

Fall 9-1-2010

Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices

Eferiekose Ukala

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/jece>



Part of the [Environmental Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Eferiekose Ukala, *Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices*, 2 Wash. & Lee J. Energy, Climate & Env't. 97 (2011), <https://scholarlycommons.law.wlu.edu/jece/vol2/iss1/4>

This Note is brought to you for free and open access by the Journal of Energy, Climate, and the Environment at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Energy, Climate, and the Environment by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

Gas Flaring in Nigeria’s Niger Delta: Failed Promises and Reviving Community Voices

By Eferiekose Ukala*

Abstract

This Note examines the use of litigation to stop gas flaring in Nigeria’s Niger Delta, and proposes an alternative solution to the ongoing gas flaring in the Niger Delta region. In exploring an alternative solution, this Note (1) details the history of gas flaring in Nigeria; (2) discusses Nigeria’s gas-flaring legislation and its implementation; (3) analyzes the impact that landmark gas flaring cases have had on the stoppage of gas flaring; and (4) details how litigation has been used as a tool to combat gas flaring, juxtaposing the concept of the rule of law. This Note concludes by suggesting that other solutions should be explored in combating the gas flaring problem in Nigeria’s Niger Delta.

Table of Contents

I. Introduction	98
II. Brief History of the Nigerian Economy and Gas Flaring.....	99
A. History of Nigeria.....	99
B. Gas Flares	100
III. Legal Framework.....	103
A. Laws Addressing Gas Flares in Nigeria	104
B. The Judicial Response to Gas Flaring.....	105
IV. Theoretical Framework.....	112
A. Litigation as a Tool to Stop Gas Flaring?	112
B. The Rule of Law	114
V. Alternative Approach.....	120
A. What Is Community Arbitration?	121
B. Applying Customary Arbitration to Gas Flaring.	122
C. The Prerequisite to the Customary Arbitration Method.....	122
D. The Customary-Arbitration Approach in Practice.....	124
VI. Conclusion	126

* Class of 2011, J.D. Candidate at the Washington and Lee University School of Law. This note was initially prepared for the Climate Change and Environmental Law Seminar. I appreciate the feedback and comments from Professor Hari Osofsky. Thank you to all of the members of the *Journal of Energy, Climate, and Environment* for their help with preparing this essay for publication.

I. Introduction

Over the past few decades, the Niger Delta region of Nigeria has been the focus of climate change issues. The climate change discussion began after environmental pollution associated with oil production in the Niger Delta region burgeoned and became part of the global discussion. Oil production companies, such as Shell, have engaged in methods that have disregarded human lives and the environment during their oil-drilling process. Thus, the Niger Delta ecosystem changed drastically once Shell arrived in the area in the 1950s.

One of the devastating consequences of oil drilling in the Niger Delta region is gas flaring. As crude oil is extracted from the ground, associated gases are released. These associated gases are called gas flares. The Nigerian government has unsuccessfully attempted to battle the gas-flaring issue. These attempts have been unsuccessful because of the government's favoritism toward Shell.

To draw more attention to the issue, Niger Delta citizens, like the plaintiffs in *Massachusetts v. EPA*,¹ have attempted to use the courts and litigation to address the issue of climate change. In particular, Niger Delta citizens have focused on stopping gas flaring. This essay focuses on the role of the Nigerian courts in gas-flaring litigation and the use of litigation as a tool to stop gas flaring.

Part II gives a brief history of Nigeria and an introduction to gas flaring. Part III focuses on gas-flaring legislation and its implementation. Furthermore, Part III discusses the impact of the *Gbemre v. Shell Petroleum Development Co.*² case in stopping gas flaring in the Niger Delta region. Part IV discusses how litigation has been used as a tool to combat gas flaring and how the concept of the rule of law applies to gas-flaring litigation; apropos of gas-flaring legislation, a comparison is also drawn between the *Kenule Saro-Wiwa* case and the *Gbemre* case. Part V suggests an alternative way to stop gas flaring. Part VI summarizes the conclusion of this paper.

This paper establishes that litigation has not been an effective tool to stop gas flaring: rather than applying the rule of law, Nigerian courts have applied *rule by corporation*. Given that the Nigerian courts are highly

1. See *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (holding that if the EPA makes a "judgment" that greenhouse gas emissions contribute to climate change, the EPA has to regulate emissions of greenhouse gases unless it provides some reasonable explanation as to why it cannot or will not do so).

2. *Gbemre v. Shell Petroleum Dev. Co.*, [2005] No. FHC/B/CS/53/05, at 29–30 (F.H.C.) (Nigeria), available at <http://www.climatelaw.org/cases/case-documents/nigeria/nishell-nov05-judgment.pdf> (holding that the Nigerian Constitutional right to life includes the right to a clean, pollution-free environment and that Shell's failure to halt gas flares violates said right).

influenced by the government, which in turn is influenced by oil companies, a possible solution may be to allow Niger Delta communities to both promulgate gas-flaring laws and arbitrate gas-flaring matters. This customary arbitration approach may be a more effective tool to stopping gas flaring because customary arbitrators are free from Shell's undue influence and have been long committed to stopping gas flaring. At this juncture, it is important to give a brief discussion of the Nigerian political and judicial climate.

II. Brief History of the Nigerian Economy and Gas Flaring

This section presents a brief introduction to Nigeria, which is relevant to understanding the idiosyncrasies of gas-flaring legal regulation in Nigeria. Part A presents a detailed introduction to the Nigerian economic climate and its oil economy, shedding light on how mismanagement of Nigeria's natural resources may also be a contributing factor to the government's inability to stop gas flaring. Part B discusses gas flaring in Nigeria and its impact on the environment and human lives.

A. History of Nigeria

Nigeria, the most populated African country, is located in West Africa with a population of about 120 million people.³ Nigeria's natural resources include crude oil, gold, cotton, yams, rubber, hides, and skins.⁴ Notwithstanding the fact that Nigeria sits on diverse natural resources, Nigeria still has a very weak economy, with a GDP per capita (nominal) of about \$2,400 (2009 estimate) and approximately 70% of the population living below the poverty level.⁵ These economic statistics substantiate the claim of government mismanagement of natural resources.

Nigeria is the largest oil producer in Africa with most of the oil-producing land located in the Niger Delta region.⁶ Shell, one of the largest oil producers in Nigeria, first discovered crude oil in Nigeria in the 1950s.⁷

3. KENNETH OMEJE, *HIGH STAKES AND STAKEHOLDERS: OIL CONFLICT AND SECURITY IN NIGERIA* 25 (2006).

4. *See* Central Intelligence Agency, *The World Factbook: Nigeria* (2010), <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last visited Nov. 14, 2010) (listing some of Nigeria's natural resources) (on file with the Journal of Energy, Climate, and the Environment).

5. *Id.*

6. *See* OMEJE, *supra* note 3, at 31 ("Nigeria's total proven reserves of oil are estimated to be 34 billion barrels (onshore and offshore), mostly in the [Niger] Delta area.") (citations omitted).

7. *See id.* at 33 (describing the first commercial discovery of crude oil in Nigeria in May 1956 by a joint venture of Shell and British Petroleum).

Under the name of Shell D'Arcy, received exclusive exploration and prospecting rights for petroleum in Nigeria in 1937 and officially began drilling for oil in Nigeria's Niger Delta region in 1956.⁸ Crude-oil products that are produced in Nigeria are deemed the property of the federal government.⁹ Consequently, no private individual has a right to oil.¹⁰ Today, Nigeria gains more than 70% of its revenue from oil exportation.¹¹ Despite the substantial revenue from oil production, Nigeria continues to suffer from the environmental degradation associated with oil production, and gas flaring continues to be the norm in the region.¹² In fact, Nigeria is the world's second largest gas flarer.¹³

The next part details the effects of gas flaring on the Niger Delta people with particular emphasis on Shell's gas-flaring practices. The discussion of oil companies' practices will focus on Shell because Shell is the dominant oil company in Nigeria.

B. Gas Flares

One of the major problems associated with crude-oil production is gas flaring. This part defines gas flaring, explains how gas flares are produced, and describes the impact of gas flares on the environment and on human lives. This discussion illustrates how gas flaring adds to the problem of climate change and the importance of regulating gas flaring in Nigeria.

8. See IKE OKONTA, ORONTO DOUGLAS & GEORGE MONBIOT, *WHERE VULTURES FEAST: SHELL, HUMAN RIGHTS AND OIL IN THE NIGER DELTA* 23 (2003) (providing the history of Britain's interest in Nigerian oil and describing various ordinances related to Nigerian oil that were intended to benefit Shell).

9. See Petroleum Act, (1990) Cap. 350, § 1, (Nigeria) available at http://www.nigeria-law.org/Petroleum_Act.htm (vesting ownership and control of all petroleum in Nigeria in the state).

10. See *id.* § 13 (making it an offense for any person to prospect, explore, or win or work petroleum without a license granted from the state under the act).

11. See OMEJE, *supra* note 3, at 35 ("Oil revenue as a percentage of total national revenue has also grown from a less than 25 percent average in the 1960s to an average of more than 70 percent from the 1970s through the 1990s.").

12. Poison Fire (Vimeo 2008) available at <http://poisonfire.org/poison-fire-movie> (showing video testimonies from individuals in the Niger Delta on the environmental and community impacts of oil spills and gas flaring in the region).

13. See Press Release, The World Bank, *Satellite Observations Show Declining Levels of Gas Flaring, Greenhouse Emissions* (Nov. 17, 2009) available at <http://web.worldbank.org/> (click "News" hyperlink then "Press Releases" and enter Nov. 16, 2009 date) (reporting the results of a satellite study conducted by Global Gas Flaring Reduction which showed that Nigeria flares the second most gas of any country in the world).

Gas-flaring emissions contribute significantly to global warming.¹⁴ They are produced when extra gases are burned off during the oil-drilling process.¹⁵ Gas flares are composed of toxic gases such as sulfur dioxide, nitrogen dioxides, benzapryene, toluene, xylene, and hydrogen sulfide.¹⁶ These gases, for example, methane and CO₂, are released into the atmosphere in large quantities, and have a negative effect on the environment.¹⁷

Gas flaring is harmful to human life and the environment. Nigeria's Niger Delta residents observe visible gases oozing from oil-production sites.¹⁸ Alarmingly, these sites are located in the midst of villages and have become a modern addition to the Niger Delta landscape.¹⁹ Mr. Ebere Udeagu, a former deputy governor related the following:

Gas flaring by oil companies in the oil producing communities has terribly devastated a substantial portion of farmlands leaving the streams polluted. These areas have been turned into ghettos and swamps with the indigenes becoming destitute in their fatherland. Their sources of livelihood, which is farming and

14. See BRUNO GERVET, GAS FLARING EMISSION CONTRIBUTES TO GLOBAL WARMING 2, 10 (Mar. 2007), *available at* http://www.ltu.se/polopoly_fs/1.5035!gas%20flaring%20report%20-%20final.pdf (explaining that heat emissions explain 55% of global warming and concluding that the energy released by gas flaring in the last 120 years accounts for about 3% of missing heat generation).

15. See Press Release, The World Bank, *supra* note 13 ("Flaring or burning of gas occurs to dispose of natural gas liberated during crude oil production and processing, most often in remote areas where there is no gas transportation infrastructure or local gas market.").

16. THE CLIMATE JUSTICE PROGRAMME & ENVIRONMENTAL RIGHTS ACTION/FRIENDS OF THE EARTH NIGERIA, GAS FLARING IN NIGERIA: A HUMAN RIGHTS, ENVIRONMENTAL, AND ECONOMIC MONSTROSITY 24 (2005), *available at* <http://www.climatelaw.org/media/cases/case-documents/nigeria/gas-flaring-in-nigeria.pdf> [hereinafter THE CLIMATE JUSTICE PROGRAMME].

17. See NNIMMO BASSEY, GAS FLARING: ASSAULTING COMMUNITIES, JEOPARDIZING THE WORLD 9–11 (Dec. 10, 2008) *available at* <http://www.eration.org/publications/presentations/gas-flaring-ncc-abuja.pdf> (describing the harmful effects of gas flaring on the health of the people in the Niger Delta, on the economy of the region, and on the world because of gas flaring's relation to climate change).

18. See Ofeibe Quist-Arcton, *Gas Flaring Disrupts Life in Oil-Producing Niger Delta* (National Public Radio July 24, 2007), *available at* <http://www.npr.org/templates/story/story.php?storyId=12175714> (reporting that villagers see huge flames emitted from gas flaring sites and billows of black smoke that leap into the sky).

19. See *id.* (describing the villages of Ebocha-Egbema, which are located in the heart of the Niger Delta and where gas flares loom over houses, farms, and shops).

fishing, have been closed as the streams have lost life, and the lands are no longer fertile.²⁰

Unfortunately, the Niger Delta people's main occupation is farming and fishing. Thus, gas flares not only have a devastating effect on the environment but also on their means of livelihood.

Indeed, the addition of gas flares has not only been detrimental to the environment but also has changed life in the villages. Kenule Saro-Wiwa asserted the following:

[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 ten 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.²¹

Gas flaring in the Niger Delta region has also contributed to numerous diseases among the residents, such as asthma, bronchitis, cancer, blood disorders, and skin diseases; these diseases are directly correlated to gas flaring.²² As a result of these diseases "[l]ife expectancy in the Niger Delta is markedly lower [in comparison to other parts of Nigeria] . . . [the average age of death in the Niger Delta region] stands at about 40 years."²³ These testimonials also suggest that large quantities of gases are flared in the Niger Delta region. Although there is a dearth of sufficient data stipulating the exact amount of gas flaring in Nigeria, it has been reported that Nigeria flares about 75% of the gases it produces.²⁴ Due to the high emission rate, the impact of the flared gases is substantial. On a national and global scale, gas flares are a significant contributor to global warming and climate change.²⁵ Thus, they not only affect the Niger Delta community but also

20. Eugenia Okpara, *Imo Deputy Governor Laments Menace of Gas Flaring*, DAILY TIMES OF NIGERIA, Nov. 27, 2003, available at <http://news.biafranigeriaworld.com/archive/2003/nov/27/244.html>.

21. KENULE SARO-WIWA, GENOCIDE IN NIGERIA: THE Ogoni TRAGEDY 78 (1992).

22. See Bassey, *supra* note 17, at 9 (describing the health effects of gas flaring on the people in the Niger Delta region).

23. *Id.*

24. See THE CLIMATE JUSTICE PROGRAMME, *supra* note 16, at 11 (stating that "Nigeria currently flares 75% percent of the gas it produces").

25. See BRONWEN MANBY, HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES 66 (1999), available at

contribute to global greenhouse emissions. In fact, Nigeria's gas flaring produces almost 25% of Africa's greenhouse gases.²⁶

However, gas flares, also known as associated gas, could be emitted in environmentally safe ways, including re-injecting them into the earth or using them as an energy source.²⁷ While these alternative methods are practiced in countries like the United States, such environmentally safe methods are not practiced in Nigeria. For example, a Niger Delta resident stated "[I]ed by oil giant Shell, [oil companies] have been burning gas for decades when they could be using it to provide energy to the local population. The government must ensure that oil companies stop this destructive practice now."²⁸ In fact, oil companies have continuously flared gas for nearly 50 years.²⁹ Moreover, the local population is often left without electricity and has limited access to crude-oil products.³⁰ This statement suggests that Shell's oil-production practices have been met with resentment by the Niger Delta community and that the Nigerian government has not effectively addressed the problem. In sum, this section illustrates the detrimental effects of gas flaring and the alternatives to minimizing gas flaring. The next section of this essay discusses ways in which the Nigerian government has attempted to combat gas flaring.

III. Legal Framework

In the early 1960s, the Nigerian government recognized gas flaring as

<http://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf> (noting that gas flaring is a significant contributor to greenhouse gases).

26. See UN Integrated Regional Information Networks, *Should Stopping Gas Flaring be a Priority?* (Sept. 3, 2008) available at 2008 WLNR 26858547 (ranking countries by greenhouse emission).

27. See GULZHAN NURAKHMENT, *GAS FLARING AND VENTING: WHAT CAN KAZAKHSTAN LEARN FROM THE NORWEGIAN EXPERIENCE?* 5-7 (2006) available at http://www.dundee.ac.uk/cepmlp/car/html/CAR10_ARTICLE14.PDF (discussing environmentally safe alternatives to gas flaring).

28. Paula Palmer, *Emergency Action: Stop Gas Flaring in Nigeria*, Jan. 12, 2009, <http://www.foei.org/en/media/archive/2009/nigeria-to-stop-companies-flaring-gas> (last visited Mar. 12, 2010) (on file with Washington and Lee Journal of Energy, Climate, and the Environment).

29. See *Shell: Guilty of Climate Crimes*, <http://www.shellguilty.com/learn-more/climate-crimes/> (last visited Oct. 31, 2010) (detailing Shell's oil drilling activities in Nigeria) (on file with Washington and Lee Journal of Energy, Climate, and the Environment).

30. See Paula Palmer, *Mangrove Action Project, Niger Delta's Mangrove Communities Threatened by Continued Gas Flaring*, Jan. 12, 2009, <http://mangroveactionproject.org/news/action-alerts/niger-deltas-mangrove-communities-threatened-by-continued-gas-flaring> (last visited Oct. 31, 2010) (noting that despite the fact that Nigeria's Niger Delta is endowed with crude oil, local residents have limited access to crude-oil by-products) (on file with the Journal of Energy, Climate, and the Environment).

a potential problem associated with oil production. Since then, the government has combated the gas flaring issue through legislation such as the Petroleum Act of 1969 and the Gas Re-Injection Act. Part A below discusses the enactment of gas-flaring legislation and its implementation, focusing on the major legislative events spanning from when Nigeria gained independence in the 1960s to the present. This timeline is important in understanding the impediments to the stoppage of gas flaring.

Part A concludes that Nigeria has not successfully halted gas flaring because of the petroleum ministry's lack of adequate enforcement. In other words, the petroleum minister's favoritism toward Shell has rendered legislation on gas flaring meaningless. Part B of this section analyzes the judicial response to gas flaring and concludes that Nigerian courts cannot be used as a forum for protesting gas-flaring issues until the judicial system is free from bias toward oil companies such as Shell. If these practices persist, the current 2012 deadline for stopping gas flaring may only be symbolic.

A. Laws Addressing Gas Flares in Nigeria

The stoppage of gas flaring in Nigeria has not been successful because of the failure to enforce gas-flaring legislation. The Petroleum Act of 1969 was the first Act that addressed the general potential problem of oil production and its accompanying environmental hazards.³¹ This act encouraged oil companies to submit oil-development schemes that specified potential solutions to such environmental hazards.³²

In 1979, the Nigerian government made its first attempt to specifically address the issue of gas flaring by promulgating the Associated Gas Re-Injection Act No. 99.³³ Through this Act, the government mandated that oil companies "re-inject gas into the earth's crust and/or submit detailed plans for gas utilization."³⁴ January 1, 1984 was set as the deadline to stop gas flaring; however, an oil company could be exempt from this deadline if they were issued a certificate from the petroleum minister.³⁵ Major oil companies in Nigeria indicated difficulties in meeting the 1984 deadline, citing lack of resources to construct a gas-injection plant within the

31. See OMEJE, *supra* note 3, at 43 (detailing the history of the Nigerian's government attempt to combat gas flaring).

32. See *id.* at 45 (explaining the procedure implemented by the Nigerian government to stop gas flaring).

33. See *id.* (observing the Nigerian government's success in developing a strategy to stop gas flaring).

34. *Id.* at 45.

35. See *id.* at 20 (stipulating that oil companies could be exempt from the January 1, 1984 deadline if they obtained a certificate from the Nigerian petroleum minister).

timeframe;³⁶ consequently, the deadline was extended by one year.³⁷ However, oil companies failed to adhere to the policies stipulated in the 1984 deadline, claiming it was too expensive to re-inject gas.³⁸ Consequently, approximately 55% of oil fields were exempted from participating in gas re-injection and an insignificant penalty was imposed on oil fields where gas flared.³⁹

By 2007, the "Nigerian department of Petroleum Resources . . . [reported that there were about] 117 flare sites in the Delta."⁴⁰ Gas-flare practices continued to increase dramatically as oil companies deemed it less expensive to pay the minimal fines than to re-inject gas. Consequently, about 75% of gas is flared, whereas approximately 12% is re-injected.⁴¹ Although legislators promulgated a law to combat gas-flaring, gas flaring remains an issue because of inadequate enforcement due to low penalties imposed for violations and the granting of exemptions to oil companies that flare gas.

B. The Judicial Response to Gas Flaring

Despite the laws governing gas flaring, gas flaring remains widely practiced in Nigeria's Niger Delta region. Shell continues to flare gas and has been unable to provide a certificate from the petroleum minister, pursuant to the Re-injection Act, to show that it is not feasible to engage in gas re-injection.⁴² Until 2005, the petroleum minister remained silent on this issue, despite the fact that Shell has been unable to provide any evidence that it is flaring gas lawfully.⁴³ Because the petroleum ministry

36. *See id.* (noting that oil companies were reluctant in complying with the government's mandate).

37. *See id.* (observing the Nigerian government's willingness to be accommodating to the needs of oil companies).

38. *See* Yinka Omorogbe, *Regulation of Oil Industry Pollution in Nigeria*, in *NEW FRONTIERS IN LAW* 147–63 (Epiphany Azinge ed., Oliz 1993) (discussing the oil companies' inability to adhere to the proposed alternative to gas flaring).

39. *See id.* (reporting the data on the percentage of oil companies that were exempted from the mandatory gas re-injection program).

40. *See* Sasha Chavkin, *Shell Games in Nigeria*, *THE NATION* (Jan. 4, 2010), available at <http://www.thenation.com/article/shell-games-nigeria> (reporting the 2007 data on gas flaring in Nigeria).

41. *See* MBendi Information Services, *Oil and Gas in Nigeria*, <http://www.mbendi.co.za/indy/oilg/af/ng/p0005.htm> (last visited Oct. 31, 2010) (noting that Nigeria is a member of OPEC and is its 12th largest producer) (on file with the Journal of Energy, Climate, and the Environment).

42. *See* THE CLIMATE JUSTICE PROGRAMME, *supra* note 16, at 31 (reporting Shell's non-compliance with the gas flaring legislation).

43. *See* Press Release, Climate Justice, *Legal Action to Stop Nigerian Gas Flaring* (June 20, 2005), available at <http://climatelaw.org/media/2005Jun20/> (last visited Oct. 31, 2010) (observing that Nigeria's petroleum minister failed to sanction Shell, despite Shell's

failed to combat gas flaring in Nigeria, Niger Delta citizens and residents have sought to use the Nigerian courts as a tool to stop gas flaring.

This section will analyze the role the Nigerian courts have played in combating gas flaring. On careful examination of *Gbemre v. Shell Petroleum Development Co.*, this section concludes that the Nigerian courts have also failed to assume their role as impartial arbitrators in matters involving gas flaring. If this attitude continues, gas flaring will persist, as the court will not be able to implement any stipulated gas-flaring deadline.

Before delving into the discussion of how the Nigerian courts have handled gas-flaring cases, it is imperative to understand the courts' role. There are different theories of the courts' role in litigation; however, only a few theories that pertain to the Niger Delta issue will be discussed in this section. One school of thought, led by Lon Fuller, presents the notion that the court's role is to arbitrate between individuals.⁴⁴ Fuller's theory presents the traditional view that the court's role is limited to strictly resolving private rights disputes—disputes between private people.⁴⁵

Building on Fuller's model, Abram Chayes presented a model positing that the court is a tool for social change.⁴⁶ In the second model, Chayes postulated that judges are "the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court [This model] require[s] the judge's [continuous] involvement in administration and implementation."⁴⁷ Consequently, under the second model, the judge goes beyond reaching a judgment in the case, ensuring that the court redresses constitutional rights violations. In Chayes' model, the true goal of the plaintiff is to achieve success beyond the courtroom—sending a political message: a goal beyond the mere winning of a case.⁴⁸

After assessing these models, Professor Jules Lobel postulated a third model such that the courts could be used "as a forum of protests."⁴⁹ In Lobel's model, the courts are deemed a "forum in which the struggle for

non-compliance with the gas flaring legislation) (on file with the Journal of Energy, Climate, and the Environment).

44. See Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 479 (2004) ("[T]he mainstream model [posited by Lon Fuller] views courts as arbiters of disputes between private individuals asserting particular rights.").

45. See *id.* (establishing that the court's role is to resolve private rights).

46. See, e.g., Edward F. Sherman, *Introduction to the Symposium: Complex Litigation: Plagued by Concerns over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 590 (2004) (noting that by "the mid-1960's, the civil rights movement, judicial activism in the constitutional arena, and new liability standards created by statutes and courts lead to greater resort to the courts for social and economic problems").

47. *Id.* at 604 n.4 (citing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976)).

48. See Lobel, *supra* note 44, at 479 (stating that Chayes model "emphasized the court's power to remedy structural, constitutional or statutory violations").

49. *Id.* at 479–80.

societal change occurs. Even when public interest lawsuits prevail in courts, often their most lasting legacy is not the relief ordered by the court, but the lawsuit's contribution to the ongoing community discourse about an important public issue."⁵⁰ The third model allows the court to mediate arguments on social justice issues such as climate change and environmental law matters. This model merges the goals of the first two theories in that it allows individuals to raise claims in matters addressing community issues, and, in so doing, the plaintiff is able to send political messages to the community on important community issues, contributing to the discussions of ongoing community matters. Lobel's theory thereby maximizes the role of the court in arbitrating matters in society.

Not all scholars have accepted Lobel's model. For example, Lobel's model arguably violates the United States Federal Rule of Civil Procedure 11, which bars lawyers from bringing lawsuits for "improper purpose."⁵¹ While this paper acknowledges that there are competing theories of the role of the courts, this essay focuses solely on the court as a forum for protest and a tool for social change. The discussion of the court as a forum of protest and as a tool of social change is particularly relevant, given that the Nigerian government has failed to stop gas flaring over the past several decades. Due to the Nigerian government's inability to stop gas flaring thus far, this discourse explores whether the Nigerian courts can help stop gas flaring in Nigeria's Niger Delta region. Against this theoretical backdrop, this section will analyze the role of the Nigerian courts in gas-flaring cases.

In matters regarding gas flaring, Niger Delta plaintiffs have not been successful in using the court as a tool for social change in that the courts have not been able to implement and administer constitutional policy. A court can only be used as a tool for social change when the court is impartial and willing to abide by its constitutional role as an unbiased arbitrator. The *Gbemre* case illustrates an attempt to use the court as a forum for social change; however, this goal was not met because of the lack of a truly independent judiciary. Jonah Gbemre, on behalf of the Iwherekan Community in Delta State, brought suit against Shell Petroleum Development on the grounds that Shell's gas-flare practices violated the fundamental rights of the people, which are guaranteed under sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999, and the African Charter on Human and Peoples' Rights Act, Cap. A9, Volume 1, Laws of the Federation of Nigeria, 2004.⁵² Secondly, the plaintiff argued that Shell's failure to engage in an assessment of the effects of gas flares in the Niger Delta region violated the Environmental Impact Assessment Act,

50. *Id.* at 480.

51. FED. R. CIV. P 11(b).

52. *See Gbemre*, No. FHC/B/CS/53/2005 at 1(detailing Gbemre's complaints).

Cap. E12, Vol. 6, Sec 2(2), Laws of the Federation of Nigeria.⁵³ The third argument was that the Associated Gas Re-Injection Act, Cap. A25, Volume 1, Section 3(2)(a)(b), Laws of the Federation of Nigeria, 2004, which permits gas flaring, is inconsistent with Section 33(1) and 34(1) of the 1999 Nigerian Constitution; as such, the Re-Injection Act should be deemed void.⁵⁴ Consequently, the plaintiff sought an injunctive relief to stop Shell from flaring gas.⁵⁵

In November 2005, the High Court responded to this matter by issuing an injunction stopping Shell and other oil companies from engaging in gas-flaring activities. The High Court reasoned that gas flaring violated the constitutional rights to life and dignity of the people of the Niger Delta community.⁵⁶ The Court also found that the gas-flaring laws were unconstitutional and void and thereby instructed the Attorney General as well as the Federal Executive Council to create new gas-flaring regulation that would pass constitutional muster.⁵⁷

Although this decision was a historic one, victory on the stoppage of gas flaring was only short lived, as Shell violated the court's order and continually engaged in flaring gas.⁵⁸ Shell refused to comply with the court's order, arguing, *inter alia*, that the High Court failed to apply proper judicial procedure and Shell lacked adequate resources to liquefy gas flares.⁵⁹ In December 2005, Mr. Gbemre filed suit against Shell on the grounds that Shell failed to comply with the court's order.⁶⁰ Although Gbemre's contempt suit may be deemed premature given that the court

53. See *id.* at 2 (detailing the plaintiff's argument relating to the Environmental Impact Assessment).

54. See *id.* (noting that gas flaring violates the Nigerian Constitution).

55. See *id.* (discussing Gbemre's request for damages).

56. See *Gbemre*, No. FHC/B/CS/53/2005 at 30 ("[T]he constitutionally granted fundamental rights to life and dignity of human person . . . inevitably includes the right to clean poison-free, pollution-free and healthy environment.").

57. See *id.* at 31 ("[T]he provisions of sections 3(2)(a), (b) of the Associated Gas Re-injection Act Cap, A25 Vol. 1 Laws of the Federation of Nigeria . . . are therefore unconstitutional, null and void.").

58. See Press Release, Climate Justice, Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again, May 2, 2007, <http://www.climatelaw.org/cases/country/nigeria/media/2007May2/> (last visited Nov. 16, 2010) [hereinafter Climate Justice Press Release II] (reporting on Shell's failure to "immediately respect a court order to stop gas flaring in Nigeria" by April 30th, 2007) (on file with the Journal of Energy, Climate, and the Environment).

59. See Richard Black, Contempt Case for Shell Over Gas, BBC NEWS, Dec. 24, 2005, <http://news.bbc.co.uk/2/hi/science/nature/4556662.stm> (last visited Nov. 16, 2010) (reporting on the possibility of contempt of court proceedings against Shell for its failure to stop gas flaring as ordered by the Nigerian Federal Court) (on file with the Journal of Energy, Climate, and the Environment).

60. See Climate Justice Press Release II, *supra* note 58 (monitoring the Gbemre's subsequent actions after the November 2005 High Court's decision).

issued an injunction barely forty-five days earlier, the suit helped the plaintiff contribute to the discussion about ending gas flaring.

However, Gbemre's lawsuit was not successful at fueling social change because the court was not able to administer the constitutional principle guiding the case after November 2005, the date the court issued an injunction to Shell. After the *Gbemre* case was decided, the court failed to implement the constitutional principle of its decision, "the rights to clean poison-free, pollution-free healthy environment."⁶¹ The court's inability to implement its decision is evidenced by the fact that in April 2006, the court released Shell of its obligation to stop flaring gas on the condition that Shell met the quarterly step-by-step reduction in gas flaring.⁶² By adopting a step-by-step approach, the goal was to end gas flaring by April 30, 2007.⁶³ However, the Nigerian court of appeals restrained the *Gbemre* court from sitting on May 31, 2006, the date set for personal appearances regarding Shell's step-by-step proposal to halt gas flaring.⁶⁴

Sadly, by April 30, 2007, Shell failed to present the quarterly step-by-step gas-flaring reduction proposal and was still flaring gas.⁶⁵ Between April 2006 and April 2007 Shell did not reduce the amount of gas flared.⁶⁶ Moreover, after Shell violated the orders and a contempt case was filed, the trial judge who originally heard the case was transferred to a different district and the case file was reported lost.⁶⁷ Since then, no actions have been taken against Shell. The *Gbemre* case events illustrate that the *Gbemre* case did not lead to any immediate social change, because after the trial judge ruled in favor of Gbemre, the court failed to implement the constitutional principle on which the case was grounded: the rights to pollution-free healthy environment.

While the *Gbemre* case did not result in an immediate stoppage of gas flaring, it aroused discussion on Shell's gas-flaring practice in the international community. Due to national and international pressures, the Nigerian government announced that by December 2007, all gas-flaring

61. See *Gbemre*, Suit No. FHC/B/CS/53/2005 at 30 (stipulating that clean environment is a constitutional guaranteed right).

62. See Climate Justice Press Release II, *supra* note 58 ("In April 2006 . . . [Shell] was granted a conditional stay of execution, releasing it from the duty to comply with a court order in November 2005 to stop flaring, on three conditions. One year on, two of these conditions have not been met.").

63. See *id.* (discussing the failure to comply with the court's order).

64. See *id.* ("[T]he Court of Appeal . . . ordered the . . . [Federal High Court] not to sit on the day appointed for the personal appearances.").

65. See *id.* (observing that the April 30, 2007 deadline was not met).

66. See *id.* ("[T]he judge . . . [was] removed from the case, transferred to the north of the country, and [for the second time] there . . . [were] problems with the court file.").

67. See *id.* (reporting the transfer of the district judge to a different district).

activities must be halted.⁶⁸ The deadline was later extended to January 1, 2008, and then again to January 6, 2008.⁶⁹ Indeed, the January 2008 deadlines were not met and the Nigerian government did not penalize Shell for gas flaring. During this time period, Kenule Saro-Wiwa Jr.'s Alien Tort Action case against Shell was being heard by a Judge in the Southern District of New York.⁷⁰ The case was settled in favor of Kenule Saro-Wiwa Jr.⁷¹

Ironically, a foreign court, rather than a Nigerian court, was the first court to have a binding and implemented decision on the matter. This settlement makes the Nigerian government appear unresponsive to environmental matters. A few months after the Kenule Saro-Wiwa Jr. settlement, the legislature proposed another gas-flaring bill.⁷² The bill proposes to end gas flaring by December 2012.⁷³ However, even though gas-flaring litigation pressured the Nigerian legislative branch to promulgate legislation to combat this hazard, gas-flaring orders and government deadlines appear to be rather symbolic than realistic. The Nigerian government had continuously set deadlines to stop gas flaring since the 1960s; thus, this new deadline may only be an addition to the already failed deadlines.

With the new gas-flaring deadline, the gas-flaring problem may have, yet again, only garnered a temporary political response. The high-level deference toward Shell is likely to stall the process to end gas flaring. Moreover, when such deference is continuously conferred on an oil company, it is difficult to achieve social change because the government continually relies on the oil companies' stipulations. For example, this protectionism of oil companies is evident in the *Gbemre* case, where the

68. See Bassey, *supra* note 17, at 5 ("It was in response to local and international pressure that the Federal Government once more pledged to gas flares in Nigeria.")

69. See *id.* (detailing the different deadlines that the Nigerian government set to stop gas flaring).

70. See *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW)(HBP), at 17–32 (S.D.N.Y. March 16, 2009), available at <http://ccrjustice.org/files/3.16.09%205th%20Amended%20Complaint.pdf> (alleging that the executions, imprisonment, and torture of various plaintiffs at the hands of the Nigerian military junta were carried out with Shell's knowledge, consent, and support).

71. See *Wiwa v. Shell Petroleum Dev. Co.*, No. 04 Civ. 2665, at 4 (S.D.N.Y. June 7, 2009), available at http://wiwavshell.org/documents/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed.pdf (settling the case of *Wiwa v. Shell Petroleum Development Co.* for \$11,000,000.00).

72. See Onwuka Nzeshi, *Gas Flare Deadline Now December 2012*, THIS DAY, Jan. 14, 2010, <http://allafrica.com/stories/201001140228.html> (last visited December 20, 2010) (reporting that the Nigerian "House of Representatives . . . perfected the legislative framework pegging the deadline for gas flaring in Nigeria's petroleum sector at December 31, 2012") (on file with the Journal of Energy, Climate, and the Environment).

73. See *id.* (observing that the stoppage of gas flaring deadline has been postponed to December 2012).

trial judge was transferred to a different district a few months after ordering Shell to stop flaring gas.⁷⁴ In fact, the judge was transferred after Shell's numerous attempts to stay the proceedings.⁷⁵

Withstanding these impediments, Niger Delta citizens continue to discuss the need to stop gas flaring.⁷⁶ Although such gas-flaring litigation instigates discussion on the issue among community members, such discussion is only short lived among cabinet members because of their stance of protectionism toward oil companies.⁷⁷ With such clouded vision, the government influences the judicial branch, as will be discussed in Part IV (B). Consequently, the court either succumbs to the government's wishes in protecting Shell or tactfully declines to take further action in the case.⁷⁸ However, social change cannot be achieved when a court is unwilling to deviate from the *status quo*. In sum, while the *Gbemre* case contributed to the ongoing dialogue on gas flaring, the goal of using the court as a forum for protest and social change cannot truly be achieved when a governmental system is plagued by undue influence from the executive branch.

74. See Climate Justice Press Release II, *supra* note 58 (discussing the subsequent transfer of the Judge assigned to the *Gbemre* case).

75. See *id.* (noting that Shell wanted the district court to stay proceedings until the Court of Appeals decided whether the district court has jurisdiction over the matter).

76. See Poison Fire, *supra* note 12 (following "a team of local activists as they gather 'video testimonies' from communities on the impact of oil spills and gas flaring" in the Niger Delta).

77. See Emmanuel Aziken, Inalegwu Shaibu & Leon Usigbe, *Nigeria: Senate's Public Hearing on Gas Flaring Begins*, VANGUARD, Nov. 25, 2008, <http://allafrica.com/stories/200811250120.html> (last visited Nov. 16, 2010) (reporting on a public hearing in the Nigerian Senate on the Gas Flaring Prohibition and Punishment Bill prescribing a December 2008 deadline for the prohibition of gas flaring in the Niger Delta) (on file with the Journal of Energy, Climate, and the Environment). The Senate announced that gas flaring must stop by December 31, 2010. See Sufuyan Ojeifo, *Gas Flaring Must End By December 2010*, THIS DAY, May 15, 2009, <http://allafrica.com/stories/200905150189.html> (last visited Nov. 16, 2010) (reporting on the passage of the Gas Flaring (Prohibition and Punishment) Bill 2009, giving oil companies a December 31, 2010 deadline to end gas flaring in the Niger Delta) (on file with the Journal of Energy, Climate, and the Environment). However, the federal government did not allocate the necessary funding in its budget to stop gas flaring. See Charles Okonji, *FG Dumps Zero Gas Flare Agenda*, NIGERIAN COMPASS, Jan. 5, 2010, http://www.compassnews.net/Ng/index.php?option=com_content&view=article&id=37822:fg-dumps-zero-gas-flare-agenda&catid=111:energy&Itemid=712 (last visited Nov. 12, 2010) (saying that the Nigerian federal government did not budget for strategies aimed at stopping gas flaring in the Niger Delta in 2010) (on file with the Journal of Energy, Climate, and the Environment).

78. See *Gbemre*, No. FHC/B/CS/53/2005 at 29–30 (holding that the Nigerian Constitutional right to life includes the right to a clean, pollution free environment, and that Shell's failure to halt gas flares violates said right).

IV. Theoretical Framework

In addition to using the courts as a forum for social change to stop gas flaring in Nigeria's Niger Delta, Nigerian plaintiffs have explored litigation in the courts as a "forum for protest." Discussion of the role of litigation in stopping gas flaring in Nigeria's Niger Delta is important as it illustrates the possible role, limitation, and impediments of the Nigerian court in stopping gas flaring. Additionally, the analysis of litigation in stopping gas flaring is important given that a Federal Court in Port Harcourt dismissed a similar gas-flaring case that had identical claims to the *Gbemre* case.⁷⁹ As such, Part A will analyze the use of litigation as a tool to stop gas flaring in the Niger Delta region and concludes that litigation has not be an effective tool in combating gas flaring. Part B builds on the concept of the rule of law and the importance of the rule of law in gas-flaring litigation. This part concludes that if Nigerian courts fail to abide by the principle of the rule of law, the court will be unable to serve as an independent arbitrator and will not be able to ensure that gas-flaring deadlines are met.

A. Litigation as a Tool to Stop Gas Flaring?

Some scholars have argued that litigation is an effective tool to combat environmental degradation and climate change.⁸⁰ Professor Hari Osofsky concluded, "the cross-cutting nature of climate change makes this litigation an important mechanism for spurring and fine-tuning governmental and corporate efforts."⁸¹ Climate-change litigation has been a successful tool in bringing about environmental justice in countries such as the United States.⁸² In assessing the success of climate-change litigation, Professor

79. See Barr Ikechukwu Opkara v. Shell, [2005] No. FHC/PH/CS/518/05, at 23 (F.H.C.) (Nigeria), available at <http://www.climatelaw.org/cases/country/nigeria/gasflares/22092006> (dismissing the suit because the plaintiffs—four Niger Delta communities—did not rely on explicit rights of the Nigerian constitution).

80. See, e.g., Hari M. Osofsky, *Climate Change Litigation as Pluralistic Legal Dialogue?*, 26 STAN. ENVTL. L.J. 181, 182 (2007) (discussing the conceptualization of climate change litigation as a pluralist legal dialogue, and arguing "for a less extreme version of hybridization that still hews true to the legal pluralist literature").

81. See Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, CLIMATE LAW 5 (2010), available at <http://iospress.metapress.com/content/23746166q74620p2/fulltext.pdf> (analyzing "the ongoing role of climate change litigation as part of transnational efforts to address the problem" and considering the implications of applying "a taxonomy of diagonal regulatory approaches to two examples of climate change litigation stemming from the US Clean Air Act").

82. See *Massachusetts v. EPA*, 549 U.S. 497, 504–35 (2007) (reversing the U.S. Court of Appeals for the District of Columbia Circuit's decision upholding the EPA's refusal to

Osofsky discussed the "formal successes" of climate-change litigation as well as its "informal success."⁸³ Professor Osofsky noted, "the attention that these [climate change] cases receive pressure policymakers to address . . . [the climate change] problem and draws attention to the plight of vulnerable populations and ecosystems."⁸⁴ Furthermore, "[b]oth formally successful suits and those with little hope of achieving binding results have together helped to change the regulatory landscape at multiple levels of government by putting both legal and moral pressure on a wide range of individuals and entities to act."⁸⁵ Thus, Professor Osofsky posited that success in climate-change litigation goes beyond the court's judgment as it focuses on pressuring effects of climate-change litigation on individuals and policymakers.⁸⁶

However, as is evident in Nigeria, environmental-law litigation, masked under human-rights litigation, has not been informally successful and is not likely to be informally successful until Nigeria adopts good governance: a type of governance that encapsulates the elements of the rule of law. Indeed, gas-flaring adjudication has raised public awareness, but the awareness raised may not amount to informal success given that gas flaring litigation has not pressured policymakers to ensure that gas-flaring practices end. The Nigerian government has been under pressure from both local and international communities to stop gas flaring over the past 16 years; however, the Nigerian government has not implemented a plan to stop gas flaring.⁸⁷ But during this time period the government has been very good at delivering empty promises to stop gas flaring.

Litigation in Nigerian courts cannot be an effective tool to stop gas flaring when the courts violate the rule of law. As exemplified in the *Kenule Saro-Wiwa* case, Nigerian courts have been highly influenced by the executive branch, in violation of the principle of the rule of law. However, litigation cannot stop gas flaring when the executive branch influences the courts because the courts will only dictate outcomes commensurate with the executive branch's orders. Litigation in Nigeria will only generate results that are favorable to the executive, a clear violation of the spirit of the rule of law. When the court's holding

engage in rulemaking with regard to global climate change under the Clean Air Act because the Act did not authorize the EPA to address global climate change).

83. See Osofsky, *supra* note 81, at 9–29 (noting how climate change litigation, successful or not, can be instrumental in changing regulation).

84. See *id.* at 8–9 (observing the effects of litigation on climate change regulation).

85. See *id.* at 9 (noting how climate change litigation, successful or not, can be instrumental in changing regulation).

86. See *id.* at 9–10 (describing the informal success of climate change litigation).

87. See Boycott Shell/Free Nigeria: The Main Issues, *Shell in Nigeria: What are the Issues?*, <http://www.essentialaction.org/shell/issues.html> (last visited Nov. 16, 2010) (summarizing alleged transgressions by Shell in Nigeria and advocating a boycott of the company) (on file with the Journal of Energy, Climate, and the Environment).

coincides with the executive branch's political agenda, the likelihood that gas flaring litigation puts pressure on policymakers diminishes. Nigerian policymakers are not necessarily pressured by such gas-flaring litigation because; (1) these policymakers have long been aware of the gas-flaring issue and have been reluctant to address the issue; (2) corruption inundates the Nigerian political system and a citizen's attempt to pressure policymakers is likely to be met with brutal punishment. Indeed, continuous gas-flaring litigation, scrutiny from international organizations, and pressure from foreign countries may help persuade the Nigerian courts to abide by the rule of law principle.

Part B therefore further builds on the concept of the rule of law and how it applies to Nigeria. It concludes that in gas-flaring litigation matters, the Nigerian courts are not bound by the principle of the rule of law and that the rule of law is a prerequisite for litigation to be an effective tool to stop gas flaring.

B. The Rule of Law

In Nigeria, in cases involving oil companies such as Shell, the concept of the rule of law is a mere idealization. A major impediment to stopping gas flares and the environmental hazards lies in the fact that Nigeria has adopted a *rule by corporation* approach rather than a *rule of law* approach. Although various scholars have postulated theoretical meanings to the rule of law, a common consensus is that a legal system guided by the rule of law must *inter alia*, ensure that the laws are previously announced, that the legal system is predictable, that all are equal before the law, and that there is an independent judiciary.⁸⁸

One of the most important elements of the rule of law is restraint of tyranny. In fact, "rule of law means freedom from arbitrary and tyrannical governance through restraints on state power."⁸⁹ In contrast, rule by corporation could be defined as corporations, such as oil corporations, influencing the government and the government subsequently influencing the courts. In a rule-by-corporation approach, oil companies simply ignore

88. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 209–10 (rev. ed. 1969) (stating the prerequisites for rule of law); Joseph Raz, *The Rule of Law and Its Virtue*, in *The Authority of Law: Essays on Law and Morality* 214–17 (2d ed. 2009) (giving some principles that can be derived from the basic idea of the rule of law including the principles that laws should be relatively stable, that the law should be relatively open and clear, and that the judiciary must be independent); Lawrence B. Solum, *A Law of Rules: A Critique and Reconstruction of Justice Scalia's View of the Rule of Law*, *APA NEWSLETTERS* 16 (2002), available at <http://papers.ssrn.com/abstract=303575> (explaining A. V. Dicey's views on the Rule of Law).

89. Erik Luna, *Wither Goes Cuba? Prospects for Economic & Social Development Part II of II*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 529, 584 (2004).

regulations or court orders that are not favorable to them, without fear of being sanctioned. In fact, in Nigeria, oil companies are minimally sanctioned. In other words, the oil companies are granted impunity.

In matters concerning environmental issues and Shell, the Nigerian courts fail to be free of "arbitrary and tyrannical government" in that the executive branch, in collaboration with Shell, controls the legal system. This phenomenon was exemplified in the *Kenule Saro-Wiwa* case in which the executive branch issued *carte blanche* to the judiciary to punish indigents who were deemed traitors to the oil industry.⁹⁰ Although the *Kenule Saro-Wiwa* case was under a different government, it warrants discussion because it depicts the pattern and culture of how the executive branch effectively influences the judiciary. Comparing the facts of the *Kenule Saro-Wiwa* case to the *Gbemre* case also reinforces the theme of a highly influenced judiciary in environmental-litigation cases.

Kenule Saro-Wiwa, an indigenous person and human-rights activist who also denounced the inhumane use of law to achieve a political agenda and environmental degradation, was met with death by hanging.⁹¹ Using a sham charge, the Nigerian government imprisoned Kenule Saro-Wiwa. It was alleged that Kenule Saro-Wiwa was responsible for the death of four Ogoni chiefs at a meeting that he in fact did not attend, despite the fact that the government was unable to establish any connection between the alleged murder and Kenule Saro-Wiwa.⁹² The military dictator, Sani Abacha, appointed a military tribunal consisting of military personnel who belonged to the executive branch of government to preside over the case after he determined that Kenule Saro-Wiwa was involved in "civil disobedience."⁹³ The military-tribunal personnel were also members of the executive branch of government that authored the Civil Disturbances (Special Tribunal) Decree, No. 2 of 1987, the Decree that governed Kenule Saro-Wiwa's

90. See Muchelle Morum & Lucy Finlayson, *In Prison with Ken Saro-Wiwa*, http://www.nigerdeltacongress.com/iarticles/in_prison_with_ken_saro.htm (last visited April 7, 2010) (detailing a public talk given by Ledum Anazur Mitee, a Nigerian activist from "one of the sites for oil exploitation in the Niger delta," who was a cellmate of Ken Saro-Wiwa before his execution) (on file with the Journal of Energy, Climate, and the Environment).

90. See *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW)(HBP), at 8–10 (S.D.N.Y. March 16, 2009), available at <http://ccrjustice.org/files/3.16.09%205th%20Amended%20Complaint.pdf> (alleging that the executions, imprisonment, and torture of various plaintiffs at the hands of the Nigerian military junta were carried out with Shell's knowledge, consent, and support).

92. See *The Case Against Shell*, <http://wiwavshell.org/the-case-against-shell/> (last visited Nov. 16, 2010) (summarizing the events surrounding the execution of Ken Saro-Wiwa, Shell's alleged liability, and the legal action against Shell being pursued by the Center for Constitutional Rights and Earth Rights International) (on file with the Journal of Energy, Climate, and the Environment).

93. Civil Disturbances (Special Tribunal) Decree, No. 2 of 1987 § 1(1)(a)–(d).

prosecution.⁹⁴

In the *Kenule Saro-Wiwa* case, the executive and legislative branches merged. The executive branch was influenced by the thirst for profits from Shell. The indigenous people observed military personnel being transported in Shell's vans to the Niger Delta region. Consequently, Kenule Saro-Wiwa was sentenced to death by hanging, an unlikely consequence for being an environmental-rights advocate. Moreover, at the time Kenule Saro-Wiwa was convicted, there were no laws criminalizing environmental-rights advocacy. If the rule of law means anything, it "means that government in all its actions is bound by rules fixed . . . which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."⁹⁵ The *Kenule Saro-Wiwa* case exemplifies arbitrary rulings in environmental matters and illustrates the judiciary's failure to respect the concept of the rule of law.

With the ascension of the current democratic government, one could argue that the Nigerian courts are now purged from arbitrary rulings and the oil companies' undue influence. However, such an argument is misplaced. The oil companies' undue influence was illustrated in the *Gbemre* case discussed in Part III (B), in which the trial judge was transferred and the case file reported lost a few months after the judge ordered Shell to stop flaring gas.⁹⁶ The missing case file and the judge's transfer may appear to be a mere coincidence; however, one familiar with the Nigerian justice system may not be surprised by these sudden events.⁹⁷ The question then becomes whether these actions were intentionally taken to impede the proceeding and whether the *Gbemre* case was deemed to be a threat to the *status quo*.

94. See *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization v. Nigeria*, 137/94, 139/94, 154/96 and 161/97, African Commission on Human and Peoples' Rights, Oct. 31, 1998, available at <http://www.unhcr.org/refworld/docid/3ae6b6123.html> (last visited Nov. 16, 2010) (holding that, with regard to the imprisonment and execution of Ken Saro-Wiwa, "there has been a violation of Articles 9.2, 10.1 and 11, 26, 16 . . . [and] that in ignoring its obligations to institute provisional measures, Nigeria has violated Article 1 [of the African Charter]") (on file with the Journal of Energy, Climate, and the Environment).

95. F.A. HAYEK, *THE ROAD TO SERFDOM* 80 (50th anniversary ed., U. of Chicago Press 1994).

96. See Climate Justice Press Release II, *supra* note 58 (detailing the subsequent events after the case was heard by the Federal High Court).

97. See Press Release, Friends of the Earth, Shell Fails to Obey Gas Flaring Court Order, May 2, 2007, http://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007.html (last visited Nov. 16, 2010) (reporting on Shell's failure to comply with a Federal High Court of Nigeria order that it "submit a detailed plan of action on how gas flaring would be stopped by 30 April 2007") (on file with the Journal of Energy, Climate, and the Environment).

It could be inferred that the judge was transferred to halt the *Gbemre* case. This inference is also supported by the fact that after the judge was transferred and the case file was reported lost, Gbemre was arrested and detained by Nigerian soldiers.⁹⁸ The soldiers who arrested Gbemre are the same soldiers who guard the gas-flaring sites—members of the Nigerian Armed Forces.⁹⁹ Indeed, it appears that Gbemre's arrest bears no relationship to the problems of the judiciary; however, it is the same military that interfered with the *Kenule Saro-Wiwa* case. Moreover, in the *Gbemre* case, as in the *Kenule Saro-Wiwa* case,¹⁰⁰ Gbemre was arrested during a community interactive forum discussing the impact of gas flaring.¹⁰¹ As such, Gbemre's arrest suggests that the judge's transfer and the missing case file were not a mere coincidence. The government went beyond silencing the court by transferring the judge, to attempting to silence Gbemre. Gbemre's arrest was an action geared to instill fear in him. The *Gbemre* and *Kenule Saro-Wiwa* cases illustrate the military's modus operandi. In environmental-law cases, the military continues to influence the courts. Although, the military's actions in gas-flaring cases under the current government are not as brutal as their actions were under Sani Abacha's regime when the *Kenule Saro-Wiwa* case was decided, the military continues to punish citizens who oppose gas flaring. For example, in May 2009, Amnesty International reported that:

[T]he Nigerian military continues to carry out attacks by land, air and sea on the oil-rich Niger Delta. Reports indicate hundreds, possibly thousands, of Nigerian civilians may be dead. Entire villages have reportedly been burned to the ground . . . [recent occurrences such as this have] received little international attention. Aid groups and journalists have been blocked from

98. See Press Release, Environmental Rights Action/Friends of the Earth, Nigeria, ERA Flays Arrest of Activists, Journalists, Sept. 2, 2008, http://www.eraction.org/index.php?option=com_content&task=view&id=132&Itemid=1 (last visited January 12, 2011) [hereinafter Environmental Rights] (condemning the arrest and detention of Environmental Rights Action/Friends of the Earth, Nigeria personnel "by soldiers guarding gas flaring sites operated by Shell" while noting that the Nigerian military acts in collaboration or under the orders of the Nigerian government) (on file with the Journal of Energy, Climate, and the Environment).

99. See *id.* (observing Gbemre's activities after the November 2005 judgment).

100. See Shell: Guilty of Human Rights Abuses, <http://www.shellguilty.com/learn-more/human-rights-abuses/> (last visited Nov. 16, 2010) (laying out a timeline of Shell's alleged role in Human Rights Abuses in Nigeria) (on file with the Journal of Energy, Climate, and the Environment).

101. See Environmental Rights, *supra* note 98 (noting the hostility towards Gbemre after his case was heard by the Federal High Court).

entering the remote region, which is accessible only by boat.¹⁰²

The military acknowledged these recent attacks but claimed that the "attacks have only targeted militant camps as part of a peace-keeping effort."¹⁰³

The report mentioned above illustrates how the current democratic government has minimized the publicity of the ongoing harassment in the Niger Delta region. The current military attacks are similar to the Ogoniland events in the mid 1990s when the military raided Ogoniland, burned down houses, and killed Ogoni citizens under the pretext of "peace-keeping efforts."¹⁰⁴ Thus, despite the new democratic government, the government remains resistant to environmental-rights activism. Given the similarities between the Sani Abacha regime and the current regime, Nigeria's current legal system may not be accountable to environmental issues such as gas flaring, because "a legal strategy for holding government accountable . . . should invoke the power of the judiciary as an enforcement arm of government."¹⁰⁵ Thus, unless the Nigerian government and judiciary are delivered from the influence of oil corporations such as Shell, the goal to end gas flaring in the Niger Delta region may be mere fantasy.

Furthermore, for gas-flaring-related litigation to help stop gas flaring, there must be environmental laws or statutes to give guidance to the judiciary, and such legal principles must be moral. Ronald Dworkin argues that the rule of law "requires that the rules in the rule book capture and enforce moral rights."¹⁰⁶ It is imperative to note that what may be deemed moral right depends on the unique society. In other words, laws that govern

102. See Juan Gonzalez, *Massive Casualties Feared in Nigerian Military Attack on Niger Delta Villages*, DEMOCRACY NOW!, May 21, 2009, <http://www.democracynow.org/2009/5/21/nigeria> (last visited Jan. 14, 2011) (reporting on a Nigerian military offensive in the Niger Delta and the possible resultant death toll "in the hundreds, maybe thousands.") (on file with the Journal of Energy, Climate, and the Environment).

103. *Id.*

104. See Human Rights Watch, *The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria*, July 1, 1995, <http://www.unhcr.org/refworld/docid/3ae6a7d8c.html> (last visited Nov. 16, 2010) (detailing military oppression in Nigeria related to Shell's oil interests in the Niger Delta, and making recommendations on how to correct the problem to the government of Nigeria) (on file with the Journal of Energy, Climate, and the Environment).

105. See, e.g., Mary Christina Wood, *Atmospheric Trust Litigation*, in CLIMATE CHANGE READER 99–126 (W.H. Rodgers, Jr. & M. Robinson-Dorn eds. 2009) available at <http://www.law.uoregon.edu/faculty/mwood/docs/atmo.pdf> (proposing "an organizing legal framework based on the public trust doctrine to define government responsibility in climate crisis . . . impos[ing] a fundamental limitation on the power of government over natural resources," and assigning government "the fiduciary obligation to protect such resources for present and future generations").

106. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 12 (Oxford U. Press 1985).

must collectively reflect the conscience of the people. Laws that reflect the conscience of the people are laws that are easier to understand and may make implementation easier. Such morality in law implies that the government has a fiduciary duty to safeguard the people's fundamental rights by protecting them from environmental hazards.¹⁰⁷

Although Gbemre's claim was grounded in a constitutional principle, the court noted it was problematic that the laws governing gas flares were outdated.¹⁰⁸ The lack of an applicable gas-flaring law cripples judicial review because the judiciary lacks relevant guidance when reviewing gas-flaring matters. Consequently, the courts struck down the outdated gas-flaring laws and instructed the legislative branch to enact new laws.¹⁰⁹ In accordance with the judiciary's recommendation, a new bill was passed. However, the ambiguity of provisions resulted in a public outcry. The bill stipulates in part:

Any person who flares gas after the 31st day of December, 2010 contrary to Section 1(2) of this Act, commits an offence under this Act, and shall be liable to conviction and pay a penalty which shall be equal to the cost of the volume of gas flared at the international market at the date of flaring.¹¹⁰

Although the creation of the new bill is laudable, some legal professionals have criticized the bill, arguing that it is a sham that will only allow oil companies to continue their gas-flaring practices.¹¹¹ The major concern is that the language of the bill is too vague. It fails to stipulate what the cost of gas really means, thus resulting in difficulty in determining the amount of penalty to be stipulated. This vagueness may

107. See Wood, *supra* note 105, at 100 ("Atmospheric trust litigation is premised on the generic and inherent fiduciary obligation of all governments to protect a shared atmosphere that is vital to human welfare and survival.").

108. See *Gbemre*, No. FHC/B/CS/53/2005 at 30 (ordering the promulgation of a new gas flaring law).

109. See *id.* (finding that the gas flaring laws at the time of the Gbemre litigation were outdated).

110. See Bamidele Aturu, *Prohibition of Gas Flaring Bill 2009: From Lamentation to Action? A Presentation at the Forum on Gas Flaring 2*, available at http://www.saction.org/home/saction_image/ATURUS%20PAPER%20ON%20GAS%20FLARING.pdf (summarizing the provisions of the Prohibition of Gas Flaring Bill 2009 and examining said provisions "to see whether or not they would meet the concerns raised by communities and organizations as to the devastating and deleterious effects of mindless flaring of gas in Nigeria").

111. See Jide Ogundana, *Too Many Bumps on a Level-Playing Field*, <http://www.iflr1000.com/LegislationGuide/225/Too-many-bumps-on-a-level-playing-field.html> (last visited April 1, 2010) (reviewing the Nigerian Petroleum Industry Bill, and attempting "to ascertain what it portends for investment in Nigeria") (on file with the Journal of Energy, Climate, and the Environment).

lead to arbitrary penalty or no penalty. In other words, if such a bill is passed into law, it may lead to inconsistency in gas-flaring litigation, which may only fuel arbitrariness in the judicial system and deprive citizens of the ability to predict the consequences of certain political actions.¹¹² Thus, "the principal object of [the] government [in the gas flaring issue must be to give oil corporations clear and precise] . . . rules by which to shape [its] conduct."¹¹³ If the rules are not clear and precise, then oil companies will continually find weakness or exceptions in legislation, thereby allowing them to continue flaring gas under the color of law.

These criticisms by legal professionals are important because it is the legal professionals who are responsible for litigating issues pertaining to the bill in the court. Moreover, the legal professionals are more educated and knowledgeable than both the average citizen and the government about how the Nigerian court system works. Hence, these legal professionals' criticisms suggest that the new bill will not help stop gas flaring and the new 2012 proposed deadline is a mere illusion.

Given the government's numerous failed promises to stop gas flaring and the Nigerian court's inability to serve as a neutral arbitrator, the next section of this paper explores an alternative approach to combat the gas flaring issue in Nigeria's Niger Delta region.

V. Alternative Approach

This part suggests customary arbitration as an alternative to litigation. A customary-arbitration approach is significantly different from litigation because it minimizes the government's role in the litigation process. Because the government is highly influenced by Shell, a customary-arbitration process would consequently limit Shell's influence in impeding the stoppage of gas flaring. This proposed approach also minimizes gas-flaring litigation in the Nigerian courts, which are highly permeated by Shell's influence. Hence, the customary-arbitration approach would minimize Shell's influence in the gas-flaring decision-making processes. Part A defines community arbitration and discusses its historical roots. Part B discusses the application of the customary-arbitration model to gas-flaring matters. Part C highlights the prerequisite to adopting the customary-arbitration method in combating gas flaring. Part D discusses the benefits and drawbacks of the customary approach. This section concludes that customary arbitration may be a more effective tool in stopping gas flaring because community arbitrators are free from Shell's

112. See FULLER, *supra* note 88, at 214–17 (stating that rule of law requires that citizens to be able to predict political actions).

113. *Id.*

undue influence.

A. What Is Community Arbitration?

Customary arbitration has been practiced in Nigeria since colonial rule. It has been recognized under Nigerian law and has been historically used in land and domestic dispute matters.¹¹⁴ The Nigerian Supreme court has defined customary arbitration as "[a]ny system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but enforceable and binding within Nigeria as between both subject to its sway."¹¹⁵ The customary-arbitration model is grounded in the hierarchical culture embedded in Nigerian communities. As Dr. Taslim Olawale Elias observed: "it is well accepted that one of the many African customary modes of settling disputes is to refer the dispute to the head of the family or an elder or elders of the community."¹¹⁶ Thus, in a customary-arbitration approach, the judges are community members and the venue for the arbitration is the local community.¹¹⁷

The goal of customary arbitration is "reconciliation, peace and assuagement of feelings that might otherwise dislocate social cohesion and solidarity."¹¹⁸ Although Nigeria's customary arbitration is not codified, the participants in customary-arbitration processes have generally adhered to the arbitrator's resolution.¹¹⁹ Customary arbitration produces binding resolution because prior to the commencement of the proceedings the parties often agree to abide by the arbitrator's decision.¹²⁰ Indeed, the

114. See AMAZU A. ASOUZU, *INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT* 116–175 (2001) (focusing on whether arbitration and ADR methods can contribute to the aspirations and needs of African states and their nationals, while at the same time satisfying the expectations of international investors and traders for profit, security and stability, and ensuring fairness and justice to both parties).

115. Oluwafemi Oladipo, *Where Does Islamic Arbitration Fit into the Judiciary Recognized Ingredients of Customary Arbitration in the Nigeria Jurisprudence?*, in 8 *AFR. J. ON CONFLICT RESOL.* 2, 106 (2008).

116. TASILIM OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 80 (3d impression 1972).

117. *Id.* at 187–205 (describing the customary-arbitration approach).

118. ASOUZU, *supra* note 114, at 117.

119. *Id.* at 118 (indicating that no African country has a statutory provision for customary arbitration, except for the proposed Arbitration Act of Ghana 2000).

120. See S. Breckenridge Thomas, *The American Review of International Arbitration*, 17 *AM. REV. INT'L ARB.* 183, 184 (2006) (considering "the approach to international arbitration taken by four countries—China, Mexico, Nigeria, and Saudi Arabia . . . [and] provid[ing] the reader with a current status of the countries' economies, the historical development of alternate dispute resolution, and pertinent laws governing the treatment of international arbitration").

parties involved in the arbitration voluntarily participate in the process.¹²¹ For cases in which the parties do not submit to the decision of the arbitrators, the parties can appeal to the Nigerian courts.¹²² Building on this framework, the next part discusses the use of customary arbitration as a tool to stop gas flaring.

B. Applying Customary Arbitration to Gas Flaring.

Although customary arbitration is common throughout Africa, it has not been used as a tool to stop gas flaring. Community representatives should be allowed to serve as arbitrators in gas-flaring matters as well as promulgate gas-flaring laws. Customary arbitration is likely to be an effective solution to stopping gas flaring, given that the customary-arbitration method has been able "to administer justice where the formal state justice system is inadequate, or perceived as illegitimate."¹²³ The customary-arbitration model should be applied to the gas-flaring issue because "[t]he logic of customary law focuses on the well-being of the community, rather than the rights of the individual. In practice this means that customary legal decisions tend to be compromises rather than clear decisions for one party against another."¹²⁴ Consequently, the customary-arbitration approach will focus on the unique needs of the Niger Delta community, while also balancing Shell's alleged financial restraint in implementing a scheme to stop flaring gas. The unique needs of Niger Delta residents include the urgent need to stop gas flaring and revive the environment.¹²⁵

C. The Prerequisite to the Customary Arbitration Method

As stated in Part V(A), to ensure that the decision of the customary-

121. See Oladipo, *supra* note 115, at 115 ("Voluntary submission is the basis of arbitration and it is universal to the concept of arbitration under all legal systems.").

122. See Thomas, *supra* note 120, at 198 (noting that the parties in an arbitration have the "freedom to appeal" when a decision is unfavorable).

123. Brynna Connolly, *Non-State Systems and the State: Proposals for Recognition Typology*, 38 CONN. L. REV. 239, 242 (2005).

124. Elfin Henrysson & Sandra E Joireman, *On the Edge of Law: Women's Property Rights and Dispute Resolution in Kissi, Kenya*, 43 LAW & SOC'Y REV. 39, 41 (2009).

125. See Friends of the Earth Int'l, *Stop Gas Flaring in Nigeria: Call on Shell's New CEO to Comply with Nigerian Law and Stop Gas Flaring in the Niger Delta*, <http://www.foei.org/en/get-involved/take-action/stop-flaring> (last visited April 7, 2010) (discussing Friends of the Earth International's "cyberaction against the government of Nigeria urging them to put a stop to the illegal and harmful practice of gas flaring," and asking visitors to "sign our petition to urge the Shell CEO to [. . .] end gas flaring in Nigeria once and for all") (on file with the Journal of Energy, Climate, and the Environment).

arbitration panel is binding, the parties must voluntarily participate in the process. Thus, if a customary arbitration approach is adopted, Shell may not be willing to submit to the process, and even if Shell participates, Shell will probably appeal the customary arbitrators' decision to the Nigerian courts. To encourage Shell to participate in the process of community arbitration, the Niger Delta community could stipulate that Shell would only be permitted to drill crude oil if it is willing to work with the community to stop gas flaring. This approach sounds harsh; however, given the fact that over the past several years Shell has failed to adhere to any gas-flaring deadlines, such a harsh stipulation may be the only way to get Shell's compliance. It is arguable that such a harsh stipulation may not stop gas flaring, given that after Shell "was hit by a storm of protests by locals over its operations in [Ogoniland in 1993],"¹²⁶ Shell ceased oil production in the land and has not made any attempts to clean up the land or commence oil production in Ogoniland.¹²⁷ Shell's failure to clean up or negotiate with the Ogoni people on possible reentry into the land, is couched in the fact that Shell has numerous alternative oil drilling sites in the Niger Delta region.¹²⁸ Withstanding the fact that Shell was evicted from Ogoniland, Shell is still profiting from oil production in other Niger Delta communities. Ogoniland was only one of Shell's numerous options. Thus, for customary arbitration to help stop gas flaring, the Niger Delta communities must act in unison. Acting together, the Niger Delta communities could present Shell with the option of implementing an effective scheme to end gas flaring or face the possibility of eviction. Consequently, Shell would be faced with the option of losing its Nigerian oil-production revenue if evicted due to non-compliance or taking measures to stop gas flaring. Given the fact that Nigeria is one of the world's top oil producers and oil production is a very lucrative business,¹²⁹ it is likely that Shell will opt for the latter option. Thus, under customary-arbitration approach Shell would face penalties if it fails to stop flaring gas. Hence, the customary approach will be able to accomplish what the Nigerian

126. See Arien Stuyt & Spencer Swartz, *Nigeria to Pull Shell Ogoni License*, DOW JONES NEWSWIREs, Sept. 22, 2006, available at, http://www.rigzone.com/news/article.asp?a_id=36439 (reporting the Nigerian government's decision to "revoke Royal Dutch Shell PLC's . . . oil license in the country's Ogoniland").

127. See *id.* ("Shell stopped operating in Ogoniland in 1993 . . . [t]hey have no future plans for the license.").

128. See Comrade Sunny Ofehe, *Environmental Pollution in the Niger Delta*, Feb. 18, 2010, <http://www.nigerdeltacampaign.com/index.php/2010/02/environmental-pollution-in-the-niger-delta/> (last visited Jan. 14, 2011) (discussing environmental pollution in the Niger Delta and calling on oil companies to identify environmental problems in the Niger Delta, prepare a plan to address the problems, restore the ecosystem, and adopt "poverty alleviation measures that will help win over the support and confidence of the Niger Delta people") (on file with the Journal of Energy, Climate, and the Environment).

129. See OMEJE, *supra* note 3, at 31 (discussing the scale of Nigeria's oil production).

government and courts have failed to achieve—implementation of penalties for flaring gas.

D. The Customary-Arbitration Approach in Practice

A customary-arbitration approach would be faster at settling gas-flaring disputes than the Nigerian Courts. "[C]ustomary dispute resolution systems are praised for their accessibility, local knowledge, low cost, and speed when contrasted with national court systems and public law."¹³⁰ Customary arbitration is more efficient because community representatives are not inundated with as many cases as the Nigerian courts.¹³¹ Moreover, these community leaders are more experienced than the Nigerian courts in gas-flaring issues. Most community members have lived in gas-flaring communities all their lives and are more educated on the fatal effects of gas flaring.¹³² Consequently, community representatives are more likely to arbitrate gas-flaring matters efficiently, given that they have suffered the detrimental effects of continuous gas flaring for decades.

An advantage of the customary approach is that community representatives, primarily farmers, are more knowledgeable about the land and the importance of land preservation.¹³³ A citizen of the Akala-Olu community emphasized the need to access the philosophy that the "earth recycles itself."¹³⁴ Various members of the Niger Delta community, in a documentary interview, advocated the need to stop gas flaring.¹³⁵ Due to this knowledge, customary arbitrators may act in the best interest of the environment. In other words, community members have a greater interest in ensuring that gas flaring stops, in contrast to the Nigerian government's profit interests. As discussed earlier, members of the community suffer from the heat and toxic gases of the gas flare, as "most of the flares are

130. Henrysson & Joireman, *supra* note 124, at 41.

131. See Kayode Oladele, *The Nigerian Lawyer and Abuses of Court Processes*, Feb. 28, 2010, <http://www.nigeriavillagesquare.com/articles/guest-articles/the-nigerian-lawyer-and-abuse-of-court-process.html> (last visited Nov. 16, 2010) (detailing problems with the Nigerian justice system stemming from "the rise in the abuse of court process by lawyers and their clients even sometimes with the active connivance and participation of some unprincipled judges") (on file with the Journal of Energy, Climate, and the Environment).

132. See SARO-WIWA, *supra* note 21, at 78 (describing the effects of gas flaring in Ogoni land).

133. See Ben Amunwa, *Shell Must Clean Up its Act in Nigeria*, THE GUARDIAN, Dec. 4, 2009, available at <http://remembersarowiwa.com/guardian-comment-shell-must-clean-up-its-act-in-nigeria/> (revealing some of the ugly details of the Shell oil spills case in The Hague and placing Shell's appalling environmental record under scrutiny).

134. Poison Fire, *supra* note 12.

135. See *id.* (documenting the reactions of the Niger Delta residents to gas flaring). The sentiments expressed in the documentary are important because it allowed various Niger Delta citizens to express their opinion regarding gas flaring.

located in village land, some a few hundred meters from the houses."¹³⁶ However, government officials are rarely exposed to the immediate detrimental effects of gas flaring because they generally do not reside in the villages. Moreover, the government is not likely to act in the best interest of the environment, given that it operates a joint venture with Shell.¹³⁷ The government's favoritism toward Shell is illustrated in the testimony of an Oruma resident who testified that community member's objection to Shell's gas flaring has resulted in brutal treatment from the government.¹³⁸ Thus, the government resists actions that interfere with Shell's profitable business of flaring gas. Due to the joint venture, when Shell profits, the government profits, and vice-versa. Thus, the government does not have any real incentive to stop gas flaring, whereas members of the Niger Delta community have a vested interest in stopping gas flaring.

Moreover, the customary-arbitration approach is more flexible and would allow community leaders to modify the gas-flaring laws to fit the present needs of the community.¹³⁹ The customary-arbitration system is not as bureaucratic as the Nigerian government's legislative process. Given that community leaders work on a smaller scale, they would be faster at agreeing to gas-flaring legislation that will reflect community sentiments.

While the customary-arbitration approach has numerous advantages, it also presents some concerns. First, Niger Delta community members may be hostile to Shell during the arbitration process due to the environmental and human-rights injustices the Niger Delta citizens have suffered resulting from Shell's gas-flaring practices. To minimize this problem, international-organization representatives who have officers in the Niger Delta region, such as Friends of the Earth International, may be appointed to chaperone the customary arbitration process. Secondly, while Niger Delta residents have the general goal to stop gas flaring, the specific communities may stipulate differing obligations to Shell during the process. To counter this problem, the representatives from various Niger Delta communities would have to vote on standards to adopt and agree that such standards would be binding on their respective communities. Third, a customary-arbitration may increase the Nigerian government's malicious treatment, in the form of military attacks and killings, in the Niger Delta communities and this may hinder a community's gas-flaring adjudication process. However

136. *Id.*

137. See OMEJE, *supra* note 3, at 33 (observing that the Nigerian government and Shell operates a joint venture).

138. Poison Fire, *supra* note 12 (documenting the Niger Delta residents' testimonies of the harsh punishments they faced as a result of advocating for their rights to a pollution free environment).

139. See DENNIS CAMPBELL & SUSAN COTTER, *COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS* 132 (Kluwer Law Int'l 1996) (noting that a "distinctive feature of customary law is its characteristic flexibility").

international pressure and sanctions may help halt such intentional government actions.

In sum, while the customary-arbitration approach may not be perfect, it is a more efficient way of halting gas flaring because it minimizes the role of the government in the process and allows the Niger Delta residents—the people most affected by gas flaring—to participate in the process. As discussed earlier, Niger Delta residents suffer fatal health ailments and have lost their means of livelihood, fishing and farming, as a result of gas flaring. On the other hand, the government benefits financially from gas flaring and stopping gas flares would reduce the Nigerian government's revenue, given that it is cheaper to flare gas than re-inject it. Consequently, the Nigerian government does not necessarily have a vested interest in stopping gas flaring. Thus, because the Niger Delta residents have a higher stake in putting an end to gas flaring, they are more likely to develop and implement a scheme to stop gas flaring. Hence, the Nigerian government should be persuaded to permit the implementation of community promulgated gas-flaring laws. Allowing community members to serve as arbitrators may be an efficient and more effective way to stop gas flaring.

VI. Conclusion

In conclusion, the customary arbitration method is a possible solution to stopping gas flaring, a goal the Nigerian government has failed to achieve for more than 50 years. However, if the customary-arbitration approach is not adopted, then oil companies will continue flaring gas until the courts are impartial and the rule of law becomes meaningful. The courts must ensure that Shell adheres to court orders and complies with legislation. However, Nigeria's current political climate raises serious doubt about whether the government has the willpower to cease favoritism towards Shell. Moreover, oil companies will only stop flaring gas when the Nigerian government provides them with an incentive to do so. Such an incentive includes imposing a strict and high penalty for violation of gas-flaring laws. Thus, as long as the Nigerian government protects the oil companies, the oil companies will persist in gas flaring, and environmental degradation.