

# WHY THE EXTANT LEGAL FRAMEWORK PROHIBITING GAS FLARE IN NIGERIA DID NOT WORK<sup>1</sup>

## **A PAPER PRESENTED AT A SOCIAL ACTION ORGANIZED FORUM ON GAS FLARING PROHIBITION AND SUSTAINABLE ENERGY FUTURE FOR NIGERIA, 30/09/2009 at Bolton White Hotels Ltd, Abuja**

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Nigeria is doubtlessly the largest country in Africa. According to the CIA<sup>3</sup> it has an area of 923,768 sq. km., about twice as large as California and nearly four times as large as the UK<sup>4</sup>. It has an estimated population of over 137 million (cf. 55 million in 1963)<sup>5</sup>, with 43.4% under 15 years of age (UK:18.3%)<sup>6</sup>. Infant mortality is put at about 70 deaths/1,000 pop (UK: 5.28)<sup>7</sup>, with 3.5 million people living with HIV/AIDS (UK: 34,000)<sup>8</sup>. GDP for 2003 was forecast to be \$41.9 billion – less than Bangladesh with almost the same population (\$48.3b, 2002 estimate)<sup>9</sup> (UK: \$1,794 b)<sup>10</sup>.

According to the March 2003 Country Analysis Brief of the US Energy Information Administration (EIA), which gives a good overview (CD1)<sup>11</sup>, in 2002 about 90% of the country's export revenues came from oil (\$17.2 b), and Nigeria was the 5<sup>th</sup> largest crude oil producer to the US: 567,000 barrels were exported to the US out of 1.9m bbl/per day export production, with total

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<sup>1</sup> Being a presentation at Interactive Forum of Civil Society Groups, Legislators, the Media and Government agencies to discuss common concerns on the Gas Flaring Prohibition Bill, utilisation of associated gas and renewable energy organised by the Social Development Integrated Centre (SDIC), in collaboration with Stakeholders Democracy Network (SDN) and International Institute for Environment and Development (IIED) held at Bolton White Hotel Limited, Area 11, Garki, Abuja on 29 -30 September, 2009.

<sup>2</sup> LLB, PGD, LLM, MNIM, BL

<sup>3</sup> Albeit not the most reliable source of information.

<sup>4</sup> CIA, The World Factbook, Nigeria: <http://www.cia.gov/cia/publications/factbook/print/ni.html>. (NC). Last updated on 11 May 2004. UK figure: CIA, The World Factbook, United Kingdom: <http://www.cia.gov/cia/publications/factbook/print/uk.html>. (NC). Actual figure: 60,094,648 (July 2003 est.).

<sup>5</sup> As above. The 1963 figure is taken from the 1967 edition of Everyman's Encyclopaedia in Twelve Volumes, Vol. 9, page 158. (NC).

<sup>6</sup> As above.

<sup>7</sup> As above.

<sup>8</sup> As above.

<sup>9</sup> US EIA Country Analysis Brief Bangladesh (May 2003): <http://www.eia.doe.gov/emeu/cabs/bangla.html>. The population of Bangladesh is 138, 448, 210 (July 2003 est) according to the CIA, The World Factbook, Bangladesh: <http://www.cia.gov/cia/publications/factbook/geos/bg.html>.

<sup>10</sup> US EIA Country Analysis Brief, Nigeria (March 2003): <http://www.eia.doe.gov/emeu/cabs/nigeria.html>; and UK (April 2004): <http://www.eia.doe.gov/emeu/cabs/uk.html>; .

<sup>11</sup> Also available here: <http://www.eia.doe.gov/emeu/cabs/nigeria.pdf>,

production of about 2.1 m bbl/per day (UK: 2.4m bbl/per day produced; Saudi Arabia: 8.5m).

The first Nigerian legislation expressly on flaring dates back to 1969. Regulation 42 of the Petroleum Drilling and Production Regulations of that year (which seems still to be in force, though has been superseded by stronger laws) provides:

*"not later than five years after the commencement of production from the relevant area, the licensee or lessee shall submit to the minister, any feasibility study, programme or proposals that he may have for the utilization of any natural gas, whether associated with oil or not, which has been discovered in the relevant area"* (emphasis added).

The current legal position is that flaring of associated gas in principle and generally has been illegal since 1984, pursuant to section 3(1) of the Associated Gas Re-injection Act 1979.

At the same time, section 3(2) of the Act empowers the Minister to **disapply** the general prohibition in respect of a particular field of fields by issuing a certificate, if the minister is satisfied that utilization or re-injection of the produced gas is not appropriate or feasible in that field(s):

*"specifying such terms and conditions, as he may in his discretion choose to impose, for the continued flaring of gas in the particular field or fields"*

or

*"permitting the company to continue to flare gas in the particular field or fields if the company pays such sum as the Minister may from time to time prescribe".*

It is instructive to her what the World Bank says about these payments, which are treated

like royalties, on page 64 of the GGFR Initiative's report:<sup>12</sup>

*"In accordance with the Associated Gas Reinjection Act 1979, a fee is charged for flaring. This was first set at 0.50 Naira per million cubic feet (mcf) but effective January 1998 is 10 Naira per mcf, which at November 2003 exchange rates is equivalent to US\$0.076 per mcf. This sum is payable in the same way as royalty—in foreign currency into the designated foreign account into which royalties are paid. It is worthwhile noting that in recent years oil companies in Nigeria have been charged a total of between 20 million and 50 million Naira (or US\$150,000–370,000) annually for flaring associated gas. However, this has to be*

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<sup>12</sup> Also available here: [www.worldbank.org/ogmc/files/regulationofassociatedgasflaringandventing.pdf](http://www.worldbank.org/ogmc/files/regulationofassociatedgasflaringandventing.pdf)

*seen in the overall context of gas flared. A recent study carried out for the Bureau of Public Enterprises of Nigeria estimated that each year the country loses between US\$500 million and US\$2.5 billion to gas flaring."*

Proven oil reserves are put by the EIA at 24-31 billion barrels (UK: 4.7b; Saudi Arabia: 264.2b). Gas is even bigger, with Nigeria ranked 9<sup>th</sup> in the world in terms of reserves. Proven natural gas reserves are said to be 124 trillion cubic feet (UK: 22.2 tcf; Saudi Arabia: 224.7 tcf (4<sup>th</sup>))<sup>13</sup> – or even as much, if reserves figures now have much credibility, as 246 tcf<sup>14</sup>. In 2001, natural gas production was estimated at 0.55 tcf<sup>15</sup> (UK (2002E): 3.6 tcf; Saudi Arabia: 1.9). Reserves and production data are discussed further later on.

A thorough understanding of our assignment necessarily implicates an understanding of the legal framework prohibiting gas flare in Nigeria. Accordingly, this presentation considers it pertinent to reproduce the relevant laws relating to gas flare in Nigeria in such a graphic and self-explanatory manner so as to make it explicit and easily comprehensible to all and one interested in appreciating the politics, political economy and laws of gas flare and environmental justice with the attendant clamour for a complete and effective gas flare cessation in Nigeria. The aforesaid legal framework is as specified in the three statutory enactments reproduced hereunder as follow:

1. AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS {RATIFICATION & ENFORCEMENT ACT, CAP 10 LAWS OF THE FEDERATION OF NIGERIA, 1990 .....

**Article 16**

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

**Article 24**

All peoples shall have the right to a general satisfactory environment favourable to their development.

**Article 25**

States Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedom contained in the present Charter and to see to it that these freedom and rights as well as corresponding obligations and duties are understood.

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<sup>13</sup> As above.

<sup>14</sup> Nigeria Handbook & Review, 11<sup>th</sup> Edition, 2002 (page100): "Nigeria's associated and non-associated gas reserves were estimated to be some 120 trillion cubic feet (TCF) by 1998. But for the year 2001, it rose to about 246 tcf, representing about 100 per cent increase in about three years." (HC1).

<sup>15</sup> As above.

**1. ASSOCIATED GAS RE-INJECTION ACT {CAP. 26}, CHAPTER 26**  
ARRANGEMENT OF SECTIONS

SECTION

1. Duty to submit preliminary programme for gas re-injection.
2. Duty to submit detailed plans for implementation of gas re-injection.
3. Flaring of gas to cease.
4. Penalty.
5. Power to make regulations.
6. Act to apply in Exclusive Zone.
7. Interpretation.
8. Short title.

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**ASSOCIATED GAS RE-INJECTION ACT {CAP. 26}, CHAPTER 26**  
[originally No. 99 of 1979]

**An Act to compel every company producing oil and gas in Nigerian to submit preliminary programmes for gas re-injection and detailed plans for implementation of gas re-injection.**

[28<sup>th</sup> September, 1979] Commencement.

1. Notwithstanding the provision of **regulation 42 of the Petroleum (Drilling and Production) Regulations** made under the **Petroleum Act**, every company producing oil and gas in Nigeria, **shall not later than 1<sup>st</sup> April, 1980** submit to the Minister a preliminary programme for-
  - (a) schemes for the viable utilization of all associated gas produced from a field or groups of fields;
  - (b) project or projects to re-inject all gas produced in association with oil but not utilized in an industrial project.
2. (1) Not later than 1<sup>st</sup> October, 1980, every company producing oil & gas in Nigeria shall submit to the Minister, detailed programmes & plans for either-
  - (a) the implementation of programmes relating to the re-injection of all produced associated gas; or
  - (b) schemes for the viable utilization of all produced associated gas.(2) The fact that some of the gas produced in association with oil has been earmarked for some alternative utilization shall not exempt compliance with section 1 of this Act and subsection (1) of this section.
3. (1) **Subject of subsection (2) of this section no company engaged in the production of oil or gas shall after 1<sup>st</sup> January, 1984 flare gas produced in association with oil without the permission in writing of the Minister.**
  - (2) Where the Minister is satisfied after 1<sup>st</sup> January, 1984 that utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields, he may issue a certificate in that respect to a company engaged in the production of oil or gas-
    - (a) Specifying such terms and conditions, as he may at his discretion choose to impose, for the continued flaring of gas in the particular field or fields; or
    - (b) Permitting the company to continue to flare gas in the particular field or fields if the company pays such sum as the Minister

may from time to time prescribe for every 28.317 Standard cubic metre (SCM) of gas flared:

Provided that any payment due under this paragraph shall be made in the same manner and be subject to the same procedure as for the payment of royalties to the Federal Government by companies engaged in the production of oil.

4. (1) Where any person commits an offence under section 3 of this Act, the person concerned shall forfeit the concessions granted to him in the particular field (s) in relation to which the offence was committed.
- (2) In addition to the penalty specified in subsection (1) of this section, the Minister may order the withholding of all or part of any entitlements of any offending person towards the cost of completion or implementation of a desirable re-injection scheme, or the repair or restoration of any reservoir in the field in accordance with good oilfield practice.
5. The Minister may make regulations prescribing anything requiring to be prescribed for the purposes of this Act.
6. **The provisions of this Act shall apply to the Exclusive Zone as they apply to land as defined in section 1 of the Petroleum Act.**
7. In this Act, unless the context otherwise requires— “Exclusive Zone” has the same meaning assigned thereto in the Exclusive Economic Zone Act. “Minister” means the Minister charged with responsibilities for matters relating to petroleum.
8. This Act may be cited as the Associated Gas Re-injection Act.

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## 2. ASSOCIATED GAS RE-INJECTION ACT *CHAPTER 26*

[SUBSIDIARY LEGISLATION 43 of 1984]

### ASSOCIATED GAS RE-INJECTION (CONTINUED FLARING OF GAS) REGULATIONS

under sections 3 and 5 Commencement: 1<sup>st</sup> January, 1985

1. As from the commencement of these Regulations, the issuance of a certificate by the Minister under section 3 (2) of the Associated Gas Re-Injection Act, for the continued flaring of gas in a particular field or fields, shall be subject to any one or more of the following conditions, that is -
  - (a) where more than seventy-five *per cent* of the produced gas is effectively utilized or conserved;
  - (b) where the produced gas contains more than fifteen *per cent* impurities, such as N<sub>2</sub>, H<sub>2</sub>S, CO<sub>2</sub>, etc. which render the gas unsuitable for industrial purposes;
  - (c) where an on-going utilization programme is interrupted by equipment failure: provided that such failures are not considered too frequent by the Minister and that the period of any one interruption is not more than three months;
  - (d) where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or possible utilization point is less than 50,000 SCF/KM:

Provided that the Gas to Oil ratio of the field is less than 3,500 SCF/bbl, and that it is not technically advisable to re-inject the gas in that field;

- (e) where the Minister, in appropriate cases as he may deem fit, orders the production of oil from a field that does not satisfy any of the conditions specified in these Regulations.
- 2. **The Minister may, from time to time, review, amend, alter, add to or delete any provision of these Regulations as he may deem fit.**
- 3. These Regulations may be cited as the **Associated Gas Re-Injection (Continued Flaring of Gas) Regulations.**

From the foregoing analysis, it is easily understandable that many factors are actually responsible for the non-functionality of the desired gas flare cessation legislation and the attendant negative social, economic and environmental consequences. Some of these factors, in the humble view of this paper include, among others, the following points, namely;

1. Military Dictatorship & Hegemonic Leadership
2. Constitutionally flawed federalism (Exclusive as opposed to Concurrent or Residual Control of natural Resources)
3. Lack of Executive Cover, Leadership or Political Will
4. Corruption
5. Inelegant Legal Drafting/Ambiguity
6. Ambiguous provisions in the law and the attendant regulations
7. Absence of broad-based justiciable and or enforceable monitoring or non-governmental oversight mechanism
8. Economic Factors. Advocates of continued gas flare reason that since domestic market for gas is inadequate and the cost for gas development is high, the oil companies cannot embark on any gas development programme. Accordingly, government should continue to permit gas flaring since it depends on oil production for its revenue<sup>16</sup>.

The deadline of January 1, 1984 specified in the Act after which flaring of gas was meant to cease was thus extended *sine die*<sup>17</sup>.

According to the leadership of Giant Oil Companies, Basil Omiyi, in his 2001 Norwegian speech offered these reasons:

“Why Gas Is Flared In Nigeria.

Nigeria has been compelled by a combination of historical, economic, and geographical factors to flare gas. They include the following:

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<sup>16</sup> See [http://www.nigeriaoil-gas.com/investment/oil\\_and\\_gas\\_legislation2.htm](http://www.nigeriaoil-gas.com/investment/oil_and_gas_legislation2.htm)

<sup>17</sup> by virtue of regulation 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations of 1985, which confers powers on the Minister to issue Certificate to companies to enable them continue to flare gas.

- Limited numbers of appropriate reservoirs conducive for gas reinjection/storage and the economies of doing so.
- The huge cost of developing major and inter-connecting network of gas pipelines.
- Low technological and industrial base for energy consumption in the country.
- Limited regional and international gas market
- Inadequate fiscal and gas pricing policies to encourage investment
- The difficult terrain of the Niger Delta which hindered the gas gathering process.”

Similarly, Shell offer this explanation in answer to the FAQs on her website<sup>18</sup>:

*“Why can't you end gas flaring in Nigeria before 2008?*

*The rate at which the flares-out programme is achieved will be determined by economic, commercial and technological decisions. This is because any accelerated project to end flaring implies accelerated funding and market availability of gas, which are in themselves quite challenging. For instance, Government, as partners in the joint venture operated by Shell Nigeria, may have to allocate a higher priority to the flares-out programme for it to receive more funding amongst other compelling and competing developmental needs. There is also the issue of project lead-time. Gas gathering and utilisation projects take up long construction periods, even where the funds are readily available.*

*Shell Nigeria remains strongly committed to its corporate target to eliminate all unnecessary gas flaring from its operations by 2008 and good progress is being made towards achieving this target. The cornerstone of the flares-out strategy is LNG exports, but in addition the company has put together a series of strategic investments in gas gathering/utilisation projects that will lead to the elimination of gas flaring by 2008. This constitutes a significant part of the published US\$8.5 billion investment programme of the NNPC/Shell/TotalFinaElf/Agip Joint Venture over the next few years.*

*Currently, 40% of electricity generation in Nigeria is based on gas supplied by Shell Petroleum Development Company (SPDC). With the on-going deregulation of the economy, industry has commenced partnering with the National Electric Power Authority (NEPA) to meet the rising demand for domestic power. Shell is actively working towards full participation in this regard. Finally, via Shell Nigeria Gas Company (SNG), some level of success is being achieved in promoting gas as*

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<sup>18</sup>[http://www.shell.com/home/Framework?siteId=nigeria&FC2=/nigeria/html/iwgen/leftnavs/zzz\\_lhn4\\_5\\_0.html&FC3=/nigeria/html/iwgen/news/faq/faq\\_2211\\_1522.html#14](http://www.shell.com/home/Framework?siteId=nigeria&FC2=/nigeria/html/iwgen/leftnavs/zzz_lhn4_5_0.html&FC3=/nigeria/html/iwgen/news/faq/faq_2211_1522.html#14)

*industrial fuel of choice in the local economy. Partners are required here to accelerate this process and programme.”*

The Nigerian Strategic Plan is of the view that<sup>19</sup>: “... Nigeria’s natural gas resources exploitation is limited by the following:

- 1) resources are in a remote location (in bulk market terms)
- 2) the major potential market of power is in a state of stagnation
- 3) limited infrastructure to transport the gas beyond the current locations of Lagos and Port Harcourt
- 4) high levels of initial investment required. Unlike oil, gas can rarely be used immediately after production.
- 5) Consumption of each increment of gas production requires a large initial expenditure on a complete network of production, transmission, and distribution facilities.
- 6) poor investment climate due to lack of a proper consistent legal, fiscal, and approval framework.
- 7) The realization of further gas projects in Nigeria will have to overcome these general barriers to development together with some specific Nigerian difficulties. In addition, domestic gas demand growth will depend on economic growth and stability.”

Some had argued that the extension of gas flaring was consequent upon non-readiness of the N.N.P.C., which was supposed to bear a large part of the cost of constructing and maintaining the gas injection plants, coupled with the alleged financial and technical incapacity of the major oil producing companies to meet and beat the 1984 ultimatum, as it were, and submitted that prior to the extension, most oil companies had applied or were about to apply for permission to continue to flare unutilised associated gas<sup>20</sup>.

However the success of the Nigeria Liquefied Natural Gas and the Oso Condensate (NGL1) and allied projects are veritable testimonies that there was more economic sense in utilization of associated gas than wasting them. Secondly, ample opportunity existed and still exist for equity and loan capital, locally and internationally.

Thirdly, the economic cost of gas flaring in terms of deliberate wastage of natural resources and environmental degradation far outweighs the argument for continued gas flaring. Consequently, there is no justification to legalize any further continuation of gas flaring in the form of issuance of certificate and at

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<sup>19</sup> See paragraphs 1.16 and 1.17 on page 14 of the Plan.

<sup>20</sup> Ibid.

all.<sup>21</sup> Every hand must therefore be on the deck to terminate this noxious and illegal contravention of the Constitutional and fundamental rights of the Nigerian people with the resultant negative consequences on the climate and our environment.

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<sup>21</sup> Ibid.