

# How serious is Nigeria about climate change mitigation through gas flaring regulation in the Niger Delta?

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## Abstract

Nigeria currently contributes significantly to the total amount of greenhouse gases (GHGs) produced in Africa through unabated emissions from its oil and gas industry in the Niger Delta, making the country an important player in global climate change mitigation efforts. Gas flaring is the major medium by which Nigeria contributes to the global percentage of deleterious GHGs released into the atmosphere. Therefore, regulatory efforts at the cessation of gas flaring in the country is important within the wider context of global climate change mitigation, and is worthy of analysis. The recent ‘code red’ warning by the Intergovernmental Panel on Climate Change (IPCC) about the clear and present danger unmitigated climate change currently poses to the planet, together with Nigeria’s recent pledge at COP26 to eliminate GHG emissions by 2060, makes this analysis even more necessary. Accordingly, this article generally assesses the efforts of Nigeria at eliminating gas flaring within the context of its international commitments on battling climate change. The first part of the article explores the history and current status of gas flaring in Nigeria. The second part critically analyses the guiding policy, regulatory, legislative, and judicial efforts at ending gas flaring in Nigeria with the view to determining the seriousness of the country in domestically matching its international commitments towards mitigating climate change through the phasing out of GHG emissions.

## Keywords

Climate change, climate change mitigation, gas flaring, greenhouse gases, Niger Delta.

## Introduction

The recent landmark report of the Intergovernmental Panel on Climate Change (IPCC)<sup>1</sup> has outlined the threat that climate change currently poses to the existence of the planet as it is. According to the report, climate change is already negatively affecting every inhabited region of the Earth, and human influence

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1. The report of the United Nations Intergovernmental Panel on Climate Change is the most comprehensive report on the current state of climate change. The nearly 4,000-page report was authored by 234 experts and has about 14,000 citations of scientific sources.

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is the ‘unequivocal’ factor behind it.<sup>2</sup> This was recently reiterated by the Glasgow Climate Pact<sup>3</sup> agreed to by about 197 countries at the Conference of Parties in Glasgow (COP26).<sup>4</sup> Referring to the IPCC’s Report as a ‘code red for humanity’,<sup>5</sup> the Secretary-General of the United Nations, Antonio Guterres, warned that the scientific evidence is irrefutable that greenhouse gas emissions are choking the Earth and placing billions of people in danger. Additionally, global heating is increasing at an alarming rate and affecting every region on Earth, with many of the changes steadily becoming irreversible. Global atmospheric carbon dioxide concentrations are currently higher than at any time in the last 2 million years.<sup>6</sup> Global surface temperatures also exceed the most recent multi-century warm period – around 6500 years ago.<sup>7</sup> The Arctic Sea ice has reached its lowest level since 1850 and covers the smallest area it has covered in the past 1000 years.<sup>8</sup> Global mean sea level is currently higher than it has been in 3000 years and has warmed faster over the past century than the last deglacial period 11,000 years ago.<sup>9</sup> The Report confirmed that human-induced climate change affects every region of the world, causing extreme heat waves, heavy precipitation, tropical cyclones and droughts.<sup>10</sup>

However, Africa appears to be one of the most affected regions. The increase in surface temperatures has been more rapid in Africa than the global average, with human activities dominant.<sup>11</sup> Similarly, sea levels in Africa have increased quicker than the international mean sea level over the last three decades. As a result, the sea-level rise in Africa is sure to rapidly continue, leading to frequent and severe coastal flooding in low-lying areas and coastal erosion in sandy coasts.<sup>12</sup> In West Africa, there have been observed monsoon precipitation due to greenhouse gas emissions, as well as increases in river flooding, agricultural and ecological droughts, with projected increases in seasonal meteorological droughts, wind speed, heavy precipitation and pluvial flooding.<sup>13</sup>

Consequently, if there is no sharp reduction in greenhouse gas emissions, global warming will exceed the 1.5 degrees Celsius threshold. The effects of global warming will be irreversible and climate consequences more severe.<sup>14</sup> Global heating above 1.5 degrees Celsius has been reported to be catastrophic for Pacific Island nations.<sup>15</sup> It could result in the loss of entire countries within the century due to the rising sea levels.<sup>16</sup> Currently, the Earth is already at 1.2 degrees Celsius and rising.<sup>17</sup> Thus, it is unsurprising that 53% of the population of the United States consider climate change to be an ‘urgent problem’ requiring

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2. United Nations, *Climate Change 2021: The Physical Basis* (Intergovernmental Panel on Climate Change IPCC, 2021) 7, 8, 21.
  3. FCCC/PA/CMA/2021/L.16 – UNFCCC.
  4. Mary Gagen, ‘Glasgow Climate Pact: Where Do all the Words and Numbers We Heard at COP26 Leave Us?’ (The Conversation, 2021) at <https://theconversation.com/glasgow-climate-pact-where-do-all-the-words-and-numbers-we-heard-at-cop26-leave-us-171704> accessed November 2021.
  5. United Nations Secretary-General, ‘Secretary-General’s Statement on the IPCC Working Group 1 Report on the Physical Science Basis of the Sixth Assessment’ available at <https://www.un.org/sg/en/content/secretary-generals-statement-the-ipcc-working-group-1-report-the-physical-science-basis-of-the-sixth-assessment> accessed August 2021.
  6. *Ibid.* 9.
  7. *Ibid.*
  8. *Ibid.*
  9. *Ibid.*
  10. *Ibid.*,10.
  11. United Nations, *Climate Change 2021: Regional Fact Sheet – Africa* (IPCC, 2021) 1.
  12. *Ibid.* 2.
  13. *Ibid.*
  14. United Nations, *Climate Change 2021: The Physical Basis*, (IPCC, 2021) 18.
  15. United Nations, *Climate Change 2021: Regional Fact Sheet – Small Islands* (IPCC, 2021) 1-2.
  16. Kate Lyons, ‘IPCC Report Shows ‘possible loss of entire countries within the century’’ (August, 2021) available at <https://www.theguardian.com/world/2021/aug/10/ipcc-report-shows-possible-loss-of-entire-countries-within-the-century> accessed August 9 2021.
  17. Laura M. Lombrana, ‘Global Temperatures Already 1.2°C Above Pre-Industrial Levels’ (December 2020) available at <https://www.bloomberg.com/news/articles/2020-12-02/global-temperatures-already-1-2-c-above-pre-industrial-levels#xj4y7vzkg> accessed June 2022.

swift and immediate action, while 60% regard climate change as one of the most serious problems in the world even ahead of the economy or international terrorism.<sup>18</sup> Buoyed by the threat of climate change, the Secretary-General of the United Nations has encouraged countries, governments, global businesses and civil society to embrace 'green' policies, and for heavy emitters to bring their emissions down to zero to limit global warming and avoid the impending global climate catastrophe.<sup>19</sup>

As stated above and as evidenced by the IPCC Report, Africa is vulnerable to the effects of climate change and is currently experiencing some of its effects at a higher rate than other parts of the world. While greenhouse gases (GHG) emission is one of the major causes of global warming and climate change in Africa and the world, Nigeria is the greatest GHG emitter in Africa through the gas flaring from its oil and gas industry. Nigeria is one of the top seven gas flaring countries in the world, contributing about 65% of global gas flare and GHG emissions.<sup>20</sup> Through gas flaring alone, Nigeria is responsible for contributing an estimated 48 million tonnes of GHG emissions into the atmosphere – more than the entire sub-Saharan Africa combined.<sup>21</sup> Incidentally, most of these gas flaring sites responsible for these emissions are mainly located in the Niger Delta region of Nigeria, as it is the location of the oil and gas industry in Nigeria. The Niger Delta, and indeed the entire country, has for decades experienced first-hand the negative impacts of unmitigated GHG emissions through gas flaring. Nigeria is currently experiencing mixed incidences of climate change-related droughts, loss of biodiversity, environmental conflicts, rising sea levels, acid rain, and forced migration.<sup>22</sup> Nowhere in Nigeria is this more felt than in the coastal communities of the Niger Delta and in coastal cities such as Lagos which are affected by flooding related to climate change.<sup>23</sup> In fact, Lagos – Africa's most populous city and a low-lying city on Nigeria's Atlantic coast – is currently under threat of becoming uninhabitable by 2050<sup>24</sup> and completely submerged by 2100 due to climate change-induced rising sea levels.<sup>25</sup> This underscores the clear and present danger that unabated gas flaring and the resulting climate change-induced disasters pose to Nigeria.

### What are gas flares?

Gas flares are produced when the extra gases from crude oil drilling and production processes are burned off into the atmosphere.<sup>26</sup> With Nigeria reputed to have the ninth largest gas reserves in the world,<sup>27</sup> the fifth

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18. Brendan Coolsaet (ed), *Environmental Justice: Key Issues* (Routledge, 2021) 2.
  19. United Nations Secretary-General, 'Secretary-General's Statement on the IPCC Working Group 1 Report on the Physical Science Basis of the Sixth Assessment', (n 5).
  20. Uzuazo Etemire, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight' (2021) 15(2) *Carbon and Climate Law Review* 158.
  21. Uzuazo Etemire, 'Climate Change Litigation in Nigeria: Challenges and Opportunities' in Francesco Sindico and Makane Moise Mbengue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer, 2021), 409.
  22. Uzuazo Etemire, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight' (n 17) 158.
  23. Adaku J. Echendu, 'The Impact of Flooding on Nigeria's Sustainable Development Goals (SDGs)' (2020) 6(1) *Ecosystem Health and Sustainability* 1.
  24. Daisy Dune, 'Country Profiles – The Carbon Brief Profile: Nigeria' (2020) at <https://www.carbonbrief.org/the-carbon-brief-profile-nigeria> accessed 2 November 2021.
  25. Jane Johnson, 'Experts Say Rising Sea Levels and Flooding Could Make Lagos Uninhabitable' (August 4, 2021), Circle of Blue: Where Water Speaks, at <https://www.circleofblue.org/2021/daily-stream/the-stream-august-4-2021-experts-say-rising-sea-levels-and-flooding-could-make-lagos-uninhabitable/> accessed 2 November 2021.
  26. Eferiekose Ukala, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices' (2011) 2(1(4)) *Washington and Lee Journal of Energy, Climate and Environment* 97–101.
  27. Israel Aye and Emmanuel O. Wingate, 'Nigeria's Flare Gas (Prevention of Waste & Pollution Regulations) 2018' (2019) 21(2) *Environmental Law Review* 119.

largest exporter of liquid natural gas (LNG),<sup>28</sup> and even described as a ‘gas province with some oil in it’,<sup>29</sup> Nigeria has an estimated 180 trillion cubic feet of proven natural gas as at 2016, making it the largest gas reserve holder in Africa.<sup>30</sup> Yet, it is a significant contributor to approximately 65% of the total amount of gas flared globally,<sup>31</sup> flaring about 60% of its associated gas,<sup>32</sup> effectively placing it as the country with the worst record of gas flaring in the world.<sup>33</sup> Most of this gas is associated gas – a by-product of crude oil production, thus, most of the gas reserves are currently located in the Niger Delta region of Nigeria. Gas flare estimates in 2014 showed that in Nigeria 75% of associated gas produced is flared.<sup>34</sup> However, recent estimates by the Nigerian Department of Petroleum Resources (DPR) place the flaring of associated gas in Nigeria at 11.04%,<sup>35</sup> and the World Bank global gas flare statistics ranks Nigeria as the 7<sup>th</sup> worst gas flaring country as of 2018.<sup>36</sup>

During the process of crude oil refining, the gas (associated gas) is separated from the crude oil. Rather than harnessing or re-injecting this associated gas, most of the multinational oil firms flare the gas, mainly because of the lack of infrastructure on many of Nigeria’s oil fields that is needed to recapture the associated gas,<sup>37</sup> and the unwillingness of the multinational oil firms to invest in such infrastructure because it is cheaper and cost effective to flare the gas.<sup>38</sup> Separating associated gas from oil involves complicated processes that make use of powerful compressors for the transmission of the gas for utilization.<sup>39</sup> These pieces of equipment are costly and difficult to procure. Re-injecting the associated gas involves complicated and equally costly processes that require the utmost skill, precision and expertise.<sup>40</sup> Flaring the gas – the comparatively cheaper option for the oil companies – is their preferred cost-effective option. Additionally, the penalties for gas flaring, imposed by law on the oil companies, are not weighty enough to be deterrent, making it cheaper and easier to flare associated gas.<sup>41</sup> Another reason adduced for flaring gas, albeit unconvincing to some,<sup>42</sup> includes

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28. U.S. Energy Information Administration, *Country Analysis Brief: Nigeria* (U.S. EIA Independent Statistics and Analysis), May 2016. [https://www.eia.gov/beta/international/analysis\\_includes/countries\\_long/Nigeria/nigeria.pdf](https://www.eia.gov/beta/international/analysis_includes/countries_long/Nigeria/nigeria.pdf) accessed December 10, 2020.
  29. Obioma H. Onyi-Ogelli, ‘The Legal Regime for Nigerian Gas’ (2017) 8(2) *Nnamdi Azikwe University Journal of International Law and Jurisprudence* 151.
  30. US Energy Information Administration, *Country Analysis Brief: Nigeria* (U.S. EIA Independent Statistics and Analysis, May, 2016 [https://www.eia.gov/beta/international/analysis\\_includes/countries\\_long/Nigeria/nigeria.pdf](https://www.eia.gov/beta/international/analysis_includes/countries_long/Nigeria/nigeria.pdf) accessed 10 December 2019.
  31. Uzuazo Etemire, (n 20) 158.
  32. Olusola J. Olujobi, ‘Analysis of the Legal Framework Governing Gas Flaring in Nigeria’s Upstream Petroleum Sector and the Need for Overhauling’ (2020) 9 *Social Sciences* 2.
  33. Atei M. Okorobia and Stephen T. Olali, ‘The Historical Trajectory of Crude Oil Exploration and Production in Nigeria, 1930–2015’ in Prince E. Ndimele (ed), *The Political Ecology of Oil and Gas Activities in the Nigerian Aquatic Ecosystem* (Elsevier, 2018), 28.
  34. KPMG, *Nigeria’s Oil and Gas Industry Brief (2014)* 5 at <https://s3.amazonaws.com/rgi-documents/807cb4d6f40af92c55d9a0cd4aed6c942cb08537.pdf> accessed 12 September 2021.
  35. Department of Petroleum Resources, *2018 Nigerian Oil and Gas Industry Annual Report*, at <https://www.dpr.gov.ng/wp-content/uploads/2020/01/2018-NOGIAR.pdf> accessed 12 September 2021).
  36. World Bank, ‘Top 30 Flaring Countries (2014–2018) Ranked by 2018 Flare Volume’ quoted in Adaeze Okoye, ‘Tax-Deductible Flare Gas Penalty Payments in Nigeria: Context, Responsibilities and Judicial Interpretation’ (2021) 39(3) *Journal of Energy and Natural Resources Law* 346.
  37. Eghosa Ekhaton, ‘Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation’ (2016) 21(1) *Annual Survey of International & Comparative Law* 78.
  38. Adamu K. Usman, *Nigerian Oil and Gas Industry Laws: Policies and Institutions* (Malthouse, 2017), 429.
  39. *Ibid.*
  40. *Ibid.*
  41. Noah A. Izoukumor, ‘A Critical Assessment of the Pollution Prevention Laws and Regulations in Nigeria: Why They Failed to Protect the Environment of Nigeria’ (2019) 87 *Journal of Law, Policy and Globalization* 46.
  42. Okoye believes this argument is unconvincing as Nigeria has a population of about 200 million. See Adaeze Okoye, (n 36) 346.

a lack of domestic demand. Thus, an estimated 2.5 billion cubic feet of associated gas is flared daily in the Niger Delta.<sup>43</sup>

Against this background, this paper aims to analyse the status of gas flaring in the Niger Delta, its implications for climate change in the region, and the legislative, regulatory and judicial efforts at ending gas flaring in the region. The first part traces the origins and history of gas flaring in Nigeria, the second part interrogates the legislative and regulatory attempts at stopping gas flaring in the country, while the final part analyses the judicial attempts to stop gas flaring and how these judicial decisions have affected climate change litigation and mitigation in Nigeria. It also scrutinizes recent judicial developments in climate change litigation in Nigeria and the fresh judicial pathways for creating deterrence to the flaring of gas by oil companies in Nigeria. The paper concludes by using the current regulatory status of gas flaring in the Niger Delta to analyse how serious Nigeria is about its international commitments to climate change mitigation.

### History of gas flaring in the Niger Delta and its socio-ecological effects

The history of gas flaring in the Niger Delta dates back to the colonial era before independence when the colonial oil companies were more concerned with their profits than the debilitating effects of gas flaring to the Niger Delta and the residents therein.<sup>44</sup> Addressing the issue of gas flaring in the run-up to independence in 1960, Lord Home, the then Secretary of State for the Colonies, stated that ‘until there is this worthwhile market and until there are facilities (e.g. pipelines and storage tanks) to use the gas, it is normal practice to burn off this by-product from the oil wells’.<sup>45</sup> Conversely, during the passage of the 1976 UK Energy Act, the environmental implications of gas flaring were recognized as unacceptable in the UK, but the significant amount of revenue the colonial authorities stood to gain from the continuous production of crude oil in the Niger Delta while overlooking the waste therefrom (gas flaring), could not be ignored. Thus, the economic benefits of flaring gas outweighed considerations about the health and well-being of those directly impacted by gas flaring.<sup>46</sup>

The socio-ecological system of the Niger Delta – the people, the environment and the communities – directly bear the brunt of ecologically deleterious and life-endangering effects of gas flaring. Noxious and toxic gases such as methane, nitrogen oxide, sulphur dioxide, benzene, hydrogen sulphide, carcinogens and other greenhouse gases – which have been directly linked to global warming and climate change<sup>47</sup> – are all present in the gas that has been flared for decades in the Niger Delta.<sup>48</sup> Thus, the flora, fauna and the entire socio-ecological system of the region have suffered the effect of unabated gas flaring for more than half century causing negative atmospheric, biological, geological, physical and socio-economic impacts.<sup>49</sup> After carrying out empirical research on the health effects of gas flaring in the Niger Delta, Maduka and Tobin-West concluded that:

Apart from the effect on atmospheric temperature, the gases flared serve as pollutants to air and water. Green-house gases also precipitate the formation of acid rain. All this leads to negative outcomes on the health of the people who live and work in communities that are exposed to gas-flaring activities. These health

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43. Eghosa Ekhaton, (n 37) 78.

44. Environmental Rights Action (ERA), *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity* (Amsterdam: Friends of the Earth International, 2005) 2, <https://www.foei.org/wp-content/uploads/2014/04/gasnigeria.pdf> accessed 5 December 2021.

45. *Ibid.*

46. Eghosa Ekhaton, (n 37) 79

47. Omosivie Maduka and Charles Tobin-West, ‘Is Living in a Gas-flaring Host Community Associated with Being Hypertensive? Evidence from the Niger Delta Region of Nigeria (2017) 2(4) *British Medical Journal Global Health* 2.

48. Temi E. Ologunorisa, ‘A Review of the Effects of Gas Flaring on the Niger Delta Environment’ (2001) 8(3) *International Journal of Sustainable Development & World Ecology* 251.

49. *Ibid.*

outcomes range from chronic and recurrent respiratory diseases, abnormal haematological indices and increased susceptibility to blood dyscrasias, dermatological diseases and malignancies among others.<sup>50</sup>

Consequently, over the decades since oil was discovered and gas flaring began in the region, the inhabitants of the Niger Delta have suffered from numerous incapacitating and fatal diseases such as asthma, cancer, bronchitis, blood disorders and several other debilitating diseases that have all been linked to gas flaring. The preponderance of acid rain and the release of over 250 toxins and carcinogens in the region has also been linked to gas flaring.<sup>51</sup> The effect gas flaring by the oil companies has had on the communities in the Niger Delta for more than half a century, is aptly described by the late environmental rights activist, Ken Saro Wiwa, when he stated:

There has been a disruption of normal life in the village. The people have been used to having 12 hours of day and 12 hours of night. But now, their position is worse than that of the Eskimos in the North Pole for while nature gives the Eskimos six months of daylight followed by six months of night, Shell-BP has given Dere people about 10 years of continuous daylight. There are no compensations for these inconveniences and there is nothing to show that Shell-BP shields the flame from the people.<sup>52</sup>

In other words, sleep, which could serve as a temporary escape from the hardships in the communities due to gas flaring, are denied the residents of these oil-bearing communities. Perpetually exposed to unbearable heat, high noise levels and round-the-clock daylight conditions, the people in this region are vulnerable to physiological and psychological disorders.<sup>53</sup> Their source of living, which is mainly farming (fish and crop) are currently irreparably affected. Large portions of farmlands are periodically left damaged by the noxious gases from gas flaring with the acid rain and harmful precipitates therefrom.<sup>54</sup> The waters, streams and rivers are left poisoned, and the lands have become infertile.<sup>55</sup> Gas flare stacks, sometimes as high as 10-storey buildings keep burning day and night, emitting fierce and prickly heat, sending animals fleeing, depriving villages of cool air and darkness of night constantly for decades.<sup>56</sup>

Similarly, Friends of the Earth, a well-recognised international NGO declared:

Gas flares burn several stories high throughout the Niger Delta, often within a few hundred yards of communities. Some flares...have been burning constantly day and night for over 30 years. People living in villages near the flares suffer from polluted air and water, contract asthma and cancer as a result of breathing flare smoke...<sup>57</sup>

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50. Omosivie Maduka and Charles Tobin-West, (n 47) 2.

51. Amanze R. Ejiogu, 'Gas Flaring in Nigeria: Costs and Policy' (2013) 24(6) *Energy & Environment* 987; Adati A. Kadafa, 'Oil Exploration and Spillage in the Niger Delta of Nigeria' (2012) 2(3) *Civil and Environmental Research* 44.

52. Ken Saro-Wiwa, *Genocide in Nigeria: The Ogoni Tragedy* (Saros International Publishers, 1992), 78, quoted in Eferiokose Ukala, (n 26) 102.

53. Raymond M. Izarali, 'Human Rights and State-Corporate Crimes in the Practice of Gas Flaring in the Niger Delta' (2016) 24 *Critical Criminology* 398.

54. Eferiokose Ukala, (n 26) 102.

55. *Ibid.*

56. Leonore Schick, Paul Myles, Okonta E. Okelum, 'Fossil Fuels: Gas Flaring Continues Scorching Niger Delta' (November 30 2021) at <https://www.dw.com/en/gas-flaring-continues-scorching-niger-delta/a-46088235> accessed 30 November 2021.

57. FOE, 'Gas Flaring in Nigeria – An Environmental Health Nightmare' at <https://foe.org/2009-05-gas-flaring-in-nigeria/> accessed 20 December 2021.

In the meantime, the deadline for the cessation of gas flaring has been shifted several times –2004, 2008,<sup>58</sup> 2012<sup>59</sup> and 2020<sup>60</sup> with no end yet in sight. In fact, geospatial infrared readings from the National Oceanic and Atmospheric Administration<sup>61</sup> (NOAA) satellites, show that gas flaring in the Niger Delta is on the rise, with the gas flares burning more brightly in 2018 than they have ever burned since the NOAA satellites started monitoring the flares in 2012.<sup>62</sup>

### Guiding policy on gas flaring and climate change in Nigeria

Nigeria is a Party to the United Nations Framework Convention on Climate Change (UNFCCC)<sup>63</sup> and the Paris Agreement,<sup>64</sup> having signed and ratified both instruments. The Agreement is a legally binding international treaty on climate change. The goal of the treaty is to limit global warming and climate change by significantly cutting down global greenhouse gas emissions. Along with 195 other countries, Nigeria signed this treaty in 2016 and ratified it in 2017.<sup>65</sup> Under the Agreement, all Parties, including Nigeria, agreed to ‘Intended Nationally Determined Contributions’ (INDC) to the reduction of global greenhouse gases. Under its INDC, Nigeria voluntarily committed to unconditionally reduce its greenhouse gases by 20% and conditionally by 47% upon the receipt of international support.<sup>66</sup> However, this commitment has not been given the full weight of the law in Nigeria by domestication through legislation as required by the Nigerian Constitution.<sup>67</sup> Consequently, the country’s commitment under the Paris Agreement cannot currently be mandated by the Nigerian courts.<sup>68</sup>

Similarly, the current 2016 Nigerian National Policy on the Environment<sup>69</sup> reiterates Nigeria’s commitment towards combating climate change by recognizing the urgent need for the country to domesticate the UNFCCC and implement the Paris Agreement and the Nationally Determined Contributions under it. The Policy also commits to the continuation of effective participation in global climate change negotiations and mainstream climate change into all sectors of the economy. Etemire argues that the inclusion of Nigeria’s international commitment on climate change in the revised National Policy on the Environment is in recognition of the fact that Nigeria’s regulatory framework on climate change is weak. This argument is strengthened by the fact that like the INDC, the Nigerian courts cannot entertain an action resulting from non-implementation of the Policy.<sup>70</sup>

58. ERA, (n 44) 14.

59. Francis Ibitoye, ‘Ending Natural Gas Flaring in Nigeria Oil Fields’ (2014) 7(3) *Journal of Sustainable Development* 14

60. Paul Myles, Leonore Schick and Okonta Okelum, ‘Special Report: Nigeria’s Gas Flares Increases ahead of 2020 Deadline’ *Premium Times* (Nov. 25, 2018) at <https://www.premiumtimesng.com/news/headlines/297472-special-report-nigerias-gas-flares-increase-ahead-2020-deadline.html> accessed 17 January 2022.

61. The NOAA is a scientific agency within the United States Department of Commerce that focuses on the conditions of the oceans, atmosphere, predict and understand weather changes and the factors that lead to them. See <https://www.noaa.gov/our-mission-and-vision> accessed 5 January 2022.

62. *Ibid.* see <https://ncc.nesdis.noaa.gov/index.php> accessed 5 January 2022.

63. (1992) 31 ILM, 849.

64. UNFCCC, Paris Agreement (entered into force in 2016) (United Nations, 2015) at <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed on 2 November 2021.

65. *Ibid.*

66. The Federal Government of Nigeria, *Nigeria’s Nationally Determined Contribution* (as amended) (Federal Ministry of Environment, 2021) at <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Nigeria%20First/NIGERIA%202021%20NDC-FINAL.pdf> assessed 2 December 2021.

67. Cap 25, Laws of the Federation of Nigeria (LFN) 2004, Section 12.

68. Uzuazo Etemire, (n 20) 162.

69. National Policy on the Environment (Revised 2016) at <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Nigeria%20First/NIGERIA%202021%20NDC-FINAL.pdf> accessed 2 December 2021.

70. Uzuazo Etemire, (n 20) 162.

More recently, at the 26<sup>th</sup> instalment of the Conference of the Parties to the UNFCCC (COP26) in Glasgow in November 2021, Nigeria joined about 200 other countries in agreeing to the Glasgow Climate Pact.<sup>71</sup> The Pact reiterates their commitment to combating climate change by working towards net-zero greenhouse gas emissions by increasing their carbon-cutting commitments by phasing out fossil fuels.<sup>72</sup> Specifically, Nigeria pledged to reach net-zero greenhouse gas emissions by 2060.<sup>73</sup>

Despite the fact of non-domestication, ratifying the Paris Agreement, submitting a revised INDC, and agreeing to the Glasgow Climate Pact, demonstrates on paper at least, Nigeria's commitment towards eliminating greenhouse gas emissions and stemming the tide of climate change. The sincerity and political will (or absence thereof) of Nigeria's commitment at the world stage will be determined by its domestic legislative and judicial efforts at stopping gas flaring in the Niger Delta (since it is the biggest source of greenhouse emissions and climate change in the country).

### **Legislative and regulatory efforts at combating climate change in the Niger Delta**

Nigeria has historically lacked a specific detailed and binding legal framework for climate change mitigation and adaptation,<sup>74</sup> and as at the time of writing this work, all efforts by the Nigerian government till date to produce a specific legal instrument on climate change have been abortive.<sup>75</sup> However, since gas flaring is the biggest cause of GHG emissions in Nigeria, the laws governing gas flaring in Nigeria will be examined to assess the efforts of the country at meeting its international obligation to mitigate climate change in Nigeria by eliminating gas flaring in the Niger Delta.

There have been a few regulatory attempts to stop gas flaring in the Niger Delta communities. The Petroleum Act (Drilling and Production) Regulations,<sup>76</sup> made pursuant to the Petroleum Decree of 1969<sup>77</sup> (now the Petroleum Act,<sup>78</sup> which has been superseded by the recently-enacted Petroleum Industry Act (PIA), 2021) provided in Regulation 42 that oil companies with oil prospecting licences and leases should submit a viable feasibility study for associated gas utilization within five years of commencing operations. Yet, the Regulations failed to discourage gas flaring before the preparation of the feasibility study or impose penalties for gas flaring before and after submission of the study. This invariably meant that oil companies were free to flare gas, without any penalties, for five years until the feasibility study is submitted.<sup>79</sup>

The Associated Gas Re-Injection Act (AGRA)<sup>80</sup> which was enacted to address the deficits of previous legislations in stopping gas flaring in the Niger Delta, failed to fare any better than the previous legislations.

71. FCCC/PA/CMA/2021/L.16 – UNFCCC.

72. Washington Post Staff, 'The Glasgow Climate Pact Annotated' (The Washington Post, November 2021) at <https://www.washingtonpost.com/climate-environment/interactive/2021/glasgow-climate-pact-full-text-cop26/> accessed 3 November 2021.

73. Ruth Olurounbi, 'Nigeria Pledges to Reach Net-Zero Emissions by 2060' (Bloomberg, 2021) at <https://www.bloomberg.com/news/articles/2021-11-02/nigeria-targets-to-reach-net-zero-emissions-by-2060-buhari-says> accessed 3 November 2021.

74. *Ibid*, 160

75. *Ibid*.

76. Petroleum Act (Drilling and Production) Regulations 69 of 1969.

77. Petroleum Decree No.51 of 1969.

78. Cap P10 Laws of the Federation of Nigeria (LFN) 2004. The PIA, which was enacted in 2021, essentially repeals the Petroleum Act. It was enacted to provide legal, governance, regulatory and fiscal framework for the Nigerian Petroleum Industry and the development of host communities. See, Petroleum Industry Act, No. 6 of 2021, available at <http://www.petroleumindustrybill.com/wp-content/uploads/2021/09/Official-Gazette-of-the-Petroleum-Industry-Act-2021.pdf> accessed 17 June 2022.

79. Uche J. Orji, 'An Appraisal of the Legal Frameworks for the Control of Environmental Pollution in Nigeria' (2012) 38(2) *Commonwealth Law Bulletin* 152.

80. No. 99 of 1979 (now Cap A25 Laws of the Federation of Nigeria 2004).



Section 3 (1) of the AGRA expressly prohibited gas flaring with the penalty of the forfeiture of concessions of oil fields for oil companies in violation of this rule. However, by the provisions of Section 3 (2), the Minister of Petroleum retained the discretion to permit the flaring of gas where the Minister is convinced that re-injection or utilization of the gas is unfeasible. This proviso proved to be unhelpful for the cessation of gas flaring as it left the door open for the oil companies to corruptly obtain gas flaring permits and licences<sup>81</sup> from the Minister who could exercise this discretion in any manner the Minister deemed fit. It therefore came as no surprise that the AGRA failed to reduce or cease gas flaring in the Niger Delta.

The next regulatory attempt to stop gas flaring – the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations (AGRA Regulations)<sup>82</sup> – made by the Minister of Petroleum in accordance with the provisions of the AGRA Act,<sup>83</sup> permitted gas flaring under certain conditions,<sup>84</sup> and prescribed absurdly low fines<sup>85</sup> that made it more economically viable for the oil companies to flare associated gas rather than re-injecting it or utilizing it. More so, these conditions or exemptions automatically exempted about 86 out of a possible 155 oil fields owned by the multinational oil companies, from the Regulations or the penalties prescribed therein. Predictably, the AGRA Regulations failed to have any impact in the cessation of gas flaring and utilization or re-injection of gas. It is, however, not cynical to state that the long title of the Regulation - Associated Gas Re-Injection (Continuation of Flaring of Gas) – is not only oxymoronic, but also, when combined with the exemption which permits the Minister unbridled discretion to issue permits for gas flaring, gives a glimpse into the lack of genuine intent from the Nigerian government at that time to stop gas flaring in the Niger Delta. Currently, even though it has been reported that the percentage of gas flared in Nigeria has reduced since 2002 and now stands at 10 percent as of 2018,<sup>86</sup> there are reports of new gas flaring sites being constructed by oil companies like Shell, on oil fields in the Niger Delta since 2013, despite the aforementioned laws and regulations.<sup>87</sup>

It has been opined that the seemingly half-hearted attempts by the Nigerian government to end gas flaring in the Niger Delta through legislation, and the non-compliance by the oil companies thereof, could be directly traced to alleged endemic corruption within the Nigerian oil and gas industry.<sup>88</sup> As a result of this alleged pervasive corruption, oil and gas production in the Niger Delta is tied solely to economic considerations without any thought as to its effect on climate change in the country. Thus, legislative loopholes that give the Minister discretionary powers to grant gas flaring permits entrench corruption and will always have the potential to be abused by the oil companies.<sup>89</sup>

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81. Olubayo Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Intersentia, 2014) 354.

82. Regulation 43 of 1984

83. Section 3 and 5, Associated Gas Re-Injection Act (AGRA Act).

84. Where more than 75 percent of the produced gas is effectively utilised or conserved; where the produced gas contains more than 15 percent impurities which render the gas unsuitable for industrial purposes; where an ongoing utilisation programme is interrupted by equipment failure; where it is technically impossible to re-inject the gas in the field; where the minister orders the production of oil from a field that does not satisfy any of the conditions specified in the Regulations. See Regulation 1, AGRA Regulations, 1984.

85. The fine was set at a meagre N10 (Ten Naira) per standard cubic feet flared (scf), which amounts to about \$0.03 (less than half a quarter of one dollar) and has remained that way as of 2017. See 'Ibibia L. Worikam, Uzuazo Etemire and Paul S. Tamuno, 'Oil Politics and the Application of Environmental Laws to the Pollution of the Niger Delta: Current Challenges and Prospects' (2019) Vol. 17, Issue 1, *Oil, Gas & Energy Law Intelligence*, 8; PwC, 'Assessing the Impact of Gas Flaring on the Nigerian Economy' (2019) *PwC Nigeria*, at <https://www.pwc.com/ng/en/assets/pdf/gas-flaring-impact1.pdf> 10, accessed 12 October 2021; Uche J. Orji, 'An Appraisal of the Legal Frameworks for the Control of Environmental Pollution in Nigeria' (2012) Vol. 38, (n 79) 332.

86. PwC, 'Assessing the Impact of Gas Flaring on the Nigerian Economy', *ibid* 3.

87. Afoke Ohwojeheri, 'Shell's Gas Flaring Furnace in Opolo-Epie, Nigeria' (2019) Environmental Justice Atlas at <https://ejatlas.org/conflict/shell-gas-flaring-in-opolo-epie-nigeria>, accessed 12 October 2021.

88. Adeoye O. Akinola, 'Resource Misgovernance and the Contradictions of Gas Flaring in Nigeria: A Theoretical Conversation' (2018) 53(5) *Journal of Asian and African Studies* 756.

89. *Ibid*.

Nevertheless, the most recent effort by the Nigerian government to tackle the flaring of gas came in 2017 when the Federal Executive Council approved a new National Gas Policy (NGP).<sup>90</sup> The idea of the Policy was to adopt strategies like flare capture and utilization technologies to finally bring an end to gas flaring by the year 2020 and position Nigeria as a serious gas-based industrial nation with reduced emphasis and dependence on crude oil.<sup>91</sup> Pursuant to the primary objective of ending associated gas flaring by 2020, The Flare Gas (Prevention of Waste and Pollution) Regulations 2018<sup>92</sup> was issued by the President of the Federal Republic of Nigeria, in his capacity as the Minister of Petroleum resources, in accordance with its parent Act – the AGRA.<sup>93</sup> The Regulation provides a legal framework for the protection of the Niger Delta communities and the broader Nigerian environment from the deleterious effects of gas flaring and climate change.<sup>94</sup> It also has the potential to help derive social and economic benefits from associated gas which would normally be flared and wasted during oil production.<sup>95</sup>

The Regulations introduces a different tactic from the previous attempts at ending gas flaring in the Niger Delta. Basically, the Regulations empower the Federal Government to appropriate all flare gas held by oil producing companies that hold oil prospecting licences, leases and marginal fields.<sup>96</sup> Under this arrangement, the Minister may issue a ‘Permit to Access Flare Gas’ to a third party investor (which must be a company registered in Nigeria, and must not be an oil and gas production company) on an exclusive basis to take flare gas from one or more flare sites on behalf of the Federal Government, and dispose of it in a manner authorized by the Federal Government, but subject to the terms specified in the Permit.<sup>97</sup> This Permit is issued by the Minister to the Permit Holder only after a competitive bidding process.<sup>98</sup> This gas flaring commercialization scheme not only has the potential to drastically reduce gas flaring in the Niger Delta, it can also generate gas revenues for the Federal Government.

Another significant aspect of the Flare Gas Regulations 2018 is the penalty for the flaring of gas and non-compliance with the flare gas commercialization provisions. Like the AGRA, gas flaring is still illegal under the Flare Gas Regulations 2018, except when it is permitted or approved by the Minister.<sup>99</sup> Thus, associated gas producers and Permit Holders for the commercialization scheme are not allowed to engage in routine gas flaring from their facilities. The penalty for routine gas flaring has also been increased in the 2018 Regulation. Accordingly, oil companies that produce more than 10,000 barrels of oil per day in any Oil Mining Lease field or Marginal Field, that engages in the routine or non-routine flaring of gas shall be liable to pay \$2.00 (two U.S Dollars) per 28.317 standard cubic metres (one thousand standard cubic feet)

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90. Ministry of Petroleum Resources, ‘National Gas Policy: Nigerian Government Policy and Actions’ (2017) <http://www.petroleumindustrybill.com/wp-content/uploads/2017/06/National-Gas-Policy-Approved-By-FEC-in-June-2017.pdf> accessed 29 December 2021.

91. Occhiali Giovanni and Falchetta Giacomo ‘The Changing Role of Natural Gas in Nigeria: A Policy Outlook For Energy and Sustainable Development’ (2018) Working Paper, No. 010, Fondazione Eni Enrico Mattei (FEEM), Milano. 21. Available at <http://hdl.handle.net/10419/177262> accessed 29 October 2021. See also, TEMPLARS, ‘Flare Gas (Prevention of Waste and Pollution) Regulations 2018’ (2018) Templars Integrated Gas Practice, p.2. available at <https://www.templars-law.com/wp-content/uploads/2018/09/FLARE-GAS-PREVENTION-OF-WASTE-AND-POLLUTION-REGULATIONS-2018.pdf> accessed 29 October 2021.

92. Government Notice No. 59, Gazette, (9 July 2018) No. 88, Vol. 105) B97 – 111. Came into force on July 5, 2018.

93. Section 5 of the AGRA empowers the Minister of Petroleum with the discretion to make regulations necessary for the purposes of the Act.

94. Paragraph 1, Flare Gas (Prevention of Waste and Pollution) Regulations, 2018.

95. Stephen O. Oke, ‘Gas Flaring in Nigeria and the Flexed Muscles of the 2018 Regulations: Key Implications and Investment Considerations’ (2019) 17(1) *Oil, Gas & Energy Law Intelligence (OGEL)* 1.

96. Regulation 2(2) Flare Gas Regulations, 2018. See also, Israel Aye and Emmanuel O. Wingate (n 27) 122.

97. Paragraphs 3 and 8(3) Flare Gas Regulations, 2018.

98. Paragraphs 3(1), Flare Gas Regulations, 2018.

99. Paragraph 12, Flare Gas Regulations, 2018.

of gas flared.<sup>100</sup> This marks an increase in the penalty provisions of the quondam AGRA, from the flat penalty of N10 (less than half of \$1) per 1,000 scf (standard cubic feet). It is submitted that this penalty is still too minute to constitute a deterrent to the flaring of gas.

However, neither the gas Producer nor the Permit Holder will be liable where gas is flared as a result of an act of war, community disturbance, insurrection, storm, flood, earthquakes or other natural phenomenon which is beyond the reasonable control of the Producer.<sup>101</sup> In addition, any Producer of flare gas that chooses to commercialize associated gas on their own terms and outside the requirements of Paragraph 3 of the Flare Gas Regulations (that requires a competitive bidding process coordinated by the Federal Government and a subsequent Permit issued by the Minister), shall be liable to a revocation of their Certificate for Gas Flaring.<sup>102</sup>

From the above, it could be arguably concluded that with the Flare Gas Regulations 2018, the Nigerian Government appears to be committed, *prima facie*, in its resolve to bring an end to gas flaring in the Niger Delta in line with its international commitments on global climate change mitigation. However, it remains to be seen if the goal of a complete end to gas flaring by 2030 will be achieved, in line with Nigeria's Nationally Determined Contribution (NDC) to the Paris Agreement to end the flaring of associated gas and other greenhouse gases by 2030,<sup>103</sup> and its commitment under the Glasgow Climate Pact at COP26.

It is however concerning that the discretionary power of the Minister to grant permits to oil companies to flare gas, as was present in the AGRA, has also been retained in the 2018 Flare Gas Regulations. As stated above, such discretionary powers are capable of being corrupted or exploited by the oil companies with their financial power and influence, into getting permits from the Minister using his discretionary powers.

Undoubtedly, the major objective of the 2018 Flare Gas Regulations is the elimination of gas flaring by 2030. Whether the Regulations were borne out of public interest<sup>104</sup> or a genuine need meet the international obligation to mitigate climate change through the ceasing of gas flaring in the Niger Delta, only time will tell, especially when the courts are called upon to interpret the provisions of the Regulation.<sup>105</sup> In the meantime, at the time of writing, it is the third quarter of 2021 (three years after the coming into force of the Regulations), and gas flaring is still a daily occurrence in the Niger Delta, with its concomitant effect on the climate painfully felt by the inhabitants of the region. Also, there has not been any recorded evidence of enforcement and implementation of the Regulations.

Furthermore, it is noteworthy that the most anticipated piece of legislation meant to regulate the Nigerian oil and gas industry – the Petroleum Industry Act (PIA)<sup>106</sup> – was finally passed into law in August 2021, after more than a decade of legislative stalling since it was introduced to parliament as a Bill in 2008. The PIA touches on gas flaring but does not unequivocally proscribe it. Instead, it requires oil field operators to

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100. Paragraph 13, Flare Gas Regulations, 2018.

101. *Ibid.*

102. Paragraph 14, Flare Gas Regulations, 2018.

103. The Paris Agreement is an internationally binding treaty on climate change with the main aim of tackling global warming by each member state pledging to reduce their emission of greenhouse gases as soon as possible. To this effect, the member states were required, by 2020, to submit their plans for climate change action and reduction of greenhouse gases. These plans are known as 'nationally determined contributions' (NDCs). The Paris agreement was adopted by 196 parties, on December 12 2015, and entered into force on November 4, 2016. See <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 12 October 2021. Nigeria signed the Paris agreement in 2016 and ratified in 2017. By 2020, Nigeria submitted its NDC, where it committed to end gas flaring and drastically reduce greenhouse gases by 2030. Presumably, the Flare Gas Regulations of 2018 was an attempt by the Nigerian government to work towards fulfilling its obligations under the Paris Agreement. See, UNFCCC, 'Nigeria's Intended National Determined Contribution' at [https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Nigeria%20First/Approved%20Nigeria%27s%20INDC\\_271115.pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Nigeria%20First/Approved%20Nigeria%27s%20INDC_271115.pdf) accessed 12 October 2021.

104. Israel Aye and Emmanuel O. Wingate, (n 27) 127

105. *Ibid.*

106. Petroleum Industry Act, No. 6 of 2021, available at <http://www.petroleumindustrybill.com/wp-content/uploads/2021/09/Official-Gazette-of-the-Petroleum-Industry-Act-2021.pdf> accessed 17 June 2022.

submit a ‘natural gas flare elimination and monetisation plan’ within 12 months of securing a license to operate.<sup>107</sup> However, the Act still permits oil field operators to flare gas in the case of emergencies, as an acceptable safety practice, for facility start-up and operational reasons such as equipment testing, or if the Regulatory Commission grants a permit to do so.<sup>108</sup> In other words, under the PIA, gas flaring is still permitted albeit under certain conditions. This has been regarded as another half-hearted attempt to stop gas flaring in Nigeria.<sup>109</sup>

It will come as no surprise, therefore, if the genuineness of Nigeria’s commitment to the Paris Agreement (INDC) and the Global Climate Pact at COP26 on climate change mitigation through the phasing out of GHGs, is called to question.

## Judicial efforts at combating climate change in Nigeria through stopping gas flaring in the Niger Delta

The issue of gas flaring and its deleterious effects on the Niger Delta, was highlighted by the Nigerian Federal High Court in the case of *Jonah Gbemre v. Shell Petroleum Development Company (SPDC) & Others*.<sup>110</sup> The residents of a host community in the Niger Delta, due to the lethargy and indifference of the Nigerian government towards their plight, sought to use the Nigerian courts as a medium for putting an end to the flaring of gas in the region.<sup>111</sup> This case presented an opportunity for the Nigerian Judiciary to make its mark on environmental and climate change jurisprudence in Nigeria and help facilitate an end to the issue of gas flaring in the Niger Delta, thereby mitigating global climate change. In *Gbemre*, the applicant, Jonah Gbemre, instituted an action in court on behalf of himself and the residents of the *Iwherekan* Community – a host community in the Niger Delta to the oil exploration activities of the Respondents, SPDC. The application was brought pursuant to Sections 33 (1), 34 (1) of the Nigerian Constitution which guarantees the right to life and dignity of human persons; and Articles 16 and 24 of the African Charter<sup>112</sup> which guarantee the right to health and a general satisfactory environment. The applicants alleged, *inter alia*, that the oil exploration and production of SPDC in their community was characterized by incessant gas flaring which resulted in the poisoning and pollution of the air, water and food in the community.<sup>113</sup> Consequently, the community recorded premature deaths, respiratory terminal illnesses such as cancer, acidified lakes leading to the poisoning of water and killing of fish

107. Section 108, PIA 2021.

108. Sections 104 (1) and 107, PIA 2021.

109. Olusola J. Olujobi, Tunde E. Yebisi, Oyinkepreye P. Patrick and Afolabi I. Ariremako, ‘The Legal Framework for Combating Gas Flaring in Nigeria’s Oil and Gas Industry: Can It Promote Sustainable Energy Security?’ (2022) Vol. 14, *Sustainability*, 13-14.

110. *Jonah Gbemre v. Shell Petroleum Development Company (SPDC) & Others*. Suit No. FHC/3/C5/53/05 (Unreported) Federal High Court, Benin, 14 November 2005 (Per Nwokorie J).

111. Eferiokose Ukala, ‘Gas Flaring in Nigeria’s Niger Delta: Failed Promises and Reviving Community Voices’ (2011) 2(1(4)) *Washington and Lee Journal of Energy, Climate and Environment* 97, 106.

112. African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9 LFN, 2004. The African Charter on Human and Peoples Rights (Banjul Charter) was signed and ratified by Nigeria in 1981 and was incorporated into the Corpus Juris of Nigeria through the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, pursuant to Section 12 of the Nigerian Constitution which stipulates that “No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly (Parliament)”. See the cases of *Mhwun v Minister of Health & Productivity & Ors*, (2005) 17 NWLR (pt. 953) 120; *Abacha v Fawehinmi* (2000) 6 NWLR (pt 660), 228, where it was held by the courts that international treaties entered into by the government of Nigeria do not become binding until such treaty has been enacted into law by the National Assembly (Parliament). See also, Flora A. Onomrherhinor, ‘A re-examination of the Requirement of Domestication of Treaties in Nigeria’ (2016) Vol. 7, *NAUJILJ*. 20; Christian N. Okeke, ‘The Use of International law in the Domestic Courts of Ghana and Nigeria’ (2015) Vol. 32, *Arizona Journal of International & Comparative Law*, 396; Chilenye Nwapi, ‘International Treaties in Nigerian and Canadian Courts’ (2011) Vol. 19, *African Journal of International & Comparative Law*, 38.

113. *Gbemre v. SPDC* (n 110).

on which the community depended on for food.<sup>114</sup> Thus, the Applicant sought, among other reliefs, a declaration from the court against the enabling statute and regulation that made the flaring of gas permissible. The applicants requested the court to declare Sections 3(2)(a) and (b) of the Associated Gas Re-Injection Act (AGRA) and Section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulation – under which gas flaring in the Niger Delta could be permitted – to be unconstitutional, null and void for being inconsistent with the applicants’ right to life and dignity of human persons guaranteed by the Nigerian Constitution<sup>115</sup> The other major relief the applicants sought was an order of perpetual injunction restraining the respondents (SPDC) or their agents, from the further flaring of gas in the applicant’s village.

In a proactive and inventive manner, the court gave an expansive meaning to the right to life guaranteed under the Nigerian Constitution,<sup>116</sup> holding that the right to life also includes the right to a clean and healthy environment free of poisonous air and pollution; and that also, the respondents were in breach of the constitutionally guaranteed right to life of the applicants.<sup>117</sup> The court further held that the provisions of the AGRA and the AGRA Regulations under which gas flaring in the Niger Delta may be permitted by the Minister, are inconsistent with the constitutionally guaranteed right to life of the applicants and therefore unconstitutional, null and void.<sup>118</sup>

Commenting on the nature of the reliefs sought by the applicant in the *Gbemre* case, Faturoti *et al* found it impressive that the reliefs sought did not focus on short term pecuniary compensation, but rather, concentrated on the long-term survival of the inhabitants of the community, by insisting on a nullification of the laws permitting gas flaring, and a permanent cessation of gas flaring in the *Iwherekan* community.<sup>119</sup> According to them, court actions on environmental degradation that are limited to compensation are not only short-sighted and only offer temporary reprieve to the community, but they also compromise the long-term future and lives of the residents of such host communities because it ignores the roots of the problems and perpetuates environmental despoliation and loss of lives.<sup>120</sup>

The *Gbemre* case is a significant one for a few reasons. It was a landmark effort to regulate gas flaring in Nigeria through a judicial approach.<sup>121</sup> It was the first judicial decision in Nigeria to unequivocally declare gas flaring as illegal.<sup>122</sup> It marked a new dawn in the attainment of environmental justice in the Niger Delta. Also, the decision has had significant positive implications for the pursuance of environmental justice in the Niger Delta. Disappointingly, the perceived victory and judicial innovation achieved by the decision in *Gbemre* appears to be pyrrhic in the light of the non-enforcement of the judgement, allegations of state complicity and interference; and the blatant disregard of the decision of the court

114. Adamu Kyuka Usman, *Nigerian Oil and Gas Industry Laws: Policies, and Institutions* (Malthouse, 2017) 432; Uche J. Orji, ‘Moving From Gas Flaring to Gas Conservation and utilisation in Nigeria: A Review of the Legal and Policy Regime’ (2014) *OPEC Energy Review* 263.

115. Section 33 and 34, Nigerian Constitution 1999.

116. *Ibid.*

117. *Gbemre v. SPDC* (n 110) 30.

118. Section 1 (3) of the Nigerian Constitution provides: ‘if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void’.

119. Bukola Faturoti, Godswill Agbaitoro and Obinna Onya. ‘Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue?’ (2019) Vol. 27 (2) *African Journal of International and Comparative Law*, 234.

120. *Ibid.*, 235.

121. Uche J. Orji, (n 114) 163.

122. Bukola Faturoti *et al*, (n 119) 234; Abdulkadir B. Abdulkadir, ‘Gas Flaring in the Niger Delta of Nigeria: A Violation of the Right to Life and Comment on the Case of Jonah Gbemre v. Shell Petroleum Development Company of Nigeria Limited’ (2014) Vol. 22, No. 1, *IJUM Law Journal*, 90.

by the respondents (SPDC).<sup>123</sup> The respondents ignored the orders of the court compelling them to cease gas flaring in the applicant's community forthwith.<sup>124</sup> The order of the court compelling the respondents to submit a detailed plan for achieving complete end to gas flaring by 2007, was similarly ignored.

Also, in what has been alleged to be evidence of state complicity, interference and executive arm-twisting by the Nigerian government, the judge that delivered the ground-breaking judgement in *Gbemre* was taken off the case and transferred to another court in a different part of the country.<sup>125</sup> Since then, the case has gotten lost in the minefield of legal technicalities characteristic of the Nigerian judicial system, and is believed to have died a natural death.<sup>126</sup> According to Faturoti *et al*, the alleged complicity of the Federal Government in the stonewalling of the *Gbemre* case was motivated by the fact that the Nigerian government is a joint venture partner with the multinational oil companies,<sup>127</sup> and the enforcement of the *Gbemre* judgment would arguably have inadvertently led to a decrease in oil production, which in turn would have been inimical to the interests of the Nigerian government and oil companies in terms of oil revenues.<sup>128</sup> Here, the survival and well-being of the inhabitants of the Niger Delta appeared to be given little or no consideration. As at the time of writing, while there has not been any recorded evidence that the applicant sought the enforcement of the decision in a higher court, the respondents appealed the decision of the lower court, but the appeal has been pending for several years and has still not been heard.<sup>129</sup> Perhaps, as has been suggested, if the appeal is heard, the substantive issues will be examined and it will expose the respondents to the risk of the Court of Appeal upholding the decision of the Federal High Court.<sup>130</sup> Thus, collusion with the Nigerian government and judicial interference appears to be the preferred route of the respondents (SPDC) to render the decision of the trial court ineffective. As it stands, the decision of the Federal High Court in the *Gbemre* case, albeit impressive and encouraging for climate change and human rights litigation in Nigeria, appears to be persuasive at best and may not have the full status of established law.<sup>131</sup>

Nevertheless, the *Gbemre* case is a template on which future litigants on climate change-related cases could have built on, but almost two decades later, the case has failed to gain traction and build momentum in holding private and public oil companies accountable for their deleterious emissions that incessantly contribute to climate change in Nigeria.<sup>132</sup>

A few reasons have been adduced for this. One of the major reasons is what has been referred to as the 'judicial posture'<sup>133</sup> of the Nigerian judiciary, as exemplified in a few oil-related cases,<sup>134</sup> which seems to prioritize the economic benefits and interests of the deleterious oil and gas industry over the negative effects the industry has on the environment and the lives of the inhabitants of the host communities. The

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123. Bukola Faturoti *et al* (n 119) 235-237; James R. May and Dayo O. Tiwajopelo, 'Dignity and Environmental Justice in Nigeria: The Case of *Gbemre v. Shell*' (2019) 25, *Widener Law Review* 270; Rhuks T. Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (Routledge, 2013), 38.

124. Bukola Faturoti *et al* (n 119) 235.

125. *Ibid.* See also, Uche J. Orji, (n 114) 163.

126. *Ibid.*

127. *Ibid.*, 236.

128. Raymond M. Izarali, 'Human Rights and State-Corporate Crimes in the Practice of Gas Flaring in the Niger Delta, Nigeria' (2016) Vol. 24 *Critical Criminology*, 398; Uche J. Orji, (n 114) 163.

129. Uzuazo Etemire, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight' (2021) 15(2) *Carbon and Climate Law Review* 163.

130. Bukola Faturoti *et al*, *ibid.* 236.

131. *Ibid.*, 240.

132. Uzuazo Etemire, 'Climate Change Litigation in Nigeria: Challenges and Opportunities' in Francesco Sindico and Makane Moise Mbengue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer, 2021), 416.

133. *Ibid.*, 165.

134. *Chinda v. Shell BP* (1974) 2 RSLR 1; *Oronto Douglas v. SPDC Nigeria Ltd.* FHC/L/CS/573/96 (unreported).

concomitant effect of this judicial posture is the reluctance of the victims of oil-related environmental damage and prosecutors to approach the courts for reliefs due to scepticism. Restrictive *locus standi* (standing to sue) rules are also the result of this posture of the Nigerian Judiciary when it comes to oil and gas-related cases, and it has severely restricted public interest litigation for the benefit of the victims of oil and climate change-related damage.<sup>135</sup> In other words, the restrictive rules on standing to sue in oil and gas cases in Nigeria are largely a product of judicial decisions where the courts appear to be more interested in the economic gains of oil and gas-related activities, rather than their negative effects.<sup>136</sup> Thus, the standing rules are interpreted by the courts in a manner that is restrictive to litigants and victims of environmental damage, but facilitative to the oil and gas companies in the furtherance of their economic interests.<sup>137</sup> The Nigerian courts have been urged to change this attitude or approach to oil-related environmental damage cases by interpreting the rules on standing in a less restrictive manner, for there is to be any chance of progress in climate change litigation, mitigation and adaptation in Nigeria.<sup>138</sup>

This admonition appears to have been considered in the recent case of *Centre for Oil Pollution Watch (COPW) v. Nigerian National Petroleum Corporation*<sup>139</sup> by the Nigerian Supreme Court. In this case, the appellant (COPW) a non-governmental organization (NGO) registered in Nigeria, sued NNPC over spilled crude oil from its burst pipelines that polluted two major streams – Ineh and Aku – of the Acha Community in Abia State. The appellant alleged that the spillage was as a result of the negligence of NNPC, and that even when the defendants took steps to stop further spillage, they failed to clean up the spill. Consequently, the streams, which the appellants claimed were the only source of water for the community, became contaminated, killing all the flora and fauna, and thus unfit for human consumption. NNPC raised a preliminary objection to the hearing of the suit at the trial court, leveraging the restrictive rules on standing to sue, to claim that the appellants (COPW) had no standing to sue because they were not directly affected by the spill. Demonstrating the ‘judicial posture’ of the courts mentioned earlier, the trial court predictably upheld the objection of the defendants and struck out the case for lack of *locus standi*.

The appellant appealed to the Court of Appeal which denied the appeal for the same reasons the trial court struck it out. Dissatisfied, appellants appealed to the apex court of Nigeria – the Supreme Court – which granted the appeal. In granting the appeal, the court sought the opinion of a group of *amici curia* (friends of the court), which was made up legal academics, experienced practicing lawyers, and senior advocates of the Supreme Court. In the opinion of the *amici curia*, the rules on standing to sue in Nigeria should be liberalized not only to reflect global best practice in other common law jurisdictions, but to also allow NGOs institute public interest litigation for the advancement of environmental protection and environmental and climate change jurisprudence. On the strength of the submissions of the *amici curia*, the Supreme Court, per Nweze JSC (Justice of the Supreme Court), allowed the appeal and held that COPW had standing to sue and referred the case back to the trial court to determine the substantive issues.

The judgment of the Supreme Court has significant implications for the future and progress of climate change litigation, including future attempts at stopping gas flaring in the Niger Delta through the courts. In fact, Etemire asserts that climate-related cases like the *Gbemre* case might have been decided differently it

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135. Miriam C. Chinyere and Emmanuel O. Wingate, ‘NGO Standing in Petroleum Pollution Litigation in Nigeria – Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation (2020) 13 *Journal of World Energy Law and Business* 490.

136. *Oronto Douglas v. Shell Development Company Ltd* (1999) NWLR (pt. 591); *Allan Irou v. Shell BP, Suit No. W/89/71 Warri High Court* (unreported).

137. Rhuks Ako, ‘The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India’ (2013) 3(4) *NUJS Law Review* 435–436.

138. Uzuazo Etemire, (n 132) 165.

139. *Centre for Oil Pollution Watch (COPW) v. Nigerian National Petroleum Corporation* (2019) NWLR 1666.

came after *COPW*.<sup>140</sup> Firstly, the apex court considered climate change issues as currently critical enough to abandon the historical judicial posture of economy over environment.<sup>141</sup> Thus the court relaxed the hitherto restrictive rules of standing to sue in environmental and climate change-related matters, to make it possible for NGOs, climate change and environmental activists to undertake public interest litigation in climate change matters.<sup>142</sup> Secondly, it is the first judicial decision to expressly and unequivocally use the terms ‘climate change’ and ‘global warming’ and to describe them as a clear and present danger to the planet and ‘future generations’.<sup>143</sup> The court stated:

There is no gainsaying in the fact that there is increasing concern about climate change, depletion of the ozone layer, waste management, flooding, and global warming... Both nationally and internationally, countries and organizations are adopting stronger measures to protect and safeguard the environment for the benefit of the present and future generations.<sup>144</sup>

Although the case is celebrated more for its liberalizing of the hitherto restrictive rules on standing to sue in oil-related environmental damage cases, special consideration must be given to the refreshing dynamism and progressiveness in the reasoning of the apex court as regards climate-related cases in Nigeria, especially as it demonstrates a clear recognition of the threat that climate change poses to Nigeria specifically, and to the Earth in general.

## Conclusion

This paper aimed to assess the seriousness of Nigeria in its international commitment to combat climate change through the phasing out of GHG emissions. Pursuant to this objective, the legislative, regulatory and judicial efforts at stopping gas flaring in the Niger Delta were explored and analyzed, since gas flaring in the oil industry is the major source of GHG emission and thus climate change in the Niger Delta and in the country. The analyses of the legislative and regulatory efforts revealed that efforts to stop gas flaring in the Niger Delta from the 1960s till date have been superficial at best. These efforts have been characterized by weak penalties, convenient loopholes and the granting of wide discretion to the Minister of Petroleum, arguably with the potential for the continued flaring of gas in the Niger Delta. Economic gains and not climate change considerations appear to be the driving factor. However, the 2018 Flare Gas Regulations aimed at eventually eliminating gas flaring, remains untested in the courts of law. If the effectiveness of the Regulations is to be assessed by the current and constant rate of gas flaring in the Niger Delta, then it can be concluded that the Regulations have been largely ineffective in stopping gas flaring.

Judicial attempts at combating climate change through the stopping of gas flaring have yielded arguably better results. However, the judicial posture of the courts in Nigeria still seem to favour the economic interests of the government over climate change considerations. However, the recent Supreme Court decision in *COPW v NNPC* evidences a potential but refreshing shift in the jurisprudence of the judiciary in Nigeria regarding cases that have significant import for climate change and the stopping of gas flaring in Nigeria.

Finally, Nigeria might have signed and ratified the relevant international instruments that show, albeit in theory, that it is serious about combating climate change – the UNFCCC, the Paris Agreement, INDC and

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140. Uzuazo Etemire, ‘The Future of Climate Change Litigation in Nigeria: *COPW v NNPC* in the Spotlight’ (2021) 15(2) *Carbon and Climate Law Review* 167.

141. *Ibid.*

142. *Ibid.*, 166.

143. *COPW v NNPC*, (n 139) 580-581; See also, Uzuazo Etemire, (n 132) 167.

144. *Ibid.*



the Glasgow Climate Pact. However, domestically, the situation tells a different story. The non-domestication of the Paris Agreement into its body of laws, the lack of a legal framework specifically on climate change and the legislative and regulatory track record of the country in its attempts to phase out gas flaring, makes mockery of these international obligations. Currently, as part of its new set of climate change commitments under the Glasgow Climate Pact at COP26, Nigeria has unequivocally pledged to phase out GHG emissions (i.e gas flaring) by 2060. Cynics might regard it as another shifting of the goal post. Nevertheless, if its new commitments are to be realistically and effectively achieved, Nigeria has more than a few legislative, regulatory and judicial measures to put in place to achieve the actualization of these international commitments on combating and mitigating climate change.


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