

ENVIRONMENTAL POLLUTION IN THE NIGER DELTA OF NIGERIA: HUMAN RIGHTS VIS A VIS ECOCIDE LAW – WHICH WAY OUT?

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ABSTRACT

*The life-threatening magnitude of environmental pollution in the Niger Delta of Nigeria calls for the employment of highly potent and effective measures to address the environmental enormities perpetrated in the region. The paper looks into certain hindrances to addressing environmental degradation in the Niger Delta. It critically appraises the human rights approach to find out if it gives a sure hope in tackling the problem. It x-rays the human rights approach to combating environmental degradation which was successfully adopted for the first time in Nigeria in *Gbemre v. Shell*. It recommends that machinery should be put in motion for the case whose outcome (though on appeal) constitutes a major breakthrough for the human rights approach in Nigeria to be finally decided. The paper also explores the origin and meaning of the term ecocide touching on the status of the crime of ecocide in international law and particularly in Nigeria. The paper therefore proposes that in tackling environmental pollution in the Niger Delta of Nigeria a double-barreled approach involving the application of human rights and ecocide law be employed as the way out.*

1.0 Introduction

It has been observed that the Niger Delta is one of the ten most significant wetlands and marine ecosystems in our planet; and the oil industry in this region has undoubtedly made great contribution towards the growth and development of the whole nation. However, unsustainable oil exploration activities have made the Niger Delta region to be among “the five most severely petroleum damaged ecosystems in the world.”¹ According to Ite *et al*,

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¹ Kadafa, Adati Ayuba. “Oil Exploration and Spillage in the Niger Delta of Nigeria.” (2012) *Civil and Environmental Research*. Vol. 2, No. 3, p. 38.

Petroleum exploration and production in the Nigeria's Niger Delta region and export of oil and gas resources by the petroleum sector has substantially improved the nation's economy over the past five decades. However, activities associated with petroleum exploration, development and production operations have local detrimental and significant impacts on the atmosphere, soils and sediments, surface and groundwater, marine environment, biological diversity and sustainability of terrestrial ecosystems in the Niger Delta. Discharges of petroleum hydrocarbon and petroleum-derived waste streams have caused environmental pollution, adverse human health effects, detrimental impact on regional economy, socio-economic problems and degradation of host communities in the 9 oil-producing states in the Niger Delta region.²

In fact, the Niger Delta has been described as "the world capital of oil pollution."³ Qazibash has expressed the view that the "so-called development projects" which should have engendered prosperity, have indeed brought about human rights breaches and environmental degradation."⁴

The situation of extreme environmental degradation plaguing the Niger Delta requires an urgent high-pitched call for the application of potent measures in preserving the environment. The magnitude of environmental pollution in the Niger Delta, the tragic state of helplessness of the inhabitants of this *putrefying sore*, as well as the apparent attitude of indifference displayed by

² See Ite, Aniefiok E., Ibok, Udo J., Ite, Margaret U., Petters, Sunday W. "Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta." (2013) *American Journal of Environmental Protection*. Vol. 1, No. 4, p. 78.

³ "Nigeria's Agony Dwarfs the Gulf Oil Spill. The US and Europe Ignore It." Accessed on 15th October, 2014. Retrieved from <http://www.guardian.co.uk/world/2010/may/30/oil-spills-nigeria-niger-delta-shell>

⁴ Qazibash, Ali M. "International Law Weekend Proceedings: Human Rights Environment and Development in South Asia." (2000) *ILSA Journal of International and Comparative Law*. Vol. 6, p. 424.

supposed stakeholders both locally and internationally call for the employment of highly potent and effective measures to combat the environmental enormities perpetrated in the Niger Delta. It is therefore proposed that a double-barreled approach involving the application of human rights and ecocide law be employed as the way out.

Following this introductory aspect is the Part 2 which deals with hindrances to combating environmental degradation in the Niger Delta. Part 3 critically examines the efficacy of the human rights approach. Part 4 explores the extent to which the human rights approach has been applied in Nigeria. In looking into adopting the approach of ecocide law, Part 5 focuses on the meaning of ecocide, its status in international law, and whether it is being adopted in Nigeria while Part 6 concludes the paper.

2.0 Hindrances to Combating Environmental Degradation in the Niger Delta

Shinsato has expressed the view that countries that are hosts to transnational corporations often lack “the means or the will to implement and enforce strict standards on” such transnational companies.⁵ However, it has been observed that governments habitually consider economic investment by transnational corporations and also give primacy to the development of their countries “such that concern for the environment falls by the wayside.”⁶

Shinsato has also pointed out that the population of the States where the transnational corporations operate are often helpless considering the enormous funds and the influence the corporations exercise and, to make the situation worse, the existing laws that govern relationship among States do not “provide victims with an adequate legal remedy against” such transnational corporations (TNCs).⁷ The learned scholar posits further that:

⁵ Shinsato, A. L. “Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria.” (2005) *Northwestern University Journal of International Human Rights*. Vol. 4, p. 186.

⁶ Thomas M. Franck. *Fairness in International Law and Institutions* 368 (1995).

⁷ Shinsato, A. L. *Op. Cit.* P. 186.

The reality is that TNCs have enormous economic and thereby political clout and often the government and the courts of a developing country may hesitate to impose liability on a profitable industry. Thus, additional legal mechanisms to support domestic law should be developed.⁸

Moreover, Nnimmo Bassey has alleged that Shell BP has been hindering “progressive legislation both” within Nigeria and in the US, pointing out that “they have been living above the law...”,⁹ hence he suggested that the company must face prosecution at the ICJ.¹⁰

The failure of relevant regulatory bodies to implement laws against oil pollution and gas flaring seriously smacks of endemic corruption in the oil and gas sector of the country. It is curious to note that gas flaring has generally been made illegal in Nigeria since 1984 by virtue of Section 3 of the Associated Gas Reinjection Act, 1979, which permits flaring of gas by corporations “if they have field(s) specific, lawfully issued ministerial certificates.”¹¹ That notwithstanding, the flaring of gas has continued in increasing proportion; and since 1979, legislations have prohibited flaring of gas but oil corporations are exempted from the ban annually.¹² Moreover, prohibition of flaring was once again announced in 2008 but was postponed.¹³ However, communities in the Niger Delta have long demanded a halt to gas flaring at the region's oil wells, and the Nigerian government had ordered that all flaring should cease by 2011.¹⁴ It is observed that flaring still continues with great intensity as mere lip service is

⁸ Ibid. P. 195.

⁹ “Nigeria's agony dwarfs the Gulf oil spill. The US and Europe ignore it.” Loc. Cit.

¹⁰ Ibid.

¹¹ “Gas Masked.” Loc. Cit. See “Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity.” Op. Cit. P. 14.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

paid to the order. How can it be explained that in spite of the deadly environmental effects of gas flaring, there is no end to the shift in the terminal date for gas flaring in Nigeria? With transnational corporations manned by executives who are only mindful of maximizing profits of their corporations at the expense of the environmental safety of their host communities, executives who can employ huge sums of petro-dollars under their command to weaken any legislation against their economic interests or compromise reports of government inspectors on gas flaring or oil spillage, or even put a clog in the wheel of justice to frustrate any impending judgment against them, the issue of finding permanent solution to the environmental genocide caused by oil spillage and gas flaring may require supernatural intervention.

Finally, one serious hindrance is that the clear right to a protected and improved environment provided in Section 20¹⁵ of the Constitution of the Federal Republic of Nigeria, 1999 is contained in Chapter II¹⁶ which is rendered non-justiciable by virtue of Section 6(6)(c).¹⁷ According to the Constitution Drafting Committee, Section 6(6)(c) was entrenched in the Constitution based on the argument that while first generation rights impose restraints on the State, the second and third generation rights require positive steps on the part of the State to provide material resources for the enjoyment of the rights.¹⁸

¹⁵ Section 20 of *1999 Constitution of the Federal Republic of Nigeria* states as follows: “The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.”

¹⁶ Chapter II is captioned “Fundamental Objectives and Directive Principle of State Policy.” Apart from the right to environment, the Chapter also contains other second and third generation rights as educational, political, social, cultural, economic, and foreign policy objectives and directive principles. It is noteworthy that first generation rights such as rights to life, dignity of the human person, and personal liberty, are entrenched in Chapter IV.

¹⁷ The import of this provision is that in case of failure of the state to provide certain amenities for citizens to enjoy the rights enshrined in Chapter II, any attempt by anyone to take a legal action on the basis of that failure against the state to enforce the said rights would amount to an exercise in futility.

¹⁸ Dakas, C. J. D. “The Implementation of the African Charter on Human and Peoples’ Rights in Nigeria.” (1986-1990) *UJLJ*, Vol. 3, p. 44.

3.0 The Human Rights Approach: Any Sure Hope?

The question may be asked if indeed the human rights approach offers any sure hope? Undoubtedly, several measures have been employed both in the past and present in addressing environmental degradation at different levels – internationally, regionally, and municipally. In our contemporary period, there has been emphasis on the use of human rights in environmental protection. A report by *Asia Pacific Forum* asserts that a number of existing human rights may be used to tackle environmental problems. These include a range of civil, political, economic, social and cultural rights which rely on environmental quality for their full attainment. This relation may aid the employment of human rights to deal with environmental problems. These rights consist of “the rights to: life; health, adequate standard of living (including food, clothing and housing); family life and privacy; property; culture; freedom from discrimination; self-determination; and just and favourable conditions of work.”¹⁹

However, it is worthy to point out that certain existing civil and political as well as economic, social and cultural rights have been expanded to accommodate environmental concerns and applied in environmental protection at international²⁰ and regional²¹ levels as well as various local jurisdictions.²²

¹⁹ “Human Rights and the Environment: Final Report and Recommendations.” P. 12. Accessed on 2nd April, 2015. Retrieved from <http://www.asiapacificforum.net>

²⁰ See *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 88 (Sept. 25). In this case decided by the ICJ, the then Vice President of of the court Christopher Weeramantry in a Separate Opinion pointed out that:

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

²¹ See the decision of the European Court of Human Rights in *Tatar and Tatar v. Romania* (2009) Application no. 67021/01 (27 January 2009); *Marangopoulos Foundation for Human Rights v. Greece*, Complaint No. 30/2005 (6 December 2006); the decision of the African Commission on Human and Peoples’ Rights

Nevertheless, the agitation for a specific right to a safe and clean environment appears to have gained wide acceptance and ascendancy leading to its recognition in various international²³ and regional²⁴ instruments as well as being clearly entrenched as a human right in the constitutions of several States in the world.²⁵

in *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, Comm. 155/96, A.C.H.P.R. Doc. COMM/A044/1 (May 27, 2007); the decision of Inter-American Commission on Human Rights in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Aug. 31, 2001) available at http://www.corteidh.or.cr/seriecing/serie_c_79ing.doc. ; *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OE/Ser.L/V/II.122, doc. 5 rev. 1 P 153 (2004), available at <http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm>.

²² See the Pakistani case of *Shehla Zia v. WAPDA* (1994) PLD 693 (SC); Kenyan case of *P.K Waweru v. Republic of Kenya* (2006), High Court of Kenya, Misc. Civil Application No. 118 of 2004, 1 KLR (Environment and Land) 677; Israeli case of *Adam, Teva ve'Din (Human Being, Nature and Law) v. Prime Minister of Israel et al.* (2004) No. 4128/02 (16 March 2004) (Supreme Court); the Nigerian case of *Gbemre v. Shell*, Federal High Court, Benin 14 November 2005, Unreported Suit No FHC/B/CS/53/05, *Gbemre v. Shell* (Judge C.V. Nwokorie).

²³ It has been observed that international human rights instruments have typically given insignificant attention to the environment and the three main international human rights instruments hardly mention the link between the environment and human rights. See Thornton, J. & Beckwith, S. *Environmental Law*. (London: Sweet & Maxwell, 2004) p. 386. It is worthy to note that the three major human rights instruments are the 1966 *International Covenant on Civil and Political Rights*, 1966 *International Covenant on Economic, Social and Cultural Rights*, and the 1948 *Universal Declaration of Human Rights*.

²⁴ The right to a healthy environment has been recognized in the following regional instruments: Article 24, *African Charter on Human and Peoples' Rights*, 1981; Article 11(1) of *San Salvador Protocol to the American Convention on Human Rights*, 1988; Article 38, *Arab Charter on Human Rights*, 2004.

²⁵ In drawing a comparison between international environmental law and human rights law, Burger has indicated:

The scope of international environmental law differs from human rights law in that it does not imbue individuals with non-derogable rights. While some of the international environmental conventions make room for civil society - almost exclusively as participants and monitors, though rarely as active members or as individuals with standing to bring an action to dispute resolution - none of

Moreover, Boyd has revealed that by 2012, among the 193 member States in the United Nations, 177 had recognized the right to a healthy environment through their constitutions, environmental legislations, court decisions, or by ratifying an international agreement.²⁶ It has been revealed that specifically, 95 States have given constitutional status to the right to a healthy environment.²⁷ On the effects of these provisions, Boyd has pointed out as follows: “These provisions are having a remarkable impact, ranging from stronger environmental laws and landmark court decisions to the cleanup of pollution hot spots and the provision of safe drinking water.”²⁸

In spite of the apparent progress being made, the extent and possible usefulness of the right to a healthy environment is still a subject of argument²⁹ with supporters and critics taking divergent positions. One then wonders if the human rights approach, or in particular, the constitutionalizing of the right to a healthy environment is the *expected messiah* for tackling environmental problems or one should look for another. Besides, if indeed the environmental rights approach is a better and more effective approach, what happens to dozens of nations that are yet to entrench environmental rights³⁰ into their constitutions? Moreover, it has been admitted that there are certain States “where

them ensures that individuals have their individual rights protected. A substantive human right to a clean environment would add a degree of protection that individuals do not have under any other regime.

See Burger, M. “Bi-Polar and Polycentric Approaches to Human Rights and the Environment.” (2003) *Colum. J. Envtl. L.* Vol. 28, pp. 383-384.

²⁶ Boyd, D. R. “The Constitutional Right to a Healthy Environment.” (2012) *Environment: Science and Policy for Sustainable Development*. Vol. 54, No. 4, p. 4, available at <http://dx.doi.org/10.1080/00139157.2012.691392>

²⁷ Boyd, D. R. “A Healthy Environment should Be a Basic Human Right.” October 29, 2012. Accessed on 12th March, 2015. Retrieved from <http://www.davidsuzuki.org/blogs/docs-talk/2012/10/a-healthy-environment-should-be-a-basic-human-right/>

²⁸ Boyd, D. R. “The Constitutional Right to a Healthy Environment.” *Op. Cit.* P. 3.

²⁹ *Ibid.* P. 5.

³⁰ *Ibid.* P. 12.

constitutional environmental rights and responsibilities have had minimal impact.”³¹ What factors could be responsible and how can such factors be addressed? It has been observed that many States currently constitutionalize the right to a healthy environment yet several questions about the relationship of human rights and the environment are still unanswered.³²

Furthermore, Sharp has revealed that

Despite the veritable flourishing of environmental rights finding their way into human rights documents on the international, regional, and national levels, there have been very few actual cases brought to enforce those rights. Less heartening still, the cases which have been brought, for the most part, have been unsuccessful.³³

The learned scholar has further stated that the aforesaid documents together “present an increasingly coherent doctrinal basis for affirmatively establishing environmental attack on human rights as an international crime” and that “the growing consensus recognizing these rights” notwithstanding, “there is a conspicuous lack of state practice prosecuting their violation.”³⁴ In accounting for the scarcity of cases both in developing and developed States, Churchill pointed out that “other preoccupations and priorities” abound while applying “human rights treaties than protecting the

³¹ Ibid.

³² “Independent Expert on human rights and the environment.” Accessed on 7th March, 2015. Retrieved from <http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEenvironmentIndex.aspx>

³³ Sharp, Peter. “Prospects for Environmental Liability in the International Criminal Court.” (1999) *Virginia Environmental Law Journal*. Vol. 18, p. 232. Illustrating with the case of *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), dismissed with prejudice, 1998 U.S. Dist. LEXIS 2522 (March 3, 1998), Sharp sums up the case as follows: dismissing claim of environmental torts and "cultural genocide" after concluding that cultural genocide was not yet recognized by international law and noting that the law of genocide requires a showing of specific intent to destroy a "group," not a "culture". Sharp, Peter. Ibid.

³⁴ Ibid. Pp. 232-233.

environment"; on the other hand, in developed states "procedures for protecting the environment" which are not related to human rights exist in general.³⁵

3.1 Adopting the Human Rights Approach in Nigeria

It is interesting to note that the human rights approach to combating environmental degradation was successfully adopted for the first time in Nigeria in *Gbemre v. Shell*.³⁶ In the instant case, the Applicant requested the Federal High Court for the following reliefs:

- (1) a declaration that the constitutionally guaranteed rights to life and dignity of the human person provided in Sections 33(1) and 34(1) of the Constitution includes the right to a clean, poison-free, pollution-free and healthy environment;
- (2) a declaration that the actions of the respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of the fundamental rights to life (including healthy environment) and the dignity of the human person guaranteed by Sections 33(1) and 34(1) respectively of the Constitution;
- (3) a declaration that the provisions of Section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and Section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, under which the continued flaring of gas in Nigeria may be allowed, are inconsistent with the applicant's right to life and/or

³⁵ Churchill, R. R. "Environmental Rights in Existing Human Rights Treaties." in *Human Rights Approaches to Environmental Protection* 108 (Alan E. Boyle et al. eds., 1996). Cited in Sharp, Peter. Ibid. P. 232.

³⁶ See *Gbemre v. Shell*, Federal High Court, Benin, 14 November 2005, Unreported Suit No FHC/B/CS/53/05, *Gbemre v. Shell* (Judge C.V. Nwokorie) available at <http://www.climatelaw.org/cases>

dignity of the human person enshrined in Sections 33(1) and 34(1) of the Constitution and therefore are unconstitutional, null and void; and

- (4) an order of perpetual injunction restraining the respondents by themselves or by their agents, servants, contractors or workers or otherwise howsoever from further flaring of gas in the applicant's community.³⁷

The court decided *inter alia* that the constitutionally guaranteed rights to life and dignity of the human person inevitably includes the rights to a clean, poison-free, pollution-free, and healthy environment.³⁸ The actions of the respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a gross violation of the community members' (including the applicant's) fundamental right to life (including healthy environment) and dignity of the human person as enshrined in the Constitution of Nigeria 1999.³⁹ The court further ordered the respondents to take immediate steps to stop further gas flaring in the applicant's community.⁴⁰

On the significance of this judgment, Ebeku has observed that:

...this is the first case in which a Nigerian court has expansively interpreted the right to life guaranteed in the 1999 Constitution of Nigeria to include the right to a healthy/clean environment and also upheld or enforced the legal right to a satisfactory environment protected in the African Charter on Human and Peoples' Rights as incorporated into Nigerian domestic law (the judge partly relied on this legal right in reaching his decision in the case). Importantly, this judgment is consistent with the jurisprudence of other jurisdictions as seen above and can therefore be counted

³⁷ Ibid at 30–31.

³⁸ Ibid at 14–15.

³⁹ Ibid.

⁴⁰ Ibid at 31.

as a new example of the increasing tendency across the world to enforce the constitutional right to a healthy/clean environment and/or interpret the constitutional right to life expansively to include the right to a healthy/clean environment.⁴¹

However, the case is currently on appeal and it has been reported that “on 31 May 2006, the judge in the case had been removed from the court in Benin and the file of the case could not be located.”⁴²

4.0 The Approach of Ecocide Law

4.1 Ecocide: What It Is

It has been revealed that in 1992, Murray Freshbach, then a Research Professor of Demography at Georgetown University, collaborated with Alfred Friendly, Jr., the Moscow correspondent for Newsweek at that time, to examine “the impact of decades of environmental abuse” and their panoramic study coined the term “ecocide”.⁴³

⁴¹Ebeku, Kaniye S.A. “Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited.” (2007) *RECIEL* Vol. 16, No. 3, p. 318.

⁴² “Gas Flaring Lawsuit (Re Oil Companies in Nigeria).” Accessed on 18th July, 2015. Retrieved from <http://business-humanrights.org/en/gas-flaring-lawsuit-re-oil-companies-in-nigeria>

⁴³ Feshbach, M. & Friendly, A. “Facing Facts, in Ecocide of the USSR.” (1992) *Health and Nature Under Siege* Vol. 1. Cited in Kraska, James C. “Global and Going Nowhere: Sustainable Development, Global Governance and Liberal Democracy.” (2006) *Denv. J. Int'l L. & Pol'y.* Vol. 34, p. 302. According to Feshbach, M. & Friendly,

When historians finally conduct an autopsy of the Soviet Union and Soviet Communism, they may reach the verdict of death by **ecocide**... No other great industrial civilization so systematically and so long poisoned its land, air, water and people. None so loudly proclaiming its efforts to improve public health and protect nature so degraded both. And no advanced society faced such a bleak political and economic reckoning with so few resources to invest toward recovery.

Feshbach, M. & Friendly, A. *Ibid.*

The term *ecocide*⁴⁴ however has been defined in many and varied ways by different scholars. Etymologically, the word *ecocide* is derived from the Greek “*oikos*” meaning “*house*” or “*home*” and the Latin “*caedere*” meaning “*strike down, demolish, kill*”; it translates literally to killing our home, the only one we have: Earth.⁴⁵ *Ecocide* is thus the destruction of the global environment.⁴⁶ *End Ecocide on Earth*, therefore, defines *Ecocide crime* as “an extensive damage or destruction which would have for consequence a significant and durable alteration of the global commons or ecosystem services upon which rely a group or sub-group of a human population” in compliance with the known planetary boundaries.⁴⁷

⁴⁴ A general view of *ecocide* has been presented as follows:

The term *ecocide* is more recently used to refer to the destructive impact of humanity on its own natural environment. As a group of complex organisms we are committing *ecocide* through unsustainable exploitation of the planet’s resources. The geological era we are living in, known as the anthropocene, is so named because the activities of the human species are influencing the Earth’s natural state in a way never seen before. The most notable example is that of the atmosphere which is being transformed through the emission of gases from fossil fuel use: carbon dioxide, methane, chlorofluorocarbons etc. The population explosion of the last century in conjunction with economic models built on growth are fuelling this misuse, a form of global *ecocide*. The *ecocide* we are witnessing is a symptom of the disregard and reward for accounting for the damage being caused.

“*Ecocide*.” Accessed on 10th April, 2016. Retrieved from <https://en.wikipedia.org/wiki/Ecocide?oldid=686713489>

⁴⁵ *End Ecocide on Earth*. “What Is *Ecocide*?” Accessed on 10th April, 2016. Retrieved from <https://www.endecocide.org/ecocides/>

⁴⁶ *Ibid*.

⁴⁷ *Ibid*. By global commons *End Ecocide on Earth* means: “the oceans and seas beyond territorial waters, the atmosphere, outer atmosphere and their respective chemistry, Arctic, Antarctica, cross-border rivers and lakes, ground water, migratory species, biogeochemical cycles, genetic heritages.” *End Ecocide on Earth*. *Ibid*. These spaces and species known as *Res nullius* in law and which are not owned by anyone, according to *End Ecocide on Earth*, should no longer be the scene of pollution and abusive predation, thus furthering the protection of the global ecosystem, and in any case the principle of national sovereignty

According to Kamala, “Ecocide ... refers to altering an ecosystem in such a manner that it can no longer support all manner of living organisms that previously depended on it.”⁴⁸ In the first of a series of research papers for the *University of London Human Rights Consortium’s Ecocide Project*, the term *ecocide* has been defined by Gauger *et al* as follows:

Ecocide is the direct physical destruction of a territory which can in some instances lead to the death of humans and other beings. Ecocide can and often does lead to cultural damage and destruction; and the direct destruction of a territory can lead to cultural genocide. For example, destroying an indigenous peoples’ territory can critically undermine its culture, identity and way of life.⁴⁹

Fried, has considered *ecocide* to mean “...various measures of devastation and destruction which ... aim at damaging or destroying the ecology of geographic areas to the detriment of

should not be claimed to shirk all liability when they are impacted. *End Ecocide on Earth*. Ibid. It is further revealed that:

... the destruction of an ecosystem service on which rely a human community to live, as a whole or as a sub population is equal to a crime against humanity. Thus, this type of ecocide should not be excluded from an international jurisdiction in the name of national sovereignty, nor be traded through market instruments and trading rights.

End Ecocide on Earth. Ibid.

⁴⁸ Kamala, Tirumalai. “What Is Ecocide and What Are Well-known Examples of It.” Accessed on 9th February, 2016. Retrieved from <https://www.quora.com/What-is-ecocide-and-what-are-well-known-examples-of-it>

⁴⁹ Gauger, A. “Ecocide is the missing 5th Crime Against Peace.” (Human Rights Consortium: London, 2013), p. 6. Accessed on 22nd October, 2015. Retrieved from http://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf

human life, animal life, and plant life.”⁵⁰ In the *UN Whitaker Report on Genocide, 1985*, *ecocide* has also been defined thus:

adverse alterations, often irreparable, to the environment - for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest - which threaten the existence of entire populations, whether deliberately or with criminal negligence.⁵¹

In addition, *Merriam Webster Dictionary* has defined *ecocide* as “the destruction of large areas of the natural environment especially as a result of deliberate human action.”⁵²

Higgins has also proffered a definition of *ecocide* as follows:

Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished.⁵³

Furthermore, it is pertinent to point out that there is another term *geocide* that is somewhat similar to *ecocide*; Merz *et al* have

⁵⁰ Fried, John H.E. “War by Ecocide.” (1972) in Thee, Marek (ed.) *Bulletin of Peace Proposals*. (1973), Vol. 1. Universitetsforlaget, Oslo, Bergen, Tromsø. Cited in Gauger, A. et al. Ibid. P. 5-6.

⁵¹ E/CN.4/1101, E/CN.4/Sub.2/332; Provisional SR/EICN.4/Sub.2/SR.2/SR.658. See E/CN.4/sub.2/416, paragraphs 462-478. Cited in “UN Whitaker Report on Genocide, 1985, paragraphs 29-42, pages 16 to 28.” Accessed on 10th April, 2016. Retrieved from <http://www.preventgenocide.org/prevent/UNdocs/whitaker/section6.htm>

⁵² *Merriam Webster Dictionary*. Accessed on 22nd October, 2015. Retrieved from <http://www.merriam-webster.com/dictionary/ecocide>

⁵³ *Eradicating Ecocide*. “What Is Ecocide?” Retrieved from <http://eradicatingecocide.com/overview/what-is-ecocide/>. Cited in Merz, P., Valérie Cabanes, V., & Gaillard, E. “Ending Ecocide - the Next Necessary Step in International Law.” P. 7. Paper prepared for the 18th Congress of the International Association of Democratic Lawyers on 6th April, 2014.

described it as “the environmental counterpart of genocide.”⁵⁴ Berat has defined *geocide* as:

...intentional destruction, in whole or in part, of any portion of the global ecosystem, via killing members of a species; causing serious bodily or mental harm to members of the species; inflicting on the species conditions of life that bring about its physical destruction in whole or in part; and imposing measures that prevent births within the group or lead to birth defects.⁵⁵

Gray has not only defined ecocide, he also drew a comparison between *ecocide* and *geocide*. In defining *ecocide*, he entones that:

[S]tates, and arguably individuals and organizations, causing or permitting harm to the natural environment on a massive scale breach a duty of care owed to humanity in general and therefore commit an international delict, "ecocide."... Ecocide is identified on the basis of the deliberate or negligent violation of key state and human rights and according to the following criteria: (1) serious, and extensive or lasting, ecological damage, (2) international consequences, and (3) waste. Thus defined, the seemingly radical concept of ecocide is in fact derivable from principles of international law.⁵⁶

In comparing ecocide and *geocide*, the learned scholar points out that Berat “bases geocide on a violation of a right to a healthy

⁵⁴ Merz, P. et al. Ibid. P. 6.

⁵⁵ Berat, Lynn. “Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law.” (1993) *Boston University International Law Journal*. Vol. 11, p. 343.

⁵⁶ Gray, Mark Allan. “The International Crime of Ecocide.” (1995) *California Western International Law Journal* Vol 26, No. 2, p. 216. Accessed on 22nd October, 2015. Retrieved from <http://scholarlycommons.law.cwsl.edu/cwilj/vol26/iss2/3> .

environment through intentional species destruction” while “ecocide exists as a delict, it need not be intentional or cause species extinction, and is based on breach of a number of obligations and rights. It is supported by, but unlike geocide not dependent upon, a right to a healthy environment.”⁵⁷ Merz *et al* have expressed the view that criminalizing *ecocide* “sits at the heart of an emerging body of law called Earth Law.”⁵⁸

4.2 The Crime of Ecocide in International Law

It is important to state that the earth is in serious danger as a result of certain human activities that have grievous environmental hazards both in the present and in the future. According to Higgins *et al*:

A wide range of actions imperil the planet and threaten the future of humanity and other species. These crimes and harms need to be responded to through both informal and formal means of resolution and restoration, underpinned by an internationally applicable legal framework.⁵⁹

It is sad to note that the means to respond to these anthropogenic earth-threatening environmental hazards appears to be lacking in the available legal system at the international level. In the view of Merz *et al*, the existing “legal framework does not possess the necessary tools to stop the widespread degradation of ecosystems caused by dangerous industrial activity.”⁶⁰ According to the learned scholars, “new tools are needed to safeguard not only our and in particular future generations' rights, but also the

⁵⁷Ibid, note 3.

⁵⁸ Merz, P. *et al*. Op. Cit. P. 10.

⁵⁹ Higgins, P., Short, D. & South, N. “Protecting the Planet: a Proposal for a Law of Ecocide.” (2013) *Crime Law and Social Change: An Interdisciplinary Journal*. Vol. 59, No. 1. The version of the journal accessed in the course of the research was pageless.

⁶⁰ Merz, P. *et al*. Op. Cit. P. 1.

rights of nature itself.”⁶¹ They therefore suggest that “the inclusion of a crime of ecocide as an International Crime against Peace” is one possible legal tool.⁶² To corroborate this view, Gray has posited that:

Despite its reluctance to create new international crimes, a reluctance justified by the absence of enforcement machinery, the international community will soon realize that *ecocide so menaces fundamental human rights and international peace and security that it must be treated with the same gravity as apartheid or genocide*.⁶³

⁶¹ Ibid. With regard to the utility of international criminal law in enforcing certain international norms, Megret has pointed out as follows:

There is little doubt that international criminalization is quickly becoming one of the preferred routes to enforce certain international norms. While one may occasionally have reservations about particular features of international criminal repression, the excessive focus on criminalization or even with international criminalization itself, international criminal law is helping to redefine international law and is increasingly associated with various worthy causes. Simultaneously, grave threats to the economic, social and environmental well-being of populations continue to emerge in ways that international law seems to have trouble addressing. In this context one might hope that the rise of international criminal law would contribute to the resolution of these grave threats to some degree.

Megret, F. “Offences Against Future Generations: A Critical Look at the Jodoin/Saito Proposal and a Suggestion for Future Thought.” Vol. 7, Issue 2, p. 159. Accessed on 13th April, 2016. Retrieved from https://www.academia.edu/15550844/Offences_Against_Future_Generations_A_Critical_Look_at_the_Jodoin_Saito_Proposal_and_a_Suggestion_for_Future_Thought_2011_

⁶² Ibid. It must be stated that this point has been canvassed in another article by Okwezuzu, G. E. captioned “Revivification of Efforts to Criminalize Ecocide in International Law: Emerging Trend” presented at the UI Law Conference which held on 13th to 15th July, 2016 at the University of Ibadan, and awaiting publication in the *Journal of International Law* by the Department of Jurisprudence and International Law, University of Ibadan, Ibadan, Nigeria.

⁶³ Italics mine. Gray, Mark Allan. “The International Crime of Ecocide.” (1995) *California Western International Law Journal* Vol 26, No. 2, p. 271. Accessed

4.3 The Status of Ecocide Law in Nigeria

In the international community, ten States have codified *ecocide* as a crime. Among these States, Vietnam was the first to include ecocide in its national penal code undoubtedly as a result of the Vietnam War with the US and the disastrous environmental impact.⁶⁴ Russia is said to be the second State to enact ecocide as law in its local jurisdiction.⁶⁵ It is worthy to note that eight of the ten States with ecocide law – Armenia, Belarus, Moldova, Ukraine, Georgia, Kazakhstan, Kyrgyzstan and Tajikistan⁶⁶ – were countries that were birthed after the collapse of the USSR and none is a signatory of the Rome Statute (that was created in 1996) as these States were only formed following the secession from the USSR after 1998. Furthermore, it is worthy to note that among these ten States that have codified ecocide in their Penal/Criminal

on 22nd October, 2015. Retrieved from <http://scholarlycommons.law.cwsl.edu/cwilj/vol26/iss2/3>

⁶⁴ See Gauger, A. Op. Cit. P. 12. In Article 278 of the *Vietnam Penal Code*, 1990, it is provided: “Ecocide, destroying the natural environment, whether committed in time of peace or war, constitutes a crime against humanity.” In addition, Article 342 of the aforementioned *Penal Code* further provides for Crimes against mankind as follows: “Those who, in peace time or war time, commit acts of annihilating en-mass population in an area, destroying the source of their livelihood, undermining the cultural and spiritual life of a country, upsetting the foundation of a society with a view to undermining such society, as well as other acts of genocide or acts of ecocide or destroying the natural environment, shall be sentenced to between ten years and twenty years of imprisonment, life imprisonment or capital punishment.”

⁶⁵ Gauger, A. et al. Ibid. In Article 358 of the *Criminal Code Russian Federation*, 1996, provision is made for ecocide as follows: “Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe, shall be punishable by deprivation of liberty for a term of 12 to 20 years.

⁶⁶ Article 394, *Criminal Code of the Republic of Armenia*, 2003; Article 131, *Criminal Code Belarus*, 1999; Article 136, *Penal Code Republic of Moldova*, 2002; Article 441, *Criminal Code of Ukraine*, 2001; Article 409, *Criminal Code of Georgia*, 1999; Article 161, *Penal Code Kazakhstan* 1997; Article 374, *Criminal Code Kyrgyzstan*, 1997; Article 400, *Criminal Code Tajikistan* 1998.

Codes, the provision lacks a test of intent making ecocide a strict liability offence.⁶⁷

Indeed, there are various laws on water resources in Nigeria. These include the Constitution of the Federal Republic of Nigeria 1999 Revised, Water Resources Act 1993, River Basins Development Authorities Act 2004, the Land Use Act 1978, the Minerals Act 1990, the National Electricity Power Authority Act 1972, Oil in Navigable Water Act 1968, The Petroleum Act 1969, Niger Delta Development Commission (Establishment) Act 2000, Harmful Waste (Special Criminal Provisions, etc) Act 1988, The Nigeria National Policy on Water Supply 2000, and the various States Water Boards Acts.⁶⁸

Moreover, with regard to enforceable and effective ecocide law that is void of intent, it can be said that Nigeria is not recognized as having any such ecocide law. According to Ojo,⁶⁹ if the crime of ecocide is included in Nigerian law, “TNCs⁷⁰ and their Chief Executive Officers (CEOs) who repeatedly and flagrantly take operational and managerial decisions that have repeatedly resulted in ecological destruction, loss of lives and livelihoods” will be “guilty of ecocide or crime against humanity that must be punished.”⁷¹

5.0 Conclusion

The paper looks into the problem of environmental pollution in the Niger Delta of Nigeria focusing on both the approaches of human rights and ecocide law with a view to finding out the way to address it. The paper has dwelt on hindrances to

⁶⁷ See Okwezuzu, G. E. Op. Cit. P. 20.

⁶⁸ For a discussion of various laws on water resources in Nigeria, see Ijaiya, H. “The Legal Regime of Water Pollution in Nigeria.” Accessed on 25th August, 2016. Retrieved from <http://wudpeckerresearchjournals.org/JESWR/pdf/2015/January/Ijaiya.pdf>, pp. 1-21.

⁶⁹ Dr. Godwin Uyi Ojo is Executive Director of the Environmental Rights Action/Friends of the Earth Nigeria.

⁷⁰ Transnational Corporations.

⁷¹ “Nigeria: Ecocide, A New Dimension to Crime Against Environment.” Accessed on 28th September, 2016. Retrieved from <https://ecocidealert.com/?p=6056>

combating environmental degradation in the Niger Delta; the efficacy of the human rights approach; the extent to which the human rights approach has been applied in Nigeria; the meaning of ecocide, its status in international law, and whether it is being adopted in Nigeria or not.

It is observed that while the human rights approach can be effective, it has no absolute certainty in addressing the problem of environmental pollution. It is further noted that the human rights approach to combating environmental degradation was successfully adopted for the first time in Nigeria in *Gbemre v. Shell*.⁷² However, it is observed that while the case was still on appeal, there were two occurrences: first, the judge in the case was transferred from the court in Benin; second, the file of the case got lost.⁷³ This has resulted in the discontinuation of the case whose outcome (though on appeal) constitutes a major breakthrough for the human rights approach in Nigeria. It is therefore recommended that machinery should be put in motion for the case on appeal to be finally decided.

Furthermore, bearing in mind the potential merits and efficacy of the ecocide law approach, it is strongly recommended that ecocide law in Nigeria should be enacted in conformity with what obtains in other States in the international community where ecocide law operates. Criminalizing ecocide in this manner and enforcing ecocide law in Nigeria will undoubtedly help in addressing environmental pollution in Nigeria and the Niger Delta in particular.

⁷² *Supra*.

⁷³ See “Gas Flaring Lawsuit (Re Oil Companies in Nigeria).” *Loc. Cit.*