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**BY EMAIL**

Office of the UN High Commissioner for Human Rights  
UN Office at Geneva  
CH 211 Geneva 10

For the attention of Mr. Ulrik Halsteen

[registry@ohchr.org](mailto:registry@ohchr.org)

29<sup>th</sup> August 2008

Dear Mr. Halsteen,

**Climate change and human rights**

This letter is addressed to you with a view to assisting the Office of the United Nations High Commissioner for Human Rights in its detailed analytical study of the relationship between climate change and human rights, as requested by resolution 7/23 of the Human Rights Council on 28th March 2008. It can be made available on the OHCHR website.

As I expect you will be receiving much information on this matter from many sources, this letter limits itself to drawing your attention to four unexceptional propositions which demonstrate that States have legal obligations relating to human rights and climate change *now* that need to be complied with; and which lead to a conclusion that these propositions support, *inter alia*, the right of individuals and organisations to hold States accountable for not complying with legally-binding greenhouse gas (GHG) emission reductions. (These propositions and the conclusion relate most closely to, though go beyond, the third matter in respect of which information was requested by Mr Ibrahim Wani in his letter of 16th June 2008, namely “[v]iews on the relationship between obligations arising out of international climate conventions and international human rights treaties, including on international assistance and cooperation”.)

## **1. Recognition of human rights in an environmental context is common in domestic legal systems, substantively, derivatively and procedurally**

Human rights in the context of environmental protection are well-established in many (and probably most) countries around the world, through: constitutional and statutory guarantees of the right to live in a healthy environment (substantive rights); similar guarantees of civil and political rights, such as the rights to life, to dignity and to respect for private and family life, which have been found to have been violated by environmental pollution (derivative rights); and rights to information, to participate in decision-making, and to access to justice in respect of the environment (procedural rights). These rights, however, are not usually enforceable by individuals of one State against another State.

## **2. Some of these derivative rights have already been recognized in the context of climate change, though their violation continues**

In November 2005, the Federal High Court of Nigeria in Benin City held that the flaring of gas in a Niger Delta community by Shell Nigeria is a “gross violation” of the constitutionally-guaranteed rights to life and dignity of Mr Jonah Gbemre and the Iwherekan community in Delta State. The judgment is here: <http://climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf>.

Nigerian flaring contains a toxic cocktail which exposes residents to an increased risk of premature deaths, child respiratory illnesses, asthma and cancer – while having contributed more greenhouse gases than all other sub-Saharan sources combined (according to the World Bank), and losing the country annually US \$2.5 billion.

This was the first time a Nigerian court has applied the rights to life and dignity in an environmental case. Shell Nigeria was ordered to stop flaring in the community immediately. Justice C.V. Nwokorie found the gas flaring laws to be “unconstitutional, null and void”, and ordered the Attorney General to meet with President Obasanjo *et al.* to set in motion the necessary processes for new gas flaring legislation that is consistent with the constitution.

Shell Nigeria did not comply with the order, and contempt of court proceedings were filed in December 2005, as the flaring was continuing 32 days after the judgment without a stay of execution in place.

In April 2006, the company was granted a ‘conditional stay of execution’, releasing it from the duty to comply with a court order in November 2005 to stop flaring, on three conditions. One of the three conditions of the stay was that the CEOs of Shell Nigeria and of the Nigerian National Petroleum Corporation, and the Petroleum Minister, were ordered to appear personally before the court on 31<sup>st</sup> May 2006 with a detailed plan for putting out Nigeria’s onshore flares within 12 months. On 23<sup>rd</sup> May 2006, the Court of Appeal overturned the first instance court’s order in respect of the personal appearances of the CEOs and Minister.

Over two years later, the second and third conditions still have not been met.

The second condition was that Shell was “allowed a period of one year . . . to achieve a quarterly phase-by-phase stoppage of its gas flaring activities in Nigeria under the supervision of this Honourable Court”.

This time condition has elapsed, but flaring continues.

The third condition was that “a detailed phase-by-phase technical scheme of arrangement, scheduled in such a way as to achieve a total non-flaring scenario in all their on-shore flow stations by 30th April 2007” must be submitted to the court personally by Mr. Basil Omiyi, the Managing Director of Shell Nigeria, Mr Funsho Kupolokun, the Group Managing Director of the Nigerian National Petroleum Corporation (NNPC), Mr Edmund Daukoru, the Minister of State for Petroleum Resources, and Chief Mrs Sena Anthony, the Company Secretary of NNPC. This was not and has not been done.

The flaring continues and the case is under appeal.

In a further gas flaring case, by 4 individuals and communities against Shell, Chevron, Agip and Total, a judge in the Federal High Court of Nigeria in Port Harcourt in September 2006 declined to follow the judgment of the Federal High Court at Benin City, and dismissed the action. This is being appealed. The judgment of the Port Harcourt court is here: <http://climatelaw.org/cases/country/nigeria/gasflares/22092006>

This litigation is noted in the IPCC’s Fourth Assessment Report, Contribution of Working Group III (Chapter 13.4.3). More information on the practice of gas flaring in Nigeria can be found in a report published by the Climate Justice Programme and Environmental Rights Action (Friends of the Earth Nigeria), entitled ‘*Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity*’, available from here: <http://climatelaw.org/cases/country/nigeria/cases/case-documents/nigeria/report/gas.flaring.in.nigeria.html>

### **3. Most of the States which are obliged to reduce their emissions under the Kyoto Protocol are also obliged to promote application of the principles of substantive and procedural rights in the international climate change negotiations**

The 40 State Parties (and the EU) to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - which acknowledges the substantive right, as the *raison d’être* of its guarantee of the procedural rights (Article 1) - are obliged to promote the application of the principles of that Convention in international environmental decision-making processes (Article 3.7). These processes include the UN Framework Convention on Climate Change and the Kyoto Protocol.

Of these State Parties, 28 are amongst the 37 industrialized countries which have binding targets for reducing greenhouse gas (GHG) emissions under the Kyoto Protocol.

Considering the three pillars of the Aarhus Convention in the context of the international climate change negotiations, it may be said, for example, that the UNFCCC Secretariat's website is an excellent source of information, and that the mechanisms for civil society participation at the Conferences and Meetings of the Parties appear to work fairly smoothly. However, the access to justice pillar has been almost completely ignored, and needs to be complied with in the context of the international climate treaties.

#### **4. International law prohibits one State from injuring persons and properties in another State**

This proposition derives from the famous *Trail Smelter* case in 1941 involving air pollution from Canada causing damage in the US. The tribunal stated:

**“Under the principles of international law...no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein....”**

This case is widely recognized as a seminal decision in the development of international environmental law, and its modern formulation appears in the preamble of the UNFCCC. Whilst the case of course pre-dates the main international human rights instruments, in the context of the present study it is worth bearing in mind that its formulation of the international legal principle is in terms of human impacts.

#### **Conclusion**

Traditional human rights law is not adequate for addressing climate-induced violations of rights of citizens in State A contributed to by the GHG emissions from State B. It should be, and the principles of the *Trail Smelter* case and the Aarhus Convention help in addressing that inadequacy. Equally, these propositions support, *inter alia*, the right of individuals and organisations to hold States accountable for not complying with legally-binding GHG emission reductions and similar obligations. This right needs to be included in the post-2012 regime, building on the currently limited right of competent non-governmental organisations to submit relevant factual and technical information to the KP Compliance Committee.

Please let me know if you consider that I might be able to be of more assistance.

Yours sincerely,



Peter Roderick  
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