



Sections 104 and 107 of the Petroleum Industry Act 2021 and Accelerated Genocide Concerns of the Petroleum Producing States in Nigeria

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Abstract

Genocide is acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group. Genocide is one of the crimes which are punished by international law like the genocide convention and the Rome Statute which Nigeria has acceded to since 2001. Petroleum production in Nigeria come with it laws and regulations which regulate the activities of companies involved in petroleum production in Nigeria. This law have permitted flaring of gas which is scientifically proven to cause death, infertility and trauma to humans who live around the flare stacks. This article aims at identifying provisions of the Petroleum Industry Act 2021 which contain provisions contrary to genocide convention, common sense, uneconomical and socially antithetical to civilised societies. It was found that the oil producing states in Nigeria suffer

statutory approval of genocide in sections 104 and 107 of the Petroleum Industry Act 2021; and that genocide can be enforced against government or persons who aid or act in furtherance of such atrocity. The article adopts doctrinal methodology in harnessing primary sources like the Petroleum Industry Act 2021, Genocide Convention, Rome Statute; and literatures on genocide. It was recommended that sections 104 and 107 of the Petroleum Industry Act 2021 be amended to exclude the genocide by removing the powers of the Minister or the Commission or the Authority or anyone or body or arm of government from authorising or certifying the gradual killing of persons in the petroleum producing states of Nigeria.

Keywords: Genocide, Petroleum, Producing, State, Nigeria.

Introduction

The Genocide Convention aims at prevention of or punishment for the crime of genocide by ratifying or accessing state party. It was established vide an approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948; which came into force on January 12, 1951, in accordance with article XIII (Genocide Convention, 1948). The document defined genocide to mean any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group (Genocide Convention, 1948. Art. II).

The Convention punishes acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide (Genocide Convention, 1948. Art. III). It applies in times of peace or during war (Genocide Convention, 1948. Art. I). There is no distinguishing on grounds of Government positions or political office when punishing genocide. Any person who commits genocide or any of the other acts enumerated in article III of the Genocide Convention is punished, whether they are constitutionally responsible rulers, public officials or private individuals (Genocide Convention, 1948. Art. IV). Anyone charged with genocide can be tried in his country if the state is a party to the convention or at any international penal or tribunal (Genocide Convention, 1948. Art. VI); and genocide is not a political crime for the purposes of extradition (Genocide Convention, 1948. Art. VII).

Even though Nigeria has not signed or ratified the Genocide Convention (Ladan, 2013), the country has not escaped its provisions which is covered under article 6 the Rome Statute. Nigeria signed the Rome Statute on 1st June 2000 and deposited its instrument of ratification at the Hague on 27th September 2001. It follows that from 27th September 2001 every act or attempt at genocide by government or authorities in Nigeria became subject to the jurisdiction of the International Criminal

Court.

Article 6 of the Rome Statute provides *inter alia* that genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group. The question then is whether Nigeria or its institutions and agencies of government have imposed measures or conditions of life which are capable of bringing physical destruction in whole or in part to the people of the petroleum producing states in the country? Does sections 104 and 107 of the Petroleum Industry Act 2021 not fall squarely within the contemplation of article 6 of the Rome Statute? This is argued to be answered in the positive following the literal rules of interpretation of statutes.

Literature Review

Gas Flaring

Ehirim, et al (2018) in their definition of gas flaring said it is the controlled burning of natural gas produced in association with oil in the course of routine oil and gas production, while venting is controlled release of unburned gases directly into the atmosphere. They opined that due to lack of infrastructure, Nigeria's oil fields still flare gases in an economically senseless proportion. They said the Nigerian government has been working to end natural gas flaring for several years, but the deadline to implement the policies and fine oil companies has been repeatedly postponed. The federal government of Nigeria did not only fail in implementing policies geared at gas utilization in terms of provisions of partner/counterpart funding, it failed in the political will required to enforce flare deadlines pronounced by it on several occasions by different administration with the recent one from the General Buhari Mohammed led government where Ojoye (2019) reported that 2020 was going to be the end of gas flaring in Nigeria. It was further argued that apart from the release of greenhouse gases into the atmosphere which causes ozone depletion, gas flaring also heats up the atmosphere of the Niger Delta people on a daily basis. It is an economic sabotage on the part of the government of Nigeria to continue the encouragement it is giving to oil and gas companies to flare gases in the Country (Ehirim, et al 2018).

Olujobi (2020) was of the view that gas flaring is an international concern and major contributor to climate change, air pollution and failing health conditions. Environment Rights Action under the Climate Justice Programme in their 2005 report, captioned "Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity" argued that no human in his usual frame of mind would sanction gas flaring in a Country where reports has it that more than 60% of its citizens live below poverty lines. To the group, it is environmental and economic monstrosity to burn 2.5 billion dollars and ask World Bank and other International financial institutions for loans. They concluded that gas flaring was not just unacceptable, unaffordable and avoidable, that it is also illegal. The government over the years agreed that gas flaring is not good for the economy, environment and the health of its citizens but have lacked the political impetus for flare-out in the country.

Sustainable Development

Petroleum production and exploration is one of the major sources of Nigeria government revenue. Its economic importance to the development of the country cannot be over emphasised. The challenge is whether this economic goal is not genocide in disguise following the model Nigeria has adopted in laws and regulations for petroleum production in the country. Development is supposed to be rooted in

sustainability, that is, regards being had to the present satisfaction of current generation without disregards to life, livelihood and possibilities of procreation by those in whose area the environmental resources are derived. The sustainable development theory found its root in the United Nations Stockholm Conference of 1972 on Human Environment (Brosius, 2005). It provided under the principles that humans bears a solemn responsibility to protect and improve the environment for present and future generations (Tietenberg & Lewis, 2012). It advised States to use her natural resources including air, water, land, flora and fauna in a safe and method beneficial to present and future generation through careful planning or management (Rinkesh). According to Brundtland Commission (1987) report “Sustainable development is development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.” States in the exercise of their sovereign rights over their natural resources should utilised same in a sustainable manner with best practices that are environmentally friendly because the environment and natural resources are loaned from the future generations to meet socio-economic needs of the present generation (Nelson & Agrawal, 2008).

A sustainable environment is one where humans take responsibility for anthropogenic activities (Leke & Leke, 2019) which are likely to degrade the environment or which are beyond what the environment can absorb without altering its natural compositions (Brosius and Tsing & Zerner, 2007). Flowing from the view that humans are driven by development or wealth, which some time may become over prioritised over the environment (Montt and Fraga), it became necessary that laws or bye-laws be enacted to define what human conduct would not be sustainable to an environment. According to Gbenga (2012)

Environment sustainability refers to the conservation, management and rational utilization of natural resources in such a way to maintain the integrity of each ecosystem, support all life, ensure the preservation of biodiversity and prevent environmental degradation (Gbenga, 2012, p.3).

For Leke & Leke (2019, p.27) “environmental sustainability forms one of the pillars of sustainability development, the others being social sustainability and economic sustainability. It is an aspect of the development process which emphasizes the harnessing of natural and social resources with major considerations for continuity and the future.” Many of the projects that are rooted in environmental sustainability will involve replanting forests, preserving wetlands and protecting natural areas from resource harvesting (Dokpesi, 2013). The biggest criticism of environmental sustainability initiatives is that their priorities can be at odds with the needs of a growing industrialized society (Adejumo & Adejumo, 2014).

Theoretical Framework

Resource Curse or Oil Curse or Dutch Disease Theory

The theory of resource curse or oil curse depicts the situation where nations richly endowed with petroleum do not have commensurate development in relation to their natural resources exploited or extracted in the countries (Wu, 1983). Corruption, economic sabotage, lack of political will, poverty and loss of livelihood by those whose lands the petroleum resources are constitutes reasons, among others, there is oil curse permeating resource rich countries of the third world. Oil curse is directed at explaining the misery of a country with trillions of estimated reserves of oil and gas yet is the poverty capital of the world; Dutch disease on the hand explained how the big five oil and gas company led by the Royal Dutch Shell would do in Nigeria what they cannot do in their home states. How that in *Gbemre v SPDC, 2005* case, the Judge who delivered judgment was suddenly transferred and there had been non-compliance with the judgment till date. The federal government of Nigeria is a factor in the

success of ‘Dutch disease’ in the country like was exemplified with the transfer of the Judge who delivered ruling against the Royal Dutch company Shell. That could not have happened without the comprise of the federal government of Nigeria. It further explained the reasons the billions dollars from crude oil sales are not reflecting in the development associated with such huge amount of money when compared to other nations without the Dutch Disease. Dutch Disease therefore, depicts the collaboration of the federal government of Nigeria in the economic woes of the country; their participation in the activities that destroy the environment and perpetuation of environmentally unsustainable practices in the petroleum industry in the country (Dany Bahar and Miguel A Santos, 2018).

Social Cost Theory

This theory sums the private and external costs in ascertaining profit. It is the cost of natural resources for which the oil and gas companies are not required to pay, for example, rivers, lakes, atmosphere etc. Social cost theory had been defined thus social costs are private costs borne by individuals directly involved in a transaction together with the external costs borne by third parties not directly involved in the transaction (Helbling, 2010). The Federal Government pursuant to their ownership of oil and gas in Nigeria contracts or licenses a corporation to explore or mine gas resources. This agreement which exist between federal government and such company, yet the environmental and other social impact of such contract is borne by the third parties: host communities and their residents. Social cost referred to the cost of pollution remediation and restoration, the worth of life expectancy of individuals in a host community where gas is flared; health cost resulting negligent practices of the oil and gas companies; the cost of keeping group or community safe or relocating them while producing gas; environmental restoration cost and all other externalities that are not usually put into consideration by the government and the international multinational corporations in their economics of production and profit (Tirole, 2008).

This theory postulates that health cost, environmental cost and atmospheric cost of the effects of inadequate or improper utilization of gas should be put to consideration in framing laws and making policies/regulations governing production and utilization of gas to achieve sustainable and socially viable gas utilization in Nigeria. The advocacy of this paper is a gas utilization regime in Nigeria that does not make only economic sense: maximizing profits and satisfying some few individuals’ wants over the life and health of millions of her citizens in the Niger Delta region (Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. The Federal Republic of Nigeria (Communication 155/96, October 27, 2001), rather a legal framework that considers the good of the people and elevates it over and above cheap but socially costly market efficiency.

Economic Gains Theory

The economic gains theory postulates that the interest of trade or transaction is the profit or gains in other to keep the enterprise running and profitable to investors (Mulhearn and Vane, 2012). It argues that return investment in a venture should be the principal target and other considerations like the impact of such activities on environment should be secondary (Tietenberg and Lewis, 2014). However, environmental economists argued that there is no economic sense in certificating or permitting the flaring of gas in a country that is in dare need of electric power generation and supply for her industrialization (Fullerton and Stagi. 1998). They furthered that given ‘environomics’, that is, environmental economics, gas utilisation and internal refining of crude oil would serve proper economic purposes than revenue targets being met by cheap but environmentally uneconomical practices in the petroleum industry. The value of life and the environment cannot be subjected to the proceeds from crude oil and natural gas at the expense of sustainable utilisation of the petroleum and petroleum products for the benefits of the present and future generations (Hanley and Shogren and White, 2007).

Environmental economics deals with economic and managerial aspects of pollution and natural resources (Mulhearn and Vane, 2012). It interacts between human beings and their physical surroundings (Hanley and Shogren and White, 2007). It studies the impact of pollution on human beings and suggests national utilization of resources in a proper way so that there may be an increase in social welfare or minimization of social costs. The proponents of the theory explained that the billions of cubic feet of natural and associated gas flared worth more than the amount the federal government borrowed in the 8th and 9th republic (Olujobi, 2020).

This theory is useful to explain the need for gas utilization as a major measure the protection of the environment and for the growth and development of the Country. One of the objectives of environmental quality is to restrict those production activities which enhance social costs to society (OECD, 2004). Environmental quality is largely influenced by human activities in terms of excess exploitation of resources and the production of waste (OECD, 2004). How much environmental quality is affected by exploitation of resources and production of waste depends on ecological conditions of the economy.

Research Methodology

The doctrinal method is deployed for this research with primary data gotten from Petroleum Industry Act 2021, Genocide Convention and other legislations. Books, journal articles were used to source secondary data in examining gradual annihilation of the peoples of the Niger Delta and infanticide committed through exemptions granted petroleum company to flare and vent gas in the petroleum producing states in Nigeria. This method adopted envisages a legislative action for improved environmental framework in Nigeria.

Research Results

The Genocide Provisions in Sections 104 and 107 Petroleum Industry Act 2021

The Petroleum Industry Act 2021 is enacted to among other things ensure commercialised petroleum production in Nigeria (Petroleum Industry Act 2021, part I). This objective made it difficult for the legislation to see beyond economic gains; it prioritised budgetary sums and methods for increasing revenue over lives and health of people who live and have their livelihood in the petroleum producing states. This is arguably the reason behind sections 104 and 107 of the Petroleum Industry Act 2021. That section of the petroleum law provides that a licensee, lessee or marginal field operator that flares or vents natural gas except for emergency, exemption granted by the Commission/the Authority or under acceptable safety practice, commits an offence and liable to fine. This economic framework, it is argued, did not take cognisance of the effects and conditions of genocide embedded in the section of the law.

Maduka & Tobin-West (2017) in their work entitled “Is living in a gas-flaring host community associated with being hypertensive? Evidence from the Niger Delta region of Nigeria” argued that there is a need for the relevant agencies to scale up environmental and biological monitoring of air pollutants. The implication of a possible relationship between gas-flaring and hypertension brings to the fore the need for interventions to regulate gas-flaring activities. Their research clearly ascertained a part of the health implication of gas flaring and gradual condition for the killing of the peoples around the petroleum production site in Nigeria.

A World Bank sponsored research explained that health implications of gas flaring in children with some literature. The research conducted by Alimi and Gibson (2022) entitled “The Implication of

Gas Flaring on Child Health in Nigeria” reported that

Cushing et al. (2020) used satellite observations of flaring from unconventional oil and gas wells in Texas, and link to administrative birth records for pregnant women residing up to 5km from a flaring site. Exposure to frequent nightly flare events was associated with 50% higher odds of preterm birth and shorter gestation compared with no exposure, with effects especially for Hispanic women. Flaring was not associated with reduced birthweight among term infants after controlling for gestational age. Hill (2018) focused more broadly on shale gas development in Pennsylvania and found lower birth weight among infants born to mothers who live close to shale gas wells but an insignificant effect on birth term. Their difference-in-differences model used mothers living within 2.5 km of a shale gas well or permit prior to drilling as a control for treatment of living in the same radius after drilling began (the counterfactual change in infant health is estimated using births prior to drilling at the same distance from the well bore location or permitted location). The risk of low birth weight increased after drilling began. Colborn et al. (2014) focused on air quality around fracking sites in a rural western Colorado area where residences and gas wells co-exist. They found concentrations of pollutants well above critical levels that are associated with lower developmental and IQ scores in prior research in urban areas (Alimi and Gibson, 2022 p.5).

Gas flaring hampers and hinders conception, kills children of ages 5 and below, accelerates death resulting from Lung diseases and devastates the livelihood of peoples in the area where petroleum activities takes place. As it has been argued elsewhere in this article, it is as senseless as it is a deliberate attempt at systematically killing people who indigenous or resident in the petroleum production areas of Nigeria.

Gas flaring in section 104 sub-section 1 paragraphs (a-c) and section 107 of the Petroleum Industry Act 2021 is statutorily conditioned upon: for emergency; pursuant to an exemption granted by the Commission; as an acceptable safety practice under established regulations; where it is required for facility start-up; or for strategic operational reasons, including testing (Petroleum Industry Act 2021, sections 104 and 107). It is argued that the exemption to be granted should not be done to make nonsense of the human life, health and environment as enunciated in the case of Centre for Oil Pollution Watch v. NNPC (2019). The Commission or Authority must note the provision of the Constitution that the duties of the Government or its Agencies are to protect the Nigerian land water air plants biodiversities and their interactions (Nigerian Constitution, 1999, section 20) with other biotic which permit to flare would destroy literally. The licence to flare should not be granted at all in Nigeria following the position of the Court of Appeal in *Mobil v FIRS* (2018) where that Court held to the effect that gas flaring was or is not only an economic sabotage but a violation of the right of Nigerians to life and dignity of their person. This is argued to mean that the Nigeria Petroleum Upstream Regulatory Commission or the Nigeria Petroleum Midstream and Downstream Regulatory Authority cannot and should not grant flare permits or authorise flare or venting unless for a short period for operational reasons like testing of facility or acceptable safety practice or for start-ups operations. This, in the view of this article, is the proper interpretation that should be afforded a combined reading of sections 33 and 34 of the Constitution and sections 104 (1)(a-c) and 107 of the Petroleum Industry Act 2021.

International Criminal Court Jurisdiction on Genocide Cases

Irrespective of the position in government or other status of individuals, the International Criminal Court (ICC) will have jurisdiction over them where they are subjects of information on atrocities covered by the Rome Statute (Rome Statute, 2002: art. 27). Where a person accused of crimes against humanity (which includes genocide) is a head of government and the national laws of the state confers on him some immunities from prosecution or investigation, such immunity will not debar the ICC from

proceeding against such a person for violations against articles 5,6&7 of the Rome Statute (Rome Statute, 2002: art. 27(1)). Notwithstanding the position of a person as a head of government, he can still be investigated and prosecuted (Rome Statute, 2002: art. 27(1)). A person's official capacity as member of elected representative or parliament, even executive positions does not deprive the ICC from investigating or prosecuting such a person neither will it in itself constitute grounds for reduction of sentence for the crime of genocide. Immunities known to international law or national law does not bar the ICC from exercising its jurisdiction over any person on whose activities information are referred to it (Rome Statute, 2002: art. 27(2)).

Conclusion and Recommendations

Gas flaring is neither sustainable nor economical; therefore should be deleted from petroleum legal framework in Nigeria. More so, Nigeria is a signatory to the Rome Statute which prohibits genocide in its article 6. The Rome Statute and Genocide Convention punishes persons involved in genocide whether by attempt or approving conditions which enables genocide, Nigeria heads of government and institution are liable for the gradual killing and infanticide in the petroleum producing states of the country.

It is recommended that sections 104 and 107 of the Petroleum Industry Act 2021 be amended expunging the powers to grant exemptions for gas flaring but strictly prohibiting and criminalising every act of gas flaring or venting in the petroleum producing states in Nigeria.

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