

## THE ILLUSION OF SUSTAINABLE DEVELOPMENT: HOW NIGERIA'S ENVIRONMENTAL LAWS ARE FAILING THE NIGER DELTA

*[In a] nation that the leaders do not believe in environmental protection, the concept of sustainable development is an illusion.*<sup>1</sup>

### INTRODUCTION

The petroleum industry has commercially extracted oil from the Niger Delta for the past forty years, during which time it has devastated the natural environment. As much oil is spilled in the Niger Delta annually as was spilled during the Exxon Valdez disaster.<sup>2</sup> Gas flaring, which was supposed to have ceased in 1984, continues to pollute the air today.<sup>3</sup> The oil and gas sector's reckless disregard for the environment imperils the people of the Niger Delta. More than 60% of the population depends upon the natural environment for their livelihood; they require healthy soil for farming and clean rivers for fishing.<sup>4</sup>

In 1989, the Nigerian government publically committed to "sustainable development based on proper management of the environment in order to meet the needs of the present and future generations."<sup>5</sup> Sustainable development recognizes that a healthy natural environment is an essential foundation for lasting social and economic development. Nigeria pledged to manage its environment and promote sustainable development through a system of environmental laws.<sup>6</sup> Unfortunately, Nigeria's lawmakers have long favored short-term economic gain, through support of the oil and gas industry, over long-term environmental protection. As a result, Nigeria's environmental laws are weak and underenforced.

This Note examines why Nigeria's environmental laws have failed to halt the environmental destruction caused by the oil and gas sector. Though sustainable development is unquestionably linked to human rights, this Note focuses solely on the environmental aspect of sustainable

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1. Goodluck Jonathan, *Sustainable Development and the Environment: Managing the Interface*, in OIL, DEMOCRACY, AND THE PROMISE OF TRUE FEDERALISM IN NIGERIA 307, 315 (Augustine A. Ikein et al. eds., 2008) [hereinafter OIL, DEMOCRACY, AND TRUE FEDERALISM].

2. Adam Nossiter, *Half a World from the Gulf, A Spill Scourge 5 Years Old*, N.Y. TIMES, June 17, 2010, at A1.

3. Daniel Howden, *Visible from Space, Deadly on Earth: The Gas Flares of Nigeria*, INDEP., Apr. 27, 2010, at 17.

4. AMNESTY INT'L, NIGERIA: PETROLEUM, POLLUTION AND POVERTY IN THE NIGER DELTA 14 (2009).

5. KANIYE S.A. EBOKU, OIL AND THE NIGER DELTA PEOPLE IN INTERNATIONAL LAW: RESOURCE RIGHTS, ENVIRONMENTAL AND EQUITY ISSUES 189 (2006) (quoting National Policy on the Environment (1989), § 1 (Nigeria)).

6. *Id.*

development. Part I provides a comprehensive overview of the Niger Delta's natural environment, its history of oil and gas operations, and the environmental damage caused by the oil and gas sector. Part II examines the effectiveness of agencies, statutes, and the Nigerian Constitution in protecting Nigeria's environment. Part III focuses on the role of the African Charter on Human and Peoples' Rights in Nigeria's system of environmental laws. Although this Note is primarily aimed at identifying flaws in Nigeria's environmental laws, it also identifies where provisions exist for citizen enforcement of environmental preservation and sustainable development. For Nigeria's government to fulfill its promise of sustainable development, it must reform its current system of environmental laws to hold oil and gas operators responsible for the harm they have caused and to prevent future damage.

## I. OIL AND GAS OPERATIONS IN NIGERIA

### *A. Nigeria and the Niger Delta*

Nigeria is a country of 932,768 square kilometers located in the heart of West Africa.<sup>7</sup> It is a tropical country with a coastline of about 800 kilometers.<sup>8</sup> The country has two main rivers, the River Niger and the River Benue, which converge in Lokoja and continue flowing south into the Atlantic Ocean.<sup>9</sup> Over the past forty to fifty million years, the rivers have deposited sediment where the waters slow to meet the sea.<sup>10</sup> This process formed the Niger Delta, the massive floodplain that bulges into the Gulf of Guinea.

The geographic Niger Delta is approximately 26,000 square kilometers, representing 2.8% of Nigeria's total land mass.<sup>11</sup> A World Bank study conducted in 1995 identified four distinct ecological zones in the Delta: mangroves, freshwater swamp forests, lowland rainforests, and barrier island forests.<sup>12</sup> Nigeria's mangrove swamp forest, located predominantly in the Niger Delta, is the largest in Africa and the third largest in the world.<sup>13</sup> The mangrove swamp is a sensitive ecosystem that is essential to the local economy. It is the most ecologically rich zone, consisting of more flora and

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7. Augustine Ikein, *Introduction to Nigeria and the Politics of Niger Delta Development*, in OIL, DEMOCRACY, AND TRUE FEDERALISM, *supra* note 1, at 1, 1.

8. *Id.*

9. *Id.*

10. EBOKU, *supra* note 5, at 19.

11. *Id.*

12. 1 WORLD BANK, *DEFINING AN ENVIRONMENTAL DEVELOPMENT STRATEGY FOR THE NIGER DELTA*, at vi (1995).

13. EBOKU, *supra* note 5, at 127.

fauna than any other delta ecological zone.<sup>14</sup> The freshwater swamp forest is the largest and most heterogeneous of the ecological zones. It consists both of riverbank levees (which rarely flood and are used mostly for agriculture) and back swamps (which are flooded most of the year).<sup>15</sup> The lowland rainforest ecological zone covers about 7,400 square kilometers, but little of the forest remains.<sup>16</sup> Most of the land has been cleared by slash-and-burn techniques and converted to palm-oil plantations.<sup>17</sup> The barrier island forests are freshwater forests found between the coastal beaches and the mangroves. The forests consist of rainforest species along the inland side of the beach ridge and freshwater swamp forests further inland at lower elevations.<sup>18</sup> Where the barrier-island forest is most inaccessible, it remains pristine and holds the highest concentration of biodiversity in the Niger Delta.<sup>19</sup> While the region remains understudied, the most comprehensive study to date identified sixteen rare and three endemic plant species, twenty-seven mammalian species with declining populations, and five rare mammalian species.<sup>20</sup>

While the geographic Niger Delta is a defined area, the political Niger Delta is far more difficult to classify. Some define the Delta ethnographically because the region is occupied principally by the Ijaw people.<sup>21</sup> More popularly, the Niger Delta is synonymous with the oil-producing regions of Nigeria.<sup>22</sup> With widening oil exploration outside of the geographic Niger Delta, this definition has become increasingly indeterminate. Yet, it remains powerful because inclusion in the Niger Delta “has tended to connote some proprietary rights over [Nigeria’s] oil wealth.”<sup>23</sup> The common understanding of the political Niger Delta today can be seen in Phase Two of the Niger Delta Environmental Survey.<sup>24</sup> The survey extended its study to the oil-producing states contiguous to the geographic Niger Delta, including not only Rivers, Bayelsa, and Delta States, but also areas of Abia, Akwa Ibom, Edo, Imo, and Endo States.<sup>25</sup>

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14. *Id.* at 128.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 132.

20. [Summary Volume] NIGER DELTA ENVIRONMENTAL SURVEY, PHASE TWO REPORT § 11.5, at 211 (2004) [hereinafter NDES PHASE TWO REPORT].

21. Ikein, *supra* note 7, at 15.

22. *Id.*

23. Oma Djebah, *Tackling the Niger Delta Conundrum*, THE NIGER DELTA CONGRESS (Aug. 2003), [http://www.nigerdeltacongress.com/tarticles/tackling\\_the\\_niger\\_delta\\_conundr.htm](http://www.nigerdeltacongress.com/tarticles/tackling_the_niger_delta_conundr.htm).

24. NDES PHASE TWO REPORT, *supra* note 20, § 2.3.3, at 30.

25. *Id.* at vii.

For the purposes of this Note, the Niger Delta includes these contiguous oil-producing areas.

### B. Oil and Gas Operations

The German-owned Nigerian Bitumen Company was the first to search for oil in Nigeria in 1908.<sup>26</sup> Both the first and second World Wars interrupted the search. Shell d'Arcy, a consortium owned by Royal Dutch Shell and British Petroleum, finally discovered crude oil in commercial quantities in 1956.<sup>27</sup> Shell found oil in what is now Bayelsa State in the heart of the Niger Delta.<sup>28</sup> By 1958, the production rate had reached 5,100 barrels per day, and Nigeria began shipping its first crude oil to Europe.<sup>29</sup> Today, Nigeria produces approximately 1.787 million barrels per day,<sup>30</sup> and Royal Dutch Shell remains the country's dominant oil company.<sup>31</sup> While there have been numerous oil finds, no onshore reserves have been located outside of the broader Niger Delta region.<sup>32</sup>

Oil remains essential to the Nigerian economy. The U.S. State Department reports that oil and natural gas accounted for 37% of Nigeria's Gross Domestic Product in 2006.<sup>33</sup> Furthermore, 97% of Nigeria's exports are fuel and mining products.<sup>34</sup> Oil revenues account for approximately 90% of annual revenues for the federal, state, and local governments.<sup>35</sup> The wealth realized by oil and gas production has not reached the people of the Niger Delta. Since the 1990s, protests related to oil revenues have been frequent, widespread, and sometimes violent:

[T]he alleged inequity issues include the non-participation of the Niger Delta people in oil operations; non-payment of compensation or inadequate compensation for land acquired for oil operations or damages arising therefrom; unemployment (particularly in oil companies); undevelopment of the Niger Delta region, despite the huge revenues oil contributes to the well being

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26. Edwin Egede, *Human Rights and the Environment: Is There a Legally Enforceable Right of a Clean and Healthy Environment for the "Peoples" of the Niger Delta Under the Framework of the 1999 Constitution of the Federal Republic of Nigeria?*, 19 SRI LANKA J. INT'L L. 51, 55 (2007).

27. *Id.* at 55–56.

28. *Id.* at 56.

29. EBOKU, *supra* note 5, at 70.

30. *Id.*

31. *Shell Blames Sabotage in Spills*, HOUS. CHRON., May 5, 2010, § (Business), at 1.

32. EBOKU, *supra* note 5, at 70.

33. *Background Note: Nigeria*, U.S. DEP'T OF STATE, <http://www.state.gov/r/pa/ei/bgn/2836.htm> (last visited Dec. 1, 2011).

34. *Id.*

35. EBOKU, *supra* note 5, at 73 n.37.

of the Nigerian State; and inequitable revenue allocation formula in the country.<sup>36</sup>

Militants have kidnapped oil workers, attacked oil installations, and sabotaged pipelines.<sup>37</sup> This instability has led oil companies to abandon facilities and renounce development of some oil and gas leases. Shell, which blames militant attacks for the majority of its oil spills in 2008, has even suggested that it may cease operations in Nigeria altogether.<sup>38</sup> Nigeria is prepared for this eventuality. Nigeria is negotiating with the Chinese National Offshore Oil Cooperation (Cnooc Ltd.), the third largest national oil company in China, to develop onshore oil blocks that other companies consider too dangerous due to militant attacks.<sup>39</sup> This continued development in already unstable areas of the Niger Delta will inevitably lead to further instability and environmental degradation.

### *C. The Effects of Oil and Gas Development on the Environment*

The Niger Delta is one of the world's ecosystems most severely impacted by petroleum pollution<sup>40</sup>:

People living in the Niger Delta have to drink, cook with, and wash in polluted water; they eat fish contaminated with oil and other toxins . . . ; the land they use for farming is being destroyed . . . [and] the air they breathe reeks of oil and gas . . . .<sup>41</sup>

Oil and gas development harms the environment through oil spills and gas flaring as well as other, less well-known effects of exploration and production.

#### 1. Oil Spills

Experts estimate that nearly 546 million gallons of oil have spilled in the Niger Delta, which amounts to approximately eleven million gallons per

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36. *Id.* at 301.

37. AMNESTY INT'L, *supra* note 4, at 13.

38. *Shell Blames Sabotage in Spills*, *supra* note 31.

39. Benoit Faucon & Spencer Swartz, *World News: Africa Pressures China's Oil Deals*, WALL ST. J., Sept. 29, 2009, at A14.

40. AMNESTY INT'L, *supra* note 4, at 14 (quoting FED. MINISTRY OF ENV'T ET AL., NIGER DELTA NATURAL RESOURCES DAMAGE ASSESSMENT AND RESTORATION PROJECT SCOPING REPORT I (2006)).

41. *Id.* at 21.

year.<sup>42</sup> As of 2008, 2,000 sites were identified as needing remediation because of an oil spill, and a number of these sites had experienced multiple spills.<sup>43</sup> Spills result from leaks in the network of dilapidated pipelines that run from oil wells to refineries and from “blow-outs”—uncontrolled releases of oil from wells.<sup>44</sup> Oil companies have claimed that sabotage undertaken by militants, thieves, or individuals hoping to collect remediation costs is responsible for up to 70% of oil spills.<sup>45</sup> Shell admits that it spilled more than 14,000 tons of crude oil in the Niger Delta in 2009, twice what it spilled in 2008 and more than four times what it spilled in 2007.<sup>46</sup> Shell attributes this increase to social instability in the Niger Delta and claims that the majority of the oil spilled resulted from two incidents in which militants bombed the Trans Escravos pipeline, a twenty-four-inch-wide pipeline intended to channel oil across the Sahara Desert.<sup>47</sup> Though militant activity is undoubtedly responsible for the increasing number of spills, evidence suggests that oil companies regularly claim sabotage when the spills result from equipment or operational failures.<sup>48</sup>

Fifty years of oil spills have caused massive pollution of the water and land of the Niger Delta. Spills on land destroy crops and damage the long-term productivity of the soil.<sup>49</sup> Oil contamination of topsoil reduces the availability of nutrients and increases the toxins in the soil.<sup>50</sup> Heavily contaminated soils remain unusable for agriculture for several years. Spills in the water damage fisheries and contaminate drinking and bathing water.<sup>51</sup> Fish that ingest spilled crude oil become unpalatable or even poisonous for human consumption.<sup>52</sup> Epidemiological studies have also shown a correlation between exposure to oil pollution and cancer, increased malaria outbreaks, respiratory-tract infections, dermatitis, and other symptoms.<sup>53</sup> The Niger Delta residents have experienced an incredible increase in cancer, and researchers have noted a proliferation of skin rashes among Niger Delta inhabitants.<sup>54</sup>

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42. Nossiter, *supra* note 2.

43. AMNESTY INT’L, *supra* note 4, at 16.

44. Koriambanya S.A. Carew, *David and Goliath: Giving the Indigenous People of the Niger Delta a Smooth Pebble—Environmental Law, Human Rights and Re-Defining the Value of Life*, 7 DRAKE J. AGRIC. L. 493, 500 (2002).

45. AMNESTY INT’L, *supra* note 4, at 17.

46. *Shell Blames Sabotage in Spills*, *supra* note 31.

47. *Id.*

48. AMNESTY INT’L, *supra* note 4, at 17.

49. *Id.* at 14.

50. EBOKU, *supra* note 5, at 141.

51. AMNESTY INT’L, *supra* note 4, at 14.

52. EBOKU, *supra* note 5, at 142.

53. *Id.* at 144–45.

54. *Id.* at 145.

## 2. Gas Flaring

Natural gas is produced as a by-product of the oil extraction process. Although gas can be captured and used to meet local energy needs or reinjected into the ground, it requires less infrastructure investment for a company to simply ignite it. Nigeria originally fixed 1985 as the deadline for the end of gas flaring, but the process continues to this day.<sup>55</sup> Over 70% of natural gas is still flared in the Niger Delta, and Nigeria is the site of 25% of the gas flared in the world.<sup>56</sup> In many places, gas flaring has occurred “24 hours a day for over 35 years.”<sup>57</sup>

The flaring of natural gas has been the most consistent cause of adverse environmental consequences in the Niger Delta. Natural gas flares release greenhouse gases into the atmosphere and cause acid rain. Much of the vented gas is released as methane, a gas with particularly adverse consequences for global warming.<sup>58</sup> The flares are often located near residential homes and produce intense heat and deafening noise.<sup>59</sup> Gas flaring has been linked to reduced crop yields, disruption of nocturnal animals, contamination of rain water, and corrosion of tin roofs.<sup>60</sup>

## 3. Other Sources of Environmental Damage

During the normal course of operations, the oil industry in the Niger Delta negatively impacts the environment through seismic surveys, dredging, and improper waste disposal. Exploration and extraction leases grant oil companies the right to construct roads and lay seismic lines without regard for the local communities or ecosystem. This construction is particularly damaging to the mangroves, which can take more than thirty years to recover from the laying of seismic lines.<sup>61</sup> The hydrology of mangroves is also disrupted by the construction of roads that interrupt the proper flow of water and destroy fish breeding grounds.<sup>62</sup> The mangrove and riverine systems of the Niger Delta are damaged further by dredging operations. The dredging process removes sediment, soil creek banks, and

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55. D.S.P. Alamiyeseigha, *The Environmental Challenge of Developing the Niger Delta*, in OIL, DEMOCRACY, AND TRUE FEDERALISM, *supra* note 1, at 248, 254.

56. *Id.*

57. EBOKU, *supra* note 5, at 150 (quoting D. ROBINSON, OGONI: THE STRUGGLE CONTINUES 28 (1996)).

58. *Id.* at 148–49 (citing D. Moffat & O. Linden, *Perception and Reality: Assessing Priorities for Sustainable Development in the Niger Delta*, 24 AMBIO 527, 533 (1995)).

59. *Id.* at 150.

60. *Id.* at 151 (citing E. Hutchful, *Oil Companies and Environmental Pollution in Nigeria*, in POLITICAL ECONOMY OF NIGERIA 113, 118 (Claude Ake ed., 1985)).

61. *Id.* at 153.

62. AMNESTY INT'L, *supra* note 4, at 18–19.

vegetation and deposits it alongside the new channel.<sup>63</sup> This agitation releases the accumulated toxins from the remaining soil in the channel and the dredged material.<sup>64</sup> The toxins and loosened sediment flow into and disrupt the aquatic system.

Additional waste material is generated by oil drilling, extraction, refining, and spill cleanup. All of these processes can produce solid and liquid wastes that contain materials such as grease, phenolic compounds, cyanide, sulphide, suspended solids, chromium, and biological oxygen-demanding organic matter.<sup>65</sup> This waste is commonly dumped directly onto the land or into the waterways or held in open pits that frequently overflow.<sup>66</sup> Oil-spill waste is often ignited at the site of the spill, damaging not only the land and water in the immediate vicinity but also the air through the release of toxins.<sup>67</sup> Many of these environmental harms are caused by the careless operations of oil companies in the Niger Delta.

## II. NIGERIA'S ENVIRONMENTAL LAWS

Like many developing countries, Nigeria was initially skeptical of the environmental consciousness that emerged internationally during the 1960s and 1970s. A few environmental-protection statutes existed, but these laws were not the result of any unified public-policy initiative.<sup>68</sup> However, in 1988, the discovery of an illicit toxic-waste dump in Koko, southern Nigeria jolted the country from its apathy.<sup>69</sup> As a result of the incident, the government organized an international workshop that eventually led to the publication of the National Policy on the Environment in 1989.<sup>70</sup> This policy committed Nigeria to sustainable development: "development which meets the need of the present, without compromising the ability of future generations of Nigerians to meet their own needs; inter- and intra-generational equity; prudent/wise use of natural resources, and conservation of natural resources."<sup>71</sup> Nigeria also passed the Federal Environmental Protection Agency Act (FEPA Act) in 1988, establishing the country's first

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63. *Id.* at 19.

64. *Id.*

65. EBOKU, *supra* note 5, at 154.

66. *Id.* at 154–55 (citing Y. Osibanjo, *Industrial Pollution Management in Nigeria*, in ENVIRONMENTAL CONSCIOUSNESS FOR NIGERIAN NATIONAL DEVELOPMENT 95, 97 (E.O.A. Aina & N.O. Adedipe eds., 1992)).

67. *Id.* at 155.

68. *Id.* at 187.

69. S. Gozie Ogbodo, *Environmental Protection in Nigeria: Two Decades After the Koko Incident*, 15 ANN. SURV. INT'L & COMP. L. 1–2 (2009).

70. EBOKU, *supra* note 5, at 188. The policy was revised in 1999 to account for developments in the field of environmental protection. *Id.*

71. *Id.* at 189.

agency responsible for the protection and management of the environment.<sup>72</sup> The FEPA Act was repealed in 2007 by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA Act).<sup>73</sup> The National Environmental Standards and Regulations Enforcement Agency (the Agency) is now charged with “the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria’s natural resources [and] . . . enforcement of environmental standards, regulations, rules, laws, policies and guidelines.”<sup>74</sup> The NESREA Act and the other environmental statutes form the backbone of Nigeria’s environmental law, which works in conjunction with constitutional provisions.

#### *A. Environmental Agencies and Statutes*

Nigeria has an impressive number of environmental statutes for a developing country. Many of these statutes relate to, or specifically regulate, the oil and gas industry. Unfortunately, the Agency is largely excluded from regulating the oil and gas industry.<sup>75</sup> A critical analysis of the NESREA Act and selected environmental statutes demonstrates why the legal mechanisms in place for protecting the Niger Delta have failed.

##### 1. Agency Oversight

Like the FEPA Act before it, the NESREA Act does not supplant preexisting environmental statutes. The Agency’s role is to centralize the enforcement of environmental statutes and to draft further regulations for the preservation of Nigeria’s environment. Therefore, it is difficult to understand why the oil and gas industry, arguably the greatest environmental threat to Nigeria, is excluded from so many of the NESREA Act’s provisions.

Part 2 of the NESREA Act, including sections 7 and 8, details the functions and powers of the Agency and council.<sup>76</sup> These sections are most illustrative of the exceptions in place for the oil and gas industry. Section 7 provides exceptions in five of its thirteen provisions, requiring the Agency to:

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72. *Id.* at 215.

73. National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No. (25) (2007) 94:92 O.G., A635 (Nigeria) [hereinafter NESREA Act].

74. *Id.* § 2.

75. *Id.* § 7.

76. *Id.* pt. 2.

(g) enforce compliance with regulations on the importation, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and waste *other than in the oil and gas sector*;

(h) enforce through compliance monitoring, the environmental regulations and standards on noise, air, land, seas, oceans and other water bodies *other than in the oil and gas sector*; [and]

....

(l) create public awareness and provide environmental education on sustainable environmental management, promote private sector compliance with environmental regulations *other than in the oil and gas sector* and publish general scientific [sic] or other data resulting from the performance of its functions . . . .<sup>77</sup>

Section 8 contains six more exceptions, mandating the Agency to:

(g) conduct public investigations on pollution and the degradation of natural resources, *except investigations on oil spillage*; . . .

....

(k) submit for the approval of the Minister, proposals for the evolution and review of existing guidelines, regulations and standards on environment *other than in the oil and gas sector* including[:] (i) atmospheric [sic] protection, (ii) air quality[,], (iii) ozone depleting substances, (iv) noise control, (v) effluent limitations, (vi) water quality, (vii) waste management and environmental sanitation, (viii) erosion and flood control, (ix) coastal zone management, (x) dams and reservoirs, (xi) watershed[,], (xii) deforestation and bush burning, (xiii) other forms of pollution and sanitation, and (xiv) control of hazardous substances and removal control methods[:]; [and]

(l) develop environmental monitoring networks, compile and synthesize environmental data from all sectors *other than in the oil and gas sector* at national and international levels . . . .<sup>78</sup>

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77. *Id.* § 7 (emphasis added).

78. *Id.* § 8 (emphasis added).

The exceptions in part two bar the Agency from enforcing hazardous waste regulations in the oil and gas sector. The Agency cannot monitor, license, research, survey, study, or audit the sector. It may not propose evolution of the environmental regulations for, promote compliance in, or conduct investigations of the oil and gas sector. Thus, while the Agency is technically allowed to “enforce compliance with laws, guidelines, policies and standards on environmental matters,” it may not observe the oil and gas sector in any way to determine if it is in compliance.<sup>79</sup>

The NESREA Act provides the oil and gas sector additional exceptions in sections 24, 29, and 30. Under section 24, although the Agency may *review* effluent limitations on existing point sources,<sup>80</sup> it is barred from *making* regulations on effluent limitations on new and existing point sources in the oil and gas sector.<sup>81</sup> Section 29 states:

The Agency shall co-operate with other Government agencies for the removal of any pollutant *excluding oil and gas related ones* discharged into the Nigerian environment and shall enforce the application of best clean-up technology currently available and implementation of best management practices as appropriate.<sup>82</sup>

Nigeria’s sole environmental agency is thereby bafflingly prevented from participating in the cleanup of any pollution caused by the oil and gas industry. Finally, section 30 prohibits Agency officers from entering and searching all oil and gas facilities even with a warrant issued by a court.<sup>83</sup> This section further inhibits the Agency from enforcing any environmental regulations in the oil and gas sector. Instead of simply declaring that the oil and gas sector is outside of the Agency’s purview, the NESREA Act gives the Agency the power to enforce environmental regulations in the oil and gas sector but robs it of the ability to actually do so.

Under the FEPA Act, the predecessor to the NESREA Act, the Agency was directed to cooperate with and assist the Ministry of Petroleum Resources in the removal of oil-related pollutants discharged into the Nigerian environment.<sup>84</sup> The division of power between the Agency and the

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79. *Id.* § 7.

80. *Id.* § 24. The NESREA Act defines a point source as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduct, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are or may be discharged.” *Id.* § 37.

81. *Id.* § 24.

82. *Id.* § 29 (emphasis added).

83. *Id.* § 30.

84. Nerry Echefu & E. Akpofure, *Environmental Impact Assessment in Nigeria: Regulatory Background and Procedural Framework*, ENVTL. IMPACT ASSESSMENT WIKI (Aug. 13, 2007, 8:37 PM), <http://eia.unu.edu/wiki/index.php?title=Nigeria&oldid=2394>.

Ministry of Petroleum Resources was not clearly delineated. Presumably, the Department of Petroleum Resources (DPR), the successor to the Ministry of Petroleum Resources, is now solely responsible for permitting, monitoring, and overseeing oil- and gas-sector cleanups.<sup>85</sup> The DPR declares its responsibilities to include “supervising all petroleum industry operations being carried out under licenses and leases in the country in order to ensure compliance with the applicable laws and regulations in line with good oil producing practices.”<sup>86</sup> It is also responsible for “enforcing [sic] safety and environmental regulations and ensuring that those operations conform to national and international industry practices and standards.”<sup>87</sup> Some scholars question placing environmental protection in the hands of a department responsible for the development of Nigeria’s energy sector. “Many non-governmental and academic sources point to the nature of the relationship between the DPR and the companies as one of partnership, which fundamentally conflicts with the concept of an independent body regulating the industry.”<sup>88</sup>

## 2. Other Oil-Related Environmental Statutes

Although Nigeria’s Criminal Code was enacted in 1916, it has three provisions that could be used to prosecute modern oil and gas industry representatives for polluting the environment. Section 234(e) provides for up to two years of imprisonment for any person who deliberately diverts or obstructs a navigable river.<sup>89</sup> Section 245 provides for up to six months of imprisonment for any person who corrupts the water of any spring, stream, well, tank, reservoir, or place making it unfit for its normal use.<sup>90</sup> Finally, section 247 protects the atmosphere by providing for up to six months of imprisonment for any person who violates the atmosphere so as to make it noxious for human health.<sup>91</sup> These criminal provisions seem to provide sanctions for the type of water and air pollution caused by dredging, oil spills, petroleum waste, and gas flaring. Yet, these provisions might not be useful in regulating the oil and gas industry. Criminal charges can only be brought by the state, and the perpetrators are usually corporate entities,

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85. *Organization Roles*, DEP’T OF PETROLEUM RES. (Aug. 2, 2010), [http://www.dprnigeria.com/dpr\\_roles.html](http://www.dprnigeria.com/dpr_roles.html).

86. *Id.*

87. *Id.*

88. AMNESTY INT’L, *supra* note 4, at 42.

89. EBOKU, *supra* note 5, at 194.

90. Patrick D. Okonmah, *Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta*, 41 J. AFR. L. 43, 50 (1997).

91. EBOKU, *supra* note 5, at 194–95 (quoting Criminal Code 1916 (1990) Cap. (350) § 247 (Nigeria)).

rather than individuals.<sup>92</sup> Furthermore, the short sentences—a maximum of six months for water or air pollution—might be an insufficient deterrent and penalty for befouling the fragile ecosystem of the Niger Delta.<sup>93</sup>

The Petroleum Act of 1969, though not strictly an environmental statute, does provide for the creation of various petroleum regulations relating to the environment.<sup>94</sup> The Act made comprehensive regulations for the general operations of the oil and gas industry.<sup>95</sup> It also empowered the Minister of Petroleum Resources to make regulations for the prevention of water pollution, atmospheric pollution, and other environmental damage.<sup>96</sup> Accordingly, the Minister issued the Petroleum (Drilling and Production) Regulations of 1969.<sup>97</sup> These regulations contain a number of important environmental provisions, including Regulation 25 and Regulation 36. Regulation 25 requires the licensee to take all precautions to avoid pollution.<sup>98</sup> If pollution does occur, the licensee must act promptly to control, and if possible, stop it.<sup>99</sup> Regulation 36 aims to establish good practices in the oil industry, including preventing oil from escaping into any water source and causing as little damage as possible to the surface of the land.<sup>100</sup> The possible sanctions for noncompliance with any of the Petroleum Regulations are arrest and revocation of license.<sup>101</sup> The Regulations do not authorize the DPR to demand compensation or cleanup.<sup>102</sup> Furthermore, given the DPR's interest in developing the oil and gas sector in Nigeria, it is unlikely to revoke a license.

The Oil Pipelines Act of 1956 contains some broad environmental provisions and more progressive sanctions.<sup>103</sup> The holder of a permit for the construction of an oil pipeline must take "all reasonable steps to avoid unnecessary damage to any land entered upon and any buildings, crops or profitable trees thereon, shall make compensation to the owners or occupiers for any damage."<sup>104</sup> The Act also proscribes, unless specifically

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92. *Id.* at 195.

93. *Id.*

94. *Id.*

95. Kent Nnadozie, *Environmental Regulation of the Oil and Gas Industry in Nigeria*, in *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY IN AFRICA* 103, 111 (Beatrice Chaytor & Kevin R. Gray eds., 2003).

96. EBOKU, *supra* note 5, at 195.

97. *Id.*

98. Nnadozie, *supra* note 95, at 110.

99. EBOKU, *supra* note 5, at 196.

100. *Id.* at 197.

101. *Id.* at 199.

102. *Id.*

103. *Id.* at 200–01.

104. Oil Pipelines Act (1990) Cap. (338), § 6(3) (Nigeria), available at [http://www.nigeria-law.org/Oil Pipelines Act.htm](http://www.nigeria-law.org/Oil%20Pipelines%20Act.htm).

stated otherwise in the license, any alterations to water flow that might obstruct navigation or negatively impact domestic, industrial or irrigational uses.<sup>105</sup> By providing for compensation, the Act directs some money to the actual parties injured by pollution in the Niger Delta, but it fails to order cleanup after an accident.

The Oil in Navigable Waters Act of 1968 is an anti-pollution law that is unfortunately flawed by the exceptions it provides to the oil and gas sector.<sup>106</sup> The main purpose of the Act is to prevent water pollution by sea-going vessels.<sup>107</sup> Yet, the Act also regulates the discharge of oil into any waters navigable by a sea-going vessel from any place on land or from an apparatus used for transferring oil to a vessel.<sup>108</sup> Violation of the provision is punishable by a fine.<sup>109</sup> But, a special defense is provided for the discharge of oil on land if it can be proved:

(a) that the oil was contained in an effluent produced by operations for the refining of oil;

(b) that it was not reasonably practicable to dispose of the effluent otherwise than by discharging it into waters . . . ; and

(c) that all reasonably practicable steps had been taken for eliminating oil from the effluent.<sup>110</sup>

Perhaps because of these exceptions and the general apathy of the DPR towards environmental protection, no case has ever been prosecuted under the Act.<sup>111</sup>

The Associated Gas Re-Injection Act of 1979 is another example of Nigeria's failed environmental laws.<sup>112</sup> The Act aims to compel oil companies to re-inject the gas associated with oil drilling rather than flaring it.<sup>113</sup> The most important provision of the Act states that no gas will be flared after January 1, 1984 without the written permission of the Minister

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105. *Id.* § 14(b).

106. EBEKU, *supra* note 5, at 202.

107. *Id.* at 201.

108. *Id.* at 202.

109. *Id.*

110. Oil in Navigable Waters Act (1968) Cap. (337), § 4(5) (Nigeria), available at [http://www.ecolex.org/ecolex/ledge/view/RecordDetails;document\\_Oil in Navigable Waters Act \(Act No. 34 of 1968\).html?DIDPFDSjsessionid=253C8EAC0FAB05739625C6E0371C0517?id=LEX-FAOC018389&index=documents](http://www.ecolex.org/ecolex/ledge/view/RecordDetails;document_Oil%20in%20Navigable%20Waters%20Act%20(Act%20No.%2034%20of%201968).html?DIDPFDSjsessionid=253C8EAC0FAB05739625C6E0371C0517?id=LEX-FAOC018389&index=documents).

111. EBEKU, *supra* note 5, at 202–03.

112. EBEKU, *supra* note 5, at 206.

113. *Id.* at 204.

of DPR.<sup>114</sup> Because no oil company had complied with the Act by 1984, the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations of 1984 were issued to establish conditions under which companies could qualify for a certificate to continue gas flaring.<sup>115</sup> The Regulations are so lax that they exempt approximately fifty percent of Nigeria's oil fields from re-injection requirements<sup>116</sup> and appear to allow the Minister to exempt other oil fields at her discretion.<sup>117</sup> The DPR has not disclosed to the public the number of gas flaring certificates issued.<sup>118</sup> Though several deadlines for ceasing gas flaring have been publicly agreed upon, none were reinforced by law and each passed without the cessation of gas flaring in the Niger Delta.<sup>119</sup>

Nigeria's last important environmental statute is the Environmental Impact Assessment Decree (EIA Decree) of 1992.<sup>120</sup> The EIA Decree established the Mandatory Study List, delineating the types of projects for which an EIA is mandatory.<sup>121</sup> "Petroleum" and "waste treatment and disposal" projects are included on the list.<sup>122</sup> Thus, the vast majority of oil and gas development activities in the Niger Delta require EIAs. The EIA Decree specifies that an EIA must assess how the proposed project may change the environment inside and outside of Nigeria.<sup>123</sup> Similar to an EIS under the National Environmental Policy Act, the EIA must consider alternatives and identify ways in which to mitigate adverse environmental impacts.<sup>124</sup> The DPR is required to impartially review the EIA before allowing a proposed project. However, the DPR's oversight is somewhat problematic because, as discussed above, the DPR may not impede oil and gas sector development. Furthermore, EIAs are only prepared for new projects. Many of the environmental problems currently plaguing the Niger Delta are caused by aging and dilapidated facilities.<sup>125</sup> Like Nigeria's other environmental statutes, the EIA Decree aspires to enforce good

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114. Associated Gas Re-Injection Act, (1979) Cap. (26), § 3(1) (Nigeria), available at <http://www.placng.org/lawsofnigeria/node/26>.

115. EBOKU, *supra* note 5, at 206.

116. *Id.* at 207 (quoting M. Kassim-Momodu, *Gas Re-Injection and the Nigerian Oil Industry*, 6/7 J. PRIVATE & PROP. L. 69, 84 (1986/1987)).

117. AMNESTY INT'L, *supra* note 4, at 101 n.191.

118. *Id.*

119. *Id.* at 37.

120. Environmental Impact Assessment Decree No. (86) (1992), § 1 (Nigeria) available at [http://www.nigeria-law.org/Environmental Impact Assessment Decree No. 86 1992.htm](http://www.nigeria-law.org/Environmental%20Impact%20Assessment%20Decree%20No.%2086%201992.htm).

121. *Id.* § 13.

122. *Id.*

123. EBOKU, *supra* note 5, at 211.

124. *Id.* at 212.

125. *Id.* at 214.

environmental practices but fails to protect the Niger Delta from the environmental devastation caused by the oil and gas industry.

### B. Constitutional Law

Regrettably, Nigeria's constitutional protection of the environment may be another "legal mirage."<sup>126</sup> The Nigerian Constitution, ratified in 1999, was the first Nigerian constitution to contain an express provision ensuring protection of the environment.<sup>127</sup> Section 20 of the Constitution states: "The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life [sic] of Nigeria."<sup>128</sup> Some scholars criticize this provision as being overly broad or vague, but its actual flaw is that it is unenforceable as written.<sup>129</sup> Section 20, contained in Chapter II of the Constitution, is beyond the scope of judicial review.<sup>130</sup> The Nigerian Justice Akinola Aguda laments this predicament:

I feel much concerned to think that the directive principles are to be regarded as a mere ideal, a utopia, the arrival of which the citizen can only pray and hope for, but in respect of which he can hope for no assistance whatsoever from the courts. If this were so then wherein lies [sic] the expectations and the hopes of a bright future for the teeming millions of our people who manage merely to survive at near starvation level.<sup>131</sup>

Because Article 20 is unenforceable, protections for the environment must be sought in other constitutional provisions.

Although there are no other provisions that explicitly reference the environment in the Constitution, it is possible that other Articles could be used to further environmental preservation and sustainable development. Chapter IV of the Nigerian Constitution establishes a list of enforceable fundamental human rights, including the right to life.<sup>132</sup> Although the right to a clean and healthy environment is not specifically listed in Chapter IV, there is some favorable international precedent for inferring it from the right

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126. Ogbodo, *supra* note 69, at 8.

127. *Id.*

128. CONSTITUTION OF NIGERIA (1999), § 20.

129. Ogbodo, *supra* note 69, at 8.

130. *Id.*

131. Anthony O. Nwafor, *Enforcing Fundamental Rights in Nigerian Courts – Processes and Challenges*, 4 AFR. J. LEGAL STUD. 1, 5 (2009) (quoting D.M. JEMIBEWON, *THE MILITARY, LAW AND SOCIETY: REFLECTIONS OF A GENERAL* 109 (1998)).

132. Egede, *supra* note 26, at 65.

to life.<sup>133</sup> Furthermore, the pollution in the Niger Delta is so pervasive that it harms and shortens the lives of Nigeria's citizens:

The degradation of the environment, as a result of massive pollution of the land, water and air in the Niger Delta, results in a slow and gradual death of the peoples of the area. There is no reason why the peoples in the Niger Delta cannot claim that the infringement of their right to [a] clean environment, which has a grave effect on their health and life, is an infringement of their right to life.<sup>134</sup>

Somewhat surprisingly, the Federal High Court of Nigeria seems to agree. In *Gbemre v. Shell Petroleum Development Corp.*,<sup>135</sup> the petitioner claimed that his fundamental human rights were violated by gas flaring in his community.<sup>136</sup> The court stated that the petitioner's constitutionally guaranteed right to life included the "right to [a] clean, poison-free, pollution-free and healthy environment."<sup>137</sup> The constitutional right to life is a promising mechanism for environmental enforcement as it enables individuals suffering because of environmental damage to bring their own suits, rather than depend upon the apathetic DPR. The courts may also provide compensation to victims of environmental destruction, ordering cessation of the environmentally harmful activity or even requiring legislation to prohibit further activity of that sort.<sup>138</sup> Yet, the *Gbemre* case is one of first impression, and the ruling has not yet been tested at the appellate level. Since Nigeria's Supreme Court favors a liberal interpretation of the law, the Court may look kindly on a broad interpretation of the right to life.<sup>139</sup> However, other commentators point to a series of environmental cases in Nigeria in which the courts seemed to prefer corporate economic concerns over environmental protection.<sup>140</sup> If the courts remain as unwilling as the executive to enforce sustainable development through environmental preservation, there is little hope for environmental reform.

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133. See, e.g., *Subhash Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420, 424 (India) (ruling that the right to life included the right to the "enjoyment of pollution free water and air"); see also Egede, *supra* note 26, at 68–69 (noting that both India and Bangladesh have implied the "right to a clean and healthy environment" from a constitutional right to life).

134. Egede, *supra* note 26, at 67.

135. *Gbemre v. Shell Petroleum Dev. Corp.*, 6 [2005] AHRLR 152 (Nigeria).

136. Egede, *supra* note 26, at 67.

137. *Gbemre*, 6 AHRLR at 154.

138. Edwin Egede, *Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria*, 51 J. AFR. L. 249, 267–68 (2007).

139. Egede, *supra* note 26, at 68.

140. See EBEKU, *supra* note 5, at 241–45.

## III. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and Peoples' Rights (African Charter) contains provisions that could make it the broadest enforceable environmental law in Nigeria. The African Charter, adopted in 1981, was the first international human rights instrument to explicitly guarantee environmental rights.<sup>141</sup> Article 24 of the African Charter provides: "All peoples shall have the right to a general satisfactory environment favorable to their development."<sup>142</sup> Niger Delta residents may sue oil corporations in Nigerian courts for violating this right.<sup>143</sup>

*A. Incorporation of the African Charter*

Nigeria became a party to the African Charter on January 19, 1981.<sup>144</sup> The Charter became enforceable law in Nigeria upon the passage of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act on March 17, 1983.<sup>145</sup> The African Charter Act stated that all authorities in the legislative, executive, and judicial branches of Nigeria were to give the provisions of the African Charter the full force and recognition of law.<sup>146</sup> Nigeria's Supreme Court ruled unanimously in *Abacha v. Fawehinmi*<sup>147</sup> that the African Charter is enforceable in Nigerian courts.<sup>148</sup>

Nevertheless, some commentators still believe that not all of the provisions of the African Charter are enforceable. In *Abacha*, the Supreme Court justices also held unanimously that "domesticated human rights treaty legislation was in no any way [sic] superior to the [C]onstitution" because the Constitution is the supreme law of the land.<sup>149</sup> Thus, a conflict arises when the government declares a right unenforceable, such as the right to a clean environment, while the African Charter declares the right enforceable. Some scholars believe that this conflict would be resolved in favor of the Nigerian Constitution and that Article 24 of the African Charter is actually unenforceable.<sup>150</sup> Others remain confident that Article 24 is enforceable,

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141. Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?*, 35 DENV. J. INT'L L. & POL'Y 129, 166 (2006).

142. Organization of African Unity: Banjul Charter on Human and Peoples' Rights art. 24, June 27, 1981, 21 I.L.M. 58, 63 [hereinafter Banjul Charter].

143. Egede, *supra* note 26, at 67.

144. *Id.* at 71.

145. *Id.*

146. *Id.* at 72.

147. *Abacha v. Fawehinmi*, [2000] 6 NWLR 228, 245 (Nigeria).

148. Egede, *supra* note 138, at 261.

149. *Id.* at 254.

150. *See id.* at 255–56 (noting that when rights enforceable under the African Charter are

especially in light of *Gbemre*.<sup>151</sup> In *Gbemre*, the Federal High Court found that the right to a healthy environment could be inferred from the human rights contained in the Nigerian Constitution and was also legally enforceable under Article 24 of the African Charter.<sup>152</sup> Therefore, if the right to a clean environment can be inferred to be an enforceable right in Nigeria's Constitution, there is no conflict with the African Charter.

### *B. Enforcement of the African Charter*

In 2001, the African Commission on Human and Peoples' Rights was the first international human rights body to hear a case on the right to a clean environment.<sup>153</sup> The case involved environmental destruction and other human rights violations caused by oil production and the disposal of toxic waste in the Niger Delta.<sup>154</sup> Acting on behalf of the Ogoni community of the Niger Delta, two non-governmental organizations filed a petition claiming that Nigeria had failed to meet its duties under the African Charter.<sup>155</sup> In this case, *Social and Economic Rights Action Center (SERAC) v. Nigeria*,<sup>156</sup> the Commission found that the government of Nigeria "breached its obligations to respect, protect, promote, and fulfill rights guaranteed by the African Charter."<sup>157</sup> The Nigerian Government, as the operators of the Nigerian National Petroleum Development Company (NNPC) and working in conjunction with Shell Petroleum Development Corporation (SPDC), violated:

the right to enjoy Charter-guaranteed rights and freedoms without discrimination (Art. 2), the right to life (Art. 4), the right to property (Art. 14), the right to health (Art. 16), the right to housing (implied in the duty to protect the family (Art. 18(1)), the right to food (implicit in Arts 4, 16, and 22), the right of peoples to freely dispose of their wealth and natural resources (Art. 21), and the right of peoples to a "general satisfactory environment favorable to their development" (Art. 24).<sup>158</sup>

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expressly identified as unenforceable by the Nigerian Constitution, a reviewing court resolves the issue in favor of the Constitution).

151. Egede, *supra* note 26, at 75.

152. *Id.*

153. Shelton, *supra* note 141, at 166.

154. Social & Econ. Rights Action Ctr. v. Nigeria, Comm. No. 155/96, para. 1-2 (Afr. Comm'n Hum. & Peoples' Rts. Oct. 2001), available at [http://www.achpr.org/english/Decison\\_Communication/Nigeria/Comm.155-96.pdf](http://www.achpr.org/english/Decison_Communication/Nigeria/Comm.155-96.pdf).

155. Shelton, *supra* note 141, at 167.

156. *Social & Econ. Rights Action Ctr.*, Comm. No. 155/96 at para. 13.

157. Shelton, *supra* note 141, at 167.

158. *Id.* (quoting Banjul Charter, *supra* note 142, at 63). The situation in Ogoniland was

Though the most important of these violations for our purposes involves Article 24, it is important to realize that the kind of environmental harm caused by the oil and gas industry can implicate a number of rights protected under the African Charter.

In its ruling, the Commission elaborated upon the responsibilities of a government in enforcing the African Charter. The Commission found that Article 24 “requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”<sup>159</sup> Specifically, government compliance must include:

ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising [sic] environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.<sup>160</sup>

The Commission’s findings are non-binding, but they do serve as important precedent.<sup>161</sup> The Commission’s decision is intended to guide Nigerian courts when deciding Article 24 cases. The specificity of the requirements outlined by the Commission could guide Niger Delta citizens to file successful lawsuits in the future against the Nigerian government for Article 24 violations.

#### CONCLUSION

Nigeria’s government loftily promises to pursue a path of sustainable development. At a minimum, this entails developing in such a way as to preserve a livable environment for present and future generations. The continuing oil and gas operations in the Niger Delta are degrading the environment so severely that people cannot cultivate the land or fish in the rivers. The toxins in the air, soil, and water will make the Niger Delta unsafe for human habitation for generations. Nigeria’s government has failed in its promise. Its system of environmental laws creates only the

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particularly horrendous. The consortium of NNPC and SPDC illegally dumped toxic waste and caused numerous avoidable oil spills, poisoning the soil and water. Government military troops executed Ogoni leaders that opposed the development, killed civilians, and attacked and destroyed villages. *Id.*

159. *Social & Econ. Rights Action Ctr.*, Comm. No. 155/96 at para. 52.

160. *Id.* at para. 53.

161. Egede, *supra* note 26, at 74.

illusion of environmental protection and sustainable development. In actuality, the laws meant to prevent pollution by the oil and gas sector are weak and under-enforced by an agency whose primary goal is to further oil and gas development. For sustainable development to be more than an illusion, Nigeria must close the loopholes in its environmental laws and empower the National Environmental Standards and Regulations Enforcement Agency to fully enforce the laws against the oil and gas sector.

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