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'Black Soot' Problem in Rivers State, Nigeria**

by Dr Paul Samuel Tamuno & Dr Uzuazo Etemire

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Legal Inquiry into Mechanisms for Addressing the ‘Black Soot’ Problem in Rivers State, Nigeria

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ABSTRACT

Port Harcourt, a city in the Niger Delta area of Nigeria, has been plagued by the menace of soot in the last few years. This soot pollution, which has caught international attention has been attributed primarily to the widespread artisanal refining of stolen crude oil in illegal makeshift refineries and the burning of confiscated refineries with their chemical content by Nigerian military and para-military security agencies. This article examines in detail the causes of soot pollution in Port Harcourt, its impact on the environment, as well as the governments (inadequate) efforts to provide a solution to the menace. Importantly, the article addresses the primary question of what legal options are open to citizens and members of the public who wish to take action to address the soot pollution in order to protect their interests and enhancing the sustainable development of the city of Port Harcourt.

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INTRODUCTION

'Black soot', or impure carbon particles in the air, has been a major menace plaguing Port Harcourt, a city in the Niger Delta area of Nigeria, since the year 2016 and has caught international attention.¹ Two reports from scientific studies attribute this soot to the following activities: a) wide spread artisanal refining of stolen crude oil in make shift containers; b) open air burning of seized vessels and their content of stolen crude oil; c) open air burning of seized refined petroleum products from illegal refining processes in make shift containers; d) burning of used automobile tyres at various locations within Port Harcourt for the purpose of extracting and recycling copper wire and in local abattoir operations.²

Huge volumes of stolen crude oil are illegally refined on a daily basis in make shift refineries in the Niger Delta.³ Some environmental experts argue that this rudimentary process of refining crude oil illegally in makeshift refineries is done with complete disregard to all known principles of environmental protection resulting in the fact that the residue and waste of such refining processes are emptied untreated into surrounding water bodies further harming the sensitive Niger Delta environment.⁴ In addition, huge volumes of noxious fumes are released into the atmosphere

on an hourly basis.⁵ Myriads of these makeshift refineries exist in Port Harcourt and other towns within the Niger Delta and are wrecking untold havoc on the environment on a daily basis.⁶

The federal government's immediate response to this menace has been to establish the Joint Task Force (JTF) for patrolling the Niger Delta.⁷ The Joint Task Force's policy of burning seized crude oil and refined petroleum products from oil thieves has added to the problem of soot. Experts have noted that soot poses a huge challenge to the public health of the residents of Port Harcourt.⁸ Black soot constitutes an additional challenge in a city already plagued by various forms of pollution ranging from incessant oil spills to gas flaring.⁹

This article undertakes a legal inquiry into the mechanisms for addressing the problem of soot in Port Harcourt. This inquiry considers whether the legal and regulatory response of the government guarantees the sustainable development of Port Harcourt. The nexus between soot and sustainable development lies in the fact that a clean and sustainable environment guarantees the public health of the inhabitants of a city.¹⁰ Healthy citizens in turn guarantee the economic and environmental development of the city. An unhealthy environment is harmful to both the current inhabitants of the city and to generations yet unborn, as an unhealthy environment is a major contributing factor to child mortality in developing countries like Nigeria.¹¹ This inquiry is pertinent because an indigenous American proverb states that: 'Treat the earth well: it was not given to you by your parents, it was loaned to you by your children. We do not inherit the earth

¹ Hamid Omidvarborna, Ashok Kumar and Dong-Shik Kim, 'Recent Studies on Soot Modelling for Diesel Combustion' (2015) 48 *Renewable and Sustainable Energy Reviews* 635; Kaniye S A Ebeku, *Oil and the Niger Delta People in International Law: Resource Rights, Environmental and Equity Issues* (Oil, Gas and Energy Law Intelligence Publication 2005) 25; Chris Giles, 'Port Harcourt: Why is this Nigerian City Covered in a Strange Black Soot?' *CNN* (26 April 2018) <<https://edition.cnn.com/2018/04/26/africa/nigeria-portharcourt-soot/index.html>>

² Rivers State Ministry of Environment, 'Report on the Particulate Matter (Soot): Analysis Study on Some Parts of Port Harcourt' (Government of Rivers State of Nigeria Publication 2017) 16; Shell Petroleum Development Company of Nigeria, 'Soot Report: Ambient Air Characterization of Selected Areas in Port Harcourt' (Shell Petroleum Development Company of Nigeria Publication 2017) 1

³ Ben Naanen and Patrick Tolani, 'Private Gain Public Disaster: Social Context of Illegal Oil Bunkering and Artisanal Refining in the Niger Delta' (Niger Delta Environment and Relief Foundation Publication 2014) 10

⁴ A Asimiea and G Omokhua, 'Environmental Impact of Illegal Refineries on the Vegetation of the Niger Delta, Nigeria' (2013) 13(2) *Journal of Agriculture and Social Research* 121,122

⁵ Maduawuchi Elem, 'Black Soot and Public Health of Rumuolumeni Residents in Port Harcourt, Nigeria' (2021) 8 *Direct Research Journal of Social Science and Educational Studies* 9

⁶ Asimiea and Omokhua (n 4) 125

⁷ The Joint Task Force is a security unit comprising of several security agencies that patrol the Niger Delta

⁸ Elem (n 5) 9

⁹ Paul Samuel Tamuno, 'Negligence versus Strict Liability: The Fight against Environmental Degradation in the Niger Delta' (2011) 6 *Oil, Gas & Energy Law* 1

¹⁰ Elem (n 5) 9

¹¹ *ibid* 9

from our ancestors; we borrow it from our children'.¹² This proverb highlights that the sacred duty of the present generation to preserve the environment requires the sustainable development of the environment. The report of the World Commission on Environment and Development defined sustainable development as 'development that meets the need of the present without compromising the ability of future generations to meet their own needs'.¹³ At the centre of this principle is the idea that 'although future generations might gain from economic progress derived from the exploitation of resources in the environment, those gains might be more than offset by environmental deterioration'.¹⁴

This article therefore examines the causes of soot pollution in Port Harcourt, its impact on the environment, as well as the governments (inadequate) efforts to provide a solution to the menace. Considering this discussion, the article moves on address the primary question of what legal options are open to citizens and members of the public who wish to take action to address the soot pollution to protect their interests and enhance the sustainable development of the city of Port Harcourt.

SOOT IN PORT HARCOURT, RIVERS STATE

To enhance the understanding of this article, it is necessary as a preliminary analysis to examine the origin and impact of soot. It is also necessary to examine the current resolution and amelioration efforts. These preliminary discourses pave the way for addressing the primary question of this article.

¹² 'Native American Proverbs and Wisdom' (*Legends of America*, undated) <<http://www.legendsofamerica.com/na-proverbs.html>>

¹³ World Commission on Environment and Development, *Our Common Future* (OUP 1987)

¹⁴ Sharon Beder, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics' (2000) 4 *New Zealand Journal of Environmental Law* 227

The Causes of Soot

As noted in the introduction above, the primary source of soot is the widespread artisanal refining of stolen crude oil by oil thieves and the open air burning of recovered stolen crude and products from artisanal refining. Huge volumes of stolen crude oil are illegally refined daily in makeshift refineries in the Niger Delta that violate all the known principles of the conservation of the environment.¹⁵ Huge volumes of crude oil are 'cooked' in high temperature releasing thick fog of carbon into the atmosphere.¹⁶ The background to these acts of oil theft forms part of the chequered history of the Nigerian Petroleum Industry.¹⁷ There is uncertainty as to how illegal oil refining and illegal oil bunkering started. There are some arguments that illegal petroleum refining and oil bunkering evolved out of the crisis in the Niger Delta region. The Niger Delta communities have, since the early 1990s, complained that the Multinational Oil Companies operating in the region *inter alia* 'encroach upon their lands, displace them from their communities with little or no compensation, distort their cultural lifestyle and pollute their farmlands'.¹⁸

However, this dissatisfaction in the region escalated in the late 1990s. In 1999 Niger Delta youths of Ijaw ethnicity¹⁹ converged in Kaiama²⁰ and deliberated on 'the continuous survival of their people within the Nigerian state'.²¹ This culminated in the adoption a resolution known as the *Kaiama* Declaration and the establishment of the Ijaw Youth Congress to violently resist oil explor-

¹⁵ Naanen and Tolani (n 3) 10

¹⁶ *ibid* 10

¹⁷ Section 44(3) of the 1999 Constitution of Nigeria vests ownership of all crude oil in Nigeria in the Federal Government of Nigeria. Kunle Amuwo, 'Oil and Gas: National Sovereignty, Foreign Interests and Local Bunkering in the Gulf of Guinea' (2013) 1(2) *Covenant University Journal of Politics and International Affairs* 27

¹⁸ Joy Ejegi, 'Indigenous People's Right Over Natural Resources - How has it been Accommodated by Sovereign States?' (2004) 5 *Oil, Gas & Energy Law* 4

¹⁹ The Ijaws are one of the ethnic people found in the Niger Delta region of Nigeria

²⁰ A town in the Niger Delta

²¹ Amina Laraba Wali, *Oil Wealth and Local Poverty: Exploitation and Neglect in the Niger Delta* (ProQuest 2008) 36

ation in the Niger Delta.²² In 2005, following the arrest of the leader of the Ijaw Youth Congress, the Movement for the Emancipation of the Niger Delta was established by the Ijaw.²³ This was a 'fully armed group of masked insurgents' that focused on attacking oil installations and kidnapping oil workers.²⁴ The Nigerian Government initially attempted to violently suppress this group.²⁵ This proved unsuccessful and only resulted in the establishment of other insurgent groups.²⁶ The Government subsequently responded by introducing an amnesty programme in 2009 that encouraged members of these insurgent groups to surrender their arms in exchange for a monthly allowance from the government.²⁷ The problem with the amnesty programme was that it covered only a small percentage of the youths who had taken up arms and joined the insurgent groups.²⁸ According to Asimiea, illegal petroleum refining commenced when youths not covered by the amnesty programme resorted to boiling crude oil in metal drums to distil petroleum products and selling same to the public as a means of addressing their poverty and unemployment.²⁹

Crude oil theft is primarily done by these unemployed youths who, in contrast to the insurgent groups, organised themselves as loosely formed gangs of 5 to 50 persons. These gangs used makeshift refineries to refine the crude oil into various petroleum products the most common of which was diesel followed by kerosene and then petrol.³⁰ These products are sold primarily in Ni-

ger Delta cities like Port Harcourt as these gangs lack the logistics to transport these products beyond their immediate environment.³¹ Unfortunately, this process of distilling and selling crude oil illegally has taken a huge toll on the air quality in Port Harcourt. The government's response to the menace of oil theft and artisanal refining has been to establish the JTF. The approach of the JTF has only worsened matters from an environmental perspective. For instance in the year 2015, the Nigerian Navy announced that in collaboration with the JTF, it arrested and destroyed a total of 30 ships involved in oil theft.³² Again, the Nigerian Security and Civil Defence Corps in the same year announced that in collaboration with the JTF, it destroyed (by burning) a total of 106 illegal refineries and their petroleum products.³³ JTF announced that it burnt 466 illegal refineries in 2018.³⁴ Similarly in 2019, the JTF announced that it destroyed (by burning) a total of 988 illegal refineries along with their stolen crude oil and refined products.³⁵

It must be emphasised that when the JTF announces the destruction (by burning) of illegal refineries, this announcement does not include the accessories of illegal refining that are destroyed. According to the Vanguard Newspaper,³⁶ the statement that the JTF destroyed 110 illegal refineries does not give a full picture of the pollution because it excludes 3,872 surface tanks used by operators of artisanal refineries, 191

²² *ibid*

²³ For discussion on the insurgency in the Niger Delta, Michael Watts, 'The Rule of Oil: Petro-Politics and the Anatomy of an Insurgency' (2009) 11 (2) *Journal of African Development* 27

²⁴ *ibid*

²⁵ *ibid*

²⁶ These insurgent groups include *inter alia*: the Niger Delta volunteer force, the Niger Delta Avengers Group

²⁷ Chibuzor Chile Nwobueze and Preye Kuro Inokoba, 'Mortgaging Tomorrow's Security through Today's Graveyard Peace: A Critical Discourse of the Amnesty Program in the Niger Delta, Nigeria' (2017) 5 (2) *Review of History and Political Science Journal* 1

²⁸ Asimiea and Omokhua (n 4) 125

²⁹ *ibid*

³⁰ *ibid* 24

³¹ *ibid*

³² 'Navy Arrests 30 Ships in 9 Months' *The Nation* (19 September 2015) <<https://thenationonlineng.net/navy-arrests-30-ships-in-nine-months/>>; This has always been the approach of the JTF. As far back as 2009, the JTF reported that it destroyed (by burning) about 600 illegal refineries with their petroleum products. Segun Owen, 'Nigeria Destroys 600 Illegal Oil Refineries' *Reuters* (16 December 2009) <<https://www.reuters.com/article/nigeria-oil-thieves-idUSLDE5BE28K20091215>>

³³ 'NSCDC Arrests 40 Suspected Oil Thieves in Bayelsa' *The Nation* (31 December 2015) <<https://thenationonlineng.net/nscdc-arrests-40-suspected-oil-thieves-in-bayelsa/>>

³⁴ Samuel Nkemakolem, 'Military Destroys 436 Illegal Refineries, Arrests 266 Suspects' *Punch* (7 December 2018) <<https://punchng.com/military-destroys-436-illegal-refineries-arrests-266-suspects/>>

³⁵ Julius Osahon, 'JTF Arrest 555 Suspects, Destroys 988 Illegal Refineries in 6 Months' *The Guardian* (6 October 2019) <<https://guardian.ng/news/jtf-arrests-555-suspects-destroys-988-illegal-refineries-in-6-months/>>

³⁶ The Nigerian Vanguard (July 11th 2014) cited in Elem (n 5) 10

barges, 13,129 drums 785 wooden Cargo boats, 13,343 Jerry cans belonging to illegal oil business operation.³⁷ The multiplied effect of this destruction of illegal refineries and these accessories over the years takes a huge toll on the air quality of not just the city of Port Harcourt, but of the Niger Delta as a whole. But this is not the only tragedy. Given the poverty of the region and the fact that there are few prosecutions of persons arrested for oil theft and illegal refining, the criminals who engage in illegal refining simply reconstruct new equipment for illegal refining.³⁸ This was aptly captured by a report finding of great interest 'that as soon as the disruptions are made, the operators re-erect new ones. So, the scenario is that of erect, destroy and re-erect. As this circle is maintained, so black smoke is emitted'.³⁹ In spite of growing environmental concerns about this method of burning illegal refineries and oil vessels, the JTF and other military and paramilitary organisations continue to apply this approach.⁴⁰

There is also the practice of the burning of automobile tyres for the purpose of recycling copper wire and a source of fuel in abattoirs. This practice which is common in the slums of Port Harcourt is very harmful to the quality of air.⁴¹

Impact

African states like Nigeria have in the last 2 decades prided themselves as being the lowest global contributors to climate change.⁴² African states have in the past used the lack of industrialisation as the basis for the claims that African cities are the least polluted in the world.⁴³ However, times have changed. In the year 2020, Onitsha city of Nigeria was declared the city with the highest level of air pollution in the world by the World Health Organisation.⁴⁴

For purposes of this article, it suffices to note that studies carried out in the city of Port Harcourt have established a nexus between air pollution, including soot, with morbidities like respiratory diseases, traumatic skin, outgrowth and respiratory health condition, child deformities, stillbirth, miscarriage.⁴⁵ Similarly, studies have shown that adverse health problems like eye and skin disorders are more likely in people who are frequently exposed to polluted air.⁴⁶

Soot adversely affects the sustainable development of the city of Port Harcourt. This is because a clean and sustainable environment helps guarantee the public health of the inhabitants of a city.⁴⁷ An unhealthy environment is harmful to both the current inhabitants of the city and to generations yet unborn. This is because studies

³⁷ *ibid*

³⁸ The Head of the JTF has complained that official government bureaucracies, the slow pace of the Nigerian Court process, and administrative bottle necks inhibit the prosecution of persons arrested for oil theft and illegal oil refining. See 'Full Text of the Media Briefing on the Operations of Joint Task Force (Operation Pulo Shield) in Azuzuama and Anti Oil Theft Operational Activities for the First Quarter of 2013' cited in Taiwo Adebola Ogunleye, 'Establishing Oil Theft and other Related Crimes Tribunal for Speedy Trial: Legal Issues and Challenges' (2016) 21 (4) *Journal of Humanities and Social Sciences* 20, 24

³⁹ Mkpoikana Udoma, 'Nigeria's JTF Destroys 1,437 Illegal Refineries in 15 Months' *Sweet Crude Reports* (27 May 2018) <<https://sweetcrudereports.com/nigerias-jtf-destroys-1437-illegal-refineries-in-15-months/>>

⁴⁰ eg Ugochukwu Alaribe-Umuahia, 'Soldiers Destroy Illegal Refinery in Rivers' *Vanguard* (10 April 2021) <<https://www.vanguardngr.com/2021/04/soldiers-destroy-illegal-refinery-in-rivers/>>

⁴¹ L A Jimoda and others, 'Assessment of Environmental Impact of Open Burning of Scrap Tyres on Ambient Air Quality' (2017) 15(21) *International Journal of Environmental Science and Technology* 1

⁴² African states contribute only 3.8 percent of the global Green-House Gas Emissions. Suleiman Iguda Ladan, 'An Assessment of the Effects of Climate Change on the Continent of Africa' in M A Iliya and others (eds), *Climate Change and Sustainable Development* (Funsho Press 2012) 19

⁴³ *ibid*

⁴⁴ This is attributed to the wide spread use of mobile electricity generators. Hadassah Egbedi, 'Welcome to Onitsha: the City with the World's Worst Air' *The Guardian* (02 June 2016) <<https://www.theguardian.com/cities/2017/feb/13/polluted-onitsha-nigeria-perpetual-dust-city-world-worst-air#:~:text=Onitsha%27s%20mean%20annual%20concentration%20was,for%20PM10s%20of%2020%CE%BCg%2Fm3>>

⁴⁵ Vincent Ezikornwor Weli and Obisesan Adekunle, 'Air Quality in the Vicinity of a Landfill Site in Rumuolumeni, Port Harcourt, Nigeria' (2014) 4 (10) *Journal of Environment and Earth Science* 29

⁴⁶ Okhumode H Yakubu, 'Particle (Soot) Pollution in Port Harcourt Rivers State, Nigeria- Double Air Pollution Burden? Understanding and Tackling Potential Environmental Public Health Impacts' (2017) 5(2) *Environments* 1

⁴⁷ Elem (n 5) 9

have established that air pollutants including soot are a major contributing factor to child mortality in developing countries like Nigeria.⁴⁸ This impacts the sustainable development of the city as the category of those infected include men, women and children, with children being the most vulnerable.⁴⁹

Current Amelioration Efforts

The Nigerian government response to soot both at the Federal and State level have not been productive.

At the Federal level, the Nigerian House of Representatives set up a committee on 2 November 2015 to investigate the JTF activities surrounding the burning and destruction of equipment seized from illegal refineries along with their content.⁵⁰ The purpose of the investigation was to examine the environmental and health implications of the burning of illegal refineries equipment.⁵¹ The report of this committee was never made public by the House of Representatives. Nevertheless, on 15 March 2017, the Nigerian House of Representatives cautioned the JTF against the burning of the equipment used for illegal refineries along with their content.⁵² In spite of this cautioning, the burning of equipment of illegal refining along with their content has continued unabated.

At the state level, the Rivers State government response was to set up a Scientific Work Group in 2017 to investigate the source of the soot and to make recommendations on how to tackle the soot. This Scientific Work Group submitted its re-

port that same year.⁵³ In the year 2019, the Rivers State Government set up a Technical Committee to Implement the recommendations of the Scientific Work Group.⁵⁴ This Committee was chaired by the state former commissioner for environment Prof. Roseline Konya and is comprised of the following members: one representative from three International Oil Companies (Shell Petroleum Development Company, Agip and Total), one representative each from Petrochemical and NLNG, the Attorney General of Rivers State, an expert in health (Dr Dasetima Altraide), academics such as Professor Precious Edeh and Dr Golden Ohana and a representative of civil society.⁵⁵

This committee submitted its report and recommendations to the Rivers State Government in the year 2020.⁵⁶ This report was again never put in public domain. Nevertheless, the Nigerian Guardian Newspaper was able to gain access to the report. The report noted that since 2016, 22,077 residents of the city of Port Harcourt have been hospitalised with serious cases of respiratory infections.⁵⁷ The report notes that men, women and children are included in that number but that children are the most vulnerable group.⁵⁸ The report recommended that the government should grant licenses to private modular refineries to stem the trend of artisanal refining of crude oil.⁵⁹ This report was sent to the Federal Minister for Environment, who assured the Committee that the Federal Government in Nigeria was seriously considering granting of license to private citizens to operate modular private re-

⁴⁸ *ibid*

⁴⁹ *ibid*

⁵⁰ Emman Ovuakporie and Johnbosco Agbakwuru, 'Reps Probe JTF over Burning of Illegal Refineries' *Vanguard* (4 November 2015) <<https://www.vanguardngr.com/2015/11/reps-probe-jtf-over-burning-of-illegal-refineries/>>

⁵¹ *ibid*

⁵² 'Reps Caution Military Against Destroying Illegal Refineries' *Premium Times* (15 March 2017) <<https://www.premiumtimesng.com/news/top-news/226215-reps-caution-military-destroying-illegal-refineries.html>>

⁵³ 'Report on the Particulate Matter (Soot): Analysis Study on Some Part of Port Harcourt' (Rivers State Ministry of Environment Government of Rivers State of Nigeria Publication 2017)

⁵⁴ Chukwudi Akasike, 'Rivers Govt Sets up Committee to Tackle Soot' *Punch* (18 May 2019) <<https://punching.com/rivers-govt-sets-up-committee-to-tackle-soot/>>

⁵⁵ *ibid*

⁵⁶ A Godwin, 'Again, Soot Spike in Rivers Raises Fresh Health Concerns' *The Guardian* (14 January 2021) <<https://mguardian.ng/features/again-soot-spike-in-rivers-raises-fresh-health-concerns/amp/>>

⁵⁷ *ibid*

⁵⁸ *ibid*

⁵⁹ *ibid*

fineries.⁶⁰ However, the recommendations in the report are yet to be implemented.

There have also been responses from Non-Governmental Organisations (NGOs). An outstanding NGO in this regard is the Extra Step Initiative (ESI). In 2020, ESI sent a signed 250 page petition against the JTF to the United Nations.⁶¹ Prior to this, the ESI in 2019 organised a peaceful protest to the government of Rivers State as part of the 'end black soot campaign'.⁶² In addition, the ESI in 2019, filed a law suit against the Federal Government and the JTF at the Federal High Court in Port Harcourt.⁶³ In the action, the ESI prayed the court to declare the soot as a threat to their right to life guaranteed under section 33 of the Constitution⁶⁴ and article 4 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act.⁶⁵ The law suit is still pending in the court.

Overall, efforts to address the soot problem by the federal and Rivers State governments have been relatively negligible and tokenistic. One would expect that, considering the widespread nature of the soot pollution and its dire implications for the environment, as well as human health and wellbeing, the relevant agencies of government would since have taken drastic and effective steps to solve the problem. Considering this failure by government to effectively tackle the soot problem, it is now left to the public to

take relevant legal steps to protect their environment, health, and economic wellbeing, as well as the welfare of their unborn children. Some of the important legal mechanisms available to the public for achieving this goal are hereunder considered.

LEGAL MECHANISMS FOR RESOLUTION AND REDRESS

Concerned members of the public who wish to take legal action to address the soot problem in Port Harcourt, have available to them several approaches with varying strengths and potentials. They can bring an action to hold those responsible for the soot accountable for their actions, and this will include (1) those setting up and operating illegal makeshift refineries, (2) the security agencies whose officials are disposing of these illegal refineries and their chemical content in a most environmentally harmful manner, and (3) more generally, the Nigerian government that has a duty to enforce law and order in the society as well as protect the life and properties of Nigerians. The following major legal approaches will be discussed below, namely: the common law approach; the environmental legislative approach; and the human rights approach.

Common Law Approach

Traditional public law – as it concerns provisions in environmental law statutes – is not the only legal means for protecting the environment and related human interests. Being a common law country, private law – as characterised by common law torts such as negligence, nuisance, trespass and the rule in *Rylands v Fletcher*⁶⁶ – have also been traditionally applied to redress and provide remedy for environmental harms in Nigeria, like that being caused by soot in Port Harcourt, arising from the polluting activities of individual and industries.

⁶⁰ *ibid*; NAN, 'FG Promoting Modular Refineries, New Vision for Niger Delta-Osinbajo' *The Guardian* (16 March 2021) <<https://m.guardian.ng/news/fg-promoting-modular-refineries-new-vision-for-niger-delta-osinbajo/>>

⁶¹ 'Rivers Residents Sign 250 - Paged Petition to UN Over Soot - Leadership Newspaper' *The Nigerian Leadership* (13 September 2018) <<https://www.newsheadlines.com.ng/leadership-newspapers/2018/09/13/rivers-residents-sign-250-paged-petition-to-un-over-soot-leadership-newspaper/>>

⁶² Godwin (n 56); protests were also organised by other civil society groups such as Stakeholder Democracy Network. Cletus Ukpong, 'Civil Societies Protest Against Air Pollution in Rivers' *Premium Times* (19 April 2018) <<https://www.premiumtimesng.com/regional/south-south-regional/265513-civil-societies-protest-against-air-pollution-in-rivers.html>>

⁶³ Kelvin Ebiri, 'Group Sues FG, JTF over Black Soot in Port Harcourt' *The Guardian* (Nigeria, 14 August 2019) <<https://www.pressreader.com/nigeria/the-guardian-nigeria/20190814/281543702562555>>

⁶⁴ Constitution of the Federal Republic of Nigeria 1999

⁶⁵ Cap A9 Laws of the Federation of Nigeria 2004

⁶⁶ (1866) L.R. 1 Ex 266

On the one hand, public law/statutory frameworks for environmental protection are majorly enforced by public officials (and by public-spirited individuals and organisations through public interest litigation).⁶⁷ On the other hand, private law/common law torts mechanisms provide a platform mainly for private individuals to participate in ensuring environmental justice and protection, especially (but not only) in situations like that of the present soot problem where government officials have failed to properly enforce relevant environmental statutes against polluters. Generally, common law torts mechanisms offer a variety of remedies that could help ameliorate and possibly put an end to the soot and its challenges. These remedies include: damages to be paid to the affected plaintiffs – unlike fines which under statutory provision go to the government; injunction restraining acts causing environmental harm, and injunction mandating environmental remediation. The two common law torts mechanisms that are most relevant in addressing the soot and its challenges in Port Harcourt are – negligence and nuisance.

Members of the public in Port Harcourt whose persons or properties have been harmed by the soot can resort to an action in negligence to hold the polluters accountable, and possibly secure damages and an injunction against them.⁶⁸ The tort of negligence arises from (1) the breach (2) of legal duty to take care (3) resulting in damage to the plaintiff (4) which, though not intended by the defendant, was nevertheless foreseeable.⁶⁹ To be successful in a suit in negligence, these four elements must be successfully proved by the injured party. In this respect, a *duty of care* is owed whenever it is foreseeable that if the polluter/defendant does not exercise due care (through acts and omissions), the injured party/plaintiff will be harmed. To prove *breach of the duty*, the court will consider whether the defendant acted as a *reasonable man* would have acted in the circumstances.⁷⁰ For a party to prove breach of

duty, it might also be relevant to show that the polluter/defendant failed to establish good industry practice coupled with non-observance of industry standards and guidelines. To prove that *the breach caused the damage*, the injured party/plaintiff must clearly establish the nexus between the action/inaction of the polluter/defendant and the damage suffered, usually through scientific evidence.

In some environmental harm cases, the injured parties have secured remedy through a suit in negligence. For instance, in *Chief Simon Onajoke v Seismograph Services Ltd*, the plaintiff brought an action in negligence claiming that the defendant company damaged his building during their blasting operations in the course of oil exploration.⁷¹ He successfully proved all the elements of negligence and was awarded damages by the court. The court held that ‘the defendant owed a duty to anyone whose house was likely to be damaged through the said operation, to take steps to avoid causing such damage, for example, by moving further away and to an area where explosion was not likely to cause such damage’.⁷²

What is more – an action in the tort of nuisance also offers those who have suffered soot-related harm, the possibility of accessing environmental justice and remedy; and perpetrator of nuisance may be liable whether or not the conduct in issue was intentional.⁷³ Nuisance may be private or public in nature.⁷⁴ But it is the latter that is most relevant as a mechanism for possibly addressing the soot challenge as it more adequately captures the widespread public nature of the problem. Public nuisance is the unreasonable and material interference with the comfort or convenience of the public or a right common to the general public; and this would include the right to

⁶⁷ See subsection 3.2 of this paper for a more detailed discussion on ‘public interest litigation’

⁶⁸ Tamuno (n 9)

⁶⁹ *Donoghue v Stevenson* (1932) A.C. 562

⁷⁰ To be sure, the standard of the ‘reasonable’ man is not that of a man of exceptional skill or mental agility, just as it is not that of a man of subnormal skill or mentality

⁷¹ (1971) Suit No SHC/28/67 (Sapele High Court)

⁷² *ibid* 12

⁷³ N Iroaganachi, ‘Environmental Nuisance Laws in Nigeria: Making them Effective for Sustainable Development’ (2012) 5 (1) ATBU Journal of Environmental Technology 117

⁷⁴ According to Eso JSC in the case of *AE Ipadeola & Co v Oshowale & Another* (1987) 5 SC 376, private nuisance is ‘An act or omission which is an interference with, disturbance of, or annoyance to a person in the exercise or enjoyment of... his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land’

clean and unpolluted air in public places, which is presently being compromised by the noxious soot in Port Harcourt. Apart from public officials, a representative cross-section of the affected public can band together and take a class action against the polluter.⁷⁵ In addition, an individual can successfully sue a polluter in cases of environmental public nuisance.⁷⁶

Examples abound of cases of environmental public nuisance (including atmospheric pollution which is what the noxious soot pollution is) where the injured parties have successfully enforced their rights and secured remedy. In the case of *Adediran v Interland Transport*, the plaintiff sued for and on behalf of the residents of a residential estate, complaining about the excessive noise suffered by them because of the defendant's haulage activities within the estate.⁷⁷ The court found for the plaintiffs, despite the defendant's argument, that the activities complained against were a public nuisance and awarded substantial damages against the defendant.

While common law mechanisms as discussed above provide platforms for possibly holding those responsible for the soot in Port Harcourt accountable for their actions, they harbour certain limitations that could affect their effectiveness. This article shall highlight some limitations that are relevant to soot pollution emanating from illegal and inappropriate activities. First, statutes of limitation apply to actions in torts. While such limitation periods serve the beneficial purpose of helping defendants avoid stale claims and the indefinite threat of a claim, to a large extent, given how this mechanism is usually enshrined in Nigerian laws, it often works hardship on injured parties in environmental cases.⁷⁸ For instance, Section 16 of the Rivers State Limitation Law provides for actions under torts, a limit-

ation period of five years from when the cause of action accrued.⁷⁹

The problem with the above limitation periods – where the cause of action accrues from the date of the relevant action or omission of the defendant, and not the date the injured party became aware of the effects of the defendant's action⁸⁰ – is that it fails to take cognisance of the fact that from the time a pollutant, like the present soot, is released into the environment and when its negative impact on the victim becomes apparent may take more than the stipulated limitation period.⁸¹ This is apart from the fact that gathering proper scientific evidence may sometimes take years of study, and the difficulties with access to court in Nigeria – such as lack of fund or ignorance of legal right – may further delay the institution of an action.⁸² Even judges seem to be aware of this challenge. In *Horsfall v Shell-BP*, the judge noted that ‘the course of action accrues at the time of the negligence because it is then that the damage is caused, even though its consequences may not be apparent until later’.⁸³ A fairer approach, worth emulating in Nigeria, has been adopted by jurisdictions which now provide that time runs from the date of victim's knowledge, or from the earliest date the claimant knew that the damages was of such a nature as to justify an action, that it was caused by alleged negligence of the defendant, and the latter's identity.⁸⁴

Second, it is important to note that as it relates to addressing environmental harm, common law has developed in such a manner that its rules regarding liability are not *directly* concerned with

⁷⁵ *Attorney General v PYA Quarries* (1957) 2 QB 169 CA, per Lord Denning

⁷⁶ *Adediran v Interland Transport Limited* (1991) 9 NWLR (pt 214) 155

⁷⁷ (1991) 9 NWLR (pt 214) 155

⁷⁸ For an example of the restrictive position that Nigerian Courts regarding limitation of actions, *Gulf Oil Company (Nig) Ltd v Oluba* (2003) FWLR (pt. 145) 712

⁷⁹ Cap 80 Laws of Rivers State of Nigeria, 1999

⁸⁰ As held by the Nigerian Supreme Court in *Eboigbe v NNPC* (1994) 10 KLR (Pt 22) 68, 75

⁸¹ Olanrewaju Fagbohun, *Mournful Remedies, Endless Conflicts and Inconsistencies in Nigeria's Quest for Environmental Governance: Rethinking the Legal Possibilities for Sustainability* (Nigerian Institute of Advanced Legal Studies 2012) 65 - 66

⁸² Jędrzej George Frynas, 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria' (1999) 43 (2) *Journal of African Law* 121, 129-130

⁸³ (1974) 2 RSLR 126, 131

⁸⁴ ss 11 (4) and 14A and 14B of the Limitation Act, 1980 (UK). See also, *ibid*

environmental or even social protection, but with injuries to persons and properties as the cases above reveal. Consequently, it is only where personal or property injuries are caused by the noxious soot that common law liability rules become relevant, in an incidental manner, to environmental protection and remediation as a way of preventing further human injury. In other words, a major limitation of common law liability rules is that if it cannot be shown that environmental pollution through soot has directly caused injury to a person or his/her properties, those rules will be impotent in solely ensuring environmental protection and remediation. Hence, common law is said to be mostly reactive and not proactive in nature, especially with respect to environmental harm.⁸⁵

Lastly, compared to other legal approaches for accessing environmental justice, establishing a tort in common law is arguably more difficult as its pathway to justice is littered with several hurdles, including unduly restrictive ones. For instance, a tort claimant in an environmental case involving atmospheric pollution by soot and its damaging effects, would have to prove, by adequate scientific evidence, the source of the pollution and the causal link between the pollution and the specific injury suffered. Apart from the fact that science is not always so certain and precise as to whether or the extent to which the injury where the result of the defendant's activities or other factors, hiring scientists to collect and provide such evidence is as expensive as it is time consuming.⁸⁶ Thus, for lack of sufficient scientific evidence, many Nigerian litigants have had their environmental pollution cases thrown out by the courts.⁸⁷ Indeed, litigants in an action in negligence can rely on the doctrine of *res ipsa loquitur* (i.e. 'the fact speaks for itself') to surmount this evidentiary burden by shifting

same to the defendant to prove that it was not negligent.⁸⁸

Environmental Legislative Approach

Beyond the private law mechanism of tort law, environmental legislation is the traditional public law approach for regulating human interaction with their environment and addressing any environmental harm emanating from this relationship. Broadly, apart from the fact that they are principally enforced by public authorities (and individuals, to an extent), the major qualities of environmental legislation as a public law tool for environmental regulation includes, its prescription of acceptable environmental standards; criminalisation of human actions and omissions that are incompatible with the maintenance of a healthy environment; stipulation for sanctions in the form of fines and terms of imprisonment, mainly to deter and punish violations; and provisions for pollution abatement and (sometimes) environmental restoration. Indeed, there are several federal and state environmental legislation that could be exploited to address the soot pollution in Port Harcourt, some of which are considered below.

At the federal level, there is the centuries-old Criminal Code Act, 1916, that contain some provisions relevant for addressing the present soot pollution.⁸⁹ In Section 234, it expressly criminalises 'common nuisance'⁹⁰ with respect to 'any act or omission [that]... causes inconvenience or damage to the public in the exercise of rights common to the public' and imposes two-year imprisonment on anyone found guilty of such. The 2007 National Environmental Standards and Regulations Enforcement Agency (NESREA) Act provides an improvement on the above Criminal

⁸⁵ Damilola S Olowuyi, *The Principles of Nigerian Environmental Law* (Afe Babalola University Press 2015) 81-84

⁸⁶ Frynas (n 82) 130-132

⁸⁷ *Seismograph (Nig) Ltd v Ogbeni* (1976) NWLR 290; *Ogiale v Shell BP* (1997) 1 NWLR (pt 480) 148

⁸⁸ Gilbert Kodilinye and Oluwale Aluko, *Nigerian Law of Torts* (Spectrum Books Ltd 1999) 48. *Shell British Petroleum Development Co v Amara* (2000) 9 NWLR, Pt. 671 p. 44, where the doctrine was successfully applied. *Shell British Petroleum Development Company Ltd v Adamkue* (2003) 11 NWLR (Pt 832) 533, on the rebuttal of the doctrine by the defendant

⁸⁹ Cap C38 Laws of the Federation of Nigeria, 2004

⁹⁰ The same as 'public nuisance' discussed above under common law

Code provision.⁹¹ Section 27 of the NESREA Act prohibits the ‘discharge in such harmful quantities of any hazardous substance into the air’ and imposing on persons found guilty under this provision ‘a fine, not exceeding ₦1,000,000 or... imprisonment for a term not exceeding 5 years’.⁹²

Furthermore, the Minister of Environment, under powers conferred on her by Section 34 of the NESREA Act, have made several Regulations to give full effect to Section 20 of the NESREA Act on air quality and atmospheric pollution. Two relevant ones are the National Environmental (Air Quality Control) Regulations, 2014 (Air Quality Regulation),⁹³ and the National Environmental (Control of Bush/Forest Fire and Open Burning) Regulations, 2011 (Open Burning Regulation).⁹⁴ The Purpose of the Air Quality Regulation is to ‘improved control of the nation’s air quality... [in order to] enhance the protection of flora and fauna, human health, and other resources affected by air quality deteriorations’.⁹⁵ Much of its specific provisions concerning emissions and air quality standards relates to legitimate activities and sources of emissions, and do not clearly apply to the illegal sources of soot pollution in Port Harcourt. However, the Air Quality Regulations provide in Regulation 1(b) for the rights to clean air, as well as timeous information and notification of the nature of significant levels of pollution, both of which are relevant for tackling the soot pollution.

Indeed, these rights can be enforced by aggrieved members of the public against the soot polluters, namely, those running illegal refineries and government officials disposing of same in a most environmentally unfriendly manner, despite cautions. To be clear, it is also the (enforceable) duty of Nigerian government more generally, to

protect and effect these rights to clean air and emergency information, giving its constitutional duties to protect the Nigerian environment and the life of its citizens.⁹⁶

In addition, the purpose of the Open Burning Regulations is to ‘prevent and minimise the destruction of [the] ecosystem through fire outbreak and burning of any material that may affect the health of the ecosystem through the emission of hazardous air pollutants’.⁹⁷ It is vital to stress that, according to Regulation 23 of the Open Burning Regulations, the ‘ecosystem’ which is the subject of protection in that provision includes human beings, and not just the physical environment.⁹⁸ These Regulations apply to open burning for the purpose of ‘destroying – ... Waste oil, petroleum treated and related materials and any material creating dense smoke or noxious odours’.⁹⁹ Thus, it covers the activities of Nigerian security personnel who indiscriminately and openly burn illegal makeshift crude oil refineries and related materials, which activity is a major contributor to the present soot pollution. To be sure, this form of open burning is prohibited by the Regulations,¹⁰⁰ which also imposed on convicted violators ‘a fine not exceeding ₦50,000 or imprisonment for a term not exceeding 3 months or both such fine and imprisonment’.¹⁰¹

At the level of Rivers State, the laws that may be relevant for addressing the soot pollution appear to be relatively inadequate compared to the federal laws discussed above. They exemplify the general weakness of environmental laws in Rivers State which have been argued as inadequate in achieving environmental sustainability.¹⁰² The Rivers State Criminal Code Law, which

⁹¹ Federal Republic of Nigeria Official Gazette No 92, Vol 94 of 31 July, 2007

⁹² Higher fines apply under Section 27 (1) to body corporates found guilty of the same offence, while Section 27 (4) provide for appropriate punishment for those in charge of such corporations at the time the offence was committed

⁹³ Air Quality Regulation, 2014 (Federal Republic of Nigeria Official Gazette, 26 December 2014)

⁹⁴ Open Burning Regulation, 2011 <https://www.nesrea.gov.ng/wp-content/uploads/2020/02/CONTROL_OF_BUSH_FOREST_FIRE_AND_OPEN_BURNING.pdf>

⁹⁵ Air Quality Regulation, 2014 (n 93) Reg 1(a)

⁹⁶ See subsection 3.3 below for a detailed discussion on this

⁹⁷ Open Burning Regulation (n 94) Reg 1

⁹⁸ Oliver A Houck, ‘Are Humans Part of Ecosystems’ (1998) 28 (1) Environmental Law 1

⁹⁹ Open Burning Regulations (n 94) Reg 2 (xis)

¹⁰⁰ ibid Regs 3(1) and (2) and 11

¹⁰¹ ibid Reg 21(3). Higher fines apply under Reg 21(4) to body corporates, or a facility, found guilty of the same offence

¹⁰² Ibibia Worika and Uzuazo Etemire, ‘Environmental Sustainability and Regulation in Rivers State, Nigeria’ (2020) 4(1) Chinese Journal of Environmental Law 71

is mainly an adoption of the old federal Criminal Code Act, contains the same provision discussed above on the prohibition of ‘common nuisance’.¹⁰³ Similarly, the 1986 Rivers State Public Health Law in Section 5(m) deems as a nuisance that may be abated summarily ‘any act, omission... which is or may be dangerous to life, or injurious to health or property’.¹⁰⁴ In this case, the health official is empowered to serve an abatement notice on anyone responsible for the nuisance, requiring such a person to abate same and/or prevent its reoccurrence; a fine of ₦2,000 is prescribed for noncompliance with such a notice.¹⁰⁵

The sanction regimes of the federal and state environmental legislation discussed above may deliver sufficient punishment to *some* soot polluters if properly applied and even deter a few potential ones. It is however important to stress that they arguably require enhancement to improve their deterrent effect and capacity to compensate for damage caused by the offence more adequately. For instance, apart from the fact that most of the fines prescribed in the legislation are too meagre as a deterrence, they – as well as the terms of imprisonment – are prescribed as a maximum. Thus, in this situation of soot pollution with the widespread, dire effects on the environment and human health/life for example, the courts will be unable to impose a higher fine or term of imprisonment that more appropriately reflects the scale and gravity of the offence. This may only serve to embolden largescale polluters. Therefore, an upward review of most of the fines, some of which have become paltry due to the passage of time and inflation, is required to reflect their punitive character, and improve their ability to compensate for the harm caused. It is best if the fines and terms of imprisonment are prescribed as a minimum for the courts to be able to improve higher fines and longer terms of imprisonment that matches the gravity of the offence and the time of its commission.¹⁰⁶

Overall, if the relevant environmental legislation were faithfully enforced against soot polluters, it could curb their actions. In fact, to ensure adequate and comprehensive compliance with the above statutes as a means for tackling the soot pollution, public interest litigation may be required to enforce their provisions against violators as well as the performance by the government of its duties thereunder. Fortunately, the Nigerian Supreme Court has liberalised the erstwhile unduly restrictive standing rule that might have limited the ability of civil society to take the prescribed court action.¹⁰⁷ The Supreme Court in *Centre for Oil Pollution Watch (COPW) v Nigerian National Petroleum Corporation (NNPC)* effectively broadened the standing rule in Nigeria by instituting and allowing for public interest litigation in environmental cases.¹⁰⁸ The court held that ‘public-spirited individuals and organisations’ acting in the interest and for the good of the public, and not in their personal interest, can sue relevant public authorities and private entities to demand their compliance with relevant laws and to ensure environmental protection.¹⁰⁹ Also, it recognised that they have sufficient interest in ensuring that public authorities and private entities submit to the rule of law, especially as concerns the environment that is a public good.¹¹⁰

Human Rights Approach

Human rights provide a viable platform for holding those responsible for the Port Harcourt soot accountable for the environmental pollution and human harm caused by their actions and inactions. Indeed, engaging in harmful, illegal, and inappropriate activities that significantly compromise air quality as well as human health and wellbeing, flies in the face of several substantive human rights laws. First, there is the African

¹⁰³ Vol 2, Cap 37 Laws of Rivers State of Nigeria, 1999

¹⁰⁴ Vol 5, Cap 106 Laws of Rivers State of Nigeria, 1999

¹⁰⁵ β Sections 6 - 8 for more details on the applicable sanctions (aspects of which may not be applicable to the present soot pollution)

¹⁰⁶ Fagbohun (n 81) 47 - 57

¹⁰⁷ *Oronto Douglas v Shell Petroleum Development Company Nigeria Limited and Others*, Unreported Suit No: FHC/L/CS/573/96, 17 February 1997; and TI Ogowewa, ‘Wrecking the Law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria’ (2000) 26 Brooklyn Journal of International Law 527 541-543

¹⁰⁸ (2019) 15 Nigeria Weekly Law Report 1666, 548-571

¹⁰⁹ *ibid* 590-591, 597-598

¹¹⁰ *ibid*

Charter on Human and People's Rights (Ratification and Enforcement) Act¹¹¹ (the African Charter Act) which domesticates in Nigeria the African Charter on Human and People's Rights.¹¹² This Act provides in Article 24 that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'. The Nigerian Supreme court has in several cases clarified and confirmed the enforceability, by aggrieved members of the public, of this statutory environmental right, which is obviously being violated by those causing widespread soot pollution in Port Harcourt.¹¹³

The 1999 Nigerian Constitution (as amended) does not expressly provide for a similar environmental right.¹¹⁴ However, the Nigerian Supreme Court in its recent decision in *COPW v NNPC*, explicitly recognised, for the first time, that Section 33 of the Nigerian Constitution which guarantee's the 'right to life', implicitly includes and constitutes a fundamental right to a clean and healthy environment for all.¹¹⁵ This is because acts and omissions which degrade the environment and threaten the health of people – as is the situation in Port Harcourt with respect to the soot menace – also threaten their lives which all others have a constitutional duty to refrain from violating, and which the government has a duty to protect.¹¹⁶ This derivation of an environmental human right from the traditional right to life provision is an additional, and potentially effective tool, for ensuring that the environment and related human concerns are protected.¹¹⁷

The duty of the government – as distinct from the direct polluters – to protect the environment is also reflected in Section 20 of the 1999 Nigerian

Constitution (as amended) which provides that 'The State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'. Section 20 being under Chapter II of the Constitution is generally non-justiciable on its own.¹¹⁸ However, the Nigerian Supreme Court, based on constitutional exceptions to this general rule,¹¹⁹ has held that Section 20 is justiciable when read together with, and in the context of, a provision like Section 4(2) of the Constitution (that empowers the National Assembly to make laws to promote and enforce the observance of matters contained in Chapter II) and other legislation (like the African Charter Act) made to 'activate' or give effect to Section 20.¹²⁰ Indeed, as it concerns the noxious soot in Port Harcourt, the Nigerian government has arguably failed in its duty to protect the life of Nigerians and the environment of Nigeria, and may be held accountable through legal action for its inaction against the sources of the deadly soot.

What is more – the government has a duty to adequately inform the public concerned about the soot and the imminent threat to the environment or human health posed by it, while they take steps to address the situation. This right of the public to be informed by the government of significant and imminent environmental and human health hazards – which, among others, will enable the public to make early and adequate protective/precautionary decisions – is at the core of the public's fundamental human rights.¹²¹ This point was clearly made in the case of *Socio-Economic Rights Action Centre v Nigeria*.¹²²

In that case, the applicants alleged, among others, that the Nigerian government withholds from the Ogoni communities information on the

¹¹¹ Cap A9, Laws of the Federation of Nigeria, 2004

¹¹² 27 June 1981, 1520 UNTS 217. The African Charter Act domesticates the African Charter in accordance with Section 12 of the 1999 Nigerian Constitution, Cap 23, Laws of the Federation of Nigeria, 2004

¹¹³ *COPW v NNPC* [2019] 5 NWLR [Pt 1666] 518 at 587 and 597-598; and *Abacha and Others v Fawehinmi* (2000) FWLR 585, 586 and 653

¹¹⁴ Cap C 23 Laws of the Federation of Nigeria, 2004

¹¹⁵ *ibid* 580, 587 and 597

¹¹⁶ *ibid*

¹¹⁷ Bridget Lewis, *Environmental Human Rights and Climate Change* (Springer 2018)

¹¹⁸ Section 6 (6)(c) of the 1999 Nigerian Constitution (as amended)

¹¹⁹ *eg*, proviso to Section 6 (6)(c) of the 1999 Nigerian Constitution (as amended); and in that connection, Section 4(2) of Constitution which incorporated Items 60(a), 67 and 68 of the Exclusive Legislative List in the constitution

¹²⁰ *COPW v NNPC* [2019] 5 NWLR [Pt 1666] 518 at 569-570. Uzuazo Etemire, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight' (2021) 15 (2) Carbon & Climate Law Review 158, 168-169

¹²¹ UN General Assembly, 'Calling of an International Conference on Freedom of Information' 14 December 1946, A/RES/59 <<https://www.refworld.org/docid/3b00f0975f.html>>

¹²² (2001) AHRLR 60

dangers created by oil activities in Ogoniland.¹²³ Recognising the procedural aspects of Articles 16 (on right to health)¹²⁴ and 24 (on right to environment)¹²⁵ of the African Charter (which are applicable in Nigeria), the Commission held that in order for states to comply with the 'spirit' of those provisions, of which the Nigerian government had failed, they must, among others, 'provid[e] information to those communities exposed to hazardous materials and activities'.¹²⁶ Concerning the soot, the federal government of Nigeria and the Rivers State government have arguably failed in performing this obligation and are in breach of the procedural aspects of Article 16 and 24 concerning the dissemination of emergency information, as evident even (but not only) in their lack of transparency with the outcome of the soot investigation they commissioned as highlighted above.

To be sure, Nigeria's Fundamental Rights (Enforcement Procedure) Rules, 2009, has significantly improved access to court for those whose human rights - including as it related to the state of the environment - have been breached or threatened, by allowing for, private, public interest, and representative action or litigation.¹²⁷ On this basis, non-governmental organisations and members of the public can sue to enforce their fundamental rights and/or those of other persons affected or threatened by the present soot pollution arising from the breach by the identified polluters and the Nigerian government of their respective environmental human rights obligations.

The human rights approach with respect to the relevant provisions in the Constitution and the African Charter arguably provides a better alternative opportunity for the public to get justice with regards to the present soot pollution, than the common law and environmental legislative approaches. First, in the hierarchy of laws in Nigeria, they represent a stronger claim and a superior mechanism compared to common law and environmental legislation, giving that the Constitution is the grundnorm,¹²⁸ while the African Charter Act is only inferior to the Constitution but ranks higher than other domestic legislation and other forms of law as it is clothed with international flavour.¹²⁹ Furthermore, human rights litigation is relatively easier and faster compared to the difficulties and hurdles associated with litigating a tort in common law. For example, (1) unlike in torts cases, statutes of limitation do not apply to human rights litigation;¹³⁰ (2) while torts cases can drag on for years,¹³¹ the FREP Rules contain provisions for ensuring, relatively, the prompt dispensation of justice in human rights litigation;¹³² and (3) a human rights action can be instituted proactively to prevent acts and omissions which are *potentially* adverse to one's human rights - thus, preventing irreparable harm,¹³³ whereas common law mechanisms are unfortunately reactive in nature as they can only provide remedies to the injured party after the pollution has occurred and upon strict proof of casual link.¹³⁴

¹²³ *ibid*, para 4

¹²⁴ Article 16 of the African Charter on Human and People's Rights guarantees the right to the 'best attainable state of physical and mental health'

¹²⁵ Article 24 of the African Charter on Human and People's Rights guarantees the right to a general satisfactory environment suitable to their development

¹²⁶ *Socio-Economic Right Action Centre v. Nigeria* AHRLR 60 paras 53 and 70-1

¹²⁷ Nigeria's Fundamental Rights (Enforcement Procedure) Rules, 2009 <<https://www.refworld.org/pdfid/54f97e064.pdf>>. FREP Rules, Preamble 3(e), Order II (1). See also Emeka Polycarp Amechi, 'Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation' (2010) 6(3) Law, Environment and Development Journal 322

¹²⁸ Sections 1 and 4 of the 1999 Nigerian Constitution; and Hobart Community Legal Service, 'Legislation v Common Law' (Hobart Community Legal Service, 13 December 2017) <<https://www.hobartlegal.org.au/handbook/the-justice-system/the-law/legislation/legislation-vs-common-law/>>

¹²⁹ This was the position of the Nigerian Supreme Court in *Abacha and Others v Fawehinmi* (n 113)

¹³⁰ FREP Rules, Order III

¹³¹ Jędrzej George Frynas, 'Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners' (2001) 10 (3) Social and Legal Studies 397, 410 - 411

¹³² FREP Rules, Preamble 3(f), orders II & IV

¹³³ *ibid* Order II (1)

¹³⁴ Olawuyi (n 85) 81-84

CONCLUSION

This article investigated the impact of soot on the city of Port Harcourt. The question that was addressed in the article revolved around the legal options open to citizens wanting to address the menace of soot as a means of enhancing the sustainable development of the city of Port Harcourt. This article has argued that the response of the Nigerian Government to the problem has been both political and tokenistic.

The article concludes that the problem of soot is best addressed through private individual or group litigation by concerned members of the public. A group action or one brought in a personal and representative capacity for affected members of a community may be a better approach. This approach will not only help to avoid the unwieldiness of several members of a community with the same grievances bringing different actions against the same defaulter, but it also enables poor communities to mobilise and focus their resources against a common polluting adversary. This article noted that members of the public can bring an action to hold those responsible for the soot accountable for their actions, and this will include (1) those setting up and operating illegal makeshift refineries, (2) the security agencies whose officials are disposing of these illegal refineries and their chemical content in a most environmentally harmful manner, and (3) more generally, the Nigerian federal and state government that have a duty to enforce law and order in the society and protect the life and properties of Nigerians.

This article noted that three major approaches were available to concerned members of the public. These approaches are: the common law approach; the environmental legislative approach; and the human rights approach. The first approach is the common law approach through the mechanisms provided under the law of torts. These mechanisms include: the torts of *Ryland v Fletcher*, negligence, and nuisance. It was the conclusion of this article that these torts harbour certain limitations that could affect their effectiveness. First, statutes of limitation apply to actions in torts. Second, common law rules regarding liability are not *directly* concerned with environmental protection, but with injuries to persons and properties. Consequently, it is only

where personal or property injuries are caused by the noxious soot that common law liability rules become relevant, in an incidental manner, to environmental protection and remediation as a way of preventing further human injury. In other words, a major limitation of common law liability rules is that if it cannot be shown that environmental pollution through soot has directly caused injury to a person or his/her properties, those rules will be impotent in solely ensuring environmental protection and remediation. Lastly, compared to other legal approaches for accessing environmental justice, establishing a tort in common law is arguably more difficult as its pathway to justice is littered with several hurdles, including unduly restrictive ones.

The next approach was the environmental legislative approach. It was noted that, apart from the fact that they are principally enforced by public authorities (and individuals, to an extent), the major qualities of environmental legislation as a public law tool for environmental regulation includes, its (1) prescription of acceptable environmental standards, (2) criminalisation of human actions and omissions that are incompatible with the maintenance of a healthy environment, (3) stipulation for sanctions in the form of fines and terms of imprisonment, mainly to deter and punish violations, and (4) provisions for pollution abatement and (sometimes) environmental restoration.

The last mechanism considered in this article is the human rights approach. It was the conclusion of this article that the human rights approach provides a better alternative opportunity for the public to get justice with regards to the present soot pollution, than the common law and environmental legislative approaches. First, in the hierarchy of laws in Nigeria, human rights represent a stronger claim and a superior mechanism compared to common law and environmental legislation. In addition, human rights litigation is relatively easier and faster compared to the difficulties and hurdles associated with litigating a tort in common law.

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