the Niger Delta, Nigeria", (2009) 28(3) *Journal of Human Ecology*, 177-182.

⁷⁰ The philosophy of anthropocentrism regards human beings as the centre of the universe and the source of all value, while ecocentrism shifts the centre of human thought from humans to the network of interrelations between humans and nature. See L.H. Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Martinus Nijhoff Publishers; Leiden, 2011), 25-29.

⁷¹ Bowman noted that reparation for damage to species and ecosystems remain a neglected issue, and suggested that legal principles and procedures which recognize and evaluate not only the harm to human interests from the diminution of biological diversity, but also relate to the intrinsic value of elements of the natural world. See M. Bowman "Biodiversity, Intrinsic Value and the Definition and Valuation of Environmental Harm" in M. Bowman and A. Boyle *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation*, (Oxford University Press; Oxford, 2002), 42-61.

⁷² Freeland stated that "while there remains some debate as to the precise legal scope of current and emerging notions of "environmental human rights", there is no doubting the strong relationship between human rights and the environment'. See S. Freeland "Human Rights, the Environment and Conflict: Addressing Crimes against the Environment", (2005) 2, *SUR-International Journal on Human Rights*, 113, quoted by F. Oduor, "Developing

it is recognized under Nigerian law and how it could be used as an option open to victims for addressing the oil pollution problems in the Niger Delta.

While the thesis is intended for submission by 31 December, 2011, discussions are limited to the law up to 30 September, 2011, although references may in some instances be made to events occurring after that date.

1.8 Thesis Structure

The thesis is undertaken in seven chapters, commencing with this chapter, which is a general introduction to the thesis. Chapter Two discusses the historical and regulatory framework of Nigeria's oil industry from the time of British colonial rule, to the establishment by an indigenous Nigerian Government, of the NNPC and DPR - two agencies through which it participates and regulates the oil industry, respectively. The chapter will show that the current regulatory framework and the challenges faced by these agencies have historical antecedence, which in part are responsible for the oil pollution crisis in the Niger Delta, and why it is considered that human rights rather than common law remedies are more appropriate for addressing them. The Petroleum Industry Bill currently before the National Assembly, intended by Government to address some of these challenges (by bringing all the disparate laws and regulations in the industry under one legal umbrella), will be examined to highlight what changes (if any) it will make on the problems of pollution in the Niger Delta.

Countries, Environmental Challenges, Politics and Human Rights: Another Conundrum in the Quest to Deconstruct the 'Right to Poverty'", (2010) online at <http://www.ssrn.com/abstract=1674231>, (last accessed on 29/09/2011).

Chapter Three will discuss the current methods of seeking redress for injuries suffered as a result of oil pollution under the common law torts, of trespass to land, negligence, nuisance, and the rule in *Rylands v. Fletcher*. The aim is to highlight the limitations of these common law actions, which in over 50 years of use, have failed to reduce the incidents or impact of pollution, which instead has increased exponentially.⁷³ This exposes the ineffectiveness of common law actions as a tool for addressing these issues, thus justifying an alternative mechanism, based on human rights law.

Chapter Four addresses the question whether human rights law generally and the right to a clean environment, in particular, is appropriate for redressing the oil pollution injuries in the Niger Delta. Although these discussions will commence with the conceptual framework of human rights, the aim is not to undertake a theoretical treatment of the subject or engage in the debate about the international status of the right to a clean environment, but to highlight its recognition both in international, regional and municipal (legal) instruments as well as judicial decisions, and to explore how it could be deployed under Nigerian law to address the oil pollution problems in the Niger Delta.

Chapter Five, which discusses the right to a clean environment under Nigerian law, is divided into two Parts. Part I, which is divided into three sections, examines in the first section the provisions of Section 20 of Nigeria's Constitution, 1999⁷⁴ which only provides for a duty on the government to protect citizens against pollution of the air, water and the natural environment. In

⁷³ L. Atsegbua, *et al*, *Environmental Law in Nigeria: Theory and Practice*, (Ababa Press Ltd.; Lagos, 2003), 139, where the authors specifically stated that these torts have not been of much help to victims of oil pollution.

⁷⁴ In the hierarchy of legal norms, the Constitution is at the apex, and it is important to examine the constitutional provisions before looking at other laws. See H. Schaffer, *et al*, (eds.) *Quantitative Analyses of Law: A Comparative Empirical Study*, (Akademiai Kiado; Budapest, 1990), 356.

the second section, Article 24 of the African Charter on Human and Peoples' Right, which provides for this right and now incorporated into Nigerian law, is discussed, while the third section examines some of the civil and political rights - such as the right to life, health, dignity of the human person, property, home and family life – implicated by a breach of the right to a clean environment and how they may be interpreted robustly to encompass this right. And in Part II, the procedural aspect of the right to a clean environment is discussed, including such rights as information, participation and access to justice, which are the gateways through which the substantive right may be enforced.

Chapter Six discusses the enforcement of the right to a clean environment under Nigerian law, highlighting some of the challenges or factors which impair access to court (and justice), and examining the opportunities provided by the new Fundamental Rights (Enforcement Procedure) Rules, 2009, which contains more liberal provisions than its predecessor, for the enforcement of this right.

In Chapter Seven, findings from the study and conclusions reached will be summarized, and recommendations made.

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