

CHAPTER FOUR

THE RIGHT TO A CLEAN ENVIRONMENT

- A CONCEPTUAL FRAMEWORK

4.1 Introduction

In the previous chapter the current methods for seeking redress for injuries suffered as a result of oil pollution in the Niger Delta was discussed, and shown to have a number of limitations, and the remedies provided are usually insufficient or inadequate to assuage all the injuries suffered by victims. The question is whether a human rights approach could be considered as an option open to victims for addressing the environmental problems there, not least because it may be faster and cheaper to institute, but also obviate the formidable burden of proof and technicalities associated with common law actions? Human rights remedies may include monetary awards (the principal remedies provided by the common law), as well as other consequential reliefs, such as injunctions, declarations and an order for remediation, among others. It is also suggested that human rights approach may enable victims sue the Government whose primary responsibility it is to protect its citizens and the environment against harm, as well as prevent others from doing so. The right to a clean environment is proposed as the appropriate human rights element to deploy for this purpose.

This chapter discusses the existence and recognition of the right to a clean environment both in international, regional and national human rights instruments, to determine whether it is also recognized and could work in Nigeria. To further these discussions, this chapter is divided into

two broad sections and subsections. Section 1 commences with an overview of the concept of human rights generally. As human rights evolved through and in response to political and socio-economic events or developments, the discussions will progress with the evolution of human rights in a historical context, demarcated into ‘generations’ in Section 2. Locating the ‘right to a clean environment’ as a third generation right will set the context for discussing its recognition in international, regional and national human rights law, including Nigeria. It is intended to limit discussions here to the elements of this right, while analysis of how it could be used and the parameters for such use as an alternative mechanism for addressing the environmental problems in the Niger Delta under Nigerian law will be left to the next chapter.

4.2 Background

The right to a clean environment is part of the evolving concept of environmental human rights, which encompasses both the substantive and procedural aspects. While emphasis will be placed on the substantive aspect, discussions relating to the nature and scope of this right will broadly refer to the general concept of environmental human rights, which invariably involves discussions also of the procedural aspects. The reason for this approach is that the nature, content and recognition of this ‘right’ is often discussed at this broad level, rather than on the particular basis of substantive or procedural rights. Also, a number of adjectives or phrases are used generally to describe this right or qualify the environment intended to be protected: such as ‘clean and satisfactory environment’, ‘clean and healthy environment’, ‘satisfactory environment’, ‘conducive environment’, or ‘right to environment’, or similar phrases. In this study, the phrase ‘right to a clean environment’ will be adopted for its simplicity and

convenience, whether as it relates to individuals directly or indirectly to protect the natural environment.

Since the Stockholm Conference on the Human Environment in 1972¹ and the Rio Declaration on Environment and Development in 1992,² a body of instruments,³ have grown indicating the existence of the right to a clean environment, yet concerns persist as to whether or not this right is recognized in international law.⁴ Some of these concerns, include the fact that most of the instruments containing the right are ‘soft-law’ rather than ‘hard-law’ instruments, and therefore not binding; or the uncertainty as to whether this right inheres only in humans or also in other animals or the environment itself; or whether it is an individual or collective right, as well as the nature, content and scope of this right. While this debate continues at the international level, efforts at regional and national levels appear to indicate that nations are prepared to consider human rights approach as part of the options open to them for dealing with environmental matters. Legally binding human rights instruments such as the African Charter on Human and

¹ Declaration of the UN Conference on the Human Environment (16 June, 1972)

² Rio Declaration on Environment and Development, 1992, UN Doc A/CONF.151/5/Rev 1, reprinted in 31 ILM, 874.

³ Including the Declaration of the Right to Development, GA Res. 41/128, UN GAOR Supp. (No.53) at 186, UN Doc. A/41/53, (4 December, 1986); UN Economic and Social Council (ECOSOC), Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (20 April, 1994); Hague Declaration on the Environment, 11 March, 1989, reprinted in 20 ILM 1308; Draft Declaration of Principles on Human Rights and the Environment, UN Doc. 3/CN.4/Sub.2/1994/9 reproduced in *RECEIL*, (1994) 3, 259-261. Most other environmental agreements now contain provisions calling for public information and participation, such as the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June, 1993) Art 13-16; International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris 17 June, 1994) Preamble, Arts 10(2)(e), 13(1)(b), 14(2), 19, and 25; Protocol on Water and Health to the 1992 Convention on the Protection and use of Transboundary Watercourses and International Lakes (London 17 June, 1999) Art (5)(i); Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal 29 January, 2000) Art 23.

⁴ Including G. Handl, *Human Rights and Protection of the Environmental Protection* (IIDH, San Jose; 1992), A. Boyle and M. Anderson, Eds. *Human Rights Approaches to Environmental Protection* (Clarendon Press Oxford; Oxford, 1996), cited by D. Shelton, "Developing Substantive Environmental Rights" (2010) 1(1) *Journal of Human Rights & the Environment*, 89-120, 91, for details of the differing views.

Peoples' Right, 1981⁵ and the Additional Protocol to the American Convention on Human Rights, 1988,⁶ expressly provide for the right to a clean environment. While the European Convention on Human Rights, 1950 did not contain any express environmental rights provision, jurisprudence built over the years show that the European Court of Human Rights is prepared to use an environmental rights approach to interpret existing Convention rights, such as the rights to life, property, privacy and family home.⁷ The Aarhus Convention, which is a legally binding instrument, although it deals mainly with the procedural aspects of this right (which is unaffected by this debate about recognition), makes express reference to the right to a clean environment.⁸ Apart from these regional efforts, about 118 nations in one way or the other include environmental rights in their constitutions, and courts in most of these countries have not only recognized these rights, but are also prepared to enforce them.⁹

It is however, not the intention in this study to join the debate - whether or not this right is recognized in international law - but rather to demonstrate that in spite of it, there is sufficient scope, as evidenced in these regional and national human rights instruments and judicial decisions, for the use of human rights approach, including the right to a clean environment, as an option open to victims for addressing the oil pollution problems in the Niger Delta. Before this discussion, it will be necessary to first, provide an overview of the concept of human rights.

⁵ African Charter on Human and Peoples' Rights, 17 June, 1981, (1982) 21 ILM, 58.

⁶ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 14 November, 1988 (1989) 28 ILM, 161.

⁷ Some of the cases will be discussed in paragraph 4.5.2.1 below.

⁸ The Preamble to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June, 1998), Doc ECE/CEP/43, recognizes that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself'.

⁹ Earthjustice, *Environmental Rights Report: Human Rights and the Environment* (2007) contains constitutional provisions concerning the environment from 118 countries, available online at <http://www.earthjustice.org/news/press/007/earthjustice-presents-2007-environmental-rights-report-to-un.html>, (last accessed on 26/12/2011).

4.3 Overview of the Concept of Human Rights

Human rights evolve in response to prevailing philosophical, political and socio-economic events or developments, but are inextricably bound up with the history of the modern state: on the one hand while the State is well-suited to promote the interests of its citizens in the never-ending battle for resources among different communities; on the other hand, it has also been identified as a lethal threat to the life and wellbeing of its citizens.¹⁰ Therefore, human rights are designed to reconcile State power with protection against abuse. While the State is the guarantor of human rights and provides the institutional framework called upon to safeguard the existence, the freedom and the property of individual citizens, experience throughout history has shown that, time and again those vested with sovereign powers have abused those powers and infringed on the rights of their citizens.¹¹

However, any discussion on ‘human rights’¹² must start with a basic understanding of the word ‘right’,¹³ which itself is an ambiguous term used to describe a variety of legal relationships,¹⁴ but is more generally perceived as a claim or advantage conferred on a person by rules of a particular legal system, with a correlative duty on others to do or refrain from doing an act.¹⁵ On the one

¹⁰ See C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd Ed. (Oxford University Press; Oxford, 2008), 7-8.

¹¹ Ibid.

¹² See generally on human rights, R. Banakar, (ed.) , *Rights in Context: Law and Justice in Late Modern Society*, (Ashgate Publishers; Aldershot, 2010); Lillich, Hannum, Anaya, Shelton, *International Human Rights: Problems of Law, Policy and Practice*, 4th Ed. (ASPEN Publishers; New York, 2006); M. Haas, *International Human Rights* (Routledge; Oxford, 2008); M. Tushnet, *Bills of Rights*, (Ashgate Publishers; Aldershot, 2007); M. Leiser & T. Campbell, *Human Rights in Philosophy & Practice*, (Ashgate Publishers; Aldershot, 2001); O. De Schutter, *International Human Rights Law, Cases, Materials, Commentary*, (Cambridge University Press; Cambridge, 2010);

¹³ In explaining the term right from a legal point of view, Mr. Justice Oputa stated that “If therefore, we attempt to probe human rights in the political and legal culture of Nigeria without a clear idea of rights, a clear theory of rights in general and of human rights in particular, we shall not be right about human rights.” C. Oputa, ‘Human Rights in the Political and Legal Culture of Nigeria’, Second Justice Idigbe Memorial Lecture, University of Benin, 1986, 2.

¹⁴ J.J. Shestack, “The Jurisprudence of Human Rights”, in Theodore Meron (ed.) *Human Rights in International Law, Legal and Policy Issues*, (Oxford University Press: Oxford, 1984), 71.

¹⁵ See O. Eze, *The Concept of Human Rights*, (NIIA; Lagos, 1988), 1.

hand, rights may have a moral or legal pedigree, but on the other, may connote justice, ethical correctness or something that is in consonance with the rule of law or the principles of morality.¹⁶ This definition tallies with that given by Donnelly,¹⁷ when he stated that the term ‘right’ may be looked at from both moral and political perspectives. According to him, from a moral perspective, ‘right’ means rectitude in the sense of the ‘right’ thing to do or something being right, and from a political perspective, entitlement, in the sense of someone having a right.¹⁸ Even this definition is unsatisfactory as Donnelly, instead of defining or explaining the meaning of ‘right’, merely stated that it is an ‘entitlement’ in the sense of someone having a ‘right’, without explaining what a right means. However, definition of ‘right’ has plagued legal philosophers for quite some time, and most have recently, simply based their understanding of the term on Hohfeld’s¹⁹ classification of rights, rather than attempting to define the term itself.

It is perhaps for this reason that lawyers prefer to look at ‘rights’ from a legal perspective rather than from its everyday usage. From a legal perspective, a ‘right’ approximates to the liberty to do or possess something, the denial, infringement or violation of which may give rise to legal sanctions. A distinction should be made between legal and human rights. A legal right often arises from the provision of a statute, the Constitution or common law, but the authority of human rights which may be provided for in a statute or constitution or common law, does not necessarily flow from these instruments (although you require a legal basis to enforce them) but the fact that they inhere in man as human beings and by virtue of their humanity. According to

¹⁶ E. Azinge, “Milestone Decisions on Human Rights”, in A.U. Kalu & Y. Osibanjo, (eds.), *Perspectives on Human Rights*, (Federal Ministry of Justice Law Review Series; Lagos, 1992) Volume 12, 197.

¹⁷ J. Donnelly, *Universal Human Rights in Theory and Practice*, Second Edition (Cornell University Press: Ithaca, 2003), 7.

¹⁸ Ibid.

¹⁹ Referred to by A. Fagan, ‘Human Rights’, *The Internet Encyclopaedia of Philosophy*, 8. Available online at <http://www.iep.utm.edu/h/hum-rts.htm>, (last accessed on 26/03/2007).

Donnally, human rights would appear to have humanity or human nature as their source.²⁰ Therefore, legal rights may refer to those enumerated in legal documents, which enjoy the recognition and protection of law.²¹ This is the way legal positivists²² would see ‘rights’, distinct from natural rights (or claims), which in some cases have the recognition of law, but are not legally enforceable. For legal positivists like Jeremy Bentham there is no such thing as human rights existing independent of legal codification, but the problem with this adherence to legalism is that they fail to take account of circumstances where a morally reprehensible law is codified and held to apply even though it is generally regarded as unacceptable. Examples include some of the laws enacted by the Nazi regime, which discriminated against Jews or those by the apartheid regime in South Africa, which discriminated against black South Africans. Other examples include a number of the economic and cultural rights enshrined in Chapter II of the Constitution of the Federal Republic of Nigeria, 1999, which have the force and recognized by law (the Constitution), but are unenforceable by virtue of section 6(6)(c) of the same Constitution.²³

Human rights, from a natural rights perspective refer to demands or claims which an individual or group makes on society, some of which are protected by law while others remain aspirations to be attained in the future.²⁴ These rights, naturalists believe are called ‘human rights’, as they inhere in man as a result of his humanity,²⁵ not necessarily conferred by any legal code or the

²⁰ See Donnally, *supra* note 17, 13.

²¹ A Fagan, *supra* note 19, 7.

²² See Donnally, *ibid*, 7. Fagan, *ibid*.

²³ See the distinction between fundamental rights and ‘social rights’ under the European Community law drawn by R. O’Gorman, “The ECHR, the EU and the Weakness of Social Rights Protection at the European Level”, *German Law Journal*, (2011) 12(10), 1832-1861.

²⁴ O. Eze, *Human Rights in Africa: Selected Problems*, (Macmillan Press; Lagos, 1984), 5.

²⁵ G.W. Rainbolt, ‘Rights Theory’, (2006) 1, *Philosophy Compass*, 3. In this article, Rainbolt indicated that the traditional place to begin research on ‘rights’ is with Hohfeld’s *Fundamental Legal Conceptions* (2001) in which he

political community to which he belongs, and deprivation of which would constitute a grave affront to one's sense of natural justice.²⁶ Thomas Paine (1737-1809) in *The Rights of Man* (1792) described 'natural rights'²⁷ as belonging to man prior to civil society. These rights he opined were superior to positive law and embodied those elementary principles of justice apparent to the "eye of reason."²⁸ Naturalist philosophers believed that natural laws have universal application unlike man-made laws, which were valid only to the extent of their conformity with natural laws (or laws of nature). This theory influenced historical documents such as the Magna Carta, 1215,²⁹ which laid the foundation for some of the rights enjoyed today.³⁰

4.3.1 Historical Context of Human Rights

The struggle for human rights has been a long and arduous one, with successive generations adding both to the discourse and the inequalities within society requiring redress through human rights approaches. The discussions that follow seek to set out some of these developments,

distinguished eight relations: claims, duties, liberties, no-claims, powers, liabilities, immunities and disabilities, each of which may give rise to a legal right. Ibid, 1.

²⁶ See M.A. Ajomo, "The Development of Individual Rights in Nigeria's Constitutional History", in M.A. Ajomo, *et al* (eds.) *Individual Rights Under the 1989 Constitution*, (NIALS; Lagos, 1993), 1.

²⁷ Paine was the first to use the term 'human rights' while translating the *Declaration of the Rights of Man and of the Citizen*, adopted by the French National Assembly on 27 August, 1789. Paine stated that: "The representatives of the people of France, formed into a National Assembly, considering that ignorance, neglect, or contempt of human rights, are the sole causes of public misfortunes and corruptions of Government, have resolved to set forth in a solemn declaration, these natural, imprescriptible and inalienable rights..." See A.W.B Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford University Press; Oxford, 2001), 9.

²⁸ See G. Ezejiofor, "The Development of the Concept of Human Rights: Definition and Philosophical Foundation" in Okpara Okpara (ed.) *Human Rights Law and Practice in Nigeria*, (Chenglo Limited; Lagos, 2005), 56.

²⁹By Chapter 39 of the Magna Carta, "no free man shall be taken, outlawed, banished or in any way destroyed, nor will we proceed against or prosecute him except by the lawful judgment of his peers and by the law of the land". And in Chapter 40, it states "To no one will we sell, to no one will we deny or delay right or justice". See M.R. Ishay, (ed.), *The Human Rights Reader*, (Routledge; London, 1997), 58.

³⁰M.A. Ajomo, "Human Rights and the Nigerian Judiciary", in T.O. Elias and M.I. Jegede, (eds.) *Nigerian Essays in Jurisprudence*, (MIJ Publishers Ltd; Lagos, 1993), 350.

leading ultimately to the current era in which environmental rights are looked upon as a possible mechanism for redressing environmental injuries caused by oil pollution in the Niger Delta.

In spite of the secular tone which human rights discourse has assumed in modern times, few would dispute that religious humanism, Stoicism and natural rights theorists of antiquity influenced our modern understanding of human rights.³¹ Greek philosopher, Plato³² (c427-348 B.C.E) in *The Republic* (c400 B.C.E) wrote about ‘absolute justice’, which he said could be achieved when individuals fulfill the tasks to which each is suited in harmony with the common good, and advocated a universal moral standard of ethical conduct. Similarly, Aristotle³³ (c384-322 B.C.E.) in his *Politics* stated how the concepts of justice, virtue and rights change in accordance with different kinds of constitutions and circumstances, and opined that virtue and justice blossomed where States and laws aim to encourage leisure, peace and the common good. Roman statesman and philosopher, Cicero³⁴ (c106-43 B.C.E) was himself a strong believer in the common good represented by republican principles. In *The Laws* (c52 B.C.E.), Cicero laid out the foundations of natural law and human rights, in which he indicated that individuals were entrusted by the gods with the capacity to reason, to derive subsistence from nature and to unite peacefully with other fellow citizens, and despite distinctions of race, religion and opinion, individuals are bound together in unity through an understanding that right living is what makes men better.

³¹ Ishay, supra note 29, xv.

³² Ibid, 10.

³³ Ibid, 19.

³⁴ Ibid, 23.

It was the writings of these philosophers and those of early churchmen like Saint Augustine³⁵ (c354-430 BC) and Saint Thomas Aquinas³⁶ (c1265-1273), which influenced the evolution of natural rights theory. Indeed, the early Christian crusades in England and the heavy taxation levied by the Holy Emperor Henry VI led to the internal unrest by Barons, which culminated in the enactment of the Magna Carta, 1215.³⁷ This Charter later became the basis on which oppressed groups and succeeding generations anchored the protection of their liberties. The Petitions of Right (1628) and the Habeas Corpus Act (1679) in England referred copiously to the 1215 charter. Though originally extracted by Barons against their King, the provisions of this charter became the progeny of modern human rights, providing not only for freedom from unlawful detention, personal liberty, fair hearing, but also the protection of personal property and equality before the law. Following the absolutism of the middle ages, a new liberal thinking emerged in which the State was held to protect individuals' natural rights, including the right to life (security), property, political representation and equality before the law.

Advocates of this new liberal thinking included Thomas Hobbes (1588-1679),³⁸ Jean Jacques Rousseau (1712-1778)³⁹ and John Locke (1632-1704),⁴⁰ who constructed the "social contract" theory in which they rationalized the relationship between the individual and the State (community) in agreement with the universal application of natural rights. Initially, the social contract theory posited that royal authority derived from a contract between the sovereign and the people by which the people collectively undertook to obey the ruler, and in return he would

³⁵ Ishay, supra note 29, 37.

³⁶ Ibid, 59.

³⁷ Ibid, 57-59.

³⁸ *De cive*, 1641; *The Leviathan*, (1651), cited in Kalin and Kunzli, *The Law of International Rights Protection*, (Oxford University Press, Oxford, 2011), 24.

³⁹ *Du Contrat Social [The Social Contract]*, 1762, cited in Kalin & Kunzli, Ibid.

⁴⁰ *Two Treaties of Government*, (1690), cited by Kalin & Kunzli, Ibid.

govern in their general interest. But this was modified as a compact between individuals emerging from a state of nature into civil society, whereby for their common good and in the interest of each other they undertook with one another to form a government to which they each subscribe support and allegiance.⁴¹ For this contract to work, the individual surrendered some of his rights to the community for the protection which the community in turn provides, and failure by the community to keep the terms of the contract would entitle the individual to withdraw from it, perhaps justifying disobedience, even rebellion.⁴² Locke believed that rebellions were an appropriate means to achieve or restore fundamental rights against tyranny.⁴³ Indeed, Karl Marx (1818-1883) in *The Communist Manifesto* (1848)⁴⁴ opined that revolution was an inevitable means of redressing social inequities and popular rights.

4.3.2 Human Rights in the Modern Context

The period between World Wars I and II marked the beginning of serious concerns internationally about human rights and the treatment of people in different countries of the world by governments. Before then, human rights was seen as a matter for sovereign nations, since they were the primary subjects of international law and therefore able to look after their own people.⁴⁵ However, the atrocities committed by the Nazi regime in Germany and the inhuman treatment meted out to Jews, informed new thinking about the untrammelled evil which States could wreak

⁴¹ Kalin and Kunzli, supra note 38, 21; Ezejiolor, supra note 28, 57.

⁴² J. Locke, *Civil Government*, Book II (Everyman's Edition), 149; Rousseau, *The Social Contract and Discourses*, Book II (Everyman's Edition), 71.

⁴³ Cited by Ishay, supra note 29, xxxiii.

⁴⁴ Reprinted in Ishay, *ibid*, 189.

⁴⁵ O. Gye-Wado, 'Fundamental Human Rights and Corresponding Civic Obligations Under the 1999 Constitution', in Ayua, Guobadia and Adekunle, (eds.), *Nigeria: Issues in the 1999 Constitution*, (NIALS; Lagos, 2000), 184-197, 189

on their citizens if unchecked.⁴⁶ It became obvious that the protection of human rights could no longer be left for States alone, but one in which the international community must play a part.⁴⁷ As a result, since World War II a major advancement in the global perception and development of human rights was made, particularly since the establishment of the United Nations in 1945 with the aim of promoting human rights around the world. The Charter of the UN while affirming “A faith in fundamental human rights in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”, provided in Article I that its purpose included “Promoting respect for human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion”.

In order to give certainty and precision to human rights, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights (UDHR)⁴⁸ on 10 December, 1948, the preamble of which states that: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

⁴⁶ According to Tomuschat, “the challenge for human rights is inextricably bound up with the history of the modern state: on the one hand, the state has been accepted as an organisation well-suited to promote the interests of its members in the never-ending fight for resources among different communities; on the other hand, it has also been identified as a lethal threat to the life and wellbeing of its members.” Tomuschat, *supra* note 10, 8-9. Indeed this is how Simpson described how English governments behaved in the period before the Bill of Rights, 1689 in England: “In normal conditions the principal mechanism employed by government against recalcitrant subjects is the criminal law, which is underpinned by the threat or use of coercive violence – for example in making arrests, in dragging sentenced criminals to prison, in subduing them with sandbags, or clubs, or gas, or stun guns, or whatever nasty technique is in vogue, once they get there”. See Simpson, *supra* note 27, 54. This is no different from the way some African Governments still behave even in modern times, as shown in Zimbabwe until recently, where opposition leaders were tortured, beaten, imprisoned and brutalised just for calling rallies or holding political meetings.

⁴⁷ M.A. Ajomo, *supra* note 30, 351. Indeed as far back as 1929 The Institute of International Law adopted the “Declaration of the International Rights of Man” which preamble emphasised that “the juridical conscience of the civilised world demands the recognition for the individual of rights preserved from all infringement on the part of the State”. Philip Marshall Brown while reporting on this Declaration, noted that it “aims not merely to assure individuals their international rights, but it aims also to impose on all nations a standard of conduct towards all men, including their own nationals” and repudiates the “classic doctrine that states alone are subjects of international law”. Quoted in T Buerghental, “The Evolving International Human Rights System”, (2006) 100 *American Journal of International Law*, 783.

⁴⁸ Adopted and proclaimed by G.A Res. 217 A (III), 10 December, 1948.

The emphasis on ‘human dignity’ is poignant since it attaches to every segment of the human society, including the powerful, the weak, infants and even the physically and mentally infirm.⁴⁹

The UDHR enumerates not only civil and political, but also economic, social and cultural rights and although not legally enforceable,⁵⁰ is “the principal conduit for bringing the idea of human rights into the life of many nations.”⁵¹ While the UDHR contains many lofty provisions, it did not set out the parameters for achieving them although from the onset it was not intended to have legal teeth, being a Declaration of the General Assembly. With time, however, attempts were made to translate its contents into a hard legal basis when the United Nations Commission on Human Rights, established in 1946 as a subsidiary organ of the Economic and Social Council (ECOSOC) reduced its provisions into two international conventions - the International Covenant on Civil and Political Rights (ICCPR) 1966⁵² and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966,⁵³ both of which are legally binding and impose legal obligations.

Earlier, European powers had established the Council of Europe and reaffirmed their commitment to the spiritual and moral values and the common heritage of their peoples, exemplified in individual freedoms, political liberty and the rule of law, principles which they considered to form the basis of genuine democracy. The Council began work immediately on an

⁴⁹ Tomuschat, *supra* note 10, 3.

⁵⁰ Brownlie is of the view that some of its provisions either constitute general principles of law or represent elementary considerations of humanity, its greatest significance being the authoritative guide to the interpretation of the Charter. See I. Brownlie and G. S. Goodwin-Gill, *Basic Documents on Human Rights*, 5th Ed., (Oxford University Press; Oxford, 2006). 23.

⁵¹ L. Henkin, “The International Bill of Rights: The Universal Declaration and the Covenants”, in R Bernhardt and J A Jolowicz, (eds.) *International Enforcement of Human Right.*, (1987), quoted in N.J. Udombana, *Human Rights and Contemporary Issues in Africa*, (Malthouse Press Ltd.; Michigan, 2003), 70.

⁵² Adopted on Dec. 16, 1966 and entered into force on 23rd March, 1976.

⁵³ G.A. Resolution 2200 A (xxi) of 16 December, 1966, adopted on December 16, 1966 and came into force on 3 January 1976, quoted in Ajomo, *supra* note 30, 351-352.

instrument designed to provide effective protection to human rights by mechanisms of collective enforcement,⁵⁴ and by 4 November, 1950 the Consultative Assembly had signed the European Convention on Human Rights (hereinafter “ECHR”). Other than the UDHR, the ECHR and the two Covenants – ICCPR and ICESCR - international concerns continued on various aspects of human rights violations, and a multitude of other international human rights treaties and non-binding instruments were adopted,⁵⁵ which together form the legal tool-kit for the protection of human rights around the world.⁵⁶

The categories of human rights are never closed: as new political, social and economic events unfold, which could not be addressed or adequately tackled by existing rights then the need arises to adopt new rights in order to address them. To this end, it would be necessary to explore in the following section the generations of human rights to show how events impact on the development of human rights.

4.4 Generations of Human Rights

It has become fashionable to begin modern human rights discourse with what Vasak⁵⁷ referred to as ‘generations’ of human rights.⁵⁸ This categorization helps to delineate the different epochs in

⁵⁴ See Tomuschat, *supra* note 10, 31.

⁵⁵ Including the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, reproduced in Brownlie, *supra* note 50, 405; the Convention on the Prevention and Punishment of the Crime of Genocide 1948, in Brownlie, *ibid*, 283; the Convention relating to the Status of Refugees 1951, in Brownlie, *ibid*, 288; the International Convention on the Elimination of All Forms of Racial Discrimination 1966, in Brownlie, *ibid*, 336; the Convention on the Elimination of All Forms of Discrimination Against Women 1979, in Brownlie, *ibid*, 388; and the Convention on the Rights of the Child, 1989, in Brownlie, *ibid*, 429; among others.

⁵⁶ Tomuschat, *supra* note 10, 33. A comprehensive list and details of these and other Conventions and Declarations are contained in Brownlie, *ibid*, 43. For discussions, see generally H. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law Politics Morals*, 3rd Ed., (Oxford University Press: Oxford, 2007).

⁵⁷ K. Vasak, ‘A 30-Year Struggle’, *The UNESCO Courier* (29 November, 1977), cited by Tomuschat, *supra* note 10, 25.

⁵⁸ There is now even a suggestion for a fourth generation, to include the right to information, dealing with the so-called ‘knowledge age’. See M.M. Al’Afghani, “The Fourth generation of Human rights”, in *The Jakarta Post*,

the development of modern human rights, even though this term may give the impression that a new 'generation' of rights would negate earlier generations of rights.⁵⁹ This suggestion would be absurd, in that so-called second generation rights comprising of social, economic and cultural rights could not have negated the civil and political rights before them, nor would third generation rights render the two earlier generations of rights, obsolete.

The first generation rights, considered to be 'negative' in nature, comprise of civil and political rights, contained in both the UDHR and the ICCPR, and currently enshrined in Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 under the heading of "Fundamental Rights." They are enumerated in sections 33-44 of the constitution and justiciable by virtue of section 6(6)(b) of the said constitution. The second generation rights, which are 'egalitarian' in nature, derive from the ICESR and consist of economic, social and cultural rights. These rights are couched in positive terms and may require the affirmative action of governments for their realization.⁶⁰ Most developing countries perceive some first generation rights as Western and therefore luxuries which they could not afford in the midst of abject poverty and privation, and claim to place emphasis on the second and third generation rights,⁶¹ considered more beneficial to their populace. They argue that the first generation rights of freedom of speech and of the press, personal liberty, for instance, do not mean much to a largely illiterate and subsistent

Jakarta, 9 April, 2006, cited by L. Iancu and T. Ghilain, "The Role of the Court of Justice in Environmental Justice as a Third Generation Human Right", (2011) 14, *Effectius Newsletter*, 1-7, 3.

⁵⁹ Tomuschat, *ibid*, 25-26.

⁶⁰ C. Welch Jr., "Human Rights as a Problem in Contemporary Africa", in Welch and Meltzer, (eds.), *Human Rights and Development in Africa* (Sunny Press; Albany, 1984), 24; Also Udombana, 'The Law Relating to Social and Economic Rights and the Situation in Nigeria: A Critical Analysis of the Niger Delta', (1999) 24 *The Lawyer*, 26.

⁶¹ J.N. Aduba, D.C.J. Dakas and O. Gye-Wado, "The Dynamics of Social and Economic Rights", in *Proceedings of the 32nd Annual Conference of the Nigerian Association of Law Teachers*, at the Nigerian Institute of Advanced Legal Studies, University of Lagos Campus, Lagos, between 10-13 May, 1994, 34; S.C. Agbakwa, "Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights", (2000) 5, *Yale Human Rights & Development Law Journal*, 177-216; J. Oloka-Onyango, "Reinforcing Marginalised rights in an age of Globalisation, International mechanisms, non-State actors and the Struggle for Peoples rights in Africa", (2003) 18, *American University International Law Review*, 851-911.

society struggling to eke out daily existence under very challenging economic and political conditions. But the irony is that human beings everywhere thrive more under an atmosphere of freedom and in environments conducive for self actualization.⁶² The third generation rights, sometimes called ‘solidarity’⁶³ or ‘collective’ rights,⁶⁴ include the right to development, to peace, and the right to a clean environment, contained in Articles 21, 22 and 24 of the African Charter. These provisions like most provisions of the African Charter are unique. While opponents of third generation rights believe they are not ‘true rights, but rather as ‘agreed objectives which the international community has pledged to pursue,’⁶⁵ proponents believe the full potential of human beings may not be realized without these rights.⁶⁶ Indeed, with specific reference to the right to a

⁶² President Barack Obama said as much when at his remarks to the Ghanaian Parliament opined that Governments that respect the will of their people and governs by consent and not coercion are more prosperous, more stable and more successful than those that do not. See Remarks by President Barack Obama to the Parliament of Ghana, 11 July, 2009, online at <http://www.youtube.com/watch?v=QkNpUEWIhd4>, accessed on 28/7/2011.

⁶³ O.C. Ruppel, “Third-generation human rights and the protection of the environment in Namibia”, online at http://www.environment-namibia.net/tl_files/pdf, (last accessed on 26/12/2011).

⁶⁴ B. Algan, “Rethinking ‘Third Generations’ Human Rights”, (2004) 1(1) *Ankara Law Review*, 121-155, 128-129.

⁶⁵ Tomuschat, *supra* note 10, 59. Professor Higgins is quoted as saying with particular reference to the right to development, that “it has been supported by leading writers and there does exist, a UN General Assembly Resolution on the subject, and it has been frequently invoked by various international bodies. But is noticeably absent from the International Covenant on Economic, Social and Cultural Rights. Formidable problems remain about classifying it as a human right. The right-holders are presumably the peoples of developing territories. But what the right entails is for the moment very unclear. Much of the literature that proclaims the existence of the right ignores this question entirely.” See O.J. Lynch, “Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society”, online at <http://www.ciel.org/Publications/olp3vii.html>, (last accessed on 26/12/2001). Interestingly, the report of the Joint Committee on Human Rights of the United Kingdom Parliament in their 29th Report stated with regard to whether ‘third generation’ rights should be included in the UK Bill of Rights that: “We have considered during the course of our inquiry whether any so-called ‘third generation rights should be included in a UK Bill of Rights. Third generation rights are rights which have attained international recognition but which are not easily classified as either civil and political rights or economic and social rights. They include right to self-determination, the right to natural resources, the right to economic and social development and intergenerational equity and sustainability. The nature of many of these rights makes it difficult to enshrine them in legally binding documents and for the most part they are therefore, the subject of standards which are not, strictly speaking, legally binding. There is one right which is commonly referred to as a third generation right, but which is increasingly taking legal form in international human rights instruments and constitutions throughout the world: the right to a healthy environment. We do not agree that the inclusion of environmental rights would be a “huge leap” bearing in mind the extent to which both the right to life in Article 2 ECHR and the right to respect for private life and home in Article 8 ECHR have already been interpreted as including certain environmental rights.” See online <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrightts/16509.htm>, (last accessed on 27/12/2011).

⁶⁶ Vassak argues that general protection of the environment is useless “if one does not start from the basic right of the individual to a clean and balanced environment”, and that third generation rights “infuse the human dimension into areas where it has all too often been missing having been left to the State or States”. Quoted by J.G. Morgan-

clean environment, Ruppel, suggests that it entails obligation on governments to (a) refrain from interfering directly or indirectly with the enjoyment of the right; (b) prevent third parties such as corporations from interfering in any way with the enjoyment of the right; and (c) adopt the necessary measures to achieve the full realization of the right.⁶⁷ These appear to be the core elements of this right and will be further developed in paragraph 4.5.1.1 below. For current purposes, this right will now be discussed fully in the following sections.

4.4.1 The Right to a Clean Environment – A Working Definition

This section will explore fully the right to a clean environment starting with a working definition. The aim is to delineate the focus of this study in terms of the context in which the phrase is used without discounting the fact that by its very nature, this right is still contentions and difficult to define. Also, the origin, meaning, nature, content and scope of this right will be attempted, in order to determine whether as provided by the African Charter or Nigerian law, it could provide an alternative mechanism for redressing injuries suffered as a result of oil pollution in the Niger Delta.

The right to a clean environment is part of the evolving concept of environmental human rights,⁶⁸ which broadly enunciates a rights-based approach to environmental protection, demarcated into substantive and procedural rights.⁶⁹ While the substantive right prescribes levels of

Foster, "Reverse Moderate Relativism Applied: Third Generation International Human Rights from an Islamic Perspective", *Bepress Legal Series*, Paper 235, 2004, 9.

⁶⁷ Ruppel, *supra* note 63, 103.

⁶⁸ International Institute for Environment and Development (IIED), 'Environment and Human Rights: A New Approach to Sustainable Development', (IIED, 2001).

⁶⁹ M. Burger, 'Bi-Polar and Polycentric Approaches to Human Rights and the Environment', *Columbia Journal of Environmental Law*, (2003) 28, 371, 376; M. Lorenzen, 'Background Paper on the Project Environmental Human Rights' prepared for ANPED, The Northern Alliance for Sustainability; online: <http://www.anped.org/docs/background%20document.doc>, (last accessed on 01/05/2007).

environmental ‘well-being’, the procedural rights promote processes through which the public could participate in determining the levels of pollution which may potentially affect their environment. Again, while the substantive right is enforceable by anyone affected by activities falling below the prescribed level of environmental quality to which he is entitled by law, the procedural rights may be invoked to challenge the process of engaging in those activities. The difference between the substantive formulation and the procedural aspect of this right is that the latter provides mechanisms for public involvement in the decision-making process regarding activities that may adversely affect them or the environment, while the former delineates the threshold beyond which these activities may be carried out without incurring injury to the right-bearer. In essence, while the substantive rights enforce a certain level of environmental quality, procedural rights enable citizens to determine whether or not to allow activities that may potentially devalue environmental quality.

Kiss believes that the right to a clean environment is closely related to the basic concept of human rights generally, and that procedural rights play an important role in protecting against arbitrariness.⁷⁰ According to Kiss, as with the recognition of a number of other internationally guaranteed rights, recognition of the right to a clean environment should entail, as a minimum the right to a “due process.”⁷¹ Burger on the other hand, notes that while procedural rights have the benefit of cultural and political sensitivity in defining appropriate levels within individual nations or regions, substantive rights may provide stronger protections against potentially misinformed governments bent on getting rich quick and achieving gross levels of

⁷⁰ A. Kiss, “Concept and Possible Implications of the Right to Environment”, in K.E. Mahoney and P. Mahoney, *Human Rights in the Twenty-First Century: A Global Challenge*, (Martinus Nijhoff Publishers; London, 1993) 551-559,556.

⁷¹ *Ibid*, 557.

consumption.⁷² In other words, the recognition and enforcement of the right to a clean environment eliminates recourse to incidental considerations such as socio-economic and cultural circumstances that are likely to condone activities that negatively affect the environment.⁷³ In other words, issues such as the economic benefit of oil production to the Nigerian economy should not be subordinated to the rights of the people to live in an environment fit for human habitation, even if it means temporary cessation of exploration or production activities until the offending spill is dealt with and prevented for the future, and if not to cease permanently. A situation where a people's life is exposed to toxic chemicals from oil industry pollution, fish ponds polluted, such that the people are unable to engage in their usual economic activities in order to fend for themselves, should not be allowed to continue even though this may affect the revenue of the State.

4.4.2 Origin of the Right to a Clean Environment

In this section, the origin of the right to a clean environment is discussed, by looking at some of the international instruments which provide for the right. The intention is not only to provide the context in which this right is used in this thesis, but also to develop the argument that it has some international pedigree, albeit largely in soft-law instruments.

While there is no universally accepted right to a clean environment nor was it expressly provided under the Universal Declaration⁷⁴ or any of the subsequent Covenants,⁷⁵ a number of other

⁷² Burger, *supra* note 69, 376.

⁷³ *Ibid.*

⁷⁴ Universal Declaration on Human Rights, GA Res. 217A, UN GAOR, 3rd Session, 1st Plen. Mtg., UN Doc. A/810 (Dec. 12, 1948). It is instructive that even the Universal Declaration stated in Article 25 that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". Although

international human rights instruments link the enjoyment of human rights with environmental protection.⁷⁶ The Stockholm Declaration⁷⁷ was the first to recognize this link by providing that people have a:

*fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears solemn responsibility to protect and improve the environment for present and future generations.”*⁷⁸

This was later reaffirmed by the Rio Declaration,⁷⁹ although did not use the term ‘right’, it asserted that: ‘Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.’⁸⁰ Neither of these Declarations is binding, but the former produced two binding international law instruments - the United Nations Framework Convention on Climate Change and the United Nations Convention on

not legally binding at the time it was adopted, many scholars argue that “subsequent state practice has transformed it into a document considered by many to be a statement of customary international law.” P.E. Taylor, ‘From Environmental to Ecological Human Right: A New Dynamic in International Law?’ (1990)10, *Georgia International Environmental Law Review*, (1990), 309, 315; A. Kiss and D. Shelton, *International Environmental Law*, 2nd Edition, (Transactional Publishers; New York, 2000), 27

⁷⁵ International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), UN GAOR Supp. (No.16), UN Doc. A/6316 (1966), 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), UN GAOR Supp. (No.16), UN Doc. A/6316 (1966), 993 UNTS.3 both opened for signature 16 December, 1966. (Articles 11 and 12 state that “States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions”, and “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases”, respectively.)

⁷⁶ A.L. Shinsato, “Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria”, (2005) 4, *North-western Journal of International Human Rights*, 186, 198.

⁷⁷ UN Conference on the Human Environment, Stockholm, Sweden, June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14 [hereinafter Stockholm Declaration].

⁷⁸ Stockholm Declaration, Principle 1

⁷⁹ UN Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, UN Doc. A/CONF.151/26 (12 Aug., 1992) reproduced in Sands, Tarasofsky and Weiss (eds.) *Principles of International Environmental Law: Documents in International Environmental Law*, (Manchester University Press: Manchester, 1994), Vol. II, 49-71 [hereinafter “Sands”]. The Declaration itself, although not binding recommends that States develop laws of liability and compensation for environmental damage. See Principle 13.

⁸⁰ Declaration on Environment and Development, Principle 1, *Report of the UN Conference on Environment and Development*, (New York, 1992), UN Doc. A/CONF.151/26/Rev.1; A. Boyle, ‘The Role of International Human Rights Law in the Protection of the Environment’, in A. Boyle, and M. Anderson, *Human Rights Approaches to Environmental Protection*, (Clarendon Press; Oxford, 1998), 43; See generally, Ayesha Dias “Human Rights, Environment and Development with Special Emphasis on Corporate Accountability”, *Human Development Report 2000 Background Paper*, available on-line at <http://hdr.undp.org/en/reports/global/hdr2000/papers/ayesha%20dias%20.pdf>, (last visited on 29/09/2011).

Biological Diversity - provisions of which seek to maintain the balance between the right to development and the need to protect natural resources and reduce environmental pollution.⁸¹ Other international instruments linking the enjoyment of human rights and environmental protection, include the Right to Development which provides for equality of access to basic resources and food;⁸² the Declaration of the Rights of Indigenous Peoples, which recognizes the distinctive and profound relationship which indigenous peoples have with their land and provides for “prevention from and redress for dispossession of their lands, territories or resources.”⁸³ The Hague Declaration recognizes the right of people to “live in dignity in a viable global environment”⁸⁴ while the Draft Declaration of Principles on Human Rights and the Environment (otherwise known as the Ksentini Report)⁸⁵ sets out the content of the right to a secure, healthy and ecologically sound environment.⁸⁶ This Declaration also sets out substantive and procedural environmental rights and the corresponding duties of individuals, States, international organizations and transnational corporations to respect this right.⁸⁷

⁸¹ E. Emeseh, ‘Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria,’ (2006) 24, *Journal of Energy & Natural Resources Law*, 574, 578. See also E. Emeseh, “Human Rights Dimensions of Contemporary Environmental Protection”, in M. Odello and S. Cavandoli, (Eds.) *Emerging Areas of Human Rights in the 21st Century: the Role of the Universal Declaration of Human Rights*, (Routledge; New York, 2011), 66-86.

⁸² Declaration of the Right to Development, GA Res. 41/128, UN GAOR Supp. (No.53) at 186, UN Doc. A/41/53, (4 December, 1986)

⁸³ UN Economic and Social Council (ECOSOC), Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (20 April, 1994)

⁸⁴ Hague Declaration on the Environment, 11 March, 1989, reprinted in 20 *ILM* 1308.

⁸⁵ Draft Declaration of Principles on Human Rights and the Environment, UN Doc. 3/CN.4/Sub.2/1994/9 reproduced in (1994) 3, *RECEIL*, 259-261.

⁸⁶ Principle 2

⁸⁷ A.F. Aguilar, and A.F. Popovic, ‘Lawmaking in the United Nations: The UN Study on Human Rights and the Environment’, (1994) 3, *RECEIL*, 197, 201.

Some of these instruments are not legally binding as they are regarded as “soft-law” instruments,⁸⁸ which is one of the concerns raised about the status of the right to a clean environment in international law.⁸⁹ But sometimes, these concerns are overstated, as human rights in particular, and international law in general are marked by a progressive codification process, beginning with non-binding declarations and progressing towards binding obligations when and if support exists in the international community.⁹⁰ As Sohn stated, “like the economic, social and cultural rights, the new rights, even if not immediately attainable, establish new goals that can be achieved progressively, by one laborious step after another”.⁹¹

But of greater concern for the critics are the vagueness and uncertainty as well as the difficulty in providing a concise meaning to the right to a clean environment. The meaning of the right will be attempted in the following section.

⁸⁸ “Soft law” unlike “hard law” instruments are not legally enforceable, although if generally accepted by States become *opinion juris* and norms of customary international law which are binding and legally enforceable. See Shinsato supra note 76, 199, citing J.P. Eaton, ‘The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment’, (1997) 15, *Boston University International Law Journal*, (1997), 261, 272.

⁸⁹ A. Fabra, ‘The Intersection of Human Rights and Environmental Issues: A review of Institutional Developments at the International Level’, *Human Rights and the Environment*, Joint UNEP-OHCH Expert Seminar on Human Rights and the Environment, 14-16 January, 2002, Geneva, 9, published at <http://www.unhcr.ch/environment/bp3.html>, last visited 02/06/2007. Earlier critics include P. Alston, “A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?” (1982) 29 *Netherlands International Law Review*, 307; P. Alston, “Conjuring Up New Human Rights: A Proposal for Quality Control”, (1984) 78 *American Journal of International Law*, 608.

⁹⁰ Customary international law is grounded in the assumption that non-binding declarations and other *opinion juris* become binding customary international law if they are consistently followed by States “out of a sense of legal obligation”. See D.J. Bederman, *International Law Frameworks*, (2001), 95-96, quoted by Morgan-Foster, supra note 66, 9.

⁹¹ L.B. Sohn, “The New International Law: Protection of the Rights of Individuals Rather than States”, (1982) 32 *American University Law Review*, 48-62, 1, quoted by Morgan-Foster, *ibid.* 14.

4.4.3 Meaning of the Right to a Clean Environment

While the right to a clean environment may be recognised by the Declarations mentioned above, it is vague, and uncertain who the right holders and the duty bearers are, or the content or scope of the right. According to a writer, the right appears to be widely drawn without specific measures and steps to be taken by states or governments.⁹² Perhaps, this is due in part, to the problem of defining the ‘environment’ itself. For instance, ‘environment’, may refer to the ‘totality of circumstances surrounding an organism or group of organisms’, or the ‘social and cultural conditions affecting the nature of an individual or community’, or the ‘external surroundings in which a plant or animal lives’, or all the ‘biotic and abiotic factors that act on an organism and influence their survival and development, including sunlight, soil, air, water, climate and pollution.’⁹³ Quoting Kiss and Shelton, Amechi stated that the ‘environment’ can signify any point on a continuum between the entire biosphere and the immediate physical surroundings of a person or a group. Moreover, it is neutral in itself: an environment may be good or bad, deteriorated or protected.”⁹⁴ Black’s Law Dictionary⁹⁵ on the other hand, defines the environment as “the totality of physical, economic, cultural, aesthetic and social circumstances and factors which surround and affect the desirability and value of property and which also affect the quality of peoples’ lives.” In law ‘environment’ refers to a limited area or to the entire planet, including the atmosphere and stratosphere.⁹⁶ This latter approach was adopted by the International Court of Justice (ICJ) in *The Legality of the Threat or Use of the*

⁹² Tomuschat, supra note 10, 58-59.

⁹³ The American Heritage Science Dictionary, (Houghton Mifflin Company, 2005) accessed online at <http://www.thefreedictionary.com/environment>, (last accessed on 21/09/2011).

⁹⁴ A. Kiss and D. Shelton, *International Environmental Law*, (Transnational Publishers; New York, 1991), 115, cited by 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 Witwatersrand; Johannesburg, 2009), 21.

⁹⁵ 6th Edition, cited in L. Atsegbua, *et al*, *Environmental in Nigeria: Theory and Practice*, (Ababa Press; Benin City, 2004), 4.

⁹⁶ Kiss & Shelton, supra note 94, 116.

Nuclear Weapon case,⁹⁷ when it stated that “the environment is not an abstraction, but represents the living space, the quality of life and the very health of human beings, including generations unborn”.⁹⁸ In the same vein the Indian Supreme Court stated that:

*[T]he material resources of the community like forests, tanks, ponds, hillock, mountains, are nature’s bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality of life which is the essence of the guaranteed rights under Article 21 of the Constitution.*⁹⁹

According to Amechi, the broad legal definitions of the environment make it imperative that rules and policies designed to protect the environment must not only be focused strictly on the conservation of the natural and man-made environment, but also on the promotion of socio-economic factors that impact on the environment and human well-being.¹⁰⁰ In other words, the law must provide a benchmark or threshold beyond which human activities that damage the environment or affect the lives or economic well-being of others, would incur liability.

Since the environment which is supposed to be qualified by this right cannot itself be precisely defined, is it any wonder that this right itself defies precise meaning? Perhaps, its nature and scope may throw more light on the purport of this right?

4.4.4 The Nature of the Right to a Clean Environment

Four main approaches to the nature of the right to a clean environment are discernible. The first is the ‘environmental’ approach, which posits that the state of the environment plays an

⁹⁷ (1996) ICJ Reports 241-242.

⁹⁸ Ibid, paragraph 29.

⁹⁹ *Hinch Lal Tiwari v. Kamla Devi* (2001) 6 SCC, 496, Quoted by M.B. Lokur, “Environmental Law: Its Development and Jurisprudence”, (2006), on-line at http://www.assets.wvfindia.org/downloads/green_law_lecture_July_8_2006.pdf, (last accessed on 1/10/2011).

¹⁰⁰ Amechi, supra note 94, Ibid.

important role in determining the human rights condition of its inhabitants and therefore, environmental protection is a necessary pre-condition for the full enjoyment of basic human rights. In other words, the preservation of the environment is a prerequisite for the existence of man and the enjoyment of the basic rights to life, health, water, property, shelter, food, culture and all other rights.¹⁰¹ Therefore, life would be meaningless unless the environment itself is protected, nurtured and maintained. The second is the ‘human rights’ approach, which believes that human rights are essential for ensuring environmental protection.¹⁰² That is to say that extant human rights’ provisions including the rights to life and property may be used to protect the environment from pollution.¹⁰³ The third is the ‘indivisible’ approach, which sees the linkage between the environment and human rights as intrinsic, indivisible and inseparable. This view acknowledges that just as human rights abuses often lead to environmental harm, environmental degradation often results in human rights violations.¹⁰⁴ Consequently, this view advocates a new rights-based approach to protect the intrinsic linkage between human rights and environmental protection, placing the people harmed by environmental degradation at its centre.¹⁰⁵ In other words, a new rubric of rights should be recognized to ensure the protection of human rights as well as the environment. The fourth approach is one which sees neither the need for a separate rubric of ‘rights’ nor the re-conceptualization of human rights law to cater for environmental

¹⁰¹ Klaus Toepfer, UNEP Executive Director in his statement to the 57th Session of the Commission on Human Rights in 2001, online at <http://www.unep.org/newscentre/default.asp?ct=speeches&Scope=all>, (last accessed on 21/11/2011).

¹⁰² D. Shelton, ‘The Links between International Human Rights Guarantees and Environmental Protection’, paper delivered at the Center for International Studies, University Of Chicago on April 16, 2004, 2; Also D. Shelton, ‘Human Rights and Climate Change’, Working Paper No. 09-002, December, 2009, Buffett Center for International and Comparative Studies, Working paper Series, online at http://www.cics.northwestern.edu/documents/workingpapers/Bufet-09-002_Shelton.pdf, (last accessed 21/11/2011).

¹⁰³ Ibid.

¹⁰⁴ L. Ziemer, ‘Environmental Harm as a Human Rights Violation: Forging New Links’, online: <http://www.tew.org/background/env.rights.html>, (last accessed on 21/11/2011).

¹⁰⁵ D. Shelton, supra note 102, Ibid.

degradation.¹⁰⁶ That is to say that existing rights are sufficient to deal with environmental issues without the need to establish new rights.

Despite these different approaches, the linkage and interrelationship between human rights and environmental protection is undeniable. According to Cullet, ‘environmental right’ should not be classified as a ‘synthesis right’ as it entails specific characteristics that can be distinguished from other rights, nor does it constitute a ‘shell-right’, aimed at enhancing the realization of other rights.¹⁰⁷ In essence, environmental right has a peculiar character which makes it difficult to fit into one of the three existing generations of rights, as it transcends and embodies elements inherent in each,¹⁰⁸ and in some respects is both a precondition and an outcome of the enjoyment of many rights.¹⁰⁹ Also it appertains not only to individuals, but the environment itself as well as future generations.¹¹⁰

¹⁰⁶ A. Boyle, ‘The Role of International Human Rights Law in the Protection of the Environment’, in A. Boyle and M. Anderson (eds.) *Human Rights Approaches To Environmental Protection*, (Oxford University Press; Oxford, 1996), 56, [hereinafter “Boyle and Anderson”]. See also, M. DeMerieux, ‘Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (2001) 21(3), *Oxford Journal of Legal Studies*, 524; J. Kwong, ‘Environmental "Rights": Special Rights or No Rights at all’, Liberal Důsůne Topululđu and Association for Liberal Thinking, 1999. Available online: www.liberal-dt.org.tr/Inglizce/articles/main.htm, (last accessed 21/11/2007).

¹⁰⁷ P. Cullet, ‘Definition of an Environmental Right in a human Rights Context’, (1995) 13, *Netherlands Quarterly of Human Rights*, 25-40, 27.

¹⁰⁸ R. Pathak, ‘The Human Rights System as a Conceptual Framework for Environmental Law’, in E. Brown Weiss (ed), *Environmental Change and International Law – New Challenges and Dimensions* (UN University Press: Tokyo, 1992), 205-243.

¹⁰⁹ J. Symonides, ‘The Human Right to a Clean, Balanced and Protected Environment’, (1992) 20(1), *International Journal of Legal Information*, 24-40, 9, cited by Cullet, supra note 107, Ibid.

¹¹⁰ W. Shutkin, ‘International Human Rights and the Earth: The protection of Indigenous Peoples and the Environment’, (1991) 31(3), *Virginia Journal of International Law*, 479-511, 504.

4.4.5 The Scope of the Right to a Clean Environment

As noted earlier, the meaning of environmental rights is still considered to be vague, and as some scholars suggest, at best it is an entitlement rather than a right,¹¹¹ more so as the terminology used to define the right in legal instruments, varies. While some instruments qualify the word ‘environment’, others have focused on particular elements of it. Perhaps the most popular formulation yet, includes the ‘right to a clean and healthy environment’ or ‘an environment conducive to the well-being and higher standards of living’.¹¹² Others refer to the right to a decent environment, as encompassing the social and cultural aspects of the right and emphasizing the interdependence of all elements of the human environment,¹¹³ and yet others recognize the link between the protection of the environment and development.¹¹⁴ At the national level, different countries have also adopted different terminologies to express this right. For instance, while Article 41 of the Argentine constitution refers to ‘a healthy, balanced environment which is fit for human development’, Article 225 of the Brazilian constitution refers to ‘an ecologically balanced environment,’ and Article 50 of the constitution of Ukraine refers to a ‘safe and healthy environment’.¹¹⁵ The difference in expression notwithstanding, the kernel of the right is to afford ‘each person a right to an environment that supports his physical and spiritual well-being and development’.¹¹⁶

¹¹¹ M. Fitzmaurice and J. Marshall, ‘The Human Right to a Clean Environment – Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases’, (2007) 76, *Nordic Journal of International Law*, 109.

¹¹² For instance, Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) reprinted in 28 *ILM* 156 (1989). See also, Principle 1 of the Draft UN Economic Commission for Europe Charter on Environmental Rights and Obligations adopted on 29-31 October 1990, UN Doc. ENVWA/R.38, Annex 1).

¹¹³ Principle 1 of the Declaration of the United Nations Conference on the Human Environment, UN Doc. A/Conf.48/14/Rev.1.

¹¹⁴ See for instance Article 24 of the African Charter on Human and Peoples’ Rights reprinted in 21 *ILM* 58, 1982.

¹¹⁵ See generally, CIEL, ‘Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society’, online at: <http://www.ciel.org/Publications/olp3iii2.html>.

¹¹⁶ *Ibid.*

The Draft Principles on Human Rights and the Environment and some national constitutions provide a clearer insight into this right.¹¹⁷ The ‘right’ as stated in the Draft Principles aims to promote the right of all persons to an environment adequate to meet equitably the needs of present generations without impairing the rights of future generations to meet their own needs.¹¹⁸ Principle 2 describes ‘adequate’ to mean a ‘secure, healthy and ecologically sound environment’. Even this definition is no clearer than those adopted in the national and international instruments listed above as it uses adjectives that do not provide precise descriptions of this right. Anderson noted the difficulty in translating quantitative and qualitative dimensions of environmental protection standards to legal terms.¹¹⁹ This difficulty may therefore present ethical problems in determining what the rights actually protect.¹²⁰ Du Bois, for instance, questions whether ‘human health and livelihood or ecological sustainability or the aesthetic values of existing natural endowments’ are to be protected, who the right holders are, and whether the right is limited to individuals or groups;¹²¹ and how the interests of the present may be evaluated against those of future generations and vice-versa,¹²² or whether the right is limited to human beings or extends to the earth itself and other animals.¹²³ The inability to construct a clear formulation of the ‘right’

¹¹⁷ E/CN.4/Sub.2/1994/9, Annex I (1994). The Draft Principles on Human Rights and the Environment was prepared by the Special Rapporteur on Human Rights and the Environment in 1989, and submitted to the UN in 1994.

¹¹⁸ Principle 4.

¹¹⁹ M. Anderson, ‘Human Rights Approaches to Environmental Protection: An Overview’, in Boyle and Anderson (eds.), supra note 80, 11.

¹²⁰ F. du Bois, ‘Social Justice and Judicial Enforcement of Environmental Rights and Duties’ in Boyle and Anderson (eds.), *ibid*, 153-176.

¹²¹ J. Merrills, ‘Environmental Protection and Human Rights: Conceptual Aspects’, in Boyle and Anderson (eds.), *ibid*, 28.

¹²² Merrills, supra note 121, 31-33.

¹²³ See generally, C. Redgewell, ‘Life, the Universe and Everything: A Critic of Anthropocentric Rights’, in Boyle and Anderson (eds.), *ibid*, 71-88 and J. Merrills, ‘Environmental Protection and Human Rights: Conceptual Aspects’, Boyle and Anderson (eds.), *ibid*, 34.

especially in the international sphere¹²⁴ is the basis of the argument that there is no need to have a separate right to a clean environment.

The difficulty in reaching an all-embracing definition is not unconnected with the fact that most have developed through regional and national jurisprudence in the absence of a global consensus. Indeed countries are at different levels of socio-economic development and have different cultural priorities and perceptions, which influence their relationship with the environment and therefore, their definition of the right to a clean or healthy environment. In fact, the ambiguity may be an advantage as it leaves room for interpretations bearing in mind the peculiar nature of the right to fit peculiar regional and national circumstances, taking into account relevant socio-economic and cultural factors.¹²⁵ Currently, 118 countries have constitutional provisions in one form or the other, for the right to a clean and healthy environment,¹²⁶ and how they choose to describe it is influenced by each country's socio-economic and cultural perspectives. A sampling of the constitutional provisions and the interpretation given to it by national courts reveals the level of priority placed on this right by individual countries. Whilst most developed countries with robust environmental protection regimes, may not be enthused with environmental rights, or unable to mould them into one of the established categories of human rights,¹²⁷ the same cannot be said of developing countries at the margins of development, with less robust

¹²⁴ M. Anderson, 'Human Rights Approaches To Environmental Protection: An Overview', Boyle and Anderson (eds.), *ibid*, 10-19.

¹²⁵ Shelton, *Supra* note 102, *ibid*.

¹²⁶ EarthJustice, *Environmental Rights Report 2007*, online at <http://www.earthjustice.org/library/references/2007-environmental-rights-report.pdf>, (last accessed on 29/05/2008).

¹²⁷ Cullet, *supra* note 107, 27

regulatory regimes, who may wish to depend on the emotive language of ‘right’ to secure an environment fit for habitation.¹²⁸

Notwithstanding the imprecise nature of the ‘right’, it is obvious that its aim is to promote individual and collective welfare in all the dimensions of human existence of which the environment is a part.¹²⁹ Lorenzen claims that substantive rights are the most difficult to define and suggests that the right to a clean environment should include a right to safe drinking water, clean air, and safe food as starting points for describing it.¹³⁰ The Second Part of the Ksentini Report sets out no less than 15 rights relative to environmental quality, which the right aims to protect.¹³¹ These include: freedom from pollution, environmental degradation and activities which threaten life, health or livelihood; protection and preservation of air, soil, water, flora and fauna; food and water; a safe and healthy working environment; adequate housing and land tenure and the right not to be evicted from home or land; to participate in decisions on evictions and to restitution or compensation thereof; control of lands and territories and resources and protection against destruction and degradation of land of indigenous people.

Having discussed the origin and the context in which the right to a clean environment is used in this study, as well as the nature and scope of this right, the next section will discuss how this right is recognized in international and regional human rights instruments as well as domestic law. The intention is to build on these human rights instruments to develop the argument that it

¹²⁸ See F. Oduor, “Developing Countries, Environmental Challenges, Politics and Human Rights: Another Conundrum in the Quest to Deconstruct the ‘Right to Poverty’”, online at <http://www.ssrn.com/abstract=1674231>, (last visited 10/12/2011).

¹²⁹ R. Pathak, *supra* note 108, 209.

¹³⁰ M. Lorenzen, *supra* note 69, *ibid.*

¹³¹ Articles 5-14.

is right recognized under Nigerian law, and may be used for addressing the oil pollution problems in the Niger Delta.

4.5 Recognition of the Right to a Clean Environment

The previous sections highlighted the meaning, nature and scope of the right to a clean environment. This section discusses the recognition and content of the right as expressed in global, regional and national instruments, and how they have been interpreted within global, regional and national legal systems, in order to determine how this could work under Nigerian law.

4.5.1 International Recognition

Actions and activities of international, regional and domestic bodies illustrate the interdependence of human rights and the environment and the increasing recognition of human rights-based approach to environmental protection. Such recognition demonstrates that the right to a clean environment, whether as a separate and independent right or through the application of other human rights, is emerging as an important component of international law.¹³² Actions and statements from international bodies continue to shape the emerging right to a clean and healthy environment, which could be found in treaties, declarations, reports from commissions, committees, specialized agencies and similar entities and court decisions. A review of these materials demonstrates increasing recognition that environmental harm adversely affect various individual and community rights such as the rights to life, health, culture, development,

¹³² See Earthjustice, *supra* note 9, 1. International legal norms typically arise from international conventions, international custom or as general principles of law recognised by civilised nations. Weight is also given to judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. See Article 38(1) of the Statute of the International Court of Justice (ICJ Statute), 26 June, 1945.

information and participation, and that a human rights-based approach to environmental protection, such as the right to a clean environment (in its substantive and procedural aspects) could provide an effective framework for addressing these issues.¹³³

Admittedly, early international human rights instruments such as the UDHR, the ICCPR and the ICESCR, did not contain express provisions for the right to a clean environment, but elements of this right could be inferred from them.¹³⁴ For instance, the UDHR recognizes that: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’. It is submitted that the ‘order’ to which the Declaration refers includes the environmental concerns of our time.¹³⁵ The foundation for linking human rights and environmental protection is traceable to the Stockholm Declarations,¹³⁶ Principle 1 of which declared that ‘man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being’. It also announced the responsibility of each person to protect and improve the environment for present and future generations.¹³⁷ Also, the Report on Human Rights and the Environment of the Human Rights Sub-commission on the Prevention of Discrimination and Protection of Minorities concluded that, ‘all persons have the right to a secure, healthy and ecologically sound environment’.¹³⁸ On the other hand Principle 10 of the Rio Declaration, which articulates the procedural aspect of this

¹³³ Earthjustice, *supra* note 9, 6.

¹³⁴ V. Vukasovic, *Human Rights and Environmental Issues*; online at United Nations University website; www.unu.edu.unupress/unupbooks/uu06he/uu06he0i.htm, (last accessed 01/05/2007).

¹³⁵ Human Rights And The Environment, Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, E/CN.4/Sub.2/1994/9; 6 July 1994, Section B, 34. (Hereafter referred to as the Ksentini Report).

¹³⁶ D. Shelton, *Human Rights and Environment Issues in Multilateral Treaties Adopted between 1991 and 2001*, Background Paper No. 1.

¹³⁷ Principle 4

¹³⁸ Ksentini Report, Principle 2.

right, laid down the framework for public participation in environmental decision-making upon which many other global, regional and national legal instruments are now based.

In 1986, the Experts Group of the World Commission on Environment and Development suggested the recognition of this right. Principle 1 of the draft principles states that: ‘all human beings have the fundamental right to an environment adequate for their health and well-being.’ The Convention on Biological Diversity, signed by 150 government leaders at the 1992 Rio Earth Summit is dedicated to promoting sustainable development. Conceived as a practical tool for translating the principles of Agenda 21 into reality, the Convention recognizes that beyond plants, animals and micro-organisms and their ecosystems, biological diversity concerns people and their need for food security, medicine, fresh air and water, shelter and a clean and healthy environment in which to live.¹³⁹ On the other hand, the Framework Convention on Climate Change and the Kyoto Protocol is the first legally binding international agreement to mandate the reduction of greenhouse gas emissions, having entered into force on 16 February, 2005.¹⁴⁰ Although the Protocol does not specifically mention the right to life or the right to health - as climate change interferes with the enjoyment of several human rights - its implementation would enhance the protection of these rights from adverse environmental impacts.¹⁴¹ The UN General Assembly adopted by consensus a resolution in 1990 recognizing that ‘all individuals are entitled

¹³⁹ UN DOC. UNEP/CBD/COP/8/4; EarthJustice, *supra* note 9, 45.

¹⁴⁰ United Nations Framework Convention on Climate Change, Feature: Kyoto Protocol, online at http://unfccc.int/kyoto_protocol/items/2830.php. The negotiation for an agreement to extend the application of this Protocol beyond 2012, was completed in Durban, South Africa on 11 December, 2011 with all the countries, including the United States, China, India and other developing and developed countries signing on to this new agreement, including the launch of a Green Climate Fund to channel about \$100 billion by 2020 to vulnerable countries to help them deal with the effects of climate change. See V. Eastwood and R. Curnow, “Delegates at Climate talks agree to extend efforts of Kyoto Protocol”, online at <http://www.wfmz.com/news/Delegates-at-climate-talks-agree-efforts-of-kyoto-protocol/-/121458/5098836/-/sstrjez/-/>, (last accessed on 11/12/2011).

¹⁴¹ See Earthjustice, *ibid*, 47.

to live in an environment adequate for their health and well-being.’¹⁴² Recent work by other UN organs and agencies, such as ECOSOC,¹⁴³ UNCHR,¹⁴⁴ UNCSD,¹⁴⁵ UNEP,¹⁴⁶ among others,¹⁴⁷ establish the link between environmental protection and human rights and recognize directly or indirectly the right to a clean environment and urging member States to strengthen the mechanisms for actualizing this right.¹⁴⁸

In terms of enforcement, this is no different from the enforcement of international law generally, which is determined largely by the extent of compliance with reporting and monitoring obligations or application of international standards in domestic spheres. Given that international law is still largely based on the relationship among States and not individuals or non-state actors, much of what States do with regard to human rights, border on the implementation of their human rights obligations within their municipal spheres. So that much of the enforcement of any rights-based mechanism more often than not concerns what the States do within regional arrangements or their domestic forum. But that is not to discount the position

¹⁴² G.A. Res. 45/94, U.N. GAOR, U.N. Doc. A/45/749 (14 December, 1990).

¹⁴³ See UN Economic and Social ECOSOC, What ECOSOC Does (2005) at <http://www.un.org/esa/coordination/ecosoc/about.htm>.

¹⁴⁴ Office of the United Nations Commission on Human Rights (now renamed UN Human Rights Council), Resolutions Adopted at the 61st Session, online at http://ap.ohchr.org/documents/sdpage_e.aspx

¹⁴⁵ UN Commission on Sustainable Development, UN DOC.E/CN.17/2005/12 (22 April, 2005)

¹⁴⁶ United Nations Environment Programme, *President's Summary of twenty-third session of Governing Council/Global Ministerial Environmental Forum*, UN DOC.UNEP/GC.23/L.3/Rev.1 (24 February, 2005)

¹⁴⁷ Including the financial mechanism for implementing the Conventions on Biodiversity, Climate Change, and Persistent Organic Pollutants and combating Desertification. See Global Environment Facility, *2005 Annual Report, Fertile Ground: Seeding National Actions for the Global Environment*, online at http://www.gefweb.org/Outreach/outreach-publications/documents/2005_Annual_Report.pdf.; World Health Organisation whose recent resolution in December 2005, acknowledged how environmental circumstances affect disease transmission, the intensity of natural disasters, drinking water supplies, fuel supply and human nutrition, among others. See World Health Organisation, *Ecosystems and Human Health: Some findings from the Millennium Ecosystem Assessment*, available at <http://www.millenniumassessment.org/en/index.aspx>.; International Labour Organisation whose mission is to promote social justice, human rights and labour rights. See ILO, *About ILO*, available at <http://www.ilo.org/public/english/about/index.htm>.

¹⁴⁸ See the work of the 61st session of the UN Commission of Human Rights (now renamed UN Human Rights Council), held between 14 March and 22 April, 2005, which examined numerous reports and passed many recommendations on environmental human rights including the right to a clean and healthy environment.

of international law, which for all intents and purposes has its compliance or enforcement mechanisms.¹⁴⁹ Indeed, the importance of the right to clean environment did not escape the attention of the ICJ, where Judge Weeramantry in his separate opinion in the *Gabci'kovo-Nagymaros Project* case,¹⁵⁰ emphasized that the protection of the environment is a vital part of contemporary human rights doctrine, as it is *sine qua non* to the enjoyment of other human rights, such as the right to health and the right to life itself. He further stated that it now dawns on the judicial conscience of mankind that damage to the environment anywhere can impair and undermine all human rights spoken of in the UDHR and other human rights instruments. Although Judge Weeramantry did not proclaim a new right to a clean and environment, he emphasized its importance particularly with reference to the enjoyment of other recognized human rights.

4.5.1.1 Duty to Protect, Respect and provide Access

States have a duty and obligation under international law: to protect and refrain from interfering directly or indirectly with the enjoyment of the human rights of their citizens; prevent third parties, such as transnational corporations from interfering in any way with the enjoyment of the human rights of their citizens; and (if such occurs, to investigate and) adopt measures (such as regulation or provide access to court) necessary to achieve the full realization of the human

¹⁴⁹ Such as the Country Reports to the Office of the High Commissioner for Human Rights, on human rights and environmental issues, generally or commission special reports. The latest Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in Nigeria, provided on 22 November, 2007, (A/HRC/7/3/Add.4). At page 7-8, the Report detailed the neglect and marginalization of the people of the Niger Delta region as well as the desperate poverty they face, including allegations of torture and ill-treatment meted to them. The full Report is available online at <http://www.ohchr.org/EN/PublicationsResources/Pages/Publications.aspx>, (last accessed on 26/12/2011).

¹⁵⁰ *Gabci'kovo-Nagymaros Project* case Judgement of 25 September 1997, Individual opinion of Judge Weeramantry, ICJ Reports (1997), 91-92.

rights of their citizens.¹⁵¹ The ICCPR for instance, enjoins States to “respect and to ensure to all individuals within its territory and subject to the jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁵² Article 2(3)(a) and (b) of ICCPR also provides an obligation to ensure that any person whose rights or freedoms provided under the ICCPR have been violated shall have an effective remedy determined by competent judicial, administrative or legislative authorities. This obligation further requires that States refrain from interfering directly or indirectly with the enjoyment of the human rights of their citizens or others within their jurisdiction. The obligation to ‘protect’ obliges States to prevent third parties (i.e. individuals, groups, corporations, or other entities) from interfering in any way with the enjoyment of their citizen’s human rights.

These obligations also tally with those proffered by Professor Ruggie, the UN Secretary General’s Special Representative on Human Rights, Transnational Corporations and other Business Enterprises, whose last report submitted on 20 March, 2011,¹⁵³ restated the three core principles of the State’s duty to protect and prevent against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; the corporate responsibility to respect human rights, essentially not to infringe on the rights of others; and greater access by victims to effective remedy, both judicial and non-judicial. Access to a remedy

¹⁵¹ See Ruppel, supra note 63, 103.

¹⁵² See Article 2 (1) of ICCPR.

¹⁵³ See Professor J. Ruggie’s Final Report to the Human Rights Council on Issues of Human Rights and Transnational Corporations and other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United National “Protect, Respect and Remedy” Framework*, 21 March, 2011, A/HRC/17/31, on-line at <http://www.business-humanrights.org/ReportstoUNHumanRightsCouncil/2011>, (last accessed on 1/10/2011).

is central to both the state duty to protect and corporate responsibility to respect.¹⁵⁴ The State's duty to protect against third party abuse is grounded in international human rights law contained in (a) treaties which commit States Parties to refrain from violating the enumerated rights of persons within their territory and/or jurisdiction; and (b) treaties which require States to ensure the enjoyment or realization of those rights by citizens. Under this obligation, States are not held responsible for human rights abuse by private actors *per se*, but may be in breach of their obligations where such abuse is attributable to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.¹⁵⁵ The Report further enjoins States to maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, through investment treaties or contracts, ensuring that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.¹⁵⁶

In concluding this section, while recognizing that most of the international instruments referred to are 'soft-law' instruments and therefore, not binding, any skepticisms about the recognition of the right to a clean environment in international law, does not affect regional efforts in this regard. While the three regions to be discussed below, have adopted different approaches for enforcement, the recognition of this right is no longer in doubt since the instruments in which the right is recognized, are legally binding, including the African Charter, Article 24 of which expressly provides for the right to a clean environment. These regional efforts will now be discussed below.

¹⁵⁴ Ruggie, *supra* note 153, 7.

¹⁵⁵ *Id.*

¹⁵⁶ *Ibid*, 12

4.5.2 Recognition at the Regional level

In addition to developments at the international level, regional human rights instruments recognize and provide for the right to a clean environment. Usually, regional instruments mirror relevant international practice, but with emphasis on their individual regional peculiarities. These regional instruments include the European Convention on Human Rights, 1950, the African Charter on Human and Peoples' Right, 1981, and the Additional Protocol to the American Convention on Human Rights, 1988. Each of these instruments will now be discussed in that order.

4.5.2.1 Europe

The European Convention for the Protection of Human Rights and Fundamental Freedoms, was adopted in 1950,¹⁵⁷ and the first human rights instrument to give specific content to human rights in an international agreement, combining this with a machinery for supervision and enforcement. It was signed in Rome on 4 November, 1950 and entered into force on 3 September, 1953. A central feature of this regime is the right of individual and inter-State petition. To implement this Convention, a Commission and a Court for handling both State and individual complaints was established, respectively. Also, a Committee of Ministers as the governing body of the Council of Europe was charged with responsibility for supervising the implementation of the decisions of the European Court of Human Rights (ECHR) if and when the Commission determines that there have been human rights violations. The effectiveness, respect, use and development of its

¹⁵⁷ Reproduced in Brownlie supra note 50, 611-625.

jurisprudence was such that Protocol No.11,¹⁵⁸ was adopted in May 1994, replacing the Commission with a speedier and more effective unitary mechanism,¹⁵⁹ under which the Court, supported by the Committee of Ministers of the Council of Europe (although entirely independent), stands as the sole mechanism for the protection, enforcement and interpretation of the human rights guaranteed by the ECHR.¹⁶⁰

The European Convention on Human Rights does not have any express provision for environmental rights, but the European Court of Human Rights has built up an extensive environmental jurisprudence over the years, as a result of which a *Manual on Human Rights and the Environment* was adopted by the Council of Europe in 2005 recapitulating the Court's decisions and setting out some general principles.¹⁶¹ The Manual pointed out that 'The Convention is not designed to provide a general protection of the environment as such and does not expressly guarantee a right to a sound, quiet and healthy environment', nevertheless various articles indirectly have an impact on claims relating to the environment, most notably the right to life (Article 2), the right to respect for private and family life (Article 8), the right to peaceful enjoyment of possessions and property (Protocol 1, Article 1) and the right to a fair hearing

¹⁵⁸ This Protocol came into force on 1 November, 1998. There are currently 27 members of the European Union over which the Court now has jurisdiction, including some of the former East European countries coming out of communist and totalitarian regimes.

¹⁵⁹ Protocol No. 11, Freedoms, Restructuring the Control Machinery Established Thereby, 11 May, 1994, 33 *ILM* 960 (1994), entered into force on 1 November, 1998 for all the parties to the European Convention.

¹⁶⁰ See Udombana, *supra* note 51, 140.

¹⁶¹ A. Boyle, 'Human Rights and the Environment: A Reassessment', online at <http://www.unep.or/environmentalgovernance/LinkClick.aspx?fileticket=GccCLN-brmg%3D&tabid=>, (last accessed on 25/12/2011).

(Article 6). Apart from this, the European Union adopted the Aarhus Convention which makes elaborate provisions for procedural rights.¹⁶²

Some of the notable environmental cases, which came before the European Court of Human Rights, include the case of *Lopez-Ostra v. Spain*,¹⁶³ where the court treated an issue bordering on environmental harm as a breach of the right to privacy, property and family life. In that case, the applicant and her daughter suffered serious health problems from the fumes of a tannery waste treatment plant which operated alongside the apartment building where they lived. The plant malfunctioned, releasing gas fumes, which caused health problems and nuisance to people living in the district. The town council evacuated the local residents and re-housed them free of charge during the summer, but allowed the plant to resume partial operation. In October the applicant and her family returned to their flat, where the problems continued, and finally sold her house and moved from the area. In an application to the European Human Rights Court, the court noted that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life, without seriously endangering their health. The court decided that in this instance, the plaintiff's right to private and family life had been adversely affected. It also found that States have a supervisory duty over activities carried out in their territory in order to protect private and family life and home and that a privately owned facility's nuisance could be attributable to the State.

¹⁶² L. Kramer, 'Rights of Complaint and Access to Information at the Commission of the EC' in S. Deimann & B. Dyssli, *Environmental Rights: Law, Litigation & Access to Justice*, (eds.) (Cameron May: London, 1995), 53, 54-5 [hereafter referred to as 'Deimann']

¹⁶³ ECHR (1994), Series A, No. 303C.

Also in the case of *Anna Maria Guerra and 39 Others v. Italy*, brought under Article 10 (right to freedom of information), the court confirmed that environmental pollution, without being severe, might affect individual's well-being, private and family life, and explained that the rights guaranteed by this Article were breached where the applicants waited a long period to obtain essential information, necessary to evaluate the risks involved and to which their families were exposed. The court held that the exposure to toxic emissions affected their right to private and family life provided under Article 8.

In *Hatton v. United Kingdom*,¹⁶⁴ which had to do with noise pollution at Heathrow airport, it was argued that aircraft noise infringed the rights protected by Article 8 and that the State had a positive duty to ensure adequate protection of these rights. The Court in rejecting this argument stated that there was no explicit right under the Convention to a clean and quiet environment, nor was the noise disturbances complained of caused by the State or its organs. The court found that the authorities did not overstep their margin of appreciation by failing to strike a fair balance nor that there had been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights. But in a dissenting opinion by five of the judges, they held that:

*In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, and therefore to protection against nuisance caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on.*¹⁶⁵

*Taskin and Ors v Turkey*¹⁶⁶ involved a challenge to the development and operation of a gold mine, which the applicants alleged caused environmental problems to the people of that region.

Appropriate procedures had apparently been followed, yet the challenge was to the substance of

¹⁶⁴ *Hatton v. United Kingdom* 37 Eur. Ct. H.R. 28, 648 (2003).

¹⁶⁵ *Ibid*, para 2 of the Joint Dissenting Opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner

¹⁶⁶ (App no 46117/99) (2004) ECtHRt., 621.

the decisions taken by the authorities. In reviewing the applicable legal framework and applying Article 8, the European Court of Human Rights, referred to Rio Principle 10 and the Aarhus Convention both of which set forth procedural rights. In addition, the Court quoted from a Parliamentary Assembly resolution, which recommended that member states ensure appropriate protection for life, health and family and private life, among others, the need for environmental protection, and that member states recognize a human right to a healthy, viable and decent environment. The latter includes the objective obligation for states to protect the environment in national laws, preferably at the constitutional level. Given this recommendation and the domestic constitutional guarantees, the Court found a violation despite the absence of any accidents or incidents at the mine. The mine was deemed to present an unacceptable risk.¹⁶⁷

From the above cases, it is obvious that inspite of not having an express right to a clean environment, the European Court of Human Rights is prepared to find and enforce this right through other existing rights, by striking a balance between economic activities and individual rights. This approach may not be as effective under the African or Inter-American systems, as the three regions have different levels of political and socio-economic development. While the Europeans have developed over the years, a body of robust regulatory systems, the same could not be said of Africa and or some of the Latin American countries, for whom the human rights approach may be more effective.¹⁶⁸

¹⁶⁷ See Shelton, *supra* note 102, 18.

¹⁶⁸ See discussions on generation of human rights above, paragraph 4.4 above.

While the European Convention does not expressly provide for a right to a clean environment, the Aarhus Convention,¹⁶⁹ negotiated under the auspices of the United Nations Economic Commission for Europe, provides elaborately for procedural rights. This Convention is not only binding and applicable within the European Union, but also has some global appeal and recognition.¹⁷⁰ The UN and the European Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, was adopted on 25 June, 1998 in the Danish city of Aarhus. The Aarhus Convention, as it is commonly known is a unique agreement intended to promote environmental democracy across Europe, and holds the promise of helping people re-engage with environmental decision making, not only by guaranteeing the rights to environmental information and to participate in environmental decision making, but also the right to have access to the courts through procedures that are fair, equitable, timely and not prohibitively expensive.¹⁷¹ According to Morrow, the promotion of public participation in environmental decision-making is a social good, and linked to some of the most fundamental elements of modern governance, including democratic values, accountability, improved decision-making and education.¹⁷² These rights which represent the three ‘pillars’ of the Aarhus Convention will now be briefly discussed.¹⁷³

¹⁶⁹ UN Econ. Commission for Europe, Convention on Access to Information, *Public Participation in Decision-making and Access to Justice in Environmental Matters*, UN Doc. ECE/CEP/43, (25 June, 1998).

¹⁷⁰ Kofi Anan the then Secretary General of the UN introduced the Aarhus Convention as the most ambitious venture in “environmental democracy” undertaken by the UN. See M. Mason, “Information Disclosure and Environmental Rights: The Aarhus Convention”, (2010) 10(3) *Global Environmental Politics*, 10-31, 12.

¹⁷¹ K. Morrow, “The courts and Public Participation in Environmental decision-making”, in J. Benidickson, *et al*, (eds.), *Environmental Law and Sustainability after Rio*, (Edward Elgar Publishing Limited; Cheltenham, 2011), 138-157,150.

¹⁷² Morrow, *Ibid*, 139.

¹⁷³ The rights will be more fully discussed in relation to Nigeria in Chapter V.

4.5.2.2 The Right to Information

The right to information in the context of the environment has at least two strands: the right to obtain information from government on request, and government's affirmative duty to inform the people of any or imminent environmental dangers and emergencies.¹⁷⁴ According to a writer:

*The right to information means that States have to distribute data and information relating to facts, activities, practices or projects with considerable or potential impact on the environment and to provide access to data and information concerning or potentially concerning the environment. This information should cover not just cases of pollution but all the factors likely to cause environmental damage, such as over-exploitation of resources, erosion, floods, earthquakes, etc.*¹⁷⁵

The right to seek, receive and impart information without interference is guaranteed by a number of international environmental law instruments,¹⁷⁶ and impose obligation on the government to release information about its own projects so as to increase public knowledge and awareness.¹⁷⁷

The State should also give notice to individuals likely to be affected by any situation or event, which effect could be deleterious to the environment.¹⁷⁸ In *Guerra v. Italy*,¹⁷⁹ the court was prepared to find a breach of Article 8 of the European Convention on Human Rights where the Italian authorities failed to provide the local population with information about the risks associated with a nearby chemical factory, and about how to proceed in the event of an accident.

¹⁷⁴ M. Mollo, *et al*, *Environmental Rights Report, Human Rights and the Environment*, Materials for the 61st Session of the United Nations Commission on Human Rights, Geneva, March 14-April 22, 2005, online at www.earthjustice.org.

¹⁷⁵ M. Dejeant-Pons, "The Right to Environment in Regional Human Rights Systems", in K.E. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-First Century* (1993), quoted in Dias, *supra* note 80.

¹⁷⁶ Art.19, ICCPR; Article 6(a)(ii) UN Framework Convention on Climate Change, May 9, 1992, UN Doc. A/CONF. 151726, 31 *ILM* 849 (1992), Article 14(1), Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, 32 *ILM*. 1228 (1993), Article 19, The African Charter.

¹⁷⁷ See Morrow, *supra* note 171, *ibid*.

¹⁷⁸ Dias, *supra* note 80, *ibid*.

¹⁷⁹ ECt.HRt, 19 February, 1998, 116/1996/735/932.

4.5.2.3 Right to Participate

As a means for pursuing environmental protection, participation is based on the right of those who may be affected by a project to have a say in the determination of their environmental future. The Espoo Convention on Environmental Impact Assessment in a Transboundary Context requires States to notify the public and to provide an opportunity for public participation in relevant environmental impact assessment procedures regarding proposed activities.¹⁸⁰ The right to participate is also provided for by Article 25 of the ICCPR,¹⁸¹ and articulated in the Aarhus Convention. With regard to the Aarhus Convention, the former Secretary-General to the U.N, Kofi Anan, emphasized that:

Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need of citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations.¹⁸²

4.5.2.4 Right of Access to Justice (or Court)

The term 'access to justice' is sometimes used interchangeably with 'access to court', but they have two different connotations. Whereas access to justice in environmental matters straddles the three pillars of the Aarhus Convention, access to court, on the other hand, refers to the right of people to challenge in court, any environmental decisions which may have impact on them. It is in this later connotation that discussions in this segment will focus.

¹⁸⁰ Ibid.

¹⁸¹ Art.25, ICCPR; Art.13, African Charter.

¹⁸² See Aarhus website: www.unece.org/env/pp.

It is not enough to have a right to clean environment, but this right must be coupled with a corresponding duty of the state to ensure that in appropriate cases, individuals are able to challenge governmental actions or failure to ensure that this right is not infringed upon. The ability to mount this challenge may be impeded by other barriers such as costs, more so in environmental matters, which are sometimes complex and therefore expensive to litigate. Whether for judicial review or indeed to mount a civil action for compensation or to enforce a right, legal costs are prohibitive as to discourage some litigants. Lord Robert Carnwath once said that:

*litigation through the Courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds.*¹⁸³

Although English law guarantees a successful party the recovery of its costs, it is not so much the risk of paying large sums of money in costs, but also garnering the initial funds to commence litigation. Therefore, although access may be available, litigants are often deterred by the costs of bringing an action as well as the fear of paying costs if they lose.¹⁸⁴ However, this fear is tempered by the availability in jurisdictions such as England of a reasonably well-funded legal

¹⁸³ Quoted by Coalition for Access to Justice for the Environment, “Access to Environmental Justice: Making it Affordable”, online at http://www.foe.co.uk/resource/briefings/caje_general_briefing.pdf, (last accessed on 01/09/2010). The European Commission referred the UK Government to the European Court of Justice over its failure to provide an affordable procedure for mounting legal challenges in environmental cases. The ECJ has the power to impose fines of up to €150,000 per day plus a lump sum up to €20m for non-compliance with the Aarhus Convention on environmental law, which the UK ratified in 2005. However, the ECJ found that government proposals of a costs cap of £25,000 for individuals but no cap for environmental groups, which would expose them to unlimited costs, were not compatible with the convention. See J. Rayner, “EU takes UK to court over Aarhus failings”, *Law Society Gazette*, 28 April, 2011, 2; See generally Institute for European Environmental Policy, *Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention*, online at http://www.ieep.eu/assets/422/aarhus_report.pdf, (last accessed on 1/10/2011).

¹⁸⁴ The Aarhus Convention Compliance Committee has found as unreasonable financial risks which litigants faced in the United Kingdom when they bring actions and lose and a breach of its obligations under the Aarhus Convention, which it ratified in 2005. See “ClientEarth Wins Landmark case against the UK for failing citizens on access to Justice”, online at <http://www.clientearth.org/pressreleases/landmarkcase-951>, (last accessed on 1/10/2011).

aid system, which in the current economic circumstances may be less generous in all cases, save for serious environmental harm.

In conclusion, the European human rights system is very developed and the court's jurisprudence highly regarded. The court's influence in shaping the laws of member-States is noticeable. While the 1950 Human Rights Convention, did not expressly provide for a substantive right to a clean environment, this appears to have been achieved by interpreting existing human rights provisions, in deserving cases, using environmental rights approach. However, the procedural aspect of this right is recognized by virtue of the Aarhus Convention of 1998.

4.5.3 Latin America

The first regional human rights instrument in the Americas was the American Declaration of the Rights and Duties of Man, adopted at the Ninth International Conference of American States in 1948. Not much happened to develop this Declaration until the American Convention on Human Rights was adopted in 1969, and the creation of the Inter-American Court for the Protection of Human Rights. The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights,¹⁸⁵ was later adopted in 1988 and came into force on 16 November, 1999. Article 11, titled 'Right to a healthy environment' proclaims that: 'Everyone shall have the right to live in a healthy environment and to have access to basic public services' and that 'States Parties shall promote the protection, preservation and improvement of the environment.' This provision is significant, especially as both the 1969 Convention and the 1988 Protocol are binding instruments, and apparently informed the inclusion of environmental

¹⁸⁵ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 14 November, 1988 (1989) 28 *ILM*, 161.

rights in the constitutions of some of the countries in that region.¹⁸⁶ The Convention has two supervisory organs, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The court is modeled after the European Court of Human Rights (before the reform brought about by Protocol No. 11) and does not accept direct applications to the Court, as only States parties and the Commission itself may submit a case after the procedures before the Commission have been exhausted. Once a case is accepted by the Commission, it may not be withdrawn by the State member.¹⁸⁷ The Court makes considerable contribution to the protection and enforcement of the rights protected under the Convention,¹⁸⁸ including the right to a clean environment.

A number of cases to enforce this right has come before the Court, including the *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua case*,¹⁸⁹ in which the Inter-American Commission on Human Rights alleged violation by Nicaragua of its obligations under Articles 1, 2, 21 and 15 of the Inter-American Convention following its failure to demarcate and grant official recognition to the territory of the Awas Tingni community. The Court in its judgment emphasized the right of indigenous Awas Tingni to their land and their right to judicial protection under Articles 21 and 25, respectively. Similarly, the Commission recognized the rights to life and physical security in the study it conducted in Ecuador in response to claims that oil exploitation activities were contaminating the water, air and soil, thereby causing the people of the region to have a greatly increased risk of serious illness. The Commission stated that the

¹⁸⁶ Some of these constitutional provisions will be discussed in paragraph 4.5.5 below.

¹⁸⁷ See Tomuschat, *supra* note 10, 259.

¹⁸⁸ One notable case by this court is the case of *Minor Oposa v. Secretary of the Environment and Natural Resources Fulgencio Factoran*, (1994) 33 *ILM* 173

¹⁸⁹ Inter-American Court on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, Doc.10 Rev. 1 (1997).

realization of the right to life and to physical security and integrity is related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose persistent threats to human life and health, the foregoing rights are implicated.¹⁹⁰ In the case of *Sawhoyamaxa Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights also found that Paraguay had violated an indigenous community's right to life, livelihood and culture by barring its people from their traditional lands.¹⁹¹

The Inter-American system is not as developed as its European counterpart, but its jurisprudence is authoritative and respected. While the above cases have not turned directly on Article 11, they generally demonstrate that the Court and Commission are prepared to articulate the right to a clean environment at a quality that permits the enjoyment of all guaranteed human rights. In the cases, applicants have asserted violations of the rights to life, health, property, culture and access to justice, freedom of religion and respect for culture.¹⁹²

4.5.4 Africa

The adoption of the African Charter on Human and Peoples' Rights (hereinafter "African Charter")¹⁹³ is the first major effort by Africans to do something about the human rights abuses

¹⁹⁰ Ibid, 88. See also *The Kichwa Peoples of the Sarayaku Community's Petition 167/03*, Report No. 64/04, (13 Oct., 2004); See also The Advocacy Project, Sarayaku Indians to Confront Ecuador over Oil Exploration at Inter-American Human Rights Hearing, available at http://www.advocacynet.org/pr_view/pr_38.html; International Network for Economic, Social and Cultural Rights, *Case of the Indigenous Community Yakyé Axa v. Paraguay*, available at http://www.escri-net.org/caselaw/caselaw_show.htm?doc;

¹⁹¹ Petition 0326/01 and 0322/2002, Inter-Am.C.H.R. available at <http://www.cidh.org/DefaultE.htm>

¹⁹² Shelton supra note 102, 17.

¹⁹³ Promulgated in 1981 and entered into force on October 21, 1986.

which the continent has witnessed over the years.¹⁹⁴ The African Charter is unique in that it is the only human rights charter which proclaims not only rights but also duties,¹⁹⁵ and unlike its European and the Inter-American counterparts, enumerates civil and political rights,¹⁹⁶ economic, social and cultural rights¹⁹⁷ as well as group (or solidarity) rights.¹⁹⁸ It expressly provides in Article 24 for a right to a general satisfactory environment.¹⁹⁹

The African Charter provides for an African Commission on Human and Peoples' Rights ("African Commission") with a protection and promotional mandate as well as interpretation of the Charter provisions at the request of States Parties or Inter-Governmental Institutions. Although the Commission is an organ of the OAU,²⁰⁰ the Charter provides that "States Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."²⁰¹ This provision is all-encompassing as it not only mandates States Parties (a) to establish appropriate institutions for the promotion and protection of the guaranteed rights, but also, (b) courts for the

¹⁹⁴ A. Oyeboode, "UN and the Protection of Human Rights in Africa", in G.A. Obiozor and A. Ajala (eds.) *Africa and the UN System: The First Fifty Years*, (1998), 86, quoted in Udombana, supra note 51, 74.

¹⁹⁵ The American Declaration on the Rights and Duties of Man, 1948 also proclaims duties, but the drafters of the Inter-American Convention did not follow this approach. See Buergethal and Shelton, supra note 47, 29. The imposition of duties under the African system derives from the African tradition and values that individuals have responsibilities to the communities in which they are members. And while some of these duties maybe inferred from the general legal system, others are specified under the Constitution, although these duties attach only to citizens. Section 24(a-f) of the 1999 Constitution of the Federal Republic of Nigeria provides for six general duties, prominent among which is the duty to abide by and respect the provisions, ideals and institutions of the Constitution and legitimate authorities. Others include the duty to help to enhance the power, prestige and good name of and to defend Nigeria; the duty to respect the dignity of other citizens and the rights and legitimate interests of others and live in unity and harmony and in the spirit of common brotherhood; the duty to make positive contribution towards the advancement, progress and well-being of the community; the duty to maintain law and order and the duty to pay tax. Gye-Wado, supra note 38, 94-195.

¹⁹⁶ Articles 2-13

¹⁹⁷ Articles 14-18.

¹⁹⁸ Articles 19-23.

¹⁹⁹ More will be said about this right in Chapter Five.

²⁰⁰ Now African Union by virtue of the adoption of a new Charter on 11 July, 2000.

²⁰¹ Art. 26.

interpretation and enforcement of the rights guaranteed by the Charter. To this end, Nigeria not only has a Human Rights Commission, established by the Nigerian National Human Rights Commission Act, in 1995,²⁰² but also one of the most vigorous and perhaps, ‘activist,’ courts in region.²⁰³ Although attempts were made, especially during successive military administrations to muzzle the judiciary, Nigerian courts have been resilient in applying the Charter provisions.²⁰⁴

Under the General Guidelines for Reports from States on Civil and Political Rights issued by the Commission,²⁰⁵ each State Party to the African Charter must report *inter-alia*, on “[w]hat judicial, administrative or other authorities have jurisdiction affecting human and peoples’ rights, and [w]hat remedies are available to an individual whose rights are violated”. Unlike most other regional or international human rights treaties, the African Charter contains no derogation provision, although it allows States to impose as much restrictions and limitations on the rights it proclaims as they wish. Curiously, it liberally incorporates by reference other human rights treaties and declarations²⁰⁶ as well as embodies other soft law instruments such as resolutions, to complement the normative provisions of the Charter.²⁰⁷

Article 24 of the African Charter expressly provides for the right to a clean and healthy environment, and was relied upon in the first case of its kind brought before the African Human

²⁰² Nigerian National Human Rights Commission Decree 22 of 1995, Supplement to Official Gazette Extraordinary of the Federal Republic of Nigeria No. 28, Vol. 82, 6 October, 1995, Part A.

²⁰³ O.C. Okafor, *The African Human Rights Systems: Activist Forces and International Institutions*, (Cambridge University Press; Cambridge, 2007), 93; C.A. Odinkalu, “Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples’ Rights”, *Human Rights Quarterly*, (2001) 23(2), 327-369.

²⁰⁴ Okafor, *supra* note 203, *ibid*; See also African Commission, in Communication 129/94- *Civil Liberties Organisation v. Nigeria*, Ninth Activity Report 1995-96, Annex VIII.

²⁰⁵ Second Annual Activity Report 1988-89, Annex X. The guidelines were issued pursuant to the African Charter, Art. 62.

²⁰⁶ Buergenthal and Shelton, *supra* note 50, 29.

²⁰⁷ See for example the Commission’s Resolution on Electoral Process and Participatory Governance, adopted during the Nineteenth Ordinary Session at Ouagadougou, Burkina Faso in 1996.

Rights Commission in a petition by two NGOs on behalf of the Ogoni people, against the Nigerian Government and Shell. In *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*,²⁰⁸ the claim was on grounds, among others, that the continuing gas flare in the Niger Delta as a result of the activities of Shell as well as the pollution emanating from their petroleum exploitation activities, violated the rights to health and to a clean and satisfactory environment of the Ogoni people. The Commission in interpreting the right to health and the right to a general satisfactory environment in Articles 16 and 24, respectively, stated that it implies concrete obligations for States, to “take the necessary measures to protect the health of their people” and their right to a healthy environment, which means a clean and safe environment. According to the Commission, these provisions obligate governments to desist from directly threatening the health and the environment of their citizens, and to take measures to prevent pollution and ecological degradation. The Commission held that instead, the Nigerian government was actively involved in the pollution, the contamination of the environment and related health problems of the Ogoni people, by condoning and facilitating the activities of the oil companies through placing the legal and military powers of the State at their disposal. The Commission went further to state that it will apply all the diverse rights contained in the African Charter, and that “there is no right in the African Charter that cannot be made effective”, thereby debunking the myth about the justiciability or otherwise of economic, social and cultural rights. According to Coomans:

justiciability is a fluid concept: the justiciable character of a right depends on the features and the context of a specific case, the wording of the provision and the approach taken and attitude of the body dealing with the case. In the present case, the Nigerian government had clear obligations to abstain from interfering in the enjoyment of economic, social, cultural and collective rights by the people themselves, and to protect

²⁰⁸ 27 October 2001, 15th Activity Report, Annex V. Reported in F. Coomans, ‘The Ogoni Case before the African Human and Peoples’ Rights Commission’, *International and Comparative Law Quarterly*, (2003) 52, 749

*them from violations of their rights by the oil companies. The obligation to protect is indeed a positive obligation.*²⁰⁹

Other cases submitted to the African human rights system have also utilized the provisions on the right to health, protected by Article 16 rather than the right to a clean environment contained in Article 24. In *Communications 25/89, 47/90, 56/91 and 100/93 against Zaire*,²¹⁰ the Commission held that failure by the Government to provide basic services such as safe drinking water constitutes a violation of Article 16. The finding followed the consolidation of 4 communications asserting torture, killings, arbitrary detention, unfair trials and restrictions on the right to freedom of association and peaceful assembly, suppression of freedom of the press, denial of the right to education and the right to health. With regard to the latter the Commission stated that Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take necessary measures to protect the health of their people. The failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16.

Other than the *SERAC case* which turned on Article 24, most of the other cases rely on other articles, especially Article 16 – right to health. The Commission’s interpretation of Article 24 in that case is succinct enough, but these decisions turned on the particular facts of the cases where violations of the right to health was found rather than for a ‘healthy and satisfactory’ environment.

²⁰⁹ F. Coomans, “The Ogoni Case before the African Commission on Human and Peoples’ Rights”, online at <http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf>, (last accessed on 25/12/2011).

²¹⁰ Decision taken at the 18th Ordinary Session, Cape Verde, October 2005.

The above discussions show that while the recognition of the right to a clean environment at the international level is affected by the fact that the instruments of recognition are largely soft-law instruments, the same concerns do not affect the regional levels, where the instruments are legally binding, and have already generated a body of judicial decisions. On the one hand, while there is no express provision for a right to a clean environment under the European Convention, which was adopted in 1950 at a time when environmental issues have not assumed the level of concern as they do currently, this right is implemented through the application and interpretation of existing rights. However, the Aarhus Convention which elaborates the procedural aspect of this right recognizes the right to a clean environment. On the other hand, both the Protocol to the Inter- American Human Rights Convention and the African Charter have express provisions for the right to a clean environment, and have been enforced by their regional courts as a recognizable human right.

In terms of enforcement, different approaches have been adopted. Shelton observed that while under the Inter-American system, claims linked to environmental harm have generally asserted that the right to life is threatened or that the rights of indigenous groups have been violated, in Europe the focus is on the rights to privacy, property and family life.²¹¹ Under the African system, she avers that cases submitted have generally invoked the right to health, protected by Article 16 of the African Charter rather than the right to a clean and satisfactory environment

²¹¹ D. Shelton, 'Environmental Issues and Human Rights in Multilateral Treaties Adopted between 1991 and 2001', Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva.

contained in Article 24,²¹² although the *SERAC case*, indicate an express implementation of the right to a clean environment as provided in Article 24 of the African Charter

4.5.5 Recognition at the National level

Recognition of the right to a clean environment is also demonstrated by its inclusion in the constitution of several countries or in legislation. 118 out of the world's 190 countries mentioned the protection of the environment or natural resources in their constitutions, while 100 of them recognize the right to a clean and healthy environment and/or the state's obligation to prevent environmental harm. Of these, 53 constitutions explicitly recognize the substantive right to a healthy environment.²¹³ A few examples of such constitutional provisions and judicial decisions will be highlighted in this section, to buttress the point that while the right may not achieve universal acclaim under international law, it is a recognizable human right under the laws of many nations, including Nigeria. A sampling of these constitutional provisions will be undertaken in the section below, and how the courts in those countries have attempted to interpret this right.

The Costa Rican and Chilean constitutions are examples of oil-rich countries like Nigeria, whose economies rely largely on the extractive industries. The amended Costa Rican Constitution, 1949 provides for the right of every person 'to a healthy and ecologically balanced environment.'²¹⁴ It also directs the State to 'guarantee, defend and preserve this right' and to enact laws which will determine the corresponding responsibilities of citizens as well as

²¹² Ibid.

²¹³ Earth Justice, Issue Paper: Human Rights And The Environment, Materials For The Fifty-Seventh Session Of The United Nations Commission On Human Rights Geneva, 19 March – 27 April 2001, 39-40.

²¹⁴ Title V, Sole Chapter, Article 50, online at <http://www.pdba.georgetown.edu/constitutions/costa/costa.html> last visited on 18 April, 2011.

sanctions. In *Ruth Solano Vazquez, et al v. Ministry of the Environment and Energy*²¹⁵ the Constitutional Court of Costa Rica affirmed the citizens' constitutional right to a healthy and ecologically balanced environment. In this landmark decision, the Court annulled concessions granted to US oil companies to explore for and extract oil and gas from both onshore and offshore regions, and ordered the Government to pay costs and damages for failure to carry out prior consultation with local communities concerning these potentially harmful activities.

In Chile, Chapter III, Article 19(8) of the amended 1980 Constitution provides for the 'right to live in an environment free from contamination.' It also makes it the duty of the State to protect this right as well as the preservation of nature and authorizes the State to enact laws which 'establish specific restrictions on the exercise of certain rights or freedoms in order to protect the environment.' Article 20 establishes the right to appeal to the courts for protection 'when the right to live in a contamination-free atmosphere has been affected by an arbitrary or unlawful action imputable to an authority or a specific person.' It also requires the court to 'immediately take the steps that it deems necessary to ensure due protection to the person affected.' The courts have carried out this constitutional directive in a number of cases, including *Pedro Flores y Otros v. Corporación del Cobre, Codelco, Division Salvador*, where the Supreme Court applied Articles 19 and 20 to enjoin a mining company from further depositing copper tailing wastes onto Chilean beaches, a practice that had destroyed all traces of marine life in the area.

In South Africa, the right to a healthy environment is contained in section 24 of the 1997 Constitution, which provides that 'Everyone has a right to an environment that is not harmful to their health or well being and to have the environment protected for the benefit of present and

²¹⁵ (Res. No. 2000-08019).

future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.’ In furtherance of this right, the government passed the National Environment Management Act (NEMA) in 1998 which creates a set of environmental principles directing the government on how it should act. The courts have also enforced the right to a healthy environment in *The Director, Mineral Development Gauteng Region and Sasol Mining (pty) Ltd v Save the Vaal Environment and others*²¹⁶ where the Supreme Court held that before a permit is given for mining, the government must be prepared to listen to the views of the people concerned about potential environmental impacts. The kinds of environmental concerns that could be raised include destruction of plants and animals, pollution, loss of jobs and small businesses and property values.

Perhaps, in no other jurisdiction²¹⁷ has the right to a clean environment enjoyed greater prominence than in Indian, where although there is no express constitutional provision for the right, but through judicial activism and creativity, the courts have held in several cases that the right exists and is enforceable. India was one of the first to embrace an environmental right,²¹⁸ and since 1984 when the Supreme Court heard the case of *Bandhua Mukti Morcha v. Union of India*,²¹⁹ signalled the emergence of so-called public interest litigation. This ‘judicial creativity’ commenced with relaxation of the rules of standing that enabled litigants who have suffered a

²¹⁶ 1999 (2) SA 709 (A).

²¹⁷ See the Pakistan case of *Zia v. WAPDA* (1994) PLD 693; and Bangladeshi case of *Mohiuddin Farooque v. Bangladesh & Others* (1997) 17 BLD (AD) 1.

²¹⁸ L Rajamani, ‘The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?’ (2007) 16(3) *RECIEL*, 274.

²¹⁹ (1984) 3 SCC 161. See also the case of *A P Pollution Control Board v. M. V. Nayadu* (2001) 2 SCC 62

‘legal grievance’²²⁰ to sue, as well as public-spirited individuals, without any direct ‘legal grievance,’ to bring suit on behalf of those whose rights have been violated, but are unable to sue by reason of social or economic disability.²²¹ Article 32 of the Indian Constitution, 1949 guarantees the ‘right to move the Supreme Court by appropriate proceedings for the enforcement of the rights’ conferred by the constitution, and by initially expanding the interpretation of Article 21, which guarantees the fundamental right to life and liberty,²²² this provision was gradually extended to cover other rights such as human dignity,²²³ livelihood,²²⁴ education,²²⁵ health and medical care.²²⁶ This activist stance enables the court also to find that the right to life covers the ‘right to enjoyment of pollution-free water and air’.²²⁷ The court was also prepared to interpret the fundamental human rights provisions under Article 21 conjunctively with Directive Principles of State Policy, ‘like two wheels of a chariot, one no less important than the other,’²²⁸ even though Directive Principles were not intended to be justiciable. In *Minerva Mills v. Union of India*, Bhagwati, J stated that:

There are millions of people in the country who are steeped in poverty and destitution, and for them these civil and political rights have no meaning. It was realised that to a

²²⁰ In *Re Sidebottam* (1880) 14 ChD 458, Lord Justice James defined an aggrieved person as ‘a man who has suffered a legal grievance, a man against whom a decision has been pronounced which wrongly deprived him of something, or wrongly affected his title to something’, 465

²²¹ In *S P Gupta v. Union of India* (1981) Supp SCC 87, Justice Bhagwati held that “in public interest litigation – litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, ‘diffused’ rights and interests or vindicating public interest – any citizen who is acting bona fide and who has sufficient interest has to be accorded standing’, *ibid*, at para 20. Any fears of opening the floodgates for frivolous actions was put to rest by Justice Krishna Iyer, who said that “in a society where freedoms suffer from atrophy and activism, essential for participative public justice, some risks have to be taken and more opportunities opened for the public-minded citizen to rely on the legal process and not be repelled from it by narrow pedantry now surrounding locus standi.” See *Fertilizer Corporation Kamgar Union (Regd.) v. Union of India* (1981) 1 SCC 568, para. 40.

²²² Article 21 provides that ‘no person shall be deprived of his life or personal liberty except according to procedure established by law.’

²²³ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (1981), 1 SCC 608

²²⁴ *Olga Tellis v. Bombay Municipal Corporation* (1985), 3 SCC 545

²²⁵ *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666 and *J P Union Krishman v. State of Andhra Pradesh* (1993) 1 SCC 645

²²⁶ *Consumer Education & Research Centre v. Union of India* (1995) 3 SCC 42

²²⁷ *Subash Kumar v. State of Bihar* (1991), 1 SCC 598; *M C Mehta v. Union of India* (1992) 3 SCC 256 and *Virender Gaur V. State of Haryana* (1995) SCC 577.

²²⁸ *Minerva Mills v. Union of India* (1980) 3 SCC 625.

large majority of people who are living in almost sub-human existence and for whom life is one broken story of want and destitution, notions of individual freedom and liberty, though representing some of the most cherished values of a free society would sound as empty words bandied about in the drawing rooms of the rich and well-to-do and the only solution for making these rights meaningful to them was to remake the material conditions and usher in a new social order where socio-economic justice would inform all institutions of public life so that the pre-conditions of fundamental liberties for all may be secured. Fundamental rights are no doubt important and valuable in democracy, but there can be no real democracy without social and economic justice to everyone which is the realm of Directive Principles.

The above decisions indicate both the desire and action by nations to use human rights approach and the right to a clean environment, to address or redress environmental issues or wrongs. The courts in the various jurisdictions sampled, managed to enforce this right as a result of legislation or creative interpretation of constitutional provisions.

Nigeria's approach is multifaceted. Firstly, it is a signatory to the African Charter, Article 24 of which provides for a right to a clean environment. Secondly, it also incorporated the African Charter into its domestic law as if the Charter is a separate Bill of Rights enacted by the National Assembly. Thirdly, this incorporation is without prejudice to the Fundamental Human Rights provision of the Nigerian constitution, some of which could be deployed or interpreted to incorporate environmental rights; and fourthly, section 20 of the Nigerian constitution includes a duty on the State to protect the environment. Any of these approaches indicate and recognize the right to a clean environment under Nigerian law and could be relied upon for addressing the oil pollution problems in the Niger Delta. These approaches will be fully discussed in the next Chapter.

4.6 Conclusion:

This chapter discussed the recognition of the right to a clean environment, but commenced with the conceptual framework of human rights generally, progressing to the origin and development of human rights from the early writings of Stoic philosophers and naturalists, through the events leading to the founding of the League of Nations and (later, the United Nations), and the subsequent adoption by the General Assembly of the Universal Declaration of Human Rights in 1948. The detailed treatment given to human rights in historical context was to reflect its evolution through and in response to prevailing philosophical, political and socio-economic developments, which existing human rights at the time, could not, or adequately address, requiring the adoption of new rights. This discussion led to the demarcation of human rights in terms of ‘generations,’ and locating the ‘right to a clean environment within the so-called ‘third generation’ rights, which some scholars flayed as not fitting into any of the recognizable mould of international human rights. This is due in part, to the fact that the instruments recognizing this right are ‘soft-law’ instruments, which are neither legally binding nor matured into ‘hard-law’. Other concerns, include the fact that this right is vague, uncertain and not given to precise definition, nor could the nature, content or scope, be easily discernible. While these concerns are not unfounded, they appear somewhat over-stated, as the increasing body of human rights instruments even at the international, but particularly at regional and national levels, appear to recognize the right to a clean environment. The Chapter examined in detail the meaning, nature and scope of this right in international law, and established the intrinsic linkage between the environment and human rights in international legal instruments. Whilst admitting that these instruments are not binding, they appear to enunciate the way the law is likely to go in the future.

But the case is different at the regional and national levels, where there exist legally binding human rights instruments, which expressly recognize the right to a clean environment. The chapter examined the European Convention on Human Rights, adopted in 1950, which did not have any express provision for environmental right, in part due to the fact that environmental issues had not assumed the same concerns at the time as they do now, yet the European Court of Human Rights is prepared to interpret existing convention rights such as the right to life, property, privacy and family life, using an environmental rights approach. Indeed, the Aarhus Convention, which is a legally binding instrument and adopted by the European Union in 1998, recognizes the procedural aspects of this right. Some of the jurisprudence of the European Court both in its application of the substantive and procedural aspects of the right to a clean environment were examined to see how this right has been applied by the court.

The Chapter further examined both the Inter-American and African human rights systems, which have legally binding human rights instruments and which expressly provide for the right to a clean environment in Article 11 of the Additional Protocol to the American Convention on Human Rights, 1988 as well as Article 24 of the African Charter on Human and Peoples' Rights, 1981, respectively. How the regional human rights courts have interpreted this right was also examined. While the Inter-American Human Rights Court is willing to interpret the rights to life, property, family life, religion and culture under the prism of environmental right rather than direct invocation of Article 11, the African Human Rights Commission is prepared to directly interpret and implement Article 24 as an enforceable right.

Finally, the chapter examined the constitutional provisions of certain countries which provide for the substantive right to a clean environment and the way some national courts have interpreted the environmental rights provisions in statute or the constitution.

These discussions are not only to provide a conceptual framework of human rights, but also to establish the origin and recognition of the right to a clean environment in international law, but also by the regional and national human rights systems, including Nigeria. Nigeria as a member of the international community is not only influenced by events around the world, but also bound by international and regional human rights instruments or arrangements of which it is signatory or participated in. With the challenges highlighted in Chapter III of the limitations in current common law methods of seeking redress for injuries suffered as a result of oil pollution in the Niger Delta, and having laid the foundation of the existence of the right to a clean environment both at international and regional human rights systems, how this right could be used as a possible option for addressing the oil pollution problems in the Nigeria Delta will be discussed in the next chapter.