



## OIL, POLLUTION AND THE ENVIRONMENT: DECOUPLING THE TRIANGLE IN NIGERIA THROUGH SOME LEGAL INTERNATIONAL AND DOMESTIC PERSPECTIVES

Prof. S. C. Dike\*<sup>1</sup>

Fiberesima Aminayanasam\*\*

Sokolo Solomon Kinfeh\*\*\*

### Abstract

*Since the discovery of oil globally, nations states have never been the same. The ways of life, thinking and doing things equally changed. The transition from analogue way of doing things to digital was facilitated by oil. The present computer age, the journey to space, lifesaving machines and indeed food and energy security were made possible by oil. Oil became the engine of modern progress, development and sustainability of living and non-living creatures. However, the inconvenient truth is that oil has brought more stress to living and non-living creatures and indeed to our collective heritage and environment than any other natural resource. This is through oil pollution of the environment. Oil pollution destroys, damages and impairs living and non-living creatures, leading to their extinction or death. The pollution of the ecosystem is as a result of not only the composition of oil -which is a hydrocarbon; but as a result of the operational defect by the industry. This paper seeks to resolve how to decouple oil, environment and pollution using Nigeria as a case study. The objective is to promote a sustainable oil industry that has the carrying capacity to protect our global commons. The paper adopts a doctrinal approach by relying on existing literature and deciphering past research in order to make an informed findings and recommendations. The major finding is that it is possible to undertake the petroleum industry with minimal impacts on the environment if all relevant legal and operational cautions were factored- on- board. The paper makes some detailed recommendations.*

**Keywords:** Oil, Pollution and Environment; Triangle Nigeran and Decoupling.

### 1.0 Introduction

It has been observed that the production of oil anywhere including Nigeria, has been the major cause of environmental pollution.<sup>2</sup> Although, oil is the major source of revenue for the global oil and gas nations including in Nigerian, facilitating modern economic progress. However, oil production has not guaranteed a sustainable development in most oil and gas producing countries including Nigeria. This is because the procedures adopted for the extraction and production of oil. The oil industry is now categorized as upstream, midstream and downstream sectors of which each sector has its adverse impact to the environment. Today, the search for oil, the actual production for oil, the refinement of oil, marketing the products and consumption of oil all posed serious and diverse health and environmental hazards. The transportation of oil and its many products through barges, vessels and pipelines from on community, state or nation to another even pose higher and greater adverse health and environmental implications to marine and land environments.<sup>3</sup> During oil production for example, dangerous chemicals are mixed with water which are not only hazardous but harmful to the environment and

<sup>1</sup>\* LLB (Hons) BL, LLM,PhD ( Aberdeen ) UK Aclarb (Scotland, GMI London Associate Professor of Energy Laws eme.olive@yahoo.co.uk; +2348143310952

\*\* LLB Hons, BL, LLM In-view

\*\*\* LLB Hons, BL, LLM In-view

<sup>2</sup> United nations Environmental Programme, *Environmental Assessment of Ogoni* UNEP 2011) 20-27

<sup>3</sup> ibid



further; the refining of oil into finished products produces byproducts which are inimical to the environment. Apart from these global truths about oil, in Nigeria, the continuous marginalization of the oil producing communities have contributed to acts of sabotage committed on oil and gas installations, and this contribute to environmental pollution.<sup>4</sup> According to Uzoma and Mgbemena,<sup>5</sup> an estimated 9 million – 13 million (1.5million tons) of oil has been spilled into the Niger Delta ecosystem over the past 50 years; 50 times the estimated volume spilled in Exxon Valdez Oil Spill in Alaska 1989. The first oil spill in Nigeria was at Aroromi in the present Ondo State in 1908. In July, 1979 the Forcados tank 6 Terminal in Delta State incidence spilled 570,000 barrels of oil into the Forcados estuary polluting the aquatic environment and surrounding swamp forest. The Fumiwa No. 5 well in Fumiwa Field blew out an estimate 421,000 barrels of oil into the ocean from January 17 to January, 30, 1980, when the oil flow ceased, 836 acres of mangrove forest within 6 miles off the shore was destroyed.<sup>6</sup> The above portrays the sad situation of oil spills into the environment and this scenarios continue up till date with news of oil spill incidents sometimes, hidden from the media and the public. Oil pollution is a key concern of environmental protection anywhere. Environmental protection is now considered seriously due to the effects on the ecosystem. The effects of oil pollution are inimical to human health, affects the sources of human livelihood and upset oil producing communities. Climate change or global warming is a major consequence of greenhouse gases emitted during oil and gas exploration and production.<sup>7</sup> Environmental protection was not taken seriously at the inception of oil industry anywhere including in Nigeria. This due to the profit placed on revenue from oil not until the year 1988.<sup>8</sup> Nigeria is ranked as the 6<sup>th</sup> largest producer of oil in the world and about the first in Africa with arguable best economy in Africa.<sup>9</sup> It is also well noted that presently, revenue from oil constitutes more than 80 percent of the consolidated revenue and the major financier of government's expenditure in Nigeria. According to Adetular,<sup>10</sup> the enormous revenue derived from the oil industry has not translated into equitable and sustainable development both in the Niger delta oil producing communities and in the whole country<sup>11</sup>. This is so as poverty, average life expectancy, poor hospitals, energy insecurity, poor electricity supply and poor infrastructure, are still prevalent in Nigeria- all been indicators of a poor country still enmeshed in socio-political challenges and unsustainable pattern of development<sup>12</sup>. The practical evidence of the inverse relationship between oil economy and the environment is that the environmental pollution resulting from oil prospecting, gas flaring and venting from oil and gas production, biodiversity depletion and extinction are common features in the Niger delta oil producing communities.<sup>13</sup> This repeated pollution undermines the ecological basis of a hitherto pristine ecosystem and self-sustaining agrarian economy; with a coherent way of life within the oil producing

<sup>4</sup> Akpezi Oguigwe, *Legal issues in the Niger Delta Resources Dilemma: A Collection of Essays* ( ANPEZ Centre for Environment and Development 2018)

<sup>5</sup> A. Uzoma and O. O. Mgbemena, "Evaluation of some Oil Companies in the Niger Delta Region of Nigeria: an Environmental Impact Approach" (2015)3(2) *International Journal of Environment and Pollution Research*, 19.

<sup>6</sup> *Ibid*, 19-20.

<sup>7</sup> Dieter Helm and Cameron Hepburn, *The Economic and Politics of Climate Change* (oxford University Press,2011). 12.

<sup>8</sup> The Koko incident led to the enactment of key legislation for enactment of Federal Environmental Protection Agency Act (now repealed), Harmful Waste (Special Criminal Provisions, etc) Act, Environmental Impact Assessment Act.

<sup>9</sup> Organization of Petroleum Exporting Countries (OPEC) Oil Bulletin 2019

<sup>10</sup> V. A. O. Adetular, "Oil and the People of Niger Delta: A Case Study of Economic, Social and Cultural Impact of Oil Pollution (1996) *Research Report Jos, Nigeria Centre for Development Studies*.

<sup>11</sup> Lawrence Astegbua, Vincent Akpotaire and Folarin Dimowo, *Environmental Law in Nigeria: Theory and Practice* ( 2<sup>nd</sup> ed ( Ambik Press Benin2010) 10-14.

<sup>12</sup> S C Dike, Energy Security, *The Case of Nigeria and Lessons from Brazil, Norway and the UK* ( Pearle Publishers 2015) 15-21.

<sup>13</sup> *Ibid* 152



communities of Nigeria. Thus the invasion of the SEVEN SISTERS of Texaco, Elf petroleum, Agip oil Company, Mobil, Total Shell, BP, as they formerly called and other multinational companies in Nigeria for oil exploration has mixed impacts in Nigeria- some positive and negative consequences.<sup>14</sup> The activities of some of these companies have more than anything else, contributed to unquantifiable environmental pollution, especially oil spillage. For example, since the first oil spillage that took place in Bornu on the 9<sup>th</sup> July 1970, several other incidents have occurred in different parts of the Niger Delta area of Nigeria. Over 784 oil spillage incidents took place between 1976 and 1980 in which about 1.3million barrels of oil were spilled.<sup>15</sup> Pollution has become a daily occurrence in Nigeria that it is no longer acknowledged by authorities and the industry; showing complicity by the Nigerian government with the operators of the petroleum industry in the Niger delta communities.<sup>16</sup> Thus, legislation that regulated the oil and gas production in Nigeria of 1969 – the Petroleum Act – did not contain key provisions to ensure that industry exploiting oil or involved in oil production in Nigeria also take into consideration the concomitant issues of protection of the environment seriously. The Petroleum Act only provided causal prescription for the operators to deal with the environment as well as defenses for not fairly dealing with the environment. that the Minister of Petroleum should ensure that the production of oil or the activities are carried out in more environmentally friendly environment.<sup>17</sup> The Petroleum (Drilling and Production) Regulation 1969, made pursuant to the main Act does not provide the meaning of good oilfield management which it enjoined the industry to comply throughout their operations; thus leaving the meaning to conjecture.<sup>18</sup> There both international and national legislation for controlling oil pollution. Indeed, Nigeria has copious legal frameworks for oil pollution management but the rate of pollution incidents leaves much to be desired, thus questioning the effectiveness of the laws. These laws have been incapable of stopping or preventing or even ensuring adequate clean-up of oil pollution (oil spills in particular) in Nigeria. According to Ikimi, “human activities continue to affect the natural ecosystem adversely, leading to environmental degradation or environmentally unfriendly consequences such as soil erosion, deforestation, oil spillage, biodiversity loss, ozone depletion, pollution, global warming to name a few”.<sup>19</sup> This paper argues that there are adequate legal frameworks in Nigeria to address environmental pollution but the challenge is enforceability and applicability of these laws by the relevant regulators. The Regulatory authorities such as the Department of Petroleum Resources which is an appendage and department within the Nigerian National Petroleum Corporation NNPC has herculean task regulating the compradors’ and big multinational due to lack of operational facilities. Thus, this agency is faced with regulatory capture from the same company it seeks to regulate. The Nigeria Oil Spill Detection and Response Agency (NOSDRA) is the only agency that responds to emergency oil spill and management but lacks operational facilities and personnel to engage in this arduous assignment.<sup>20</sup> The National Environmental Standards Regulations and Enforcement Agency (NESRA) is caught up with jurisdictional conflict with the (DPR) as to whose functions it is to regulate

<sup>14</sup> G Etikerentse *Nigerian Petroleum Law* (Dredew Publishers 2006)

<sup>15</sup> C. B. N. Ogbogbo, *The Niger Delta and the Resource Control Conflict Since 1960 – 1995* (PhD Thesis, University of Ibadan, Ibadan 2004), 7.

<sup>16</sup> *ibid*

<sup>17</sup> Sections 8 (1) (g) and 25 of the Petroleum Act, 1969.

<sup>18</sup> A. O. Ekpu, “Environmental Impact of Oil on Water: a Comparative Overview of the Law and Policy in the United States and Nigeria” (1995) 24 *Denver Journal of International Law and Policy*, 55.

<sup>19</sup> I. Ikimi, “The Law, the Courts and the Challenges of Environmental Protection in Nigeria” (2014) 6 *Justice Journal*, 405.

<sup>20</sup> Since funding of the agency is by Government, it stands to reason that government alone may not have the financial capability to fund the agency



the petroleum industry and this has contributed to the lackadaisical attitude of these bodies to oil pollution incidents in Nigeria.<sup>21</sup> Nwazi<sup>22</sup> also writes on the challenges of environmental law in Nigeria albeit focusing on the challenges vis-à-vis enforcement of environmental law in courts. There are equally international and regional treaties and protocol on environmental protection from oil pollution but are seldom adapted and applied here in Nigeria.<sup>23</sup> Apart from the statutory remedies and laws there are also common-law remedies that could be called in aid by government and the affected victims of oil and gas production but these common law remedies are clothed with inherent defenses.<sup>24</sup> These global regimes include International Convention for the Prevention of Pollution of the Sea by Oil, International Convention on Civil Liability for Oil Pollution Damage and the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region. Some of the international treaties, have been signed or acceded to by Nigeria but lacked the force of operations until they are domesticated.<sup>25</sup> On the whole, oil operations endanger the environment and there is need to decoupled is impact of oil from the environment. It is important to set out by defining these terms in order to enable the practical application of the legal trust of this paper.

## 2.0 Conceptual Issues

This section elucidates the conceptual issues involved in this paper which are oil, pollution and environment. Pollution has been defined as the process of making air, water, soil, etc. dirty or less useful for their originally intended purposes. According to Gray,<sup>26</sup> pollution is the introduction of contaminants into the environment that cause harm or discomfort to humans or other living organisms, or that damage the environment, which can come in the form of chemical substances, or energy such as noise, heat or light. The Organization for Economic Cooperation and Development, recommendation in 1974, defines pollution as “the introduction by man, directly or indirectly, substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment.”<sup>27</sup> Pollution has further been described as the addition of any substance or form of energy (e.g. heat, sound, and radioactivity) to the environment at a rate faster than the environment can accommodate it by dispersion, breakdown, recycling, or storage in some harmless form.<sup>28</sup> The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA)<sup>29</sup> defines pollution as man-made or man-aided alteration of chemical, physical, or biological quality of environment beyond acceptable limits. This definition limits pollution to man-made activities. This is not completely true as natural events such as earthquakes and volcanic eruptions can alter the environment. In my view pollution, is any matter or substance that lowers the quality or marketability of anything, impairs, damage or destroys any thing including human, plant and animals. From these definitions, it can be observed that there is one common feature, which runs through the tread of the extant definition and it

<sup>21</sup> United Nations Environment Program on Ogoni 2009 page 120 on conflict among regulatory bodies.

<sup>22</sup> J. Nwazi, “Access to Environmental Justice in Nigeria” (2008) 1 (1) *Lead City University Law Journal*, 16 – 19.

<sup>23</sup> Atsegbua and Akpotaire (n10) 47-65.

<sup>24</sup> Common Law of Tort to wit: trespass, strict liability and the Rule in nuisance.

<sup>25</sup> Section 12 of the 1999 Constitution; *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt. 660) 228.

<sup>26</sup> I. Gray, “Environmental Pollution, Its Sources and Effects” (2010) Available at < <http://www.tropical-rainforest-animals.com/Environmental-Pollution.html> > Accessed on 22 March 2020.

<sup>27</sup> M. Shaw, *International Law* (The Press Syndicate of the University of Cambridge, United Kingdom 2003), 23.

<sup>28</sup> Gray (n25).

<sup>29</sup> NESREA ACT, 2007.



is the fact of the alteration of the natural environment as a result of certain activities by pollution. In this paper, pollution means the alteration of the natural environment by the introduction of natural or man-made contaminants into the environment in a way that it causes harm or discomfort to human beings or other living organisms. Thus, oil spill, waste water, sludge, slurry gas which are hydrocarbon or contain of hydrocarbon amounts to pollution. Oil on the other hand include, crude oil petrol oil oily products, kerosene, diesel, oil mixture, and these could be used interchangeably. Oil is a mixture of naturally occurring hydrocarbons that can be refined into diesel, gasoline, heating oil, jet fuel, kerosene, and literally thousands of other products called petrochemicals<sup>30</sup>. Crude oil is classified according to its contents and origins, and to its per unit weight.<sup>31</sup> According to Asagunle and Agbede, "Petroleum or crude oil is an oily bituminous liquid, consisting of a mixture of many substances mainly the elements of carbon and hydrogen, and thus known as hydrocarbon. It also contains a very small amount of non-hydrocarbon element, chief amongst which are Sulphur, nitrogen, and oxygen. Oil Pollution is the resultant contamination of environment due to the introduction/presence of oil in excessive quantity and occurs mostly as a result of oil spill. It is most common in large water bodies like seas and oceans but can be Oil can be found onshore. Oil spill occurs due to the release of a liquid petroleum hydrocarbon into the environment.<sup>32</sup> This form of pollution especially affects marine water and soil. It is primarily a man-made pollution and it is as a result of human irresponsible activities. The next takes us to the meaning of environment where petroleum activities carried out. Environment has several definitions.

It is the place where a person lives or anything is located is, at any given point in time.<sup>33</sup> According to Osipitan, the environment is evidently nature's most generous contribution to human existence on earth.<sup>34</sup> the Nigerian constitution attempts a provision on the term environment when it states thus : "The state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria".<sup>35</sup> This places a constitutional duty on the government to protect and preserve the environment Whereas, Section 37 of the National Environmental Standards and Regulations Enforcement Agency Act<sup>36</sup> defines environment thus "Environment include water, air, land and all plants and human beings or animals living therein and inter- relationships which exist among these or any of them"; Section 3(1) of the Canadian Environmental Protection Act,<sup>37</sup> defined environment as the components of the earth which includes: (a) air, land and water, (b) All layers of the atmosphere (c) all organic and inorganic matter and living organisms and (d) the interacting natural systems that include components referred to in paragraph (a) to (c). In the case of *AG Lagos State v. AG Federation*<sup>38</sup> the Supreme Court held that "The totality of physical, economic, cultural, aesthetic and social circumstances and factors which surround and affect the desirability and value of property and which also affect the quality of people's lives". The environment encompasses living and non- living matters whether natural or man-made; and their interaction with one another or the aggregate of the physical

<sup>30</sup> Daniel Yergin *The Prize of oil: The Epic Quest for oil, Money and Power* ( Simon schuster. 2010) 31-35

<sup>31</sup> Business Dictionary. Available at< <http://www.businessdictionary.com/definition/crude-oil.html>> Accessed on 22 March 2020.

<sup>32</sup> UNEP 2011(n2) 105-106.

<sup>33</sup> I. Ikimi "The Law, the Courts and the Challenges of Environmental Protection in Nigeria" (2014) 6 *The Justice Journal*, 407.

<sup>34</sup> T. Osipitan, "A Conspectus of Environmental Laws in Nigeria (1997) 1 *Nigeria Journal of Public Law*, 85.

<sup>35</sup> Section 20 of the 1999 Constitution of the Federal Republic of Nigeria as amended.

<sup>36</sup> Cap. N164 Laws of the Federation of Nigeria, 2010.

<sup>37</sup> Canadian Environmental Protection Act, 1999< <http://www.Ec.gc.ca/lc/lcpe-cepa-2013/0/25-/oi-bill.pdf>> accessed on 05 March 2020.

<sup>38</sup> (2003) FWLR (pt. 168) 922.





and biological entities of the world.<sup>39</sup> This work is in agreement with this definition as its definition of the term environment. Environmental Pollution, according to a 1965 definition by the Science Advisory Committee of the United States means the:

The unfavorable alteration of our surroundings, wholly or largely as a by-product of man's actions, through direct or indirect effects of changes in energy patterns, radiation levels, chemical and physical constitution and abundances of organisms. These changes may affect man directly or through his supplies of water and of agricultural and other biological products, his physical objects or possessions, or his opportunities for recreation and appreciation of nature.<sup>40</sup>

Oil pollution is a specie of environmental pollution and there are many pollutants other than oil that discrete environment. Having know the problems and conceptual issues that tie the triangle; the next section will consider the applicable international and local laws employed for addressing succor to oil pollution victims on one part and protecting the environment from oil pollution on the other part. We shall begin with then international treaties and convention.

### **3.0 International and regional frameworks for dealing with the issue of oil pollution**

Oil pollution and environments have become Siamese twins for which no serious discussion can be made of one without the other. Similarly, no measure to control one without affecting the other. Thus, we argue that legal measures for controlling environmental challenges must affect the roles of oil and pollution on the environment. This is due to the adverse contributions of oil and other contaminants on the environment. In the same vein, most international and legal regimes on oil pollution affect the environment. Therefore, it is apposite to uncover how the international legal regimes affect oil pollution and the environment, together with their effectiveness in mitigation or reducing the foot print of pollution on the environment. This section commences with the International Convention for the Prevention of pollution of then sea by oil 1954. In this section, environment includes offshore and onshore environments

#### **3.1 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) 1954 as amended in 1962 and 1969**

OILPOL<sup>41</sup> was the first Convention to deal with intentional discharges of oil into the marine environment. The Marine Pollution Convention aimed at eliminating international pollution of the marine environment as well as minimizing accidental discharge of oil. The Convention was the outcome of a conference held by countries and their representatives in 1954 in London. The Convention prohibits the discharge of oil and oily mixtures by tankers within an area of 50 miles of land or certain prohibition zones.<sup>42</sup> The discharge of oil or of any oily mixture from such ship shall not be prohibited when the ship is proceeding from a port not provided with such receptible as are referred to in Article

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<sup>39</sup> Ikimi, (n 32) 409.

<sup>40</sup> Quoted in L. Hodges, *Environmental Pollution* (New York, 1973), 1.

<sup>41</sup> OILPOL was adopted at London on 12 May 1954 and entered into force on 26 July, 1958. It was amended in 1962.

<sup>42</sup> Art 111 and Annex A.



VIII.<sup>43</sup> Article III also exempts a ship from sanction under the Convention if the discharge of oil or an oily mixture was done for the purpose securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea.<sup>44</sup> This exception provides a gap to ship owners and captain to pollute the marine environment hiding under this defenses inherent in the Convention. With respect to the discharges that are not permitted under the Convention, the government of a Contracting State may impose penalties under the law of the territory of such a State and the penalties which shall be imposed shall not be less than the penalties which is applicable in the law of that Contracting State.<sup>45</sup> Where the oil mixture is less than 100 parts per million it is deemed not capable of fouling the surface of the sea.<sup>46</sup> Subject to the provisions of Articles IV and V, Ships are required to carry an “oil record book” in the form prescribed by the Convention<sup>47</sup> and the book may be inspected by any of the contracting states.<sup>48</sup> Contracting states are obliged to report any violations by any of the Convention standards to the governments of the state in which the violator is registered.<sup>49</sup> In turn, the government is required to punish the violator under its national laws, which must provide for penalties “adequate in severity to discourage any such unlawful discharge”.<sup>50</sup> This Convention has been domesticated in the Nigeria by the enactment of the Oil in Navigable Waters Act.<sup>51</sup> This domestication was done through incorporation by reference pursuant to section 335 of the Merchant Shipping Act( MSA). Section 335 of MSA domesticates International Conventions that deal with vessels - source pollution including the Law of the sea 1982. The section applies to:

- a) International Convention for the Prevention of Pollution from ships, 1973/1978 and the Annexes thereto;
- b) Convention Relating to Intervention on the High Seas in Cases of Threatened Oil Pollution Casualties, 1969;
- c) International Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1972;
- d) International Convention on Oil Pollution Preparedness, Response and Co- operation, 1990;
- e) International Convention on Civil Liability for Oil Pollution Damage 1992;
- f) Convention on Limitation of Liability for Maritime Claims, 1976 and the 1996 Protocol thereto;
- g) Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 and its Protocol of 1992;
- h) Basel Convention on the Control of Trans boundary Movements of Wastes and their Disposal, 1989; and

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<sup>43</sup> Art III(2)(b).

<sup>44</sup> Art IV(1) (a).

<sup>45</sup> Art VI.

<sup>46</sup> Art 111.

<sup>47</sup> Art IX (1).

<sup>48</sup> Art IX (4).

<sup>49</sup> Art X.

<sup>50</sup> Art VI. Refer also to the text of the Convention at:

<http://www.ecolex.org/server2.php/libcat/docs/multilateral/en/TRE000578.txt> Accessed on 10 September 2019.

<sup>51</sup> Oil in Navigable Waters Act Cap 06 LFN 2004.



The section further provides that any International Agreements or Convention not mentioned in paragraphs (a) to (h) of this subsection which relates to the prevention, reduction or control of pollution of the sea or other waters by matters from ships; to which Nigeria is a party shall apply including the Law of the sea 1982. One of the criticisms of the OILPOL is the latitude of the exceptions to the convention.<sup>52</sup> Under the OILPOL Convention, 1954, the accidental spillage of crude oil into navigable waters was not punishable. Other criticisms include those found in under Article 4(1) of the Convention to the effect that an offender is required to prove that oil was discharged for the purpose of saving life, or to prevent damage or destruction of vessel or cargo.<sup>53</sup> A polluter can also raise the defense of accident where the polluter can prove that the polluting substance (oil) escaped as a result of damage to his vessel, or leakage therefrom, and that all reasonable and urgent steps were taken to contain the discharge and reduce its impact on the environment.<sup>54</sup>

Further, any damage caused by non-persistent oils or chemical products from ships are not covered.<sup>55</sup> Similarly, a pollution damage resulting from the escape of oil from any ship or tankers not carrying oil in bulk as cargo is not covered. In other words, the damage must be as a result of oil being carried by a ship as cargo. The Convention will not, for instance, cover damage to a pleasure boat. Again, OILPOL did not cover pollution damage resulting from the escape of oil from vessels used in the carriage of oil in the course of inland transportation of oil (i.e. outside the fifty-mile zone) and oil escaping from offshore installations, land installation and pipelines.<sup>56</sup> In conclusion, OILPOL, was the first global convention towards the prevention of oil pollution in the marine environment. It enjoins governments of nations to desire by common agreement, to prevent pollution of the sea by oil discharged from ships and to make provisions on how the convention can be utilized in preventing oil pollution/discharge.<sup>57</sup> Although, it has been amended severally and now superseded by the 1973 Convention for the Prevention of Pollution by Ships together with its 1978 amending Protocol.<sup>58</sup> The OILPOL 1954, has been domesticated by Nigeria but is yet to ratify the MARPOL 73/78. These shortcomings outlined above were redressed with the coming into force of International Convention for the Prevention of Pollution from Ships (MARPOL)

### **3.2 International Convention for the Prevention of Pollution from Ships (MARPOL)**

An International Maritime Organization Conference was held on 2 November 1973 adopted two instruments. The first is “International Convention for the Prevention of Pollution by Oil from Ships, 1973, and the second “Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution

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<sup>52</sup> The exceptions include thus: the discharge of oil outside the fifty-mile zone and designated prohibition zone is unregulated by the Convention. The Convention does not also apply to naval ships; A vessel may also escape liability if oil is discharged in order to secure the safety of the ship and save life at sea or where the discharge has resulted from damage to the ship; Also the ship master or owner may plead the defense of sabotage and establish absence of negligence. As one commentator put it, there were many loopholes in the Convention which made its enforcement difficult. The various exceptions also made the Convention to be practically useless in the combating of intentional pollution of the Sea by oil.

<sup>53</sup> L Atsegbua, V Akpotaire and F Dimowo, *Environmental Law in Nigeria, Theory And Practice*, (Ababa Press Ltd., Lagos 2004), 22.

<sup>54</sup> Art 4(2)(a).

<sup>55</sup> *ibid*

<sup>56</sup> *ibid*

<sup>57</sup> Amokanye G. O., *Environmental Law and Practice in Nigeria*, (Lagos, University of Lagos Press, 2004) p. 462.

<sup>58</sup> (1973) 12 ILM1319; O. Fagbohun *The Law of Oil Pollution and Environmental Restoration, A Comparative Review*, (2010), p. 493.





by Substances other than Oil”.<sup>59</sup> In 1978, a Conference on Tanker Safety and Pollution Prevention took place in London and the outcome was a Protocol to amend the 1973 MARPOL Convention. The 1973 MARPOL Convention contains Annexes 1 and 11 which are compulsory for all members. Annex 1 contains regulation for the prevention of pollution by oil. Annex 11 contains provisions for the control of pollution by noxious liquid substances other than oil. The 1978 Protocol incorporated by reference Annexes 1 and 11 but limits its scope so as to relieve the Parties of their obligations under Annex 11 for at least three years (Article 11).<sup>60</sup> Annex 111 contains regulation for the prevention of Pollution by harmful Substances Carried by Sea in Packaged Form. Annex IV contained provision for the Prevention of Pollution by Sewage from Ships. Annex V contains provision for the prevention of Pollution by Garbage from Ships. Annex VI contains provision for the Prevention of Air Pollution from Ships. Annexes 111, IV, V and VI are optional to parties. The Protocol to amend MARPOL 73 entered into force on 2 October 1983.<sup>61</sup> The International Convention for the Prevention of Pollution from Ships (MARPOL) is a follow-up Convention to the OILPOL. Since the discharge of oil outside the fifty-mile zone is unregulated by the Convention, it follows that an appropriate legal regime must develop to regulate the disposal of oil and oil residues outside the fifty-mile zone and the prohibited areas. This is an area where the ballast water and other types of wastes are discharged, in the absence of the provision of waste reception facilities.<sup>62</sup> Nigeria ratified MARPOL 73/78 in May 2002 and has since domesticated the provisions of MARPOL.<sup>63</sup> The Act which domesticated MARPOL 73/78 is International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol (Ratification and Enforcement) Act<sup>64</sup> The Act states in its preamble: An Act to enable effect to be given in the Federal Republic of Nigeria to the International Convention for the Prevention of Pollution from Ships, 1973 and the 1978 Protocol; And for Related Matters. The Act then attaches to its Schedule MARPO 73 and its Protocol of 1978. The Act further provides that MARPOL 73/78 shall have the force of law in Nigeria and shall be given full recognition and effect; and be applied by all authorities and persons exercising legislative, executive and judicial powers.<sup>65</sup> The major criticism of MARPOL 73/78 is that it lacks a self-enforcing mechanism. This is because “(the) primary responsibility for the effective application of vessel safety and environmental standards laid down in international instruments rests with flag states”.<sup>66</sup> “They have an obligation to ensure that their flag vessels comply with the applicable international rules and standards relating to vessel safety and pollution control.”<sup>67</sup> Flag states refer to states having jurisdiction over the ship. The primary basis for the regulation of ships is the jurisdiction enjoyed by the State in which the vessel is registered or whose flag it is entitled to fly ( ‘the flag state’).<sup>68</sup> It is the flag state which is responsible, for instance, for regulating safety at sea and the prevention of collisions, the manning of ships and the competence of their crews, and for setting

<sup>59</sup> Gold (1973) 58 cited in Gray *op.cit.*, 90.

<sup>60</sup> P. Sands and P. Galizzi, *Documents in International Law* (2<sup>nd</sup> edn. Cambridge University Press, Cambridge 2004), 289.

<sup>61</sup> Annexes 111, IV and V have come into force.

<sup>62</sup> J Gray *Vessel Source Pollution and Key International Conventions: A Case for Change*. (PhD Dissertation, University of Auckland New Zealand 2002), 86.

<sup>63</sup> See International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol (Ratification and Enforcement) Act No. 15, 2007 which came into force on 11 April 2007.

<sup>64</sup> No. 15, 2007 in force on 11 April 2007.

<sup>65</sup> See s 1(a), (b), and (c) of the Act.

<sup>66</sup> Gray *op cit.*, 8.

<sup>67</sup> *Ibid.*

<sup>68</sup> P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, (3<sup>rd</sup> edn. Oxford University Press, Oxford 2009), 400.



standards of construction, design, equipment, and seaworthiness.<sup>69</sup> Under MARPOL 73/78 these duties are imposed on the flag states.<sup>70</sup> Therefore, if the flag state does not protect other users or bring to book any ship found violating the convention, it will be difficult to punish such vessels and the result would be brazen pollution of the environment.

### 3.3 International Convention on Civil Liability for Oil Pollution Damage 1969.<sup>71</sup> (CLC)

This Convention imposed liability to pay compensation in the event of damage caused by oil pollution at sea.<sup>72</sup> The liability regime is similar to those under the rule in *Rylands v. Fletcher*<sup>73</sup> and it is strict providing no escape route to maneuver or defenses on the part of the operators of marine environment.<sup>74</sup> This is regardless of fault, as victims of oil pollution can claim compensation from the ship owners whose ship caused the oil pollution damage.<sup>75</sup> Nigeria is signatory to the Convention but is not a signatory to its protocols of 1972 and 1992.<sup>76</sup> It is submitted that for an effective implementation of this Convention, Nigeria should sign both Protocols and make efforts in ensuring that its citizens access the fund in terms of compensation.

The Civil Liability Convention (CLC) drew impetus from the *Torrey Canyon ship accident*.<sup>77</sup> The incident led to the convening of an international Conference in Brussels and the outcome was the Civil Liability Convention, 1969.<sup>78</sup> Under the provisions of the CLC, the ship owner is entitled to limit his liability if the loss arose from an incident which does not result from his actual fault or privity.<sup>79</sup> It is appropriate here to examine the concept of limitation of liability. A person is said to be liable to another where that person suffers loss or damage at the hand of the other. Legal liability in tort (delict) or contract may thus be invoked legally to compensate the loss suffered by the other person.<sup>80</sup> The preamble to the CLC 1969 states thus:

Conscious of the dangers of pollution posed by the worldwide maritime carriage of oil in bulk, Convinced of the need to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships, Desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases, Have Agreed as follows...

<sup>69</sup> Art 94, 211 (2) of UNCLOS 1982.

<sup>70</sup> Birnie, Boyle and Redgwell, *op cit*, 401.

<sup>71</sup> IMO, International Convention Civil Liability for Oil Pollution Damage 1969 [http://www.imo.org/about/convention/listofconventions/pages/internationalconvention-on-civil-liability-oil-pollution-damage-\(ele\)aspx](http://www.imo.org/about/convention/listofconventions/pages/internationalconvention-on-civil-liability-oil-pollution-damage-(ele)aspx). Accessed on 10 September 2019.

<sup>72</sup> *Ibid*.

<sup>73</sup> (1868) L.R. 3 H. L. 30.

<sup>74</sup> G. O. Amokaye *Environmental Law and Practice in Nigeria* (2002), 464.

<sup>75</sup> The Convention has provided compensation for clean-ups costs and preventive measures as well as for environmental damage to affected countries and affected individuals in fish, fishing and tourism industries. T. Gurumo and H. Lixin, Petroleum and Sustainable Development. The Role of International Conventions, <http://ipcbee.com/vol/126/13-ICPSD2011-p1009.pdf>. Accessed on 10 September 2019.

<sup>76</sup> M. Igbokwe, "Assessment of Existing National Legislation and Regulations Related to Pollution Prevention" [www.mikegbokwe.com/new/Assessment of existing.pdf](http://www.mikegbokwe.com/new/Assessment%20of%20existing.pdf). Accessed on 10 September 2019.

<sup>77</sup> *Ibid*.

<sup>78</sup> The Convention entered into force in 1975.

<sup>79</sup> See Article 3(2), of the CLC 1969.

<sup>80</sup> J. Hare, *Shipping Law and Admiralty Jurisdiction in South Africa*, (2<sup>nd</sup> Edn. Juta & Co. Ltd., Cape Town 1999), 514.



The CLC, 1969 was adopted to ensure that adequate compensation is paid to persons who suffer oil pollution damage resulting from maritime casualties involving oil carrying ships. “Ships” means any sea<sup>81</sup>-going vessel and any seaborne craft of any type whatsoever actually carrying oil in bulk as cargo.<sup>82</sup> The Convention places the liability for such damage on the owner of the ship from which the polluting oil escaped or was discharged.<sup>83</sup> The Convention requires ships covered by it to maintain insurance or other financial security in sums equivalent to the owner’s total liability for one incident.<sup>84</sup> The Convention applies to all seagoing vessels carrying oil in bulk as cargo, but particularly to ships carrying more than 2000 tons of oil which are required to maintain insurance in respect of oil pollution damage.<sup>85</sup> The obvious advantage of this is that in the event of a pollution incident, all the claimant needs to do is sue the insurance company directly in the country where the pollution incident occurs. This makes it convenient instead of suing the owners of the ship.<sup>86</sup> The CLC also provides that the ship owner shall be liable for any pollution damage caused by oil which has escaped or been discharged from a ship at the time of an incident provided that damage was caused on the territory including the territorial sea of a contracting State and to preventive measures<sup>87</sup> taken to prevent or minimize such damage.<sup>88</sup> Pollution damage includes, amongst other costs, the cost of preventive measures<sup>89</sup> when taken, and the damage caused by these measures.<sup>90</sup> The CLC Convention has been given effect in Nigeria through Merchant Shipping (Civil Liability for Oil Pollution Damage and Compensation) Regulations. By this amendment, the Regulation has given effect to the provisions of the Protocol to the Civil Liability Convention 1992 (which is based on the LLMC 1976), as regards to the ability of the ship owner to limit his liability under the Convention and the maximum ceiling recoverable from the ship owner.

### **3.4 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution (IOPC Fund) 1992<sup>91</sup>**

The IOPC Fund came up in response to the inadequacy of the CLC as regards compensation to be paid to victims of oil pollution damage. The IOPC Fund provides supplementary compensation to be paid in cases where the totality of claims exceed the ship owner’s liability limit or where compensation is not obtainable from a ship owner who is exonerated from liability or is incapable of meeting his CLC

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<sup>81</sup> Introduction to the CLC as contained in the IMO website above.

<sup>82</sup> Art 1(1) of CLC 1969.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> L. Mbanefo, *Essays on Nigerian Shipping Law* (3<sup>rd</sup> edn. Lombard Publishers, Lagos, 2006), 69.

<sup>87</sup> Preventive measures’ is defined in Art 1(7) as ‘any reasonable measures taken by any person after an accident has occurred in order to prevent or minimise damage.

<sup>88</sup> Art 11.

<sup>89</sup> A preventive measure is a measure taken immediately after the occurrence of a pollution incident to prevent further spread of the oil pollution. It involves the provision of Booms for instance to contain the spread of the oil and the use of dispersants to spread the oil over a large surface area. It also includes the cost of putting these measures into effect.

<sup>90</sup> The damage caused by these measures may include for instance the use of chemicals which may have deleterious effects on fish and wildlife.

<sup>91</sup> International Convention on the Establishment of an International Fund for Compensation for Oil Pollution 1992. <http://www.gov.mu/portal/sites/ncb/eurd/oil/infos/textcony.pdf>. Accessed on 10 September 2019.



obligations.<sup>92</sup> Only those states which have become parties to the CLC can become members of the IOPC Fund. The Fund is financed by persons who receive crude oil or heavy oil in a contracting year. This implies that the contributors to the Fund need not be governments, but could be persons like oil companies. The Fund assembly determines the number of levies to be contributed for the payment of claims and administrative expenses.

The contribution is payable only by persons who imports oil in quantities exceeding 150, 000 tons per annum. The Convention covers only oil from tankers or ships carrying oil as cargo and its purpose is to establish an international fund to provide compensation for oil pollution damage. The Fund pays compensation to victims who suffer oil pollution if such a person is unable to obtain full and adequate compensation under the terms of the Civil Liability Convention 1969. Nigeria is a signatory to the Fund Convention of 1971 but has not yet acceded to the Fund protocol of 1992. The IOPC Fund will not pay compensation where the pollution results from a warship or acts of war and where the spillage results from an unidentified source.<sup>93</sup> The maximum amount payable under the 1971 IOPC Fund is respect of any single accident is SDRs 60 million (about \$76 million). The Fund indemnifies the ship owner for a part of the aggregate amount of his liability under the CLC to the limit of US \$42 for each ton of the ship's tonnage.<sup>94</sup> This regime continued till 1976 when it was found out that the liability limits were insufficient, especially after the Torrey Canyon incident described earlier on. A Convention on Liability was held in 1976 in Brussels and a series of amendment was proposed to the 1957 Convention. This led to the 1984 Protocol to the 1976 Liability Convention.<sup>95</sup> The 1984 amendments were finally incorporated into the international liability system when another IMO diplomatic conference was conveyed in 1992. As incorporated in these revised protocols, CLC 1992 and the Fund Convention 1992 (both came into force in May 1996). As more States ratified or acceded to the 1992 Conventions, the original conventions rapidly lost significance and the 1971 Fund Convention was terminated altogether on 24th May 2002.<sup>96</sup> At the same time when the 1969 Civil Liability Convention and the 1971 Fund Convention were being negotiated, two corresponding voluntary industry schemes were adopted. These two schemes were known as TOVALOP (Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution) and CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution).<sup>97</sup> The purpose of these industry schemes was to provide benefits comparable to those available under the Civil Liability Convention and the Fund Convention in States which had not ratified those Conventions. Both TOVALOP and CRISTAL were intended to be interim solutions and to remain in operation only until the international Conventions had worldwide application. As a result of an increasing number of States denouncing the 1969 and 1971 Conventions and ratifying the 1992 Conventions, the 'old regime' also lost importance. The 1971 Fund Convention ceased to be in force on 24 May 2002 when the number of 1971 Fund Member States fell below 25. The 1971 Fund is therefore in the process of being wound up but will continue its operations until all pending claims arising from

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92 C. Wu, "Liability and Compensation for Oil Pollution Damage: Some Currents Threats to the International Convention System", (2002) 7(1-2) *Spill Science & Technology Bulletin*, 107.

93 Mbanefo, *supra*, 70.

94 This amount is calculated based on the provisions of the Limitation of Liability Convention, 1957.

95 Mbanefo *supra*.

96 [www.imo.org](http://www.imo.org).

97 *Ibid*.



incidents occurring up to 24 May 2002 have been settled.<sup>98</sup> By voluntary agreements of member states both TOVALOP and CRISTAL have been wound up. Nigeria is a signatory to the 1992 Fund Convention and has denounced the 1969 Convention altogether.<sup>99</sup>

### **3.5 United Nations Convention of the Law of the Sea (UNCLOS)<sup>100</sup> 1982**

Nigeria is a party to the UNCLOS. UNCLOS requires States to take step to minimize pollution from offshore installations,<sup>101</sup> make efforts to implement internal laws and standards regulating seabed activities,<sup>102</sup> cooperate globally and regionally in formulating international rules and standards for the protection of the marine environment,<sup>103</sup> enforce-effective international standards<sup>104</sup> and establish adequate compensation for damage caused by pollution to the marine environment.<sup>105</sup> Although the Convention drew regulations concerning discharge of oil from ships or pipelines, it has been noted that its emphasis was more on the environment and aircrafts.<sup>106</sup> It also has been criticized for its vague considerations of pollution prevention .<sup>107</sup>

### **3.6 International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990**

The OPRC<sup>108</sup> requires States to establish a national system to promptly and effectively respond to oil pollution incidents. The Convention further requires the establishment of a competent national contingency plan which is designed to respond to oil disaster and also provides requirements for pollution emergency that vessels offshore and onshore facilities must have.<sup>109</sup> Nigeria has incorporated the provisions of OPRC into the National Oil Spill Detection and Response Agency Act, 2011.

## **4.0 Regional Instruments on Oil Pollution**

### **4.1 Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region 1981**

Nigeria has ratified this convention and its objective is to protect the marine environment, coastal zones and related internal waters which falls within the jurisdiction of the states of West and Central Africa. Member states undertake to take all necessary measures to prevent, reduce, combat and control pollution of the area with particular emphasis on pollution and exploitation of the seabed, preserve fragile

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<sup>98</sup> [www.imo.org](http://www.imo.org) *ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> United Nations Convention of the Law of the Sea 1982, 1833 UNTS hereinafter referred to as UNCLOS, <http://www.un.org/Depts/los/convention-agreements/texts/UNCLOS-epdf>. Accessed 10/05/13. See Bosna, S., "The Regulation of Manure Regulation Arising from offshore Oil and Gas facilities-An Evaluation of the Adequacy of Current Regulatory Regime and the responsibility of states to Implement A New Liability Regime, (2012) 26 A & N2 March. Nigeria acceded to the Convention on September, 30, 1962.

<sup>101</sup> Article 194.

<sup>102</sup> Article 208.

<sup>103</sup> Article 197.

<sup>104</sup> Articles 214 & 215.

<sup>105</sup> Article 235(2).

<sup>106</sup> Fagbohun, *supra*.42.

<sup>107</sup> *Ibid.*

<sup>108</sup> International Convention on Oil Pollution Preparedness, Response and Cooperation (1990, 30 ILM 1991), [http://www.imo.org/about/convention/listofconventions/pages/international-convention-on-pollution-preparedness-response-and-co-operation-\(oprc0asp](http://www.imo.org/about/convention/listofconventions/pages/international-convention-on-pollution-preparedness-response-and-co-operation-(oprc0asp). Accessed on 09 September 2019.

<sup>109</sup> Article 3, *Ibid.*





ecosystems as well as establish rules and procedure of determining liability and the payment of adequate and prompt compensation for pollution damage.<sup>110</sup>

#### **4.2 Protocol Concerning Co-operation in Combating pollution in Cases of Emergency 1981**

This Protocol covers the West and Central African Region<sup>111</sup> and is designed to protect the marine environment and coastal environment of the Region and provides that contracting parties should cooperate in all matters relating to the protection of their respective coastline and related interests from the threat and effects of pollution resulting from marine emergencies and by making contingency plans to prevent, reduce, combat and monitor such emergencies.<sup>112</sup> It should be noted that most of these Convention provide for compensation where a polluter fails to protect the environment and require member States to apply the precautionary rule. These conventions have helped Nigeria is enacting laws to protect her environment. Although Nigeria has ratified or acceded to some of the above international conventions and protocols there are still national was that deals with local issues arising from pollution onshore and offshore. This section will consider some domestic law and their effectiveness in combating environmental pollution used by oil

#### **4.3 National Legal Framework for Oil Pollution in Nigeria**

There are so many legal frameworks that directly and indirectly affect oil and environmental pollution in Nigeran the first is the constitution which is the ground norm upon which every other law derives its validity.

#### **5.0 The Constitution of the Federal Republic of Nigeria, 1999 LFN 2004**

The Constitution is the supreme law of any country. All other laws derive their relevance from it. The inconsistency of any law with the Constitution renders such law null and void to the extent of the inconsistency.<sup>113</sup> The Nigeria Constitution has taken cognizant of the need of protecting the environment and has made provisions for it in, section 20 of the constitution. It provides that the State shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria. Section 17(2) (d) provides that exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community shall be prevented. The inclusion of these sections in the constitution is aim at preventing environmental pollution such as oil pollution. The effort in this regard is quite commendable considering the importance of the environment. However, the inclusion of chapter II of the Constitution being the Fundamental Objectives and Directive principles of State policy has really reduced their effectiveness, as they have been made non-justiciable.<sup>114</sup> Apart from sections 20 and 17(2)(d) of the Constitution, section 33 of the said Constitution guarantees fundamental right to life while section 34 guarantees right to human dignity which oil pollution can cause. These two sections have been linked to the need to the unhealthy environment and low average

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<sup>110</sup> Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment, <http://www.conclumbia.edu/entri/texts/marine.coastal.west.central.africa.1981.html>. Accessed on 09 September 2019.

<sup>111</sup> Protocol concerning Co-operation in Combating Pollution in Cases of Emergency 1987. <http://sedac.ciesin.columbia.edu/entri/texts/marine.coastal.west.central.africa.1981.html>. Accessed on 10 September 2019.

<sup>112</sup> See Articles 4-10, *Ibid*.

<sup>113</sup> Section 1(3) of the Constitution of the Federal republic of Nigeria CAP C20 Laws of the Federation of Nigeria 2010.

<sup>114</sup> Section 13, *ibid*.



lifespan in Nigeria.<sup>115</sup> Prior to the enactment of the above provisions of the Constitution, previous constitutions<sup>116</sup> had no provision concerning the environment. The 1999 Constitution also provides that no treaties shall have any force in Nigeria unless such a treaty has been enacted into law by the National Assembly (Parliament).<sup>117</sup> The implication of this is that no treaty or convention acceded to by Nigeria is of any force unless it is domesticated by an act of the National Assembly. This has affected the applicability of most of the environmental protection treaties including the ones on oil pollution acceded to or signed by Nigeria. They can only be applied when they have been domesticated through enactment into law by the Nigerian National Assembly. It will be seen later that NESREA has made attempts to contain this perceived lacuna in the Constitution. But the supremacy of the Nigerian constitution cannot be derogated by mere enactment of an Act. On the non-justiciability of the Constitutional provisions on environmental protection, because under Chapter II of the Fundamental Objectives and Directive Principles of State Policy implies that no action can lie against any organ of state for failure to comply with the provisions of the section.<sup>118</sup> It is an account of this that private citizens cannot bring action against the government or its agents to court or question them when there are breaches of environmental pollution laws. Similarly, as NNPC is in Joint venture with the IOCs, no private citizens can bring or cause government to ensure clean air, land and water of Nigeria by mandamus or any legitimate actions in court. These remedies are effectively whittled down by the provisions of Section 6(6) (c) of the Nigerian Constitution which provides:

The judicial powers vested in accordance with the foregoing provisions of this section:

(c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter 11 of this Constitution.

The non – justiciability of this chapter and its provisions is contrary to the right created under the Fundamental Enforcement Rights provision in Chapter IV of the same constitution as any person who alleges that any of the provision of the said chapter IV has been breached can apply to the High Court of the State for the enforcement of the fundamental right of that person.<sup>119</sup>

South Africa has however moved away from this position to recognize environmental rights as human rights and therefore be protected (when contained in state constitution) as fundamental rights.<sup>120</sup> Reference may be made to the South African Constitution which specifically provided for the

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<sup>115</sup> A. G. Eze and T. C. Eze, “An Appraisal of the Scope of Provisions under the 1999 Nigerian Constitution for the Control of Pollution arising from the Oil and Gas Industry” (2012) 4 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 107-110.

<sup>116</sup> Prior to the enactment of the present 1999 Constitution, Nigeria has had six Constitutions which had no provisions for safeguarding the environment. They are the Clifford Constitution 1922, The Richard Constitution 1946, The MacPherson Constitution 1954, The Independence Constitution 1960, The Republican Constitution 1963, The Constitution of the Federal Republic of Nigeria 1979.

<sup>117</sup> Section 12 (1) of the Constitution of the Federal Republic of Nigeria, 1999.

<sup>118</sup> This chapter II titled Fundamental Objectives and Directive Principles of State Policy was not in previous constitutions but was added by the 1979 Constitution to provide for the objectives of the State and the right and duties of its citizens. However its provisions cannot be enforced against organs of the State.

<sup>119</sup> Section 46 (1) of the 1999 Constitution.

<sup>120</sup> A. du Plessis “Perceptive Approaches to the Interpretation and Realisation of South Africa’s Constitutional Environmental Right” (2009) 16 (2) *SAJELP*, 131.



incorporation of constitutional environmental rights as rights protected by the Constitution of the Republic of South Africa.<sup>121</sup>

Section 24 of the Constitution of the Republic of South Africa<sup>122</sup> provides:

Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
  - i. prevent pollution and other ecological degradation;
  - ii. Promote conservation; and
  - iii. Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

It is further argued that an anthropocentric or human right approach reflects a holistic view of humanity in which humans are central.<sup>123</sup>

### 5.1 Oil in Navigable Water Act.

The Act<sup>124</sup> was made in tandem with the International convention on Prevention for Pollution of the sea by oil 1954. It creates several pollution offences to reduce the incidence of oil pollution..<sup>125</sup> Nigeria having ratified the International Convention for the Prevention of the Pollution of the Sea by Oil 1954 to 1962 included its provisions in the Oil in Navigable Waters Act for the purpose of implementation.<sup>126</sup> ONWA is concerned with the discharge of oil from ships. The Act has some preventive provisions as in section 5(1) of the Act which is a clear attempt to prevent pollution of the sea in the course of transporting oil or oil- related product by ship. The law empowers the harbor authority to provide facilities instead of discharging it into the water.<sup>127</sup> The Act has also been criticized for the lenient penalties on offenders, ineffective enforcement of the laws contained in the act, and ridiculously low fines than adhere to them.<sup>128</sup> It has been observed that this Act represents the most significant and comprehensive legislative response of Nigeria to the environmental damage caused by pollutants escaping from ships.<sup>129</sup> The implication is that oil, pollution and environment are tied up with both case effect and solution .Despite its being comprehensive, the fines stated that rather too low as it does not sufficiently serve as a deterrent to violators considering the negative impact of oil pollution. It is further noted that the violator can always afford to pay the penalty and continue to pollute the waters.

<sup>121</sup> Section 24 of the Constitution of the Republic of South Africa 1996.

<sup>122</sup> 1996.

<sup>123</sup> The term anthropocentrism is derived from the Greek words *anthropos* human being and *kentron* centre n 19 of A du Plessis op cit. 133.

<sup>124</sup> Oil in Nwavigable Waters Act, Cap. O7, Laws of the Federation of Nigeria, 2010

<sup>125</sup> O. O. Ajayi, O. O., "Water Pollution in Nigeria Coastal Areas: Challenges of Present Legal Mechanism and Recommendation for Amendment", (2011) 1(3) *Journal of Sustainable Development and environmental protection*, 12. Available at: [http://www.ierdfrica.org/resources/water%20Pollution%20in20Nigeria%20Coastal%20Areas%20Challenges%20\(Ajayi\).pdf](http://www.ierdfrica.org/resources/water%20Pollution%20in20Nigeria%20Coastal%20Areas%20Challenges%20(Ajayi).pdf). Accessed on 10 September 2019.

<sup>126</sup> Amokaye, *op cit*, 441.

<sup>127</sup> C. C. Nwifo, "Legal Framework for the Regulation of Waste in Nigeria" (2010) 4 (2) *African Review Journal*, 491-501

<sup>128</sup> M. I. Igbokwe, "Assessment of Existing National Legislation and regulations Related to pollution Prevention" (2001) Workshop for the Ratification, Implementation and Enforcement of MARPOL, 73/78 Lagos

<sup>129</sup> Amokaye, *op cit*, 441-442.



## **5.2 National Oil Spill Detection and Response Agency Act (NOSDRA)**

National Oil Spill Detection and Response Agency Act establishes the National Oil Spill Detection and Response Agency. The Agency is at the forefront of response to oil spill incident in Nigeria. The Agency was established as response by the Federal Government to the numerous environmental degradations in the oil producing areas in Nigeria. It is to ensure preparedness, detection and response to all oil spillage in Nigeria that it focusses. Its main mandate is to ensure timely, effective and appropriate response to all spills as well as protect threatened environment and ensure clean-up of all impacted sites to the best extent. However, there are some defects in this Act, which include low fines, poor inspection and regulatory capture.<sup>130</sup> The requirement of confidentiality of information from the Agency when required by the Court does not show seriousness on the part of the Agency in preventing pollution. It is also observed that oil companies' personal usually lead oil spill investigations and NOSDRA does not initiate oil spill investigations leading to regulatory capture.<sup>131</sup>

## **5.3 Oil Pipeline Act LFN 2004 (OPL)**

Pipe line breakage and sabotage on Pipeline are major sources of oil and environmental pollution. The Oil Pipeline Act makes provision for licenses to be granted for the establishment and maintenance of pipelines incidental and supplementary to oil fields and oil mining and for purposes ancillary to such pipelines. The Act provides offence for damages and remediation against pollution from pipeline. Paragraph 11(5) (a) & (b) states that a holder of a license shall pay compensation to any person whose land or interest in land is injuriously affected and to any person suffering damage other than on account of his own default or on account of the malicious act of a third person as consequences of any breakage of or leakage from the pipeline or an ancillary installation. This takes care of pollution that is caused by a licensee. The acts provide for payment of compensation as a remedy to victims of environmental damage, pollution or degradation in the course of exploration, exploitation, or refining by oil companies. Thus, the Act follows incidences of oil, pollution and damage to the environment which makes it difficult to decouple one from the other. The Act creates a civil liability on the person who owns or is in charge of an oil pipeline.<sup>132</sup> He will be liable to pay compensation to anyone who suffers physical or economic injury as a result of break or leak in his pipelines. The Act further provides in section 21 for compensation where local community's interest is affected. The Act has been criticized for paying more attention to compensation payment rather than environmental protection and remediation.

## **5.4 Petroleum Act 1969 LFN 2004.**

The main law that supervises, coordinate and regulate oil pollution on the environment including the acquisition of participatory rights in oil business is the Petroleum Act 1969. The Act<sup>133</sup> deals with the ownership and grants of licenses by government and contain some general provision of Petroleum relating to pollution arising from petroleum development. The Act empowers the Minister to make regulations on matters relating to prevention of pollution and safety in the conduct of oil operations.<sup>134</sup>

<sup>130</sup> Section 6(3) of the Act empowers the Agency to impose a penalty of N500, 000 (Five Hundred Thousand Naira) for each day a person guilty of oil spill fails to report the spill to the Agency in writing and N1, 000, 000 (One Million Naira) for failure to clean up the affected spill site.

<sup>131</sup> M. A. Saleh, M. A. Ashiru, J. E. Sanni, T. A. Ahmed and S. Muhammad, "Risk and Environmental Implications of Oil Spillage in Nigeria (Niger-Delta Region)" (2017) 3(2) *IIARD International Journal of Geography and Environmental Management*, 45.

<sup>132</sup> *ibid.* Section 11 (5).

<sup>133</sup> Petroleum Act CAP P10, Laws of the Federation of Nigeria 2010.

<sup>134</sup> *ibid.* Section 9.



Consequently, the Petroleum (Drilling and Production) Regulation was made. Regulation 36<sup>135</sup> requires the licensee or lessee to maintain all his equipment and all boreholes and wells capable of producing petroleum in good repair and condition, and to carry out all his operations in a proper and workmanlike manner in accordance with the regulation. The main defect of the regulation is lack of proper enforcement mechanisms as there are no clearly defined provisions on penalties for the offences resulting from breach of the regulations. The fines are so poor, and more emphasis is laid on revenue accruing to government from oil than environmental protection. The Minister pursuant to section 9 of the Act made the Petroleum (Drilling and Production) Regulation, and other Regulations; including the Petroleum Refining Regulation, Mineral Oil Safety Regulations and Crude Oil (Transportation and Shipment) Regulations.

### **5.5 Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2007.**

This Law is an offshoot of the Federal Environmental Protection Agency Act 1998 as amended in 1992 (FEPA), FEPA is the only comprehensive legislation governing environmental protection in Nigeria before its amendment in 2007 via (NESREA). Although, the Nigerian Department of Petroleum Resources (DPR), is the main regulator of the oil and gas industry in Nigeria, the role of NEREA agency as a watch dog of all environmental breaches cannot be undermined. It is to the extent of its underutilization that the Nigerian environment is faced with degradation and annihilation.<sup>136</sup> DPR set us useful guidelines and standards for the protection of the environment from oil pollution. This is by promulgating the Environmental Guidelines and Standards for the Petroleum Industry (EGASPIN). 1991<sup>137</sup> NESREA agency has been criticized for poor penal provision, poor enforcement of its regulations inadequate operation; facilities and regulatory capture.

### **5.6 Environmental Impact Assessment Act 1992**

This Act deals with potential and perm impact caused by oil via pollution. This Act<sup>138</sup> was passed into law to restrict public and private projects to be carried or executed after proper screening, so as to ascertain their environmental impacts, and to determine appropriate remedy for improvement of the environment after which permission to carry on with the project would be given or denied. Section 12 provides that the agency shall permit or refuse a potential project where a project is likely to affect the environment. If any project is successfully executed, the Agency acting under the Act must have given the permission for such project; and would have undertaken its potential and strategic impacts not only on the environment but also to flora and fauna. The Act ensures that, the issue of environmental degradation caused by oil and gas companies would not arise in the first place because assessment would have shown that there would be a likelihood of environmental degradation.

### **5.7 Associated Gas Re-injection Act 1979**

Oil and gas exploration and production are precursors of pollution through the emissions of dangerous gasses such as carbon, nitrogen, chlorocarbon; most of which are greenhouse gases that affect adversely

<sup>135</sup> Regulation 36 of the Petroleum (Drilling and Production) Regulation.

<sup>136</sup> See section 7 1 and 2 of the NESREA Act 2007.

<sup>137</sup> Issued by the Department of Petroleum Resources Lagos 1991, Revised edition 2002.

<sup>138</sup> Environmental Impact Assessment Act, Cap E12, Laws of the Federation of Nigeria 2004.





the climate. During oil and gas production, these gases are either flared due to lack of injection facilities or vented by the operators to the atmospheres. The Associated Gas Re-Injection Act <sup>139</sup>was enacted to address the problem of gas flaring. Section 2 (1) states that every company producing oil and gas in Nigeria shall not later than 1 October, 1980 submit to the Minister a detailed program and plans for either the implementation of program relating to the re-injection of all produced associated gas or schemes for the viable utilization of all produced associated gas. Section 3(1) provides for gas flaring to cease and states that no company after 1 January, 1984 shall flare gas produced in association with oil without the permission in writing of the Minister. However, where the Minister is satisfied after the above deadline, for the utilization or re-injection of the coproduced gas is not 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 by specifying such terms and conditions, as he may at his discretion choose to impose, for the continued flaring of gas in the particular fields 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 for every 28.317 standard cubic meter of gas flared.<sup>140</sup> Penalties under this Act for offences created by Section 3 includes forfeiture of concessions and withholding of all or parts of any entitlements of any offending person by the Minister in charge of Petroleum Resources.<sup>141</sup> A major criticism of the Act is that, there are escape routes for the continuous flaring of gas provided by the Act.

This is done by providing that a license can be obtained to flare gas if a written permission is gotten from the Minister and this is what oil companies have relied on to continue flaring gas. It has also been shown that it is more economical for the operating companies to pay fines than stop gas flaring.<sup>142</sup> The Operators have equally before now complained of the absence of gas gathering facilities in the country as well as lack of funds to engage in such capital-intensive investments.<sup>143</sup> This has been linked to the non-commitment by government in playing its own part in the counter funding of the project to end gas flaring in Nigeria.<sup>144</sup>

## **6.0 Decoupling the Oil Pollution and Environment.**

Decoupling oil, pollution and environment is both a difficult task as well as a tenuous exercise due to their interconnectedness. This section attempts to examine this through law. The resolution of the inverse relationship among oil, pollution and environment is not easy as one move affects the other. From the analysis of causes of environmental pollution in Nigeria, the impact and solution of pollution on the environment; all the three are inextricably tied together to the extent of imagining the possibility of carrying out an oil exploration without endangering the environment. Further, the legal frameworks for oil pollution in Nigeria above, could have been helpful in untangling these but die to lack of enforcement, poor penal provisions and regulatory gaps noted. Thus, these legal frameworks are in

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<sup>139</sup> Associated Gas Re-Injection Act CAP A25, Laws of the Federation, 2004.

<sup>140</sup> Section 3(2) (a) & (b), *Ibid*.

<sup>141</sup> S. O. Idehen, "Examination of Legal Regimes and Institutional Frameworks for Oil Pollution Management in Nigeria: How Effective?" (2013) 1(1) *Biu Law Series*, 115.

<sup>142</sup> R. Dodondawa, "Oil Sector Reform: Challenge of Curbing Gas Reform", *The Nigerian Tribune* 4 June, 2003. <http://tribune.com.ng/news2013/en/business.package>. Accessed on 10 March 2020

<sup>143</sup> *Ibid*.

<sup>144</sup> A. T. Bello, "Oil and Gas Problems in Nigeria; the Impending Problems and the Preferable Solutions" (2016) Available at: <https://ssrn.com/abstract=3072236> Accessed on 10 March 2019.



desperate need of review. The punishment provisions for violation of the laws are very meagre and incapable of deterring the continuous occurrence of oil pollution in Nigeria. In fact, multinational companies prefer to violate these laws and pay the meagre fines or punishment than to take steps to prevent the occurrence of oil pollution in Nigeria.

Similarly, the compensation provisions too poor with difficult route to achieve by an oil and gas victim. Oil pollution has the capacity of emasculating the means of livelihood of a whole community, leaving them in abject poverty. Sometimes, the compensation paid usually end up corruptly in the pockets of very few individuals who may not even be members of the community. Similarly, most of the international treaties for the protection against oil pollution which Nigeria has signed or acceded to cannot be enforced in Nigeria except they are domesticated by enactment pursuant to Section 12 (1) and (3) of the Nigerian Constitution. This challenge posed by the constitution is despite the provision of the NESREA Act in section 7(c), which mandates the Agency to enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment and such other agreement as may from time to time come into force. This has led to controversy as to whether the Agency can actually enforce the treaties on environment where same have not been domesticated in contravention of the express provision of the Constitution. This principle is expressed in Article 26 of the Vienna Convention on the Law of Treaties, which provides that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. This principle is also known as the Principle of Good Faith (*pacta sunt servanda*). This thinking was reflected in the judgment of the Court of Appeal in the case of *Mojekwu v. Ejikeme*.<sup>145</sup>

A treaty, once ratified, becomes binding on the state party. Nigeria is therefore under an obligation to domesticate her environmental treaties by incorporating them as part of her national law to ensure effective implementation. This requires political will on the part of both the executive and legislative arms of government to comply with the provisions of Section 12 of the 1999 constitution. However, Nigerian courts are free to take the provisions of ratified treaties into consideration in arriving at decisions involving questions of rights of access to justice in environmental matters, nondiscrimination and equality.<sup>146</sup> Thus in the case of *Eagle Super Pack (Nigeria) Ltd. V. ACB Plc* the Supreme Court held thus:

My humble view is that a convention acquires the force of law by incorporation into the body of laws of this country or is shown to be a custom or usage of trade which has been regularly upheld by the superior courts in Nigeria as to acquire general acceptance, a party to civil suit wishing to rely on it must prove its existence... a party relying on the terms of an international convention or protocol must show that Nigeria has subscribed to such convention.<sup>147</sup>

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<sup>145</sup> (2002) 5 NWLR (Pt. 657), at 402.

<sup>146</sup> M. T. Ladan ‘Towards an Effective African System for Access to Justice in Environmental Matters’ (2005) 23-24 (2) *A. B. U Law Journal* 10-11.

<sup>147</sup> (2006) 19 NWLR (Pt. 1013) 20.



Similarly, in the case of *Registered Trustees of National Association of Community Health Practitioners of Nigeria v. Medical and Health Workers Union of Nigeria*, the Supreme Court while interpreting the provision of section 12 of the Constitution held that the section should be read as whole and that for a treaty to be valid and enforceable, it must have the force of law behind it albeit, it must be supported by a law enacted by the National Assembly and not bits and pieces of provisions found here and there in other laws of the land but not specifically enacted to domesticate it, to make it part of one law.

The requirement of domestication of treaties for it to be enforceable in a country is part of the mechanisms for the doctrine of separation of power and was given judicial approval in the case of *Attorney General of Canada v. Attorney General of Ontario*.<sup>148</sup> The Supreme Court in Nigeria relied on the Canada case to rule in *Abacha v. Fawehinmi*<sup>149</sup> that a treaty is binding in Nigeria after it was domesticated into the body of Nigerian laws. This work however makes a case for the amendment of this provision especially as regard environmental law treaties on oil pollution.

A detailed examination of the national laws and regulatory institutions has been carried out and it is noted that despite measures put in place by government, there has scarcely been any environmental crimes instituted against the oil companies by government; rather redress has been sought by private individuals and communities.<sup>150</sup> An example of this can be seen in the case of *Jonah Gbemre V. Shell Petroleum Development Company Nigeria Ltd & ors*<sup>151</sup>, where the applicant on behalf of himself and as representatives for other members, individuals and residents of Iwerekan Community of Delta state brought an action against the respondents to stop gas flaring in their community and which prayer was granted in their favour. Our courts have for the first time exercised judicial activism in this area. Previously the court interpreted strictly the doctrine of *locus standi* in *Oronto Douglas V. Shell Petroleum Development Company Ltd & Ors*<sup>152</sup>, where the plaintiff instituted an action at the Federal High Court to compel the defendants to comply with the Environmental Impact Assessment 1992, the Court dismissed the action based on the ground that the plaintiff had no personal interest in the matter. It is hoped that Nigerian courts would follow jurisdictions like that of India<sup>153</sup> who have exercised judicial activism in enforcing preservation of the environment through their laws.

## 7.0 Recommendation

This paper argued that it is an onerous task to decouple oil pollution and environment. However, it proposes answerable synergy where oil production will interface with environment efficiently by mitigating its impact on the environment. Accordingly, it proposes as follows:

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<sup>148</sup> (1937) AC 326

<sup>149</sup> *Supra*

<sup>150</sup> P. C. Nwilo and O. T. Badejo, "Oil Spill Problems and Management in the Niger Delta" (2015) Available at: <https://www.researchgate.net/publication/273866088> Accessed on 10 September 2019.

<sup>151</sup> Suit no.FHC/B/CS/53/05 Unreported.

<sup>152</sup> Suit NO. FHC/CS/573/93.

<sup>153</sup> In India, the courts are quite vibrant in the protection of the environment and this had been held in the case of *M.C./Mehta v. Union of India* (1988) SC115



- 1 An amendment or review of the legal framework on oil pollution in Nigeria as they are mostly obsolete and archaic. There is need to amend the punishment provisions to be stringent and capable of deterring further involvement in oil pollution.<sup>154</sup>
- 2 The route to seeking compensation should be made less arduous and the compensation provisions for oil pollution should be expanded and made to take care of the means of livelihood of the affected person until the time of restoration of the environment from the effects of the oil pollution. Compensation should be made automatic through a compensation funds and the state should secure adequate compensation from the operators and pay over to citizens as it is the practice in Norway.
- 3 Section 12, and 20 of the Nigerian Constitution should be amended
  - a. to allow or permit NESREA under section 7 of NESREA Act to enforce environmental protection treaties on oil pollution, whether such treaties are domesticated or not. This is so because most of those treaties provide for international best practices to contain, prevent, manage or control oil pollution.
  - b. To allow the provision for the protection of the environment contained in chapter 2 of the constitution to be made justiciable
- 4 DPR AND NOSDRA, the main regulators of the oil and gas environment, should be empowered to ensure swift and effective clean-up of oil spills whenever it occurs and ensure that the victims of such oil-spills are adequately paid compensation.
- 5 The three tiers of government particularly the Federal Government should partner with the members of local communities to monitor oil pipelines and installations. It is also suggested that they should resort to new technologies like monitoring sensors and alarms for effective monitoring of oil installations and pipelines. These processes can also be used for the monitoring of oil spills. However, the duty to protect oil and gas installation should rest squally with the owners
- 6 As oil production cannot be carried out without engendering the environment, efforts must be made by the operators and government to adopt best up to date technology, practicable mechanism and sustainable approach which will mitigate the impact on the environment.

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<sup>154</sup> M. C. Onuegbulam, "Restorative Justice International in the Repression of Crime in Oil and Gas Production in Nigeria" (2018) 9 (2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 167 – 176.