Reflection on The Role of The International Court of Justice in The Protection of Global Environment: A Cause for Judicial Rethinking and Creativity in Nigeria

By

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Abstract
Environmental degradation has been increasingly generating conflicts between countries sharing common resources. Such degradation has also brought discomfort to human beings who depend on the environment their existence and enjoyment. The cause of this environmental degradation is usually borne out of the way the states, companies and individuals use the environment in a none environmentally friendly way, and the most affected are the less privileged and indigenous population of the developing and least developed countries. Sequel to the environmental degradation experienced across the globe, the International Court of Justice has taken the issue of protecting the environment as a serious concern. This is evident in the court's decided novel cases which have added to the jurisprudence of international environmental law. The objective of this study is to examine the role of the International Court of Justice in the development of international environmental law. The study employs qualitative method of legal research, and reliance has been placed on both primary and secondary sources of materials.

Keywords: Environment, Conflict, Degradation, ICJ

Introduction

Widespread concern about the need for global action for the protection of the natural environment is a relatively recent phenomenon. General Public awareness of the problems relating to the global environment and the need for coordinated multilateral action to address these problems was not evident even a few decades ago with the wider dissemination of information relating to the ever-increasing environmental challenge.[1] International concern has grown steadily over the years. Some inter-state efforts to address problems relating to the oceans are, endangered species, and other natural resources date back to the nineteenth century. Modern International Environmental Law received a major boost with the 1972 United Nations Conference on Human Environment held in Stockholm, Sweden, which brought much broader attention to the issues.[2] The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. Its jurisdiction is specified in article 36 (1) of its statute, it comprises all cases which the parties referred to it. The ICJ by the very nature of its functions[3] is performing an increasingly important role in the development of the fundamental rules, principles and processes of international environmental law-making and disputes settlement.[4] International environmental law has evolved rapidly in recent decades and now constitutes a highly technical

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[1] Lal K, Nicholas. A.R 'Training Manual on International Environmental Law' available at https://books.google.com.ng>books> Assessed on 10 November 2016.

[2] Lal K, Nicholas, A.R 'Training Manual on International Environmental Law' 2.

[3] Lal K, Nicholas, A.R 'Training Manual on International Environmental Law' 3.

[4] Philippe S. Introduction to International Environmental Law (3rd ed) 1994.

and distinctive sub-discipline of public international law[5] that seeks to regulate a broad array of human activities affecting natural and built environment.[6] At the moment, the court had recently established a Special Environmental Chamber in light of the increasingly environment related content of the cases submitted to it.[7] The contribution made by the ICJ to International Environmental Law during the 1990s, cannot be underestimated. It could be argued that the court's main contribution was embodied in its advisory opinion of July 8, 1996, on the legality of the threat or use of nuclear weapons. This development further warrants renewed attention to the court's contribution to international environmental law.[8] It is against this background that this study seeks to examine the role of the ICJ in the protection of the global environment and development of environmental law and principles. This paper is divided into five parts with this introduction that set the tone of the paper as the first part. The second part examines the global outlook on the environment because environmental challenge is a global issue that no state can isolate itself from. The third part looks into the justifications of the ICJ in order to underscore when parties can approach the court. The focus of the fourth part is on the role of ICJ in the protection of global environment and this is done through judicial analysis of some decisions that form the bedrock of emerging principles of international environmental law. The fifth part looks at the need for Nigerian courts to redefine their approach to environmental cases. The last part is the conclusion.

Global Outlook On Environmental Protection

Environmental law has come of age as a subject. It stems from compilation of set of regulations that periodically and systematically developed in response to identifiable problems associated with the environment. It has attained commendable level of consistency for its clear and united theoretical basis.[9] The destruction of the planet's resources endangers the geological output of earth's resources upon which mankind rely for survival.[10] Widespread concern about the need for universal action for the protection of environment is a relatively recent phenomenon.[11] Public consciousness of the problems affecting the global environment and need for harmonized multilateral action to address these problems was not evident a few decades ago.[12] However, subsequent to the wider dissemination of information on the growing environmental challenges,[13] national and international concern have grown sporadically over the years on the

[5] Environmental Disputes International forums for non-compliance and dispute…. International plant protection convention available at https://www.ippc.int>files>publication>Assessed 10 November 2016.
[6] Phillipe S. 'Principles of International Environmental Law 2nd ed, (2003).
[7] Jorge E.V. The Contribution Of The International Court Of Justice To The Development Of International Environmental Law: A contemporary assessment' Ordhanm International Law Journals Volume 32 Issue 1 2008. Article 4
[8] Malcolm N Shaw and Malcom D Evans, 'The International Comparative Law' Quarterly Vol. 49, No. 4 (Oct. 2000), 964-978
[9] Justine Thornton and Silas Beckwith, *Environmental Law,* Sweet & Maxwell, London, 2004, 6; Maurice Sunkin, David M. Ong and Robert Wight, *Sources Book on Environmental Law,* Cavendish Publishing Limited, London, 2002, 1-2; Kramer, *Focus on European Environmental Law* cited in Maurice Sunkin, David M. Ong and Robert Wight, *Sources Book on Environmental Law,* Cavendish Publishing Limited, London, 2002, 14.
[10] See Justine Thornton and Silas Beckwith, *Environmental Law,* 2nd ed., Sweet & Maxwell, London, 2004, 6-8, 8-11
[11] United Nations Environment Programme, *Training Manual on International Environmental Law,* UNEP, 2006, 15.
[12] ibid
[13] See Dinah Shelton and Alexander Kiss, *Judicial Handbook on Environmental Law,* UNEP,2005, 3-4

need to protect the environment and the entire eco-system against degradation, desertification and pollution.[14]

States began to realise that without solid and versatile measures by all persons, the planet would become incapable of sustaining mankind and that generations to come will experience scarcity and impoverishment except our pattern of consumption and management of waste are marginally revisited and redefined.[15] Therefore, environmental law came to being as an attempt to regulate the interaction of humans and the environment on a level that allow all to operate peacefully and uniformly keeping the earth from being destroyed by the activities of humankind.[16] In the 1970s, the subject of environment began to develop globally. At this time, there were countable numbers of negotiated agreements to protect the environment globally.[17] At present, the subject of environment is witnessing high velocity for collaboration by states to safeguard the environment both nationally and internationally. Numerous legal documents are currently being negotiated and concluded. Some of them are basically dealings with environment while some made significant provisions relating to the environment.[18] It is thus imperatives to evaluate and briefly explore the development so far.

Prior to 1900, the prevalence philosophy was one of mankind's conquests over nature by science and technology and depletion of natural resources was not considered as a problem.[19] During this period, a few agreements relating to the issue of environment existed. This is because negotiated agreements then enjoyed unconstrained national sovereignty over natural resources.[20] Matters on pollution and other problems associated with the environment are not dealt with. However, the United Kingdom of Great Britain and United States of America Boundary Water Treaty of 1909 was a remarkable development at that period.[21] This treaty forbids causing injury to the health or property of each side that may arise from the pollution of water. Countries by 1900s through mutual agreements started to acknowledge the need to safeguard scarce and valuable geological resources.[22] The magnitude of protecting the resources of the earth including flora and fauna became acknowledged.[23] During this period, pronouncement on the applicability of customary rules to matters of environment began to crystallize. The *Trail Smelter Arbitration* marked the

[14] Hannum, H., "New Developments in Indigenous Rights," (1988) 18 VA J. INT'L.L 649, 666. See M. Gruter, "The Origins of Legal Behavior," (1979) J. Social Biol. Struct.43

[15] See Justine Thornton and Silas Beckwith, *Environmental Law*, 2nd ed., Sweet & Maxwell, London, 2004, 6-8, 8-11

[16] See Dinah Shelton and Alexander Kiss, *Judicial Handbook on Environmental Law*, UNEP,2005, 3-4

[17] See Justine Thornton and Silas Beckwith, *Environmental Law*, 2nd ed., Sweet & Maxwell, London, 2004, 6-8,8-11

[18] Daniel Wilkinson, *Environment and Law*, Routledge, London, 2002, 2-9; Buck Cox J., "No tragedy on the Commons" (1985) 7 *Environmental Ethics*, 49-61.

[19] ibid

[20] Grieder T., "Landscapes, the Social Construction of Nature and the Environment" (1994) 59 *Rural Sociology*, 1

[21] Treaty between the United States and Great Britain Respecting Boundary Waters Between the United States and Canada (Washington), in force 5 May 1910.

[22] Some of them are: the 1902 Convention for the Protection of Birds Useful to Agriculture, the Convention for the Protection of Migratory Birds in the United States and Canada and the Treaty for the Preservation and Protection of Fur Seals signed in 1911. The 1900 London Convention for the Protection of Wild Animals, Birds and Fish in Africa focused mainly on wildlife generally.

[23] These include the 1933 London Convention on Preservation of Fauna and Flora in Their Natural State (focused primarily on Africa), and the 1940 Washington Convention on Nature Protection and Wild Life Preservation (focused on the Western Hemisphere).

global beginning of the application of customary rules to environment.[24] This was a case between United States and Canada. The decision of the tribunal in this case has widely been accepted as endorsing the rule making a state liable for activities causing harms or damages to the territory of another state.[25] The decision has today attained a key place in the jurisprudence of environmental international laws.

Contemporary environmental international law is traceable to 1972 when states assembled at Stockholm for the Conference on the Human Environment. This gathering led to the adoption of the Stockholm Declaration.[26] The principles in the Declaration have provided the foundation for modern international environmental law.[27] Ever since then, countries have negotiated and concluded several documents to safeguard the diverse nature of the environment.[28] Another significant development was in 1992 when states assembled at Rio de Janeiro, Brazil, for the United Nations Conference on the Environment and Development.[29] Rio Declaration which was adopted at the conference symbolizes a significant step in the course begun by the Brundtland Report by laying down some principles in pursuit of sustainable environment. This was seen as an indication of the beginning of an innovative segment where environment as well as economic issues is to be incorporated into the curb webs of developmental project.[30] This shows the global progressive awareness of the crucial need to observe and investigate environmental risk and to mitigate them.

Regionally, there has been progressive development at a like pace. In Asia, the Agreement on the Conservation of Nature and Natural Resources was concluded by members' states to the Association of Southeast Asian Nations (ASEAN). The Agreement protects the ecological unit and formulated measures to control trade in scarce species.[31] The primary objective of the Agreement is the conservation of wild flora, fauna and renewable resources such as soil, vegetation, and fisheries through the safety and protection of ecosystems, habitats and endangered species, and by ensuring sustainable use of harvested ones.[32] The preamble make a clarion calls upon parties to improve on domestic strategies for conservation and to ensure that the strategies are well coordinated within the structure of a conservation and protection strategy in the Region.[33] The Agreement has been considered by many as "remarkable" and "progressive" and as the most highly developed agreement on conservation and natural resource management

[24] 33 AJIL (1939), 182, where Canada was held liable for damage from copper smelter Fumes Company operating within its territory.
[25] Ibid.
[26] See the Stockholm Declaration, 1972.
[27] See for example principle 1 of the Declaration.
[28] See for example, the Convention on International Trade in Endangered Species 1973; the London Ocean Dumping Convention 1972; and the World heritage Convention 1972; Nordic Convention on the Protection of the Environment (Stockholm), 1974..
[29] Rio de Janeiro Declaration on Environment and Development, June 16, 1992, UN Doc. A/CONF.15/15. It is popularly known as the Earth Summit.
[30] Ibid, principle 3 and 4.
[31] ASEAN Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur), 15 EPL (1985), 64. Not yet in force.
[32] Ibid
[33] ibid

at that time.[34] The idea of "sustainable development" was established in this 1985 Agreement, even before the consideration in the Brundtland Report.[35] This indeed remains the reason why the Agreement was acknowledged as a progressive instrument as it projected some of the concepts and principles of the Brundtland Report and other succeeding international environmental documents concluded.

In Africa, the Bamako Convention on Hazardous Waste was adopted by 51 African Countries.[36]The convention bans the importation of waste into Africa and prescribed procedures for the regulation of movement and management of harmful wastes within Africa.[37] The object of the convention is to safeguard public health and protect the environment from negative effects of hazardous wastes by mitigating their production to acceptable minimum. It imposes duty on state parties to prohibit the dumping at sea of hazardous waste.[38] Unlike the Basel Convention which permits trade in hazardous waste subject of environmentally sound management and prior informed consent, the Bamako Convention put an outright ban on the importation of hazardous waste into Africa from non-contracting parties.[39] In Europe, the Aarhus Convention was adopted by the European Union States in 1998.[40] The Convention established three fundamental right of the public exercisable by individual and association. These rights are: access to environmental information in possession of public bodies on request; involvement in the decision affecting the environment; and access to seek redress to allow public and individual to challenge public bodies' decisions regarding environmental issue.[41] Kofi Anan, past Secretary General of the United Nation described the convention as "the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations."[42] It focuses exclusively on participatory rights to ensure public involvement in environmental decision making process.

Thus, this development is encouraging because some years ago, most of these agreements were not feasible. This is an obvious manifestation that the protection of the environment is now seen as a universal concern both at the regional and global level. This offers us optimism that possibly, with a number of achievements capable in the future coupled with political will to deal with the enormous confrontations of global change in the environment and to address the exigent need for a friendly and sustainable environment.

Jurisdiction of The International Court of Justice

The ICJ has jurisdiction to entertain both contentious and non-contentious matters. A contentious matter is one in which an authorized body of the United Nations system issues a legal question

[34] See Khang Lian Koh "ASEAN Agreement on the Conservation of Nature and Natural Resources, 1985: A Study in Environmental Governance" Paper presented at the World Parks Congress held in Durban between 8-17 September 2003, 3.

[35] ibid

[36]Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous wastes Within Africa (Bamako), 30 ILM (1991), 775.

[37] ibid

[38] Id, article 4

[39]ibid

[40] UNECE, *The Aarhus Convention: An Implementation Guide*, New York, 2000

[41] See generally article 2, 4 and 6 of the Aarhus Convention 1998

[42] Annan, *Foreword, UNECE, The Aarhus Convention: An Implementation Guide* quoted in Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, Oxford University Press, 2009, 291-295

for the court to shed some light and give its legal opinion.[43] The contentious jurisdiction is based on the consent of parties involved. The court rests with no jurisdiction when the parties have not consented in having the matter adjudicated before it; this means that even important violations of international law may be left without proper judicial settling at least as far as the ICJ is concerned if the states have not consented previously to the jurisdiction of the court. There are three forms to express consent in a contentious jurisdiction, *Ad hoc*, *ante hoc*, or the optional clause also known as compulsory jurisdiction.[44] *Ad hoc* expression of consent occurs when a specific matter is referred to the court and the states involved manifest their will to have the issue adjudicated in a special agreement called compromise. This agreement specifies the matter and recognizes by all parties involved that a dispute exists and gives the main framework in which the court will decide. Consent *ante hoc* is expressed prior to any dispute and is manifested in the inclusion of a jurisdictional clause in an international treaty. The clauses tend to state that any dispute related to the treaty or to specific parts of the treaty-also referring to the interpretation of the agreement will be submitted to adjudication by the ICJ. Consent expressed under the optional clause, or compulsory jurisdiction is given through a declaration[45] issued by the court stating its commitment to accept any claims made before her and by so doing, a state recognizes the courts' jurisdiction as ipso facto compulsory.[46] Only States[47] (States Members of the United Nations and other States which have become parties to the Statute of the Court or which have accepted its jurisdiction under certain conditions) may be parties to contentious cases. The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:[48]

1) By entering into a special agreement to submit the dispute to the Court;
2) By virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a dispute of a given type or disagreement over the interpretation or application of the treaty, one of them may refer the dispute to the Court;
3) Through the reciprocal effect of declarations made by them under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration. A number of these declarations, which must be deposited with the United Nations Secretary-General, contain reservations excluding certain categories of dispute.[49]

[43] 'ICJ-UFRGS' available at https://www.ufrgs.br>preparation>ICJ Assessed on 30 November 2016.
[44] 'ICJ-UFRGS' 2.
[45] Declaration of this sort are issued under Article 36 (2) of the statute of the court and reaffirm the countries' commitment to the values enshrined in the UN Charter especially the pacific settlement of disputes (UN Charter art 33)
[46] As for the other UN organs –not General Assembly or Security Council and the specialized agencies they can only request those opinions when they are within their precise competence
[47] 'How the court works/international/court of justice-ICJ/CIJ' available at www.icj-cij.org/court/index.php?p1=1 &p 2=6> Assessed on 3 March 2017
[48] Alloysius P.L. 'Jurisdiction and Compliance in Recent Decisions of the international court of justice' available at www.ejil.org/pdfs/18/250.pdf.
[49] 'How the court works international court of justice – CIJ/ICJ available at www.icj-cij.org>court> Assessed on 1 March 2017.

By signing the Charter, a State Member of the United Nations undertakes to comply with any decision of the Court in a case to which it is a party. Since a case can only be submitted to the Court and decided by it if the parties have in one way or another consented to its jurisdiction over the case, it is rare for a decision not to be implemented. A State which contends that the other side has failed to perform the obligations incumbent upon it under a judgment rendered by the Court may lay the matter before the Security Council, which is empowered to recommend or decide upon the measures to be taken to give effect to the judgment.[50] The Court may give a declaratory judgment or judgment requiring performance.[51] A declaratory judgment covers questions of jurisdiction, interpretation of international treaties concerning the existence or nonexistence of a legal principle or relationship, and questions of whether there has been an infringement of a right (without pronouncing upon a wrong resulting from such infringement). The judgment, once delivered, is final and without appeal, and is binding upon the parties.[52] This means that decisions of the International Court of Justice do not have the status of a precedent.[53] However, the decisions of the International Court of Justice, the reasons generally given in a case and the interpretation of applicable law have high persuasive value and are treated with some caution by the International Court of Justice itself as secondary sources of international law.

Court of Justice and The Development of International Environmental Law

This part examines the contribution the International Court of Justice has made so far to the development of international environmental law via the cases which were brought before the court and how the decision of the court has formed a rule under international environmental law. It looks at five (5) novel cases that were brought before the international court of justice and the decision arrived at by the court which has made an impact on the international environmental law. It is beyond doubt that the International Court of Justice, as the principal judicial organ of the United Nations constitutes an essential part of the entire machinery for the maintenance of international peace in the United Nations.[54] In this sense, the role that the International Court of Justice has played and will play in future in the development of international environmental law should not be underestimated.[55] At the same time, however, it should be kept in mind that the Court, in its essential character as well as in its origin, is primarily a court of civil jurisdiction entrusted with the task primarily of settling disputes that arise between States.[56] It is not as such a court of criminal jurisdiction entrusted with the task of holding perpetrators to account for the criminal wrongs perpetrated by them in the society.

The Corfu Channel (United Kingdom Vs Albania Case (1949)[57]

On May 15, 1946, two British ships passed through Albania's North Corfu Channel where they were fired at by an Albanian battery.[58] Following this incident, the United Kingdom (plaintiff)

[50] 'GENERAL TOPICS1.2 International Court of Justice – UNCTAD' available at unctad.org>docs>assessed on 22 March 2017.
[51] '5 Declaratory Judgments of the International Court of Justice-SSRN' available at https://papers.ssrn.com>sol3>Delivery. Assessed on 18 February 2017.
[52] Article 59 of the ICJ statute
[53] stare decisis
[54] Hudson, Manley O., (ed), international legislation (1931-1950), 9 vols.
[55] Decisions of Trail Smelter Arbitration Tribunal, 16 April 1938 (Reports of International Arbitral Awards, Vol. III, 1965.
[56] HISASHI O. 20.
[57] HISASHI O. 15.

and Albania (defendant) entered into diplomatic discussions about the right of British ships to pass peacefully through Albanian waters.[59] Albania maintained that the ships should not pass through without providing prior notification to the Albanian government. However, the United Kingdom maintained it had a right under international law to innocently pass through the straits. Between May 15, 1946, and October 22, 1946, the Albanian government allegedly placed mines in the Corfu Channel in Albanian territorial waters. Albania was at war with Greece, and the mines were allegedly part of its defense. On October 22nd, British warships attempted to again pass through the straits, but were destroyed by the mines, with loss of human life.[60] The United Kingdom brought suit in the ICJ[61] on the ground that Albania had a duty to warn the approaching British ships of the mines and that the Albanian Government was internationally responsible for the consequences of the incident and must make reparation or pay compensation. Albania,[62] for its part, had submitted a counterclaim against the United Kingdom for having violated Albanian territorial waters. On 9 April 1949, the Court found that Albania was responsible for the explosions and for the resulting damage and loss of human life suffered by the United Kingdom. The Court also found that the later minesweeping by the United Kingdom had violated Albanian sovereignty. On 19 December 1949, the Court ordered Albania to pay the United Kingdom a total compensation of £843,947.00[63] The *Corfu Channel* case was the first dispute to be brought before the newly established ICJ – the offshoot of the Permanent Court of International Justice.[64]The case was a public international law case heard before the ICJ between 1947 and 1949, concerning state responsibility for damages at sea, as well as the doctrine of innocent passage. A contentious case, it was the first of any type heard by the ICJ after its establishment in 1945.[65]Corfu Channel has had a lasting influence on the practice of international law, especially the law of the sea. The concept of innocent passage used by the Court was ultimately adopted in a number of important laws of the sea conventions. The stance taken by the Court on use of force has been of importance in subsequent decisions, such as States. Additionally, the case served to set a number of procedural trends followed in subsequent ICJ proceedings.[66] The relevance of this case to environmental law stems from the fact that it provided a factual background allowing for the principles initially asserted in the Trail Smelter case to be confirmed and linked to general international law.[67] This is a rare case in which the Court came to the clear conclusion about the responsibility of the parties to the dispute for the violation of its international obligations and it did most so through confirming the principle of due diligence in international law. [68]The principle of due diligence as a well-established alternative to still insufficient accepted rules of

[58] HISASHI O. 19.
[59]'Corfu channel case (*United Kingdom v Abania*) Case Brief-Quimbee' available at https://www.quinbee.com/cases/corfu-channel-case-united-kingdom-v-albania>assessed on 21 March 2017.
[60]'Corfu channel case (*United Kingdom v Abania*) Case Brief-Quimbee' 2.
[61] Legal matters, American Society of International Law Asil Volume 46 March 2007
[62] 'United Kingdom of Great Britain and Northern Ireland V Albania-CIJ/ICJ' available at www.ICJ-CIJ.org/docket/index.php?p1=3&p2=3&case=1&p3=4>assessed on 15 March 2017.
[63] 'United Kingdom of Great Britain and Northern Ireland V Albania-CIJ/ICJ' 2.
[64] 'United Kingdom of Great Britain and Northern Ireland V Albania-CIJ/ICJ' 3.
[65] Corfu Channel Case, <https://en.wikipedia.org/wiki/Corfu_Channel_case> accessed on 2nd March 2016
[66] Anderson, David, "World Court finds Albania liable in Corfu Mining of 2 British Ships", New York Times, (1949) p.1, 15>assessed on 10 March 2017.
[67]'The Corfu Channel Case' I.C.J Reports 1946 (1) 67 para.1. Assessed on 8 March 2017
[68] 'The Corfu Channel Case' I.C.J Reports 1946 (1) 82 para.27.

State responsibility for acts that are not prohibited in international law, now is being considered as a solid principle in protecting environmental law.[69]

In this sense, this case was not one in which international environmental law was at issue. Nevertheless, the Court in the Corfu Channel case declared the following principle applicable to the situation:

> 'Every State has obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[70]

It is useful to note that the 'Stockholm Declaration' has incorporated this dictum in its Principle 21,[71] and the 'Rio Declaration' also endorsed this principle in its Principle 2[72] of International Environmental Law.

The Nuclear Tests (Australia vs France, New Zealand vs France (Interim Measures Cases) (1976)[73]

The controversy between France and certain countries situated in the south pacific over the French atmospheric nuclear tests had begun as soon as the French testing ground was moved in 1963 from the Sahara to that region, and the results of diplomatic exchanges did not satisfy the countries concerned. In May 1973, Australia and New Zealand simultaneously (though separately) instituted proceedings before the court against France. Australia asked the court to adjudge and declare that the conduct by the French Government of nuclear tests in the south pacific region that give rise to radioactive fallout constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests.[74]In view of the fact that another test was soon expected to begin, Australia filed a request for interim protection, asking the court to declare that the French Government should desist from any further atmospheric nuclear tests pending the judgment of the court in this case.

On 14 May 1973 also, New Zealand filed a request for provisional measures requesting that France refrain from conducting any further nuclear tests that give rise to radio-active fall-out while the court is seized of the case.[75] On the basis of jurisdiction both applicants invoked

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[69]'International Environmental Law-eolss.net' available at www.eolss.net/sample-chapters/ci4/E1-36-02.pdf>assessed on 5th March 2017

[70] Corfu Channel, Merits, Judgment, I. C. J. Reports 1949, 22.

[71] Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972, UN Doc. A/CONF.48/14/Rev. 1, 5.

"Principle 21. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[72] Report of the United Nations Conference on Environment and Development, Annex I, A/CONF.151/26(Vol. I).

"Principle 2. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[73] HISASHI O. 4.

[74] Nuclear Tests Case (Australia & New Zealand V France) |Case briefs available at> Assessed on 30 March 2017. www.casebrifs.com|blog...|nuclear-tests-case australia-newzealand-v-france>assessed on 3 March 2017.

[75] HISASHI O. 17.

Article 17 of the General Act of 1928, alternatively, declarations under Article 36 (2). France replied to the notifications of the two applications. In French opinion, the General Act of 1928 had lapsed with the demise of the League of Nations.[76] On 22 June 1973, the court by eight votes to six in each case, issued two parallel orders indicating provision measures. On the Australian request, the court indicated that the Government of Australia and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the court or prejudice the rights of other party in respect of the carrying out of whatever decision the court may render in the case,[77] and in particular the French Government should avoid nuclear tests causing the deposit of radioactive fallout on the Australian territory. The cases never reached the merits phase as it was considered that the declaration of the French Head of State not to pursue the nuclear tests made in the course of the proceedings was a unilateral declaration with binding effects on the French government, and that therefore the subject-matter of the case had ceased to exist at the time of the proceedings. But in preparation of the oral proceedings, New Zealand and Australia had presented extensive arguments and scientific material on the environmental impact of nuclear tests.

Gabcikovo-Nagymaros Project (Hungary/Slovakia) Case (1997)[78]

This is virtually the first instance in which a case involving an environmental problem as the direct issue in dispute came before the International Court of Justice. In 1977, Hungary and Czechoslovakia[79] concluded a treaty for the construction of a large dam project on the Danube which had four main objectives: generate power, control of floods, enhance navigability on the river, and preserve the eco-system of the island Delta. In the beginning of the 1980's, Hungary stopped working on the project and claimed that it did so, mainly, on environmental grounds. Two grounds for this action were invoked: firstly, the pollution of underground water reserve on two different locations and, second, damage to unique wetland because the dam would deprive it of 90 per cent of its water supply.[80] After the examination of respective treaty obligations, the Court considered the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments in the following terms:[81] The Court considers, first of all, the concerns expressed by Hungary for its natural environment in the region affected by the Gabcíkovo–Nagymaros Project related to an 'essential interest' of that State. Finally, the Court took up Hungary's claim that it was entitled to terminate the 1977 Treaty because "new requirements of international law for the protection of the environment precluded performance of the Treaty". On this point, the Court held:[82]

> 'neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will

[76] HISASHI O. 29.
[77] HISASHI O. 10.
[78] HISASI OWADA 25.
[79] Hungarian Peoples Republic, Czechoslovak Socialist Republic: Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic concerning the Construction and Operation of the Gabèíkovo – Nagymaros System of Locks
[80] Yearbook of the International Law Commission, 1980, Vol. II, Part 2, 51. Para. 40)
[81] Yearbook of the International Law Commission, 1980, Vol. II, Part 2, 51. Para. 40) 18.
[82] I. C. J. Reports 1996, 241. para. 29.

> consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan. By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan. The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks. It is all the more important to do this because as the Court recalled in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'

Coming to the issue of legal consequences of the judgment, the Court noted that the project's impact upon, and its implications for, the environment were of necessity a key issue. It stated that in order to evaluate the environmental risks, current standards must be taken into consideration. The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often-irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[83] Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind for present and future generations, new norms and standards have been developed, set forth in a great number of instruments during the last two decades.[84] Such new norms have to be taken into consideration, and such new standards given proper weight. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of

[83] Yearbook of the International Law Commission, 1980, Vol. II, Part 2, 51. Para. 40) 5.

[84] Although air pollution in Czechoslovakia is concentrated in the northern Bohemian industrial regions, Bratislava too has been contaminated to such an extent that a Samizdat Report of the mid-1980s marked the Slovakian metropolis as the most polluted city in Europe (see Francis W. Carter: Czechoslovakia. pp. 65f, 84f). In this context, the environmental expert, Maria Welfens, mentions an "increase in the negative trend" (Maria J. Welfens: Umweltprobleme und Umweltpolitik in Mittel- und Osteuropa: Ökonomie, Ökologie und Systemwandel) 58.

sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

Pulp Mills On River Uruguay (Argentina vs Uruguay (Interim Measures Case) (2006)[85]

In more recent years, the Court has had another case in which problems of international environmental law are at issue as the direct subject of the dispute. On 4 May 2006, Argentina seized the International Court of Justice of a dispute between itself and Uruguay concerning alleged breaches by Uruguay of obligations incumbent upon it under the Statute of the River Uruguay, a treaty signed by Argentina and Uruguay on 26 February 1975. The Statute was agreed upon in implementation of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay of 7 April 1961, and its main purpose was "to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay", which is shared by the two States and partially constitutes their joint boundary. Under the Treaty of 1961 the parties had agreed to establish a régime for the use of the river, covering, inter alia

(a) Common standard regulations for the safety of navigation;
(b) A pilotage regime taking present practices into account;
(c) Regulations governing the maintenance of dredging and buoying in accordance with article 6;
(d) Reciprocal facilities for hydrographic surveys and other studies connected with the river;
(e) Provisions for the conservation of living resources;
(f) Provisions for preventing water pollution.[86]

In its Application Argentina charged the Government of Uruguay with having, in October 2003, 'unilaterally authorized the constructions of a pulp mill near the city of Fray Bentos' and having 'failed to comply with the obligatory prior notification and consultation procedures provided for by the 1975 Statute'. Argentina stated that, despite its repeated protests, both directly to the Government of Uruguay and to CARU, 'the Uruguayan Government had persisted in its refusal to follow procedures prescribed by the 1975 Statute'. According to the Application, Uruguay had in fact 'aggravated the dispute' by subsequently authorizing the construction in the same area of a second pulp mill and of a port for that mill. Argentina claimed that these mills, which were to be constructed on the banks of the river facing the Argentine town of Gualeguaychú, would 'damage the environment of the River Uruguay and its area of influence zone', affecting over 300,000 residents, who were concerned at the major risks of pollution of the river, deterioration of biodiversity, harmful effects on health and damage to fish stocks, and the extremely serious consequences for tourism and other economic interests. Argentina accordingly requested the Court to adjudge and declare that Uruguay has breached the obligations incumbent upon it under the 1975 Statute. Argentina accordingly requested the Court, pending final judgment in these proceedings, to order provisional measures requiring Uruguay to suspend forthwith all

[85] HISASHI O. 14.
[86] Treaty between the Argentine Republic and the Eastern Republic of Uruguay concerning the Boundary Constituted by the River Uruguay. Signed at Montevideo on 7 April 1961 (United Nations Treaty Series, 1968) 98.

authorizations for construction of the mills in question, to take all necessary measures to halt building work on the mills, to co-operate in good faith with Argentina in order to ensure the optimum and rational utilization of the River Uruguay, to refrain from taking any further unilateral action with respect to the construction of the mills which did not comply with the 1975 Statute, and to refrain from any other action which might aggravate or extend the dispute which was the subject-matter of the present proceedings. The Court in its Order of 13 July 2006, found that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute.[87] It stated that there is however nothing in the record to demonstrate that the very decision by Uruguay to authorize the construction of the mills poses an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or to the economic and social interests of the riparian inhabitants on the Argentine side of the river. Further, the court held that Argentina has not persuaded the Court that the construction of the mills presents irreparable damage to the environment and not demonstrated that the construction of the mills constitutes a present threat of irreparable economic and social damage. The Court finds that the circumstances of the case are not such as to require the order of a provisional measure ordering the suspension by Uruguay of the authorization to construct the pulp mills or the suspension of the actual construction work.

The present case highlighted the importance of the need to ensure environmental protection of shared natural resources, while allowing for sustainable economic development, that it was in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development, and that from this point of view account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States. In particular, the Court cautioned that notwithstanding the fact that the Court has not been able to accede to the request by Argentina for the indication of provisional measures ordering the suspension of construction of the mills, the Parties are required to fulfil their obligations under international law it stressed 'the necessity for Argentina and Uruguay to implement in good faith the consultation and cooperation procedures provided for by the 1975 Statute. The case is still pending before the Court, waiting for its proceedings on the merits. The Court is expected to address directly the issues of international environmental law involved in this case.[88]

Towards a Rethinking to Access to Environmental Justice in Nigeria

The court remains the last hope of the commoners. Where the authority erred in law, the only avenue to make them accountable to the public is through the interference of the court. However, seeking environmental justice is a difficult task due to the stringent rules involved in environmental matters. These rules pose a great challenge to the victims of environmental degradation. These rules are the problem of *locus standi*, institution of class action, limitation of time, the issue of cost and burden of proof. All these rules to a great extent present a difficult task to victims of environmental abuse in seeking environmental justice and serves as a barrier which prevent aggrieved persons from having access to court for environmental redress. The

[87]Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, para. 87 text available at www.icj-cij.org. Assessed on 14 March 2017.

[88] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Application Instituting Proceedings filed in the Registry of the Court on 4 May 2006' Para 15.

goal of environmental justice is to secure for all communities and people protection from environmental and health hazards, and the opportunity to persuade the decision-making process. Therefore, access to environmental justice is premised to helping persons and communities' access legal redress for environmental harms.

In Nigeria, the issue of *locus standi* is a jurisdictional issue. Where a party lacks the *locus* to institute an action, the court must as a matter of law decline jurisdiction. Environmental cases are decided in Nigeria according to the traditional rules of common law regulating tort action. Before the 1979 constitution, the prevalent position was based on common law doctrine. While an individual instituting an action for private injury may not encounter difficulties so long he can prove the act of the respondents caused the damage, the same cannot be said of public injury. Where an act is that which affects the generality of the public, it is only the Attorney General that has the *locus* to institute such action because it is considered to be a crime in nature. Where an individual intends to prosecute such action, he must obtain the consent of the Attorney General or establish before the court a "special interest" suffered by him over and above that suffered by other members of the public. This position is reflected in the Supreme Court decision in *Amos v. Shell BP Petroleum Company of Nigeria Ltd*,[89] here, many victims of environmental abuse and degradation were denied access to justice on the ground that the complaint was one of public nuisance which required more than mere expression of damages. In *Seismograph Service (Nigeria) Limited v. Ogbeni*,[90] the agents in the process of carrying out oil exploratory procedures around the region of the plaintiff's building, caused damage to the property of the plaintiff and many others. In an action for damages and compensation in nuisance, the case was dismissed on the ground that the activities of the defendant constituted a public nuisance which required a special interest to succeed. The same was held in the case of *Shell Petroleum Development Company of Nigeria Limited v. Chief Otoko and Others.*[91]

However, the need for the consent of Attorney General of the Federation in an action affecting the generality of the public was to put to rest in *Adediran and Another v. Interland and Transport Limited*.[92] In this case, the Supreme Court overruled all its previous decisions on the need to obtain Attorney General Consent in matters affecting the public. The decision of the court in *Adeniran's* case was based on the provision of section 6(6)(b) of the 1979 Constitution which is in *pari materia* with the current provision of section 6(6)(b) of the 1999 Constitution (as Amended in 2011). The section states that:

> The judicial powers vested in accordance with the foregoing provisions of this section, Shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

The Supreme Court interpreted the above provision to give individuals the right and standing to sue in public nuisance without obtaining the leave of the Attorney General or without joining

[89] [1977] S.C. 109.
[90] [1976] 4 SC 85.
[91] [1990] 6 N.W.L.R. (pt. 159) 657.
[92] [1991] 9 N.W.L.R. (pt. 214) 155.

him as a party. By so doing, the Supreme Court expanded the judicial access to victims of environmental pollution. Therefore, suffice to say that in Nigeria, the requirement of Attorney General Consent is no longer the law. However, the problem still remains whether a representative or class action can be maintained in a public nuisance matter. It is on this basis that the issue of *locus standi* creates an obstacle in seeking environmental justice. Therefore, there is the need for the courts in Nigeria to rethink their approach to environmental cases. The judges have a lot to learn from the ICJ who through its creative nature has been able to come up with environmental rules and principles most of which have been regarded as part of customary international law today. Consequently, just has it has been done in some jurisdictions; the Nigeria Courts through judicial interpretation can relax the rule of access to environmental justice to enable litigants access to environmental remedies. For instance, in Bangladesh, the High Court in *Dr. M. Farooque v. Bangladesh*[93] expanded the right to life to include anything that affects life, public health and safety, and the enjoyment of polluted free water and air, and a sustaining conditions consistent with human dignity. In Costa Rica, the court in *Presidente de la socieded Marlene S.A v. Municipalidadad de Tibas, Sala Constitucional de la corte Supreme de justicia* stated that the rights to health and to the environment are essential to guarantee that the right to life is fully enjoyed.[94] The court further held that it is a right that all citizens live in an environment free from contamination.

The year 2005 marked the beginning of a new era of access to environmental justice in Nigeria. It was the first time ever that the court in the case of *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria Limited*[95] was able to read into right to life, the right to be free from pollution or activities likely to endanger life. It was a revolutionary decision that illuminates the willingness of the Nigerian judiciary to construe the constitutional right to life lengthily to include the right to a healthy/clean environment. The fact of this case was that Mr. Gbemre in a representative capacity instituted this action for himself and for each and every member of the Iwehereken community in Delta Sate Nigeria against Shell Nigeria, Nigerian National Petroleum Corporation (NNPC) and the Attorney General of the Federation. The Applicants sought amongst other things a declaration that actions of the defendants violate their rights to life and the right to the dignity of their persons and to enjoy the best attainable state of physical and mental health as well as right to a general satisfactory environment favourable to their development. The court declared that the actions of Shell in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter. The court further declared that Shell Nigeria and NNPC were to be restrained from further flaring of gas in the applicant's community and were to take instantaneous measures to end the further flaring of gas in the applicant's community. In this case, reference was made to the Africa Charter along with the constitutional provision of the right to life.

[93] [1997] 49 Dhaka Law Reports (AD), p. 1
[94] *Presidente de la socieded Marlene S.A v. Municipalidadad de Tibas, Sala Constitucional de la corte supreme de justicia*. Decision No. 6918/94 of 25 November 1994.
[95] Suit No: FHC/B/CS53/05

Gbemre v. Shell therefore became a precedent setting case in Nigeria, as the first judicial authority to declare that gas flaring is illegal, unconstitutional and a breach of the fundamental human right to life. It is of significant to Nigerians for three obvious reasons. First, it pictures how fundamental rights protected in the Constitution can be violated by environmental pollution such as gas flaring. Secondly, it shows that issues concerning the environment could be brought under the purview of human rights. Thirdly, the case also mirrored how the right to life has been expanded or interpreted in a wider perspective to include right to the enjoyment of a healthful environment. The decision of the court in *Gbemre v. Shell* is a decision in the right direction that shows that the existing provisions of fundamental rights or bill of rights in the constitution can adequately be invoked to foster the protection of environment. This decision is expected to be an eye opener to judges in adjudication of environmental cases and it is hopeful that the court will improve on this in future cases.

Conclusion

It can safely be concluded that the assessment of the role the International Court of Justice in the development of international environmental law yields in essence the following results. First, that there is an existing general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states as well as the environment of areas beyond national control, this obligation is now well grounded in customary international law second, It is fair to say that the International Court of Justice, through the process of settling a bilateral dispute involving environmental issues between States, has contributed to identifying and confirming points of law pertaining to international environmental law. This is a lesson to Nigeria courts to wake up for slumbering and be more proactive in this respect. The court is the last hope of commoners and the mere fact that the law is silent about something doesn't mean that the court should fold its arm.