An analysis of the deficiencies impeding regulation of environmental standards in the Nigeran oil and gas industry and possible solutions through legal transplantation from other model regimes.

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AN ANALYSIS OF THE DEFICIENCIES IMPEDING REGULATION OF ENVIRONMENTAL STANDARDS IN THE NIGERIAN OIL AND GAS INDUSTRY AND POSSIBLE SOLUTIONS THROUGH LEGAL TRANSPLANTATION FROM OTHER MODEL REGIMES

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An Analysis of the Deficiencies Impeding Regulation of Environmental Standards in the Nigerian Oil and Gas Industry and Possible Solutions through Legal Transplantation from other Model Regimes

BY

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Declaration

I, Chukwuemeka Chuks-Ezike, hereby declare that the work on which this thesis is based on is my original work (except where acknowledgement indicate otherwise) and that neither the whole work, nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorize the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

Abstract

Oil and gas resource exploitation has hugely contributed to Nigeria's revenue. This is therefore an important contributor to the Nigerian economy. Nigerian oil and gas business has been mainly facilitated by multinational and indigenous oil companies operating in the industry. The study regards them as participants in the industry. It is noteworthy that this study will refer to company and corporation as one and the same entity.

It has been observed that some oil and gas companies operating in Nigeria have clearly violated regulatory standards established in the Nigerian environmental regime. It has further been observed that the violations are repeated and persistent in nature. This is interesting considering that the Nigerian environmental regime has provided criminal sanctions (as a regulatory tool) to prohibit a violation of such standards and stipulates penalties that can be imposed for such violations. Moreover, other relevant regulatory administrative enforcement mechanisms have been established in relevant legislation to enforce the standards. Hence, the regime has established enforcement agencies to carry out the enforcement. The persistent violations therefore, show evidence that the Nigerian regime has failed to utilise criminal sanctioning and administrative enforcement to prevent or control violations of environmental standards, hence has been unable to guarantee the required compliance. This study therefore, seeks to identify deficiencies in the regime that have limited its utilisation of these regulatory options to ensure compliance with the standards. Beyond seeking to identify these deficiencies, this study will explore the UK and USA regimes towards identifying aspects of their criminal sanctioning and regulatory enforcement that could inspire a correction to the non-performance of the Nigerian regime.

(Keywords: Standard, Environment, Pollution, Regulation, Enforcement, Criminal, Sanction, Deficiencies).

Abbreviations

ACJA	Administration of Criminal Justice Act
API	American Petroleum Institute
APPS	Act to Prevent Pollution from Ships
ASME	American Society of Mechanical Engineers
BEIS	Department for Business, Energy and Industrial Strategy
BP	British Petroleum
BSEE	Bureau of Safety and Environmental Enforcement
CAA	Clean Air Act
CCA	Criminal Code Act
CEHRD	Centre for Environment, Human Rights and Development
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
COPFS	Crown Office and Procurator Fiscal Service
CWA	Clean Water Act
DECC	Department of Energy and Climate Change
DEFRA	Department of Environment, Food and Rural Affairs
DPP	Director of Public Prosecution
DPR	Department of Petroleum Resources
EA	Environmental Agency
EAESP	Environment Agency Enforcement and Sanctions Policy
EC	Council of the European Communities
ECEEA	European Commission and European Environment Agency
ECS	Environmental Crimes Section
ECTs	Environmental Courts and Tribunals
EFCC	Economic and Financial Crimes Commission
EGASPIN	Environmental Guideline and Standards for the Petroleum Industry in Nigeria
EIA	Environmental Impact Assessment

EMP	Environmental Management Plan
ENRD	Environment and Natural Resources Division
EPA	Environmental Protection Agency
ESAET	Environmental Services Association Education Trust
EU	European Union
FEPA	Federal Environmental Protection Agency
FHC	Federal High Court
FLPMA	Federal Land Policy and Management Act
FME	Federal Ministry of Environment
FRP	Facility Response Plan
GRPA	Government Performance and Results
HORA	Hydrocarbon Oil Refineries Act
HSE	Health and Safety Executive
ICJ	International Court of Justice
ICPC	Independent Corrupt Practices and Other Related Offences Commission
IM	Integrated Management
IPPC	Integrated Pollution Prevention and Control
MPRSA	Marine Protection, Research, and Sanctuary Act
NAS	National Academy of Science
NAO	National Audit Office
NDES	Niger Delta Environmental Survey
NEPA	National Environmental Policy Act
NESREA	National Environmental Standards and Regulation Agency
NFWF	National Fish and Wildlife Foundation
NGO	Non-Governmental Agency
NNPC	Nigerian National Petroleum Corporation
NOSDRA	National Oil Spill Detection and Response Agency
NPE	National Policy on Environment
NSWLEC	New South Wales Land and Environment Court
OCS	Outer Continental Shelf

OECD	Organisation for Economic Co-operation and Development
OEP	Office for Environmental Protection
OMPADEC	Oil Mineral Producing Area Development Company
OMPADEC	Oil Mineral Producing Area Development Commission
OPRED	Offshore Petroleum Regulator for Environment and Decommissioning
PIB	Petroleum Industries Bill
PSNR	Permanent Sovereignty over Natural Resources
RCRA	Resource Conservation and Recovery Act
RDS	Royal Dutch Shell
Scf	Standard Cubic Feet
SCF	Shell Control Framework
SEPA	Scottish Environmental Protection Agency
SPCC	Spill Prevention, Control, and Countermeasure
SPDC	Shell Petroleum Development Company
TFEU	Treaty of the Functioning of the European Union
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNGA	United Nation General Assembly
WCED	World Commission on Environment and Development
WHO	World Health Organisation

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United States v *Hastings,* 681 F.2d 706, 710-12 (11th Cir.1982) (USA Court of Appeals).

United States v *Investment Enterprises, Inc.* 10 F.3d 263, 266 (5th Cir. 1994) (USA Court of Appeals).

United States v *Iverson* 162 F.3d 1015, 1025 (9th Cir. 1998) (USA Court of Appeals).

United States v *Kondratyev* NO. 1:13-cr-00080-SLR (2013) (USA District Court for the Northern District of Florida).

United States v *Lupera* NO. 2:12-cr-002816-SDW (2013) (USA District Court for the District of New York).

United States v *Lupo* NO. 4:13-cr-00113-DCN (2014) (Ohio Northern District Court).

United States v *Mix* NO. 2:12-cr-00171-SRD-SS (2013) (USA District Court for the Eastern District of California).

United States v *Nadel & Gussman Rockies LLC.* NO. 2:13-cr-00211-ABJ (2014) (USA District Court for the District of Wyoming).

United States v *Najjar* 300 F.3d 466 (4th Cir. 2002) (USA Court of Appeals).

United States v *NH Envtl. Grp.* Inc. NO. 2:13-cr-00177-PPS-PRC (2013) (USA District Court for The District of New Hampshire).

United States v *NH Envtl. Grp*. NO. 2:13-cr-00141-PPS-PRC (2014) (USA District Court for The District of New Hampshire).

United States v *Pacific International Lines* NO. 1:13-cr-00019-TFH (2013) (USA District Court for the Eastern District of California).

United States v *Philip Morris USA, Inc.* 566 F.3d 1095, 1118-119 (DC Cir. 2009) (USA Court of Appeals).

United States v *Shapavalov* NO. 1:13-cr-00079-SLR (2013) (USA District Court for the Southern District of Texas).

United States v *Singh*, 518 F.3d 236, 249 (4th Cir. 2008) (USA Court of Appeals).

United States v *Transocean Deep Water, Inc.*, NO. 2:13-cr-00001-JTM-SS (2014) (United States Court of Appeals, Fifth Circuit).

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United States v *W&T Offshore* NO. 2:12-cr-00312-EEF-SS (2014) (USA District Court for the Southern District of Texas).

United States v *Weitzenhoff*, 35 F. 3d 1275 - Court of Appeal, (9th Circuit 1993) (USA Court of Appeals).

United States v *Wright* NO. 1:14 -cr-00007-DSC (2013) (USA District Court of Connecticut).

United States v *Jorgensen* 144 F.3d 550, 560 (8th Cir. 1998) (USA Court of Appeals).

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A P Pollution Control Board v *Bayadu AIR* 1999 SC 812 (Supreme Court of India).

Boulton v *The Queen*; *Clements* v *The Queen*; *Fitzgerald* v *The Queen* [2014] VSCA 342 at 123. (Supreme Court of Victoria, Australia).

Building Owners & Managers Association of Australia Ltd v *Sydney City Council* (1984) 53 LGRA 54, 72–73. (New South Wales Land and Environment Court, Australia).

DPP v *Russell* [2014] VSCA 308. (Supreme Court of Victoria, Australia).

Germany v *Poland (Chorzow Factory Indemnity case*) No. 17 (P.C.I.J. (Ser. A) 1928) at 29 (Permanent Court of International Justice).

Haughton v *Minister for Planning and Macquarie Generation* (2011) 185 LGERA 373, 392–401. (New South Wales Land and Environment Court, Australia).

Hungary v *Slovakia, Re Gabcikovo-Nagymaros Project (Danube Dam case)* [1997] ICJ Rep 7 (International Court of Justice).

Mahon v *Air New Zealand Ltd* [1984] 1 AC 808 (Court of Appeal of New Zealand).

Monsanto Agricoltura Italia v *Presidenza del Consiglio dei Ministri* [2003] ECR I-8105 (Court of Justice of the European Communities).

National Farmers' Union v *Secretary Central of the French Government* [2002] ECR I-9079 (Court of Justice of the European Communities).

Oposa v *Factoran* [1993] 33 ILM 173 G R No 101083 (Supreme Court of the Philippines, Manila).

Pfizer Animal Health SA v *Council of the European Union* [1999] ECR 11-1961 (Judgment of the Court of First Instance [Third Chamber] of the European Communities).

Pulp Mills on the River Uruguay (*Argentina* v *Uruguay*), Judgment, [2010] ICJ Rep (20 April 2010) (International Court of Justice).

R v *Jogee (Appellant)* and *Ruddock (Appellant)* v *The Queen (Respondent) (Jamaica)* [2016] UKSC 8; appeal from: [2013] EWCA Crim 1433 and JCPC 0020 of 2015 (Court of Appeal of Jamaica).

State of Maharashtra v *Mayer Hans George*, AIR (1965) SC 72. (Supreme Court of India).

State v *B.D. Meattle*, AIR 1957 Punj 74; 1957 Cr LJ 427 (High Court of Punjab, India).

Taskın and Others v *Turkey*, ECTHR Application no. 46117/99, Decision (10 November 2004), paras. 99-100 (European Court of Human Rights).

Tatar v *Romania*, ECTHR Application no. 67021/01, Decision (27 January 2009), para. 69.

Telstra Corporation Ltd v *Hornsby Shire Council* (2006) 146 LGERA 10 (New South Wales Land and Environment Court, Australia).

Tran [2012] VSCA 110. (Supreme Court of Victoria, Australia).

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Chapter One

General Introduction

1.0Background

Environmental principles have facilitated the development of environmental law and contributed to building an appropriate mechanism for ensuring the protection of the environment.[1] It is for this reason a country such as the UK has instructed its Secretary of State to draft a set of environmental principles that will guide environmental law in the UK when she exits the European Union.[2] Environmental principles are propositions that serve as a foundation for environmental protection.[3] Hence, environmental principles are the framework upon which rules of environmental law are developed.[4] This study regards them as obligatory because the principles have been provided in international law instruments that are binding on member countries who have subscribed to any such international law instrument. It has also been manifested in the domestic law of such member countries as environmental standards.[5] Hence standards stipulated as obligations under the relevant law will manifest some or all of the principles.[6]

[1] Client Earth, 'What Are Environmental Principles?' (Client Earth 2019) <https://www.clientearth.org/what-are-environmental-principles-brexit/> accessed 10 April 2019; Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (1st edn, Hart Publishing 2017) p.3.

[2] Section 16 (1) (a) of the European Union (Withdrawal) Act 2018.
Section 16 (2) of the Act stipulates the principles to include: precautionary principle, the preventive principle, the polluter-pays principle, the principle of sustainable development, the principle of public participation in environmental decision making, the principle of public access to environmental information, and the principle of access to justice in relation to environmental matters. These principles are discussed in chapter 2.

[3] Lluis Paradell-Trius, 'Principles of International Environmental Law: An Overview' (2000) 9 Review of European, Comparative and International Environmental Law 97.

[4] *ibid*.

[5] Ephraim Ikechukwu Elenwo and Justine Ayaegbunem Akankali, 'Environmental Policies and Strategies in Nigeria Oil and Gas Industry: Gains, Challenges and Prospects' (2014) 05 Natural Resources 889.
The environmental standards under the Nigerian regime that have exemplified the international principles of environmental law is discussed in section 2.8 of this study.

[6] Hakeem Ijaiya and Onuorah T. Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 05 Beijing Law Review 306.

Environmental standards are obligatory instruments that provide such principles as compulsory requirements that should be complied with.[7] For example, most environmental standards exemplify environmental principles such as the prevention principle, the ideal of sustainable development and even the principle of no-harm, among others.[8] By being obligatory, it entails that the provisions stipulated in environmental standards are binding and enforceable. Often, most such standards are in the form of legislative instruments and are usually set within a legal or administrative context.[9] In line with this, such standards can include institutional and legal compliance instruments as regulatory tools to enforce their provisions.[10]

Regulation is regarded as both the provision of the law and the ongoing processes of monitoring and enforcing the law.[11] One such instrument utilised as a regulatory tool to enforce environmental standards are criminal sanctions.[12] Another such enforcement tool are administrative enforcement instruments.[13] Several environmental regimes have established administrative enforcement agencies (otherwise referred to in this study as enforcement authorities) empowered with the responsibility of utilising different mechanism to enforce environmental standards on regulated persons.[14] An overview of these regulatory instruments will be carried out in section 1.3 of this study.

This study therefore seeks to determine whether these regulatory tools have been properly utilised to enforce environmental standards in the Nigerian oil and gas industry. The scope of the study will be restricted to the utilisation of criminal sanctions as an enforcement tool (which the study will regard as criminal sanctioning) and the utilisation of other administrative forms of enforcement to regulate compliance in the oil and gas industry.

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[7] Klaus Pinkau and Ortwin Renn, *Environmental Standards: Standards: Scientific Foundations and Rational Procedures of Radiological Risk Management* (Springer, London 1998) p.11.
[8] Environmental Foundation, New Zealand, 'National Environmental Standards • Environment Guide' (*Environmentguide.org.nz*, 2019) <http://www.environmentguide.org.nz/rma/planning-documents-and-processes/national-environmental-standards/> accessed 25 October 2019.
[9] Klaus Pinkau and Ortwin Renn (n.7).
[10] Neil Gunningham, 'Enforcing Environmental Regulation' (2011) 23 Journal of Environmental Law 173.
[11] Robert Baldwin, Martin Cave and Martin Lodge, *The Oxford Handbook of Regulation* (1st edn, Oxford University Press 2010) p.6.
[12] Anthony Heyes, 'Implementing Environmental Regulation: Enforcement and Compliance' (2000) 17 Journal of Regulatory Economics 108 - 111.
[13] Suresh Bhardwaj, 'Compliance Monitoring and Enforcement for Environmental Obligations', *The 12th Annual General Assembly of IAMU* (2008) p.79.
[14] *ibid*.

Proper regulation in this study will be based on the extent to which compliance with the environmental standards has been guaranteed, hence the extent to which there has not been violation of such standards. If it is discovered that there is a gross violation of the standards, then it will be deemed that the regime has failed to regulate. In this light, the study will identify possible deficiencies that have contributed to the failure of the Nigerian regime to regulate in this regard, hence reducing environmental performance in the oil and gas sector. Upon establishing the deficiencies, this study will seek to explore other model regimes (particularly the United Kingdom (UK) and the United States of America (USA) regimes) towards adapting aspects of the regimes that can proffer solutions to some (or possibly all) the deficiencies identified to have hindered proper regulation in the Nigerian regime.

1.1 Research Aim

The study seeks to address the issue around securing compliance with environmental standards through regulatory enforcement and criminal sanctioning. As mentioned in section 1.0 above (and subsequently discussed in the study) there have been several alleged violations of environmental standards in the Nigerian oil and gas industry. The aims of this study are therefore:

a) To identify the deficiencies contributing to the regulatory failure of the Nigerian environmental regime in the oil and gas industry; and
b) To consider the adaptation of aspects of the UK and USA regimes that could be used to correct these deficiencies.

1.2 Research Objectives

1) To identify environmental standards stipulated in the Nigerian regime to regulate the Nigerian oil and gas industry;
2) To identify the criminal sanctions established in the Nigerian regime for violation of environmental standards;
3) To appraise the role of enforcement agencies in implementing the standards in the industry;
4) To examine factors contributing to both the failure of criminal sanctions and the inadequacy of enforcement measures in the industry;

5) To consider aspects of the UK and USA regimes that could be adapted to proffer solutions to the identified deficiencies in the Nigerian regime.

1.3 An Overview of the Literature

As has been mentioned earlier, environmental principles serve as a structural framework for ensuring environmental protection and environmental standards exemplify most such environmental principles. Hence, environmental standards seek to promote environmental protection.[15] Writers have argued that environmental standards embedded in legislation can only be complied with if there is efficient regulation to guarantee such compliance.[16] Moreover, most regulated activities pose high risks to the environment.[17] Hence, most regimes set up enforcement authorities to implement environmental standards in most such activities.[18] Implementation here refers to all actions/mechanisms required to effect compliance with the standards.[19] Indeed, most mechanisms usually utilised in enforcement have included: investigations to monitor compliance and detect violations,[20] formal legal actions such as: criminal prosecutions for alleged violations,[21] civil suits,[22] or other administrative options.[23] It has been argued that the enforcement powers of such authorities are limited to the stipulations of the relevant statutes that establish them.[24] Hence, while the authorities are required to fulfil the enforcement duties that come with such powers, they cannot pursue matters that fall outside the scope of their powers.[25] If for instance, a statute has not established criminal prosecution as one of the powers of an enforcement agency, it will be *ultra vires* for the agency to utilise criminal prosecution as one of its enforcement mechanisms. It therefore implies that every enforcement mechanism that will be utilised in a regime will be stipulated in the existing statutes regulating the regime.

[15] Neil Gunningham (n.10) p.170.
[16] Raymond W Mushal, 'Reflections upon American Environmental Enforcement Experience as it may relate to Post-Hampton Developments in England and Wales' (2007) 19 Journal of Environmental Law 201.
[17] Julia Black, 'Risk-Based Regulation: Choices, Practices and Lessons Being Learned' in Nikolai Malyshev and Gregory M Bounds *Risk and Regulatory Policy: Improving the Governance of Risk* (OECD Paris 2010) p.187.
[18] Daniel Riesel, *Environmental Enforcement* (11th edn, Law Journal Press 2012) p.28.
[19] Ibrahim Shihata, 'Implementation, Enforcement, and Compliance with International Environmental Agreements - Practical Suggestions in The Light of the World Bank's Experience' (1997) 9 Georgetown International Environmental Law Review 37.
[20] *ibid*.
[21] Daniel Riesel (n.18) p.28.
[22] Mary Clifford, *Environmental Crime: Enforcement, Policy, and Social Responsibility* (Aspen, Gaithersburg 1998) p.19.
[23] Alon Tal, Yaara Ahalon and Hadar Yahas-Peled, 'The Relative Advantages of Criminal Versus Administrative Environmental Enforcement Actions In Israel' (2010) 4 Journal of Environmental Monitoring <https://pubs.rsc.org/en/content/articlelanding/2010/em/b919960h#!divAbstract> accessed 5 November 2019.
[24] Justia, 'Enforcement Actions Overview' (*Justia.com*, 2019)<https://www.justia.com/administrative-law/enforcement-actions/> accessed 5 November 2019.
[25] *ibid*.

However, authorities can also create enforcement instruments to facilitate the regulatory process.[26]

One such enforcement tool of regulation is criminal sanctions. Scholars have argued that criminal law should be used for serious violations or non-compliance with environmental standards.[27] Criminal sanctions have been asserted to be severe in nature, purposed to punish offenders, deter offenders, and compensate victims of the harm.[28] Such sanctions are often imposed on significant offences that threaten public safety and range from punishments such as criminal fines and prison sentences.[29] This study is of the view that these characteristics distinguish criminal sanctions from civil and administrative sanctions. Generally, criminal sanctions will condemn crime, uphold deference to the law, deter an occurrence of the criminal act, incapacitate the offender from being a menace to the society (often through incarceration), protect societal interest, rehabilitate and reintegrate the offender into society; and remediate the affected subject.[30] In particular, an effective criminal sanction should uphold deference to the law by compelling persons to abide by the stipulations of the law. This will be mainly achieved by deterring future persons likely to become offenders from becoming offenders, incapacitating offenders to rehabilitate them into becoming non-offenders. In an environmental purview, criminal sanctions will be utilised by a regime to compel compliance with statutory standards by prohibiting violations. These criminal violations are generally viewed as environmental crimes.

There are several definitions of environmental crime. Each definition is particular to what has been provided as an environmental standard under the relevant law. For this reason, an acceptable definition to this study is given by the European Commission stating that: environmental crime is an action or inaction that contravenes environmental regulation resulting to significant harm and environmental risk.[31] For example, Section 3 of the Nigerian

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[26] *ibid*.
[27] The Law Commission, 'Criminal Liability in Regulatory Contexts': Consultation Paper No 195 (The Law Commission, UK 2010) pp.2-3.
[28] Jacob Öberg, 'The Definition of Criminal Sanctions in the EU' (2014) 3 European Criminal Law Review 273.
[29] Michael G Faure and Katrina Svatikova, 'Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe' (2012) 24 Journal of Environmental Law 253.
[30] Department of Justice, Equality and Law Reform, 'Criminal Sanctions Discussion Document' (Department of Justice, Equality and Law Reform 2010) p.7.
[31] European Commission, 'Criminal Sanctions for Environmental Offences' (*European Commission - European Commission*, 2019) <https://ec.europa.eu/info/energy-climate-change-environment/implementation-eu-countries/criminal-sanctions-environmental-offences_en> accessed 23 October 2019.

Oil in Navigable Waters Act prohibits the discharge of crude oil, mud or fluid into Nigerian navigable waters. The criminal action prohibited in Section 3 is the discharge of crude oil into Nigerian navigable waters, which is therefore non-compliance with the standard not to pollute the navigable waters. From the Section, it is also evident that criminal sanctions prohibit environmental crime, thus upholding statutory standards. This is because while Section 3 above prohibits and sanctions the discharge of crude into navigable waters, it upholds the statutory standard of protecting navigable waters in Nigeria from oil pollution stipulated in Section 1 of the Oil in Navigable Waters Act.[32]

Pollution is a notorious form of environmental violation in the oil and gas industry.[33] Examples of pollution for which strong criminal sanctions have been developed in the USA are the Exxon Valdez oil spill[34] or the Deep Water Horizon spill.[35] Similarly, writers have pointed out that existing statutory provisions in the USA regime prohibit pollution in the oil and gas industry.[36] It has been argued that over the years, the USA regime has built a regulatory system with robust criminal sanctioning mechanisms in response to pollution in its oil and gas industry.[37] In light of this, there is a need to determine how existing criminal sanctioning and enforcement have dealt with similar violations in the Nigerian regime. Indeed, this study is not concerned with the issue of whether environmental regimes (such as Nigeria) should rely less on utilising criminal law for sanctioning. This is because this study seeks an improvement of a criminal regime already existing within the regulatory sphere of the Nigerian environmental regime. To make the above determination, this study will first identify activities involved in oil and gas operations and forms of pollution that have been associated with the different stages of such operations. This will enable knowledge of the system for which a better developed regulatory regime will be recommended.

[32] One environmental standard in the Nigerian regime is the requirement to prevent the pollution of navigable waters in Nigeria with crude oil, mud or fluid stipulated in Section 1 of the Oil in Navigable Waters Act 1968. In this standard, it is evident that an environmental principle clearly exemplified in this standard is the prevention principle.
[33] United Nations Environment Programme, 'Environmental Management in Oil and Gas Exploration and Production: An Overview of Issues and Management Approaches' (Words and Publication 1997) p.11.
[34] This spill occurred on March 24, 1989, in the Gulf of Alaska, after the Exxon Valdez ran aground on Bligh Reef. Delayed efforts to contain the spill dispersed nearly 11,000,000 gallons (41,640 kilolitres) of crude oil across the sound. The spill eventually polluted 1,300 miles (2,092 kilometres) of shoreline and adjacent waters.
[35] This spill (also referred to as the BP oil spill or the Macondo blowout) occurred on April 20, 2010, in the Gulf of Mexico on discharging an estimated 4.9 million barrels (210 million US gal; 780,000 m^3). It is regarded as the largest marine oil spill.
[36] Francis T Cullen and others, 'Attribution, Salience, and Attitudes Toward Criminal Sanctioning' (1985) 12 Criminal Justice and Behaviour Journal 385.
[37] Engobo Emeseh, 'Regulatory and Institutional Framework for Enforcing Criminal Liability for Environmental Damage: A Study of the Oil Industry in Nigeria' (PhD, University of Dundee 2005) p.200.

1.3.1 General Overview of Oil and Gas Operations

This study will focus on conventional oil and gas resources that includes crude oil - and natural gas and its condensates. The difference between conventional and unconventional natural oil and gas is in the types of rock within which the oil and gas are found, and the method by which they are extracted.[38] Generally, conventional oil and gas are found in relatively permeable materials in which the oil or gas can flow relatively freely towards a production well.[39] In contrast, unconventional oil and gas are trapped within rocks such as shale or coal, making it more difficult to extract.[40] The main reasons for concentrating on conventional oil and gas resources is that Nigeria has significant conventional oil and gas reserves.[41] The country possesses the world's sixth largest reserve of crude oil estimated at 36.2 billion barrels.[42] Nigeria also has a proven natural gas reserve of nearly 5 trillion cubic metres.[43] The oil and gas reserves are mainly found and located along the Niger Delta, Gulf of Guinea, and Bight of Bonny.[44] Unconventional resources such as oil shale reserve in Nigeria remains untapped because of the large deposit of the conventional oil wells (crude oil).[45] Another reason for this concentration on conventional resources is that most unconventional oil and gas resources in the USA occur on non-federal lands, hence are principally regulated by individual states.[46] In effect, unconventional resources fall outside the scope of regulation in this research which concentrates on regulation at a national (federal) level.

Despite the differences identified between conventional and unconventional oil and gas resources, testing, investigating underground formations, and drilling processes are integral to all forms of oil and gas development.[47] Hence, the process of extracting conventional and

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[38] Natural Resources Wales, 'Natural Resources Wales / Extracting Onshore Oil and Gas' (*Naturalresources.wales*, 2020) <https://naturalresources.wales/guidance-and-advice/environmental-topics/energy/extracting-onshore-oil-and-gas/?lang=en > accessed 31 March 2020.
[39] *ibid*.
[40] *ibid*.
[41] Sunday Olayinka Oyedepo, 'Energy and Sustainable Development in Nigeria: The Way Forward' (2012) 2 Energy, Sustainability and Society 3; Christian Osueke and Chinedu Ezeugwu, 'Study of Nigeria Energy Resources and Its Consumption' (2011) 2 International Journal of Scientific & Engineering Research 6.
[42] Sunday Olayinka Oyedepo (n.41).
[43] *ibid*.
[44] *ibid*.
[45] Edith Nnanna, 'Oil Shale Mineral Deposits in Nigeria with Their Locations and Uses' (*Finelib.com*, 2020) <https://www.finelib.com/about/nigeria-natural-resources/important-information-on-oil-shale-endowed-states-in-nigeria/158 > accessed 31 March 2020.
[46] Stone Pigman Walther and James Cogan, 'Oil & Gas Regulation 2020 | Laws and Regulations | USA | ICLG' (*International Comparative Legal Guides International Business Reports*, 2020) <https://iclg.com/practice-areas/oil-and-gas-laws-and-regulations/usa > accessed 30 March 2020.
[47] Natural Resources Wales (n.38).

unconventional resources are same. Generally, operations carried out in the extraction of conventional oil resources are divided into three stages: the upstream, midstream and downstream stages of operation.[48] The upstream stage mainly involves exploration, development, production and site abandonment. The exploratory stage first involves the search for rock formations with oil or natural gas deposits.[49] The exploration is carried out to estimate whether there are commercially viable reserves of oil and gas deposits in areas of the earth.[50] Techniques utilised to carry the exploration include: deep and shallow geophysical (seismic) surveys, shallow drilling and coring, aero-magnetic/gravity surveys and exploration and appraisal drilling.[51] Often, broad areas of earth are estimated to have prospective potentially high reserves of oil and gas.[52] Subsequently, appraisal wells are drilled to determine whether there are commercial quantities of oil and gas and the economic feasibility of developing such reserves.[53]

Afterwards, the oil and gas resources are produced from the validated reservoirs.[54] Subsequently, production commences after the development wells have been linked to the surface production unit and transportation facilities.[55] During production, the hydrocarbons are extracted and separated from the mixture of liquid hydrocarbons, gas, water, and solids.[56] Oil is often processed at a refinery while natural gas may be processed at a natural gas plant to remove impurities.[57] At the end of a production life-cycle (typically 20–40 years), operators are expected to plug and abandon the wells.[58] The obsolete installation is thereby removed or towed away to a new location for reuse depending on the case, a process otherwise known as decommissioning.[59] The requirements for decommissioning are often in line with the domestic regulations guiding the process in the jurisdiction or other

[48] USA's Environmental Protection Agency (EPA), 'EPA Office of Compliance Sector Notebook Project Profile of the Oil and Gas Extraction Industry' (Environmental Protection Agency 1999) p.15.
[49] *ibid*. p.16.
[50] Department of Trade and Industry, 'An Overview of Offshore Oil and Gas Exploration and Production Activities' (Department of Trade and Industry 2001) 4.
[51] *ibid*. p.5.
[52] *ibid*.
[53] Square Space, 'Overview of The Oil and Gas Exploration and Production Process' (*Environmental Management in Oil and Gas Exploration and Production*, 2019) <https://static1.squarespace.com/static/52d71403e4b06286127a1d48/t/53237da4e4b02c883fb2303c/1394834852799/AttAoverview.pdf> accessed 11 October 2019.
[54] USA's EPA (n.48) p.28.
[55] Square Space (n.53).
[56] Intermountain Oil and Gas BMP Project, 'The Development Process' (2019) Intermountain Oil and Gas BMP Project <http://www.oilandgasbmps.org/resources/development.php> accessed 11 October 2019.
[57] *ibid*.
[58] USA's EPA (n.48) p.33.
[59] Department of Trade and Industry (n.50) p.24.

international laws in force at the specified time of decommissioning.[60] There is also an expectation that during the process, the sites will be rehabilitated and restored to their pre-licence condition.[61] In effect, activities that occur at this stage include: well plugging, removal of installations and equipment as well as site restoration.

The midstream stage on the other hand, mainly involves the transportation of crude or refined petroleum products, through pipelines, oil tankers, barges, trucks or rail from the well to the processing facilities, and then to its final destination (the refineries).[62] The midstream sector also includes the storage of petroleum products and other wholesale marketing efforts.[63] The main component of the downstream stage however is the refining of crude oil and processing of natural gas.[64] It also encompasses efforts to market and distribute crude oil and natural gas related products.[65]

1.3.1.1 Pollution as an Environmental Violation in the Oil and Gas Industry

To understand the reasons for establishing environmental standards, one must first understand the extent and significance of environmental damage caused in a bid to seek socio-economic independence and dominance.[66] Excerpts from the World Commission on Environment and Development (WCED) stated that: "*The world manufactures seven times more goods today than it did as recently as 1950. Given population growth rates, a five- to ten-fold increase in manufacturing output will be needed just to raise developing-world consumption of manufactured goods to industrialized world levels by the time population growth rates level off next century*."[67] Indeed, most industrialised activities (and indeed most other human activities) harm the components of the environment (air, water, and land) and public health.[68] For the purpose of protecting the environment, there is a necessity to regulate the environmental aspects of such industrial activities.[69] In the background section,

[60] *ibid.*
[61] Claudine Sigam and Leonardo Garcia, 'Extractive Industries: Optimizing Value Retention in Host Communities' (United Nations Conference on Trade and Development 2012) p.4.
[62] *ibid.*
[63] *ibid.*
[64] *ibid.*
[65] *ibid.*
[66] Bhaskar Nath, *Environmental Regulations and Standard Setting* (E-Book, Encyclopaedia of Life Support Systems (EOLSS) 2009) p.1.
[67] World Commission on Environment and Development, 'Our Common Future' (1987) Oxford University Press p.15.
[68] Bhaskar Nath (n.66) p.2.
[69] Claudine Sigam and Leornado Garcia (n.61) p.14.

this study has noted that states like Nigeria have prescribed standards (manifesting principles of environmental law) in their environmental regime. The study also noted possible violation of such standards in the oil and gas industry. It has also been noted that pollution is a significant form of violation in the industry.

Scholars have associated oil and gas pollution with the extent of the oil and gas activity, the location and surrounding areas of the extraction process, and the technology used during the process.[70] In effect, the larger the oilfield, the greater the impacts; and complex technology used during drilling can also increase the possibility of significant impact.[71] This study will utilise the aid of Figure 1.0 below to illustrate pollution violation during oil and gas extraction. These pollutions contradict some principles of international environmental law.

Figure 1.0: *Potential Pollution That Occur During Upstream Oil and Gas Operations*

Process	Air Emissions	Process Waste Water	Residual Wastes Generated
Well Development	Fugitive natural gas, other volatile organic compounds (VOCs), polyaromatic hydrocarbons (PAHs), carbon dioxide, carbon monoxide, hydrogen sulphide.	Drilling muds, organic acid, alkalis, diesel oil, crankcase oils, acidic stimulation fluid (hydrochloric and hydrofluoric acids).	Drill cuttings (some oil-coated), drilling mud solid, weighting agents, dispersants, corrosion inhibitors, surfactants, flocculating agents, concrete, casing, paraffin.
Production	Fugitive natural gas, Other VOCs, PAHs, carbon dioxide, carbon monoxide, hydrogen sulphide, fugitive BTEX (benzene, toluene, ethylbenzene, and Xylene) from natural gas conditioning.	Produced water possibly containing heavy metals, radionuclides, dissolved solids, oxygen-demanding organic compounds, and high level of salts. Also may contain additives including biocides, lubricants, corrosion inhibitors, waste water containing glycol, amines, salts and untreatable emulsions.	Produced sand, elemental sulphur, spent catalysts, separator lodge, tank bottoms, used filters, sanitary wastes.

[70] *ibid*.
[71] *ibid*.

Maintenance	Volatile cleaning agents, paints, other VOCs, hydrochloric acid gas.	Completion fluid, waste water containing well-cleaning solvent (detergent and degreasers), paints, stimulation agent.	Pipe scale, waste paint, paraffin, cement, sand.
Abandoned Wells, Spills and Blowout	Fugitive natural gas and other VOCs, PAHs, particulate matter sulphur compounds, carbon dioxide, carbon monoxide.	Escaping oil and brine.	Contaminated soils, sorbents.

Source: USA's EPA, 'EPA Office of Compliance Sector Notebook Project Profile of the Oil and Gas Extraction Industry' (USA Environmental Protection Agency 1999) p.45.

Based on Figure 1.0 above, it is discovered that significant oil and gas pollution occurs during the upstream stage of operations. In relation to this study, it translates that criminal sanctioning and regulatory enforcement should be properly utilised to ensure compliance with relevant standards promoting environmental protection. Other forms of violation in the upstream stage of the Nigerian oil and gas industry will be examined in chapter 3 of this study. The next section will therefore give an overview of the Nigerian oil and gas industry and the Niger Delta in which a significant portion of upstream operations have occurred.

1.3.2 The Nigerian Oil and Gas Regime: A Review of Upstream Operations

There have been extensive oil and gas operations in the Nigerian upstream onshore[72] areas.[73] Most of the extraction activities have occurred in the onshore areas of the Niger Delta.[74] Moreover, writers have described a significant portion of the Nigerian oil and gas pollution to have also occurred in these areas.[75] According to Azaiki, the exploration of crude oil in the Nigerian onshore areas commenced in 1908 when German surveyors for the Nigerian

[72] Oil can sometimes be found below the surface of earth and at other times, below the sea bed. The process of extracting oil from under the sea bed (usually through floating or fixed platforms on the bed of the ocean) is called offshore drilling whereas onshore drilling is the practice of extracting oil from under the surface of earth away from the ocean.
[73] United Nations Environment Programme, 'Environmental Assessment of Ogoniland' (n.33) p.9.
[74] Sunday Olayinka Oyedepo (n.41).
[75] Aniefiok E Ite and Others, 'Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta' (2013) 1 American Journal of Environmental Protection 80.

Bitumen Corporation started exploring the onshore areas of Araromi (a fishing coastal community in the western fringe of Ondo State in Western Nigeria).[76] This effort was cut short by the outbreak of World War I in 1914, and the exploration for petroleum resources only commenced again in 1938 when Shell D'Arcy (a consortium of British Petroleum and Royal Dutch Shell)[77] was granted a sole concessionary right over the entire nation.[78] The second effort was also cut short by the outbreak of World War II in 1939.[79] As a result, oil exploration only resumed in 1946 (a year after the war ended) with Shell D'Arcy drilling a number of oil wells in the Araromi area in 1951.[80] Exploration activities moved to the Niger Delta in 1956 when Shell British Petroleum (now Royal Dutch Shell) discovered crude oil in the onshore area of Oloibiri in Bayelsa state (of the Niger Delta region).[81] By late 1956, another discovery of commercial value was made at Afam, in Rivers State (of the Niger Delta)[82] and by 1958, full commercial development of crude oil had already begun in the onshore areas of the region.[83] This discovery in commercial quantities was the giant Bomu oil field of Port Harcourt-Rivers State, which has estimated total recovery (EUR) of 0.311 billion of barrels (BB) of oil and an estimated total of 0.608 billion of barrels of oil equivalent (BBOE) including gas.[84] It is believed that the country was already producing over 5,100 barrels of crude oil per day by 1958 from its onshore platform;[85] an understandable contrast to the over 2 million barrels of crude being produced per day presently.[86]

The oil and gas sector has since played a pivotal role in shaping Nigeria's socio-economic and political development since the 1956 discovery.[87] Since then, the oil and gas industry has been a significant portion of the Nigerian economy.[88] Indeed, other writers have

[76] Steve S Azaiki, *Inequities in Nigerian Politics* (6th edn, Treasure Books 2003) p.240.
[77] This company later became Shell-BP operating in Nigeria and later Shell Petroleum Development Company
[78] Joseph Egbegbulem and others, 'Oil Exploration and Poverty in the Niger Delta Region of Nigeria: A Critical Analysis' (2013) 4 International Journal of Business and Social Science 280.
[79] *ibid*.
[80] Aniefiok E Ite and Others (n.75).
[81] Lawrence Atsegbua, *Oil and Gas Law in Nigeria: Theory and Practice* (2nd edn, New Era Publications 2004) p.42.
[82] Ayo M Ajomo, 'Law and Changing Policy in Nigeria's Oil Industry' in J.A. Omotola ed. *Law and Development* (Lagos: University of Lagos Press 1987) 84.
[83] Joseph Egbegbulem and others (n.78).
[84] Marius S Vassiliou, *The A to Z of the Petroleum Industry* (116th edn, Scarecrow Press 2009) p.300.
[85] Scott R Pearson, *Petroleum in the Nigerian Economy* (California: Stanford University Press 1970) p.44.
[86] USA Energy Information Administration, 'Nigeria Crude Oil Production: 2.01M Bbl/Day for Dec 2018' (Energy Information Administration 2018) <https://ycharts.com/indicators/nigeria_crude_oil_production> accessed 2 April 2019.
[87] *ibid*.
[88] Anthony E Akinlo, 'How Important Is Oil in Nigeria's Economic Growth?' (2012) 5(4) Journal of Sustainable Development 165; Gazi M Alam and others, 'Impact of Gas Industry on Sustainable Economy in Nigeria: Further Estimations through Eview' (2012) 12(21) Journal of Applied Sciences 2244-2251.

argued that it is the mainstay of the Nigerian economy[89] as it generates approximately 80% of the country's revenue.[90] As of 2000, 98% of the country's export earnings were derived from oil and gas exports.[91] Indeed, recent data has shown that oil and gas resources account for an estimated 90% of total exports and 80% of foreign exchange revenue.[92]

Upon Nigeria's independence in 1960, Shell–BP began to relinquish its acreage and convert its exploration licences to become prospecting licences to enable it to also produce crude.[93] However, as it became clear that the oil and gas sector was fast becoming a prime contributor to the Nigerian economy, the country made moves towards asserting its dominance in the oil and gas sector in a number of ways.[94] These moves were reasonable considering that in Nigeria, the permanent sovereignty and ownership over its mineral resources are vested in the Federal Government of Nigeria pursuant to Section 44 (3) of the Constitution of the Federal Republic of Nigeria (as amended). This sovereignty of the Nigerian state over its resources is in line with the provisions of the United Nations General Assembly (Resolution 626) and the United Nations Conference for Trade and Development (UNCTAD) which stipulates that it is "*the inalienable rights of all states to dispose of their wealth and natural resources in accordance with their national interests and based on respect for their economic independence*."[95]

First, the country discarded the sole concession policy it operated and extended exploration rights to other multinational oil companies (MOCs) so as to facilitate increased development of petroleum resources.[96] For example, Texaco Overseas Petroleum Company of Nigeria obtained exploration rights for oil and gas resources in Nigeria in 1961, Gulf Oil Company (now Chevron) also in 1961, Société Africaine des Pétroles (SAFRAP) (which later became Elf Nigeria Limited in 1974) in 1962, Azienda Generale Italiana Petroli (now AGIP) in 1962,

[89] Matthew N. Uwakonye, Gbolahan Solomon Osho and Hyacinth Anucha, 'The Impact of Oil and Gas Production on the Nigerian Economy: A Rural Sector Econometric Model' (2006) 5(2) International Business & Economics Research Journal (IBER) 62.
[90] Ayuba, A Kadafa, 'Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria' (2012) 12(3) Global Journal of Science Frontier Research Environment & Earth Sciences15.
[91] *ibid*. p.15.
[92] Moses C Ekperiware, 'Effect of Oil and Agriculture on Economic Growth in Nigeria' (2015) 3(2) Journal of Global Economics, Management and Business Research 75-76.
[93] Marius S Vassiliou (n.84).
[94] Armin Rosencrantz, Paul Kibel and Kathleen D. Yurchak, 'The Principles, Structure, And Implementation of International Environmental Law' (*Ucar.edu*, 1999) <https://www.ucar.edu/communications/gcip/m3elaw/m3html.html#chapter1> accessed 3 December 2018.
[95] United Nations General Assembly - 'Permanent Sovereignty over Natural Resources', 14 December 1962. GA Res. 1803 (XVII).
[96] Marius S Vassiliou (n.84).

and ENI in 1964. Shell–BP commenced exploration and production operations through one of its Nigerian subsidiaries, the Shell Petroleum Development Company (SPDC) in 1979.[97]

Furthermore, under the Nigerian National Petroleum Corporation (NNPC) Act 1977, the Federal government established and utilised the Nigerian National Petroleum Corporation (NNPC) to undertake commercial activities in the oil and gas industry.[98] Pursuant to Section 10 of the NNPC Act, the Federal Ministry of Petroleum Resources regulates the operations of the NNPC and its partners through the Petroleum Inspectorate (the Department of the Petroleum Resources [DPR]). It is however interesting that Section 10 (1) of the NNPC Act also makes the DPR an integral component of the NNPC. This implies that the law makes the NNPC a regulator of its own operations, hence creating a conflict of interest in the regulation of the Nigerian oil and gas sector. It also reveals to what extent the oil and gas activities of the NNPC and its partners are being regulated.

1.3.2.1 Shell Petroleum Development Company as Main Example in Nigeria

To evaluate possible oil and gas pollution in Nigeria, this study will repeatedly cite Shell Petroleum Development Company (SPDC) as a main example of a Nigerian operator. SPDC is used as the main example because the company is the operator of a Joint Venture Agreement involving the Nigerian National Petroleum Corporation (NNPC), which holds 55%, Shell 30%, Total Exploration and Production Nigeria Limited (TEPNG) 10% and Nigerian Agip Oil Company limited (NAOC) 5%.[99] Indeed, SPDC has been the pioneer operator for oil and gas operations in Nigeria.[100] In line with the joint venture formula for production in Nigeria, the SPDC is believed to control an oil mining lease area of over 31,000 square kilometres.[101] In this lease, the corporation controls more than 6,000 kilometres of pipeline; runs more than 87 flow stations; owns 8 gas plants; and produces from more than 1,000 producing wells.[102] It has been asserted that there are an estimated 159 operational oil fields in

[97] *ibid*.
[98] This is pursuant to Section 5 of the NNPC Act.
[99] Shell Nigeria, 'SPDC - Shell Petroleum Development Company of Nigeria' (Shell Nigeria 2017) <http://www.shell.com.ng/about-us/what-we-do/spdc.html> accessed 10 December 2018.
[100] *ibid*.
[101] *ibid*.
[102] *ibid*.

Nigeria.[103] With the above arrangement, Shell accounts for more than 80 of the 159 fields.[104] It has been alleged that as of 1997, Nigeria's joint venture operated by Shell accounted for a production of over 899,000 barrels per day (bpd).[105] Similarly, it has been alleged that as of 2018, Shell accounted for 819 million barrels of oil cumulatively produced in Nigeria.[106] Shell in Nigeria plays pioneering roles in onshore, shallow and deep-water exploration and production.[107] In light of this, the study believes that the environmental implications of SPDC's operations would give a perfect insight into the role of oil and gas operators in the industry.

This study will hereafter, review a Nigeria jurisdiction in which significant oil and gas operations have been carried out and which possibly may have suffered some significant environmental impacts as a result of the operations. The study asserts that the Niger Delta region is most suited for this purpose. The next section will therefore, give an insight into the Niger Delta and the significance of the region in the development of the Nigerian oil and gas industry.

1.3.2.2 The Niger Delta Region of Nigeria

Nigeria is a major oil producing country[108] producing 1.9 million barrels of oil per day.[109] In line with this, there has been extensive exploration and production of oil and gas resources in the country.[110] The Niger Delta region accounts for approximately 62.1% of Nigerian oil production.[111] The region is located at the apex of the Gulf of Guinea on the west coast of

[103] Thomas Catan and Dino Mahtani, 'Shell's Problems in Nigeria Mount Up' [2006] Financial Times <https://www.ft.com/content/8ff2c40a-c59e-11da-b675-0000779e2340> accessed 10 December 2018.
[104] *ibid*.
[105] Resolution Law Firm, 'Joint Ventures in the Nigeria Oil and Gas Industry' (2019) Resolution Law Firm <https://resolutionlawng.com/joint-venture-in-the-nigeria-oil-and-gas-industry/> accessed 16 October 2019.
[106] Shell Nigeria, 'Economic Development in Nigeria (Sustainability Report) ' (Shell Nigeria 2018) <https://reports.shell.com/sustainability-report/2018/special-reports/economic-development-in-nigeria.html> accessed 10 January 2020.
[107] Shell Nigeria, 'Our Business in Nigeria (Sustainability Report) ' (Shell Nigeria 2020) <https://www.shell.com.ng/> accessed 10 January 2020.
[108] Matthew N. Uwakonye, Gbolahan Solomon Osho and Hyacinth Anucha (n.89) p.61.
[109] Eurasia, 'Nigeria Energy Profile: Largest Oil Producer in Africa and World's Fourth-Largest Exporter of LNG – Analysis' [2019] Eurasia Review and Analysis <https://www.eurasiareview.com/08052016-nigeria-energy-profile-largest-oil-producer-in-africa-and-worlds-fourth-largest-exporter-of-lng-analysis/> accessed 26 September 2019.
[110] Joseph Effiong, 'Oil and Gas Industry in Nigeria: The Paradox of the Black Gold' (2010) 18 Environment and Social Justice: An International Perspective 329-330.
[111] International Business Publications, *Nigeria Oil and Gas Exploration Laws and Regulation Handbook* (Intl. Business Publications USA 2008) p.63.

Africa.[112] It is made up of 9 oil–producing states (Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Ondo, Imo and Rivers) which comprises over 800 oil–producing communities.[113] The region is also home to 37 million inhabitants and occupies a land space of approximately 75,000 km2 (thus constituting 7.5% of Nigeria's land mass).[114] Indeed, 37 million people are a significant portion of the estimated 150 million inhabitants of Nigeria.[115] The first commercial quantity of crude in the Niger Delta region was discovered in the Bomu community in 1957.[116] Subsequently, exploration and production activities expanded to several other areas of the region.[117]

It has been argued that oil and gas activities have thrived in the region because of the topography and natural aesthetics.[118] A significant number of the Nigerian onshore oil fields are situated across the region.[119] Indeed, Khan asserted that 78 of the 159 oilfields operative in Nigeria are located in the Niger Delta.[120] It implies that a significant portion of the Nigerian oil and gas extraction operations are carried out in the Niger Delta region. It is also believed that over 80% of Nigeria's revenue is generated from the sale of crude oil derived from the Niger Delta region.[121] It is therefore, not surprising that the Niger Delta has been extensively studied as a result of the presence of vast deposits of petroleum resources in its basin.[122] This is because the Niger Delta is alleged to be one of the world's largest prolific hydrocarbon provinces globally.[123] According to Curtis, "*A large portion of the world's oil and gas reserves are in tertiary terrigenous fill on passive continental margins and the most significant*

[112] Harry Doust, 'Petroleum Geology of the Niger Delta' (1990) 50 Geological Society, London, Special Publications 365.
[113] Leo Osuji and Chukwunedum Onojake, 'Trace Heavy Metals Associated with Crude Oil: A Case Study of Ebocha-8 Oil-Spill-Polluted Site in Niger Delta, Nigeria' (2004) 1 Chemistry & Biodiversity 1708; Patrick Oviasuyi, 'The Dilemma of Niger-Delta Region as Oil Producing States of Nigeria' [2010] Journal of Peace, Conflict and Development <https://www.bradford.ac.uk/social-sciences/peace-conflict-and-development/issue-16/dilemanigerdelta.pdf> accessed 20 March 2019.
[114] Aniefiok E Ite and others (n.75) p.80.
[115] *ibid*.
[116] Osondu Nworu, 'Ogoniland Clean-Up, Remediation and Satisfactory Environment Favourable to Its Development: Obligations of the Nigeria State' (2017) 7 World Environment 33. Bomu is located in Gokana local government of the Ogoni area of Rivers State.
[117] Ibama Brown and Eyenghe Tari, 'An Evaluation of the Effects of Petroleum Exploration and Production Activities on the Social Environment in Ogoni Land, Nigeria' (2015) 4 International Journal of Scientific Technology Research p.276.
[118] Emmanuel JC Duru, *Oil Multinationals and the Niger Delta Crises* (African Scholars Publishing Co 1999) p.81.
[119] United Nations Environment Programme (n.33) p.24.
[120] Sarah Ahmad Khan, *Nigeria* (1st edn, Oxford University Press for the Oxford Institute for Energy Studies 1994) p.145.
[121] Nelson Takon, 'Distribution of Oil Revenue to Niger Delta of Nigeria in Post-2000; Is the Debate How Fairly the Federal Government Has Redistributed Oil Revenue?' (2014) 3(4) International Journal of Development and Sustainability 587; Olu Odeyemi and Oladele A. Ogunseitan, 'Petroleum Industry and Its Pollution Potential in Nigeria' (1985) 2(3) Oil and Petrochemical Pollution 223.
[122] Nuhu G Obaje, *Geology and Mineral Resources of Nigeria* (1st edn, Springer 2009) p.45.
[123] Marius S Vassiliou (n.84).

hydrocarbon deposits of this type could be found in the U.S. Gulf of Mexico, Canadian Beaufort-Mackenzie Delta and Nigeria's Niger Delta."[124]

It would be expected that there should be a balance in the utilisation of petroleum resources and the management of the existing rich ecosystem of the region. This is because the Niger Delta arguably has the largest mangrove forests in Africa and the third largest in the world.[125] The region is also endowed with petroleum resources and a healthy ecosystem that supports the growth of aquatic plant and animal life.[126] Indeed, environmental scholars have asserted that as a result of its complex ecosystem, the mangrove forests and swamps also easily support the growth of important terrestrial and aquatic flora and fauna.[127] In this light, the ecological zones in the Niger Delta region can be broadly classified as tropical rainforest in the northern part of the Delta and mangrove forest on the warm coastlines of Nigeria.[128] It is therefore expected that activities such as the exploitation of oil and gas resources from such environment will consider the conservation of such an ecosystem. This conservation is best guaranteed under environmental principles established within the purview of environmental law to ensure environmental protection.

1.3.2.3 Pollution as a Violation of Environmental Standard in the Nigerian Oil and Gas Industry

It has been argued that although Nigeria has a seemingly vast environmental regulatory system, the country has failed to protect its environment (especially in its Niger Delta).[129] Generally, pollution sources in Nigeria include, but are not limited to, the reckless dumping of household waste and other decomposing domestic waste, waste generated from mineral mining activities, and industrial waste from manufacturing corporations.[130] In the same vein, Sangodoyin asserted that the littering of major roads and streets is a common cause of

[124] Doris M Curtis, 'Comparative Tertiary Petroleum Geology of the Gulf Coast, Niger, and Beaufort-Mackenzie Delta Areas' (1986) 21 Geological Journal 225.
[125] Marius S Vassiliou (n.84).
[126] *ibid*.
[127] Collins Ugochukwu and Jurgen Ertel, 'Negative impacts of oil exploration on biodiversity management in the Niger De area of Nigeria' (2008) 26 Impact Assessment and Project Appraisal 139.
[128] Marius S Vassiliou (n.84).
[129] Ifeanyi Anago, 'Environmental Impact Assessment as A Tool for Sustainable Development: The Nigerian Experience', *Proceedings of the FIG XXII International Congress, Washington, D.C. USA* (April 19-26, 2002) pp.1-13.
[130] Angela E Kesiena and Augustus U. S. Didigwu, 'The Devastating Effects of Environmental Degradation in the Niger Delta Region of Nigeria-A Case Study of the Niger Delta Region' [2012] Nigerian Institution of Surveyors<https://www.fig.net/resources/proceedings/fig_proceedings/fig2009/papers/ts01d/ts01d_etuonovbe_3386.pdf> accessed 10 December 2018.

domestic waste in Nigeria.[131] Other writers have asserted that domestic polluters often dump kitchen waste into major gutters or waterways causing flooding on the roads.[132] Even more, other writers believe that the indiscriminate felling of trees and sporadic burning of bushes and farmland often lead to soil erosion.[133] The list is legion and covers a wide spectrum (ranging from such domestic pollution to oil spills). Indeed, Uchendu believes that these sources of pollution cause environmental degradation and even in some cases harm to public health.[134]

Odularu has however, argued that although these sources of pollution all deserve regulatory attention, they do not match the extent of pollution that occurs during the upstream phase of oil and gas production in Nigeria.[135] It has further been argued that most such pollution violates existing environmental standards regarding the prevention of pollution of the air, water or land of any part of Nigeria.[136] In other words, the Nigerian pollution is a significant form of violation of environmental standards. Aworawo has further argued that most such pollution has occurred in the onshore areas because most E&P activities in Nigeria (especially the Niger Delta) have occurred in the onshore areas of the Niger Delta.[137] A writer has argued that the oil and gas pollution has negatively impacted the environment and public health of the Niger Delta inhabitants.[138] Moreover, considering the significant population of the region

[131] Abimbola Y Sangodoyin, 'Domestic Waste Disposal in Southwest Nigeria' (1993) 4(3) Environmental Management and Health 20-23.
[132] Onyinyechi Odika, 'Tackling Flooding and Groundwater Pollution' *Premium Times* (2017) <https://opinion.premiumtimesng.com/2017/07/18/tackling-flooding-and-groundwater-pollution-by-precious-onyinyechi-odika/> accessed 29 March 2018; Terhemba Emberga, 'An Assessment of Causes and Effects of Flood in Nigeria' (2018) 2(7) Scientific Research and Essays 308; Kingsley Efobi, 'Impact Of Flooding on Riverine Communities: The Experience of The Omambala and other Areas in Anambra State, Nigeria' (2013) 4(18) Journal of Economics and Sustainable Development 60; Prekeyi Tawari-Fufeyin, Megbuwe Paul and Adams O Godleads, 'Some Aspects of A Historic Flooding in Nigeria and Its Effects on Some Niger-Delta Communities' (2015) 3(1) American Journal of Water Resources 7-16.
[133] Sodienye A Abere, 'Deforestation and Sustainable Development in the Tropics: Causes and Effects' (2012) 2(4) Journal of Educational and Social Research 106; Mfrekemfon P Inyang and Konwea P Esohe, 'Deforestations, Environmental Sustainability and Health Implications in Nigeria: A Review' (2014) 3(2) International Journal of Science, Environment 502-517.
[134] Omenka Uchendu, 'Household Waste Disposal Laws in the Federal Republic of Nigeria' [2016] Georgia State University: Public Health Capstone Projects <https://scholarworks.gsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1040&context=iph_capstone> accessed 10 December 2018.
[135] Gbadebo O Odularu, 'Crude Oil and the Nigerian Economic Performance' [2008] Oil and Gas Business <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.531.822&rep=rep1&type=pdf> accessed 10 December 2018.
[136] *ibid.*
[137] David Aworawo, 'Deprivation and Resistance: Environmental Crisis, Political Action, and Conflict Resolution in the Niger Delta since the 1980s' (2013) 4(2) Journal of International and Global Studies 54.
[138] Augustine A Ikein, Diepreye S. P. Alamieyeseigha and Steve Azaiki (ed.), *Oil, Democracy and The Promise of True Federalism in Nigeria* (University Press of America 2008) p.274; Adam Vaughan, 'Oil in Nigeria: A History of Spills, Fines and Fights for Rights' *The Guardian* (2011) <https://www.theguardian.com/environment/2011/aug/04/oil-nigeria-spills-fines-fights> accessed 10 December 2018.

in ratio to the estimated population of Nigeria, it is inevitable that impact of environmental pollution invariably affect a huge portion of the Nigerian population.[139] Some such pollution and their impacts includes:

i) Oil Spill Pollution in Nigeria

Writers believe that there has been repeated oil spill pollution in the Niger Delta region.[140]One of the numerous examples of such pollution occurred in the populated Biile community of the Niger Delta.[141] This was caused by the SPDC's Forcados Terminal storage tank failure in 1979, which discharged approximately 580,000 barrels of crude oil into the Biile navigable river.[142] As a result of this pollution, inhabitants of the region suffered negative health challenges.[143] Writers have observed that several communities in the Niger Delta region have suffered repeated oil spills (mostly from dis-used pipelines that are yet to be decommissioned and well blow-outs from over 100 wells scattered around the area).[144] For instance, Amnesty International records that between 2008 and 2009, over 650,000 barrels of oil were emitted into Bodo land and creeks after a disused oil pipeline that was buried in the community ruptured.[145]

It is also reported that between 1976 and 2001, the SPDC discharged 3,726,000 tons of hydrocarbons, 11,695,000 tons of carbon dioxide, and 53,000,500 tons of methane in the region.[146] Recent reports also show evidence of 210 onshore oil spills in 2008 and 190 in 2009.[147] SPDC argued that sabotage of oil pipelines by inhabitants of the region accounted for some of its recorded spills.[148] Indeed, records show that within 1976 to 1991 alone, there were an estimated 2,976 oil pipeline spills (2.1 million barrels of oil) that occurred from

[139] Michael Watts, 'Resource Curse? Governmentality, Oil and Power in the Niger Delta, Nigeria' (2004) 9(1) Geopolitics 58.
[140] *ibid.*
[141] David Aworawo (n.137).
[142] Godwin Eshagberi, 'The Effects of Oil Pollution on the Environment' (2012) 23 The Nigerian Academic Forum<http://www.globalacademicgroup.com/journals/the%20nigerian%20academic%20forum/THE%20EFFECTS%20OF%20OIL%20POLLUTION.pdf> accessed 7 March 2019.
[143] Ayuba, A Kadafa (n.90).
[144] *ibid.*
[145] Amnesty International, 'The True 'Tragedy' Delays and Failures in Tackling Oil Spills in the Niger Delta' (Amnesty International 2009) <https://www.amnestyusa.org/files/afr440182011en.pdf> accessed 10 December 2018.
[146] *ibid.*
[147] Shell Nigeria, 'Oil Spill Data' (Shell Nigeria 2017)<http://www.shell.com.ng/sustainability/environment/oil-spills.html> accessed 10 December 2018.
[148] Shell Nigeria, 'Oil Theft, Sabotage and Spills' (Shell Nigeria 2014) <https://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/security-theft-and-sabotage.html> accessed 10 December 2018.

SPDC's pipelines in Ogoni.[149] Similarly, the United Nations Development Programme (UNDP) estimates that between 1976 and 2001 alone, there were an estimated 6,800 well blowouts, discharging over 3,000,000 barrels of oil into the Niger Delta region.[150] Cumulatively, it has been argued that between 9 and 13 million barrels of crude oil polluted the Niger Delta between 1958 and 2009.[151] Consequential harm that has arisen from the pollution include, but is not limited to the destruction of the aesthetic environment, destruction of aquatic life, destruction of land by oil residue, and even harm to public health and the lives of inhabitants.[152] Amnesty International has argued that most of the oil and gas pollution has been a result of the deliberate, sometimes reckless, and at other times, negligent acts of oil companies operating in the region.[153] Furthermore, it has been adduced that the oil and gas companies that perpetrated the pollution acts have failed to clean-up the affected sites.[154]

Amnesty International observed that most of the rivers and ponds that run through the Niger Delta region have been contaminated with the discharge of crude oil substances as well as oil waste.[155] Crude oil discharged during repeated spills has caused both short and long term harm to aquatic life generally (especially the Niger Delta).[156] Fish farming is one of the chief occupations of the Niger Delta inhabitants; hence it is economically important to the region.[157] To this extent, one can assume that the impact of oil pollution on the aquatic life of Niger Delta has negatively affected the economy of the region. Also, it is on record that the people of the Niger Delta rely on agriculture.[158] Most inhabitants of the Niger Delta rely

[149] Stephen Crayford, 'Conflict and Conflict Resolution in Africa' (Africa Today1996) <https://www.accord.org.za/ajcr-issues/%EF%BF%BCconflict-and-conflict-resolution-in-africa/> accessed 10 December 2018.
[150] United Nations Development Programme, ' Human Development Report 2006' (United Nations Development Programme 2006)<http://hdr.undp.org/sites/default/files/reports/267/hdr06-complete.pdf> accessed 10 December 2018.
[151] Oshienemen N Albert, Dilanthi Amaratunga and Richard P. Haigh, 'Evaluation of the Impacts of Oil Spill Disaster on Communities and Its Influence on Restiveness in Niger Delta, Nigeria' (2018) 212 Procedia Engineering 1055; Tunde Imoobe and Iroro Tanshi, 'Ecological Restoration of Oil Spill Sites in the Niger Delta, Nigeria' (2009) 11(2) Journal of Sustainable Development in Africa 55.
[152] Olusola J. Olujobi, Olabode A. Oyewunmi and Adebukola A. Oyewunmi, 'Oil Spillage in Nigeria's Upstream Petroleum Sector: Beyond the Legal Frameworks' (2018) 8 International Journal of Energy Economics and Policy 220.
[153] Amnesty International, 'Negligence in the Niger Delta' (Amnesty International 2018) <https://www.amnesty.ch/de/themen/wirtschaft-und-menschenrechte/fallbeispiele/nigeria/dok/2018/nigeria-fahrlaessigkeit-von-shell-eni/negligence-in-the-niger-delta.pdf> accessed 7 March 2019.
[154] Amnesty International, 'UN Says Shell Failed to Clean up Niger Delta Oil Spills' (Amnesty International 2019) <https://www.amnestyusa.org/un-says-shell-failed-to-clean-up-niger-delta-oil-spills/> accessed 2 September 2019.
[155] Amnesty International, 'Petroleum Pollution and Poverty in the Niger Delta Index' (Amnesty International 2009) <https://www.amnesty.org/download/Documents/44000/afr440172009en.pdf> accessed 10 December 2018.
[156] *ibid*.
[157] Michael Ikehi and Julie Zimoghen, 'Impacts of Climate Change on Fishing and Fish Farming in the Niger Delta Region of Nigeria' (2017) 3(1) Direct Research Journal of Agricultural and Food Science p.2.
[158] Kayode B Oyende, 'An Appraisal of the Law Relating to Oil Pollution in the Inland, Territorial and Maritime Waters of Nigeria' (PhD, College of Law and Management Studies University of KwaZulu-Natal Pietermaritzburg Campus 2012) p.27.

on subsistence crops that grow on their land. Despite this, oil pipelines (constructed to transport crude oil from the gathering stations to the refineries) have been allowed to run across Ogoni farmland (on the top soil) while other oil and gas infrastructure, such as wellheads and flow stations are often situated close to residential areas.[159] Based on the above fact, it would be easy for a single spill incident to destroy the viable nutrients of crops. Ordinioha and Brisibe discovered that oil spills in the Niger Delta region had reduced plant nutrients by an estimated 36% and the protein component of cassava by an estimated 40%, hence resulting in increased child malnutrition in the region.[160] More generally, oil spill waste has made a significant soil portion in most Niger Delta communities toxic to plant growth and also dangerous to animals that feed on the materials that grow on such soil.[161]

Recently, the United Nations Environment Programme (UNEP) found that the Ogoni River (from which most of the Niger Delta inhabitants derive drinking water) had been contaminated with a carcinogen at an estimate of almost 900 times above World Health Organisation (WHO) standards.[162] To this effect, the contamination of the rivers by oil spill toxins could affect the health of inhabitants that fetch drinking water from it. Other writers have argued that emissions from the combustion of associated gases during well blow-outs often cause a discharge of toxic substances such as benzene and nitrogen oxide.[163] It has been argued that the toxic gases increase the risk of air-borne diseases such as asthma, leukaemia and pneumonia.[164]

Writers have alleged some of the factors that have contributed to some of the pollution in the Nigerian upstream sector to include: the use (by oil and gas corporations) of outdated technology that is not environmentally friendly[165] and the use (by oil and gas corporations) of faulty and outdated facilities that cause spill and well-blowouts.[166] Some such allegations are described below.

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[159] Uchenna J Orji, 'An Appraisal of the Legal Frameworks for the Control of Environmental Pollution in Nigeria' (2012) 38 Commonwealth Law Bulletin 327.
[160] Best Ordinioha and Seiyefa Brisibe, 'The Human Health Implications of Crude Oil Spills in the Niger Delta, Nigeria: An Interpretation of Published Studies' (2013) 54 (1) Nigerian Medical Journal 10.
[161] Kayode B Oyende (n.158) p.26.
[162] United Nations Environment Programme (n.33).
[163] Aghogho Kingsley Edafienene, 'Media Exposure, Policy Agenda Setting and Risk Communication in Sub-Saharan Africa: A Case Study of Nigeria's Niger Delta Region' (PhD, University of South Wales 2012) p.60.
[164] Angela K Werner and others, 'Environmental Health Impacts of Unconventional Natural Gas Development: A Review of the Current Strength of Evidence' (2015) 505 Science of The Total Environment 1127-1141.
[165] Godwin Eshagberi (n.142).
[166] Lee McConnell, *Extracting Accountability from Non-State Actors in International Law* (1st edn, Routledge 2016) p.210.

Asset Integrity Work concerns improving the quality of the pipelines, well-heads, flow lines, flow stations and terminals during exploration and production of oil resources.[167] However, it was reported that in 2007, the (then) Managing Director of SPDC, Omiyi, in commenting on the of the company's assets, stated: "*we do have a substantial backlog of asset integrity work to reduce spills and flaring*."[168] Similarly, in 2004, while being questioned by Christian Aid (an NGO), a Shell Vice-President acknowledged that the existing documents showing a total picture of the lifespan and condition of SPDC's pipelines were inadequate to reflect the actual information.[169] Hence it is possible that the company could have been using a pipeline for 100 years without changing it, since the document that should have reflected such details could not be relied on. Furthermore, in 2007, Ljosne, Shell's former Regional Director (Communications Africa), in replying to an email sent by Professor Steiner, asserted that: "*the Asset Integrity Reviews are internal Shell operating documents designed to provide information on the state of our assets and improvements that are necessary - and are regarded as strictly confidential and business sensitive*." In view of this, Professor Steiner concluded in a report that SPDC still operated well below internationally recognized standards to prevent and control pipeline oil spills by not utilising the globally recognised best available technology and practices.[170]

Niger Delta Environmental Survey (NDES) recently concluded that, "*many operators have hidden under the cloak of sabotage to avoid remediation in cases of environmental spills, accidents and discharges*."[171] This implies that most such companies have avoided cleaning up their oil and gas pollution discharge under the pretence that such pollutions were caused by the pipeline sabotage activities of other third parties. Similarly, Amnesty International attributed a major cause of the spills to corroded pipes rather than sabotage.[172] They have alleged that the defence is only employed by the corporation to evade the strict liability of

[167] Albert Kate, 'Royal Dutch Shell and Its Sustainability Troubles Background Report to the Erratum of Shell's Annual Report 2010' (2011) Friends of the Earth <https://www.foei.org/wp-content/uploads/2011/05/Shell-background-report.pdf> accessed 23 July 2019.
[168] Royal Dutch Shell, 'Shell Sustainability Report 2006' (Royal Dutch Shell 2006) p.33.
[169] Christian Aid, 'Behind the Mask, the Real Face of Corporate Social Responsibility' (Christian Aid 2004) p.30.
[170] Richard Steiner, 'Double Standard: Shell Practices in Nigeria Compared with International Standards to Prevent and Control Pipeline Oil Spills and the Deepwater Horizon Oil Spill' (Milieu Defensie: Report on Behalf of Friends of the Earth 2010) p.35.
[171] Jedrzej G Frynas, *Oil in Nigeria Conflict and Litigation between Oil Companies and Village Communities* (Politics and Economics in Africa Series, Volume 1, Munster: London LIT 2002) p.197.
[172] British Broadcasting Corporation (BBC), 'Nigeria Oil Firms 'Deflect Blame For Spills', Says Amnesty' *British Broadcasting Corporation* (2013) <https://www.bbc.co.uk/news/world-africa-24839324> accessed 10 December 2018; Paul Carsten, 'Amnesty Says Shell, ENI Negligent On Nigeria's Oil Spills' [2018] Thomas Reuters<https://uk.reuters.com/article/uk-oil-nigeria/amnesty-says-shell-eni-negligent-on-nigeria-oil-spills-idUKKCN1GS00F> accessed 12 March 2019.

their pollution crimes.[173] Indeed, the National Council on the Environment (NCE) once asserted that "*most cases of oil spills across the country are results of old and faulty pipelines that were laid more than three decades ago. They have become obsolete resulting most of the time in rupture and equipment failure. Some of these pipelines are on the surface making them easy targets for vandalisation*."[174] The above assertion was reasserted by Adekola and others who stated that the Niger Delta oil pollution has been mainly caused by the use of faulty and obsolete equipment by operators.[175]

In line with the argument of the NCE, reports have shown that although the specific age of some of the existing pipelines in the Niger Delta region are not known, several such oil pipelines were installed and commenced operations in 1965.[176] Indeed, it is on record that by the year 2000, 73% of the existing pipelines in Rivers State and Bayelsa State were older than 20 years and 41% of the entire pipelines in the Niger Delta region at the time, were older than 30 years.[177]

Despite this level of pollution, there are repeated allegations that oil and gas companies believed to have caused the pollution (such as Shell Producing Development Company) have failed to clean-up the oil spill pollution.[178] It has been argued that the affected sites have been left in its deplorable state for decades with more oil spill pollution happening on such sites with recent extraction activities.[179] It is believed that although companies have failed to adequately remediate the affected sites, enforcement agencies have issued certificates

[173]Amnesty International, UK, 'Press Release: Report Also Highlights Damaging Impact of Changes to UK Legal Aid Bill for Victims of UK Companies' Actions Overseas' (Amnesty International 2011) <https://www.amnesty.org.uk/press-releases/shell> accessed 12 March 2019.
[174] Uchenna J Orji (n.159).
[175] Josephine Adekola and others, 'Health Risks from Environmental Degradation in the Niger Delta, Nigeria' (2016) 35(2) Environment and Planning C: Politics and Space 337.
[176] Chinonso H Achebe, UC Nneke and Obiora E Anisiji, 'Analysis of Oil Pipeline Failures in The Oil and Gas Industries in The Niger Delta Area of Nigeria', *Proceedings of the International MultiConference of Engineers and Computer Scientists 2012*<http://www.iaeng.org/publication/IMECS2012/IMECS2012_pp1274-1279.pdf> accessed 25 August 2019.
[177] *ibid*.
[178] British Broadcasting Corporation (BBC) News Africa, 'Shell 'Failing To Clean Up Nigeria Oil Spills' *British Broadcasting Corporation* (2015) <http://www.bbc.co.uk/news/world-africa-34707266> accessed 10 December 2018..
[179] Amnesty International, 'Niger Delta: Government Clean-Up Does Not Let Shell Off The Hook' (Amnesty International 2016) <https://www.amnesty.org/en/latest/news/2016/06/niger-delta-government-clean-up-does-not-let-shell-off-the-hook/> accessed 2 September 2019; Amnesty International, 'Shell Own Up, Pay Up, Clean Up' (Amnesty International 2012) <https://www.amnesty.org.uk/files/shell_briefing_2012_lores_0.pdf?pseTbAvkJ66t04a30yq0WNZMfmzhTLUW=> accessed 2 September 2019

identifying such sites as fully remediated.[180] This study will make a comprehensive analysis of the violation of environmental standards during the upstream stage in chapter 3.

ii) Gas Flaring Pollution in Nigeria

Having considered the incidence of oil spill in the Niger Delta, and the impact it has had on the environment and the public health of its inhabitants, this study will consider gas flaring and its effect on the Niger Delta environment. Indeed, the extraction of natural gas in Nigeria is incidental to the exploitation of crude oil.[181] In effect, gas flaring in Nigeria started about the same time oil was first discovered in the country.[182] Moreover, no deliberate effort has been made to explore for commercial gas quantities in Nigeria, except mostly those found with petroleum (associated gas).[183] These associated gases are called gas flares.[184] Gas flaring therefore involves the burning of crude oil's associated gas.[185] The associated gas is burnt instead of re-injecting it to be refined as usable gas.[186] The gas is burnt to enable the disposal of gas and the extraction of crude oil.[187] Friends of the Earth have alleged that a major reason for the continued flaring of gas was because burning off the gas, while extracting the much desired oil is cheaper than re-injecting it and refining it.[188]

It is notable that in the course of oil production associated gas is routinely flared.[189] However, Nigerian gas flaring is grossly significant considering the volume of gas flared annually. It is estimated that about 2 billion standard cubic feet of gas is currently flared in Nigeria.[190] This makes Nigeria accountable for over 75 per cent of gas flared in Africa.[191]

[180] Ngozi Nwogwugwu, Emmanuel A Olatunji and Clara Egwuonwu, 'Militancy and Insecurity in the Niger Delta: Impact on the Inflow of Foreign Direct Investment to Nigeria.' (2012) 2 Kuwait Chapter of Arabian Journal of Business and Management Review 28-30.
[181] Samuel O Aghalino, 'Gas Flaring, Environmental Pollution and Abatement Measures in Nigeria, 1969 – 2001' (2009) 11 Journal of Sustainable Development in Africa 221.
[182] Friends of the Earth, 'Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity' (Friends of the Earth 2005) <https://friendsoftheearth.uk/sites/default/files/downloads/gas_flaring_nigeria.pdf> accessed 8 March 2019.
[183] *ibid*.
[184] Eferiekose Ukala, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices' (2011) 2 Washington and Lee Journal of Energy, Climate and the Environment 97.
[185] Marcus O Edino, Godwin N Nsofor and Leonard S Bombom, 'Perceptions and Attitudes Towards Gas Flaring in The Niger Delta, Nigeria' (2009) 30 The Environmentalist 67.
[186] Greg Bankoff, Georg Frerks and Dorothea Hilhorst, *Mapping Vulnerability: Disasters, Development and People* (1st edn, Routledge 2004) p.58.
[187] Emam A Emam, 'Gas Flaring in Industry: An Overview' (2015) 57 Petroleum & Coal Journal 532.
[188] *ibid*.
[189] Samuel O Aghalino (n.181) p.220.
[190] *ibid*.
[191] *ibid*.

Emoyan further alleged that Nigeria is one of the foremost flarers of gas globally[192] accounting for 25 percent of global gas flaring.[193] Agbola and Olurin reported the existence of 123 gas flaring sites in the Niger Delta[194] from which an estimated 70 million cubic metres of the natural gas extracted in the oil wells are flared per day.[195] As of 2004, the World Bank declared that Nigeria flared 75 percent of the gas it produced.[196]

Before the 1960 Nigerian independence, the Secretary of State for the Colonies reply to the reason for its continued gas flaring operations in Nigeria was: "*until there is a worthwhile market and until there are facilities (e.g. pipelines and storage tanks) to use the gas, it is normal practise to burn off their by-products from the oil wells*."[197] In fairness to her, Gordon pointed out that in the early twentieth century, environmental consciousness was also low in the USA.[198] It is believed that World War II, increased population, urbanisation and reliance on personal vehicles for transportation increased air pollution in the mid-1900s.[199] This is not surprising, considering that environmental consciousness at the time was low. For instance, it has been asserted that until 1955, the regulatory regime of air pollution in the USA was dominated by municipal, county and state legislation.[200] Municipal, county, and state legislation dealing with air pollution has however continued beyond 1955.[201] The first real attempt at enacting federal legislation dealing with air pollution was accomplished in the enactment of the Air Pollution Control Act 1955.[202]

Similarly, it is believed that environmental consciousness became significant in the 1960s.[203] This consciousness was represented in the institutional response to environmental problems

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[192] Onoriode O Emoyan, 'The Oil and Gas Industry and The Niger Delta: Implications for The Environment' (2010) 12 Journal of Applied Sciences and Environmental Management 30.
[193] Ugboma P Peters, 'Environmental Degradation in Oil Producing Areas of Niger Delta Region, Nigeria: The Need for Sustainable Development' (2015) 4(2) International Journal of Science and Technology (STECH) 78.
[194] Francis M Onu and Michael E Ikehi, 'Mitigation and Adaptation Strategies to the Effects of Climate Change on the Environment and Agriculture in Nigeria' (2016) 9 IOSR Journal of Agriculture and Veterinary Science (IOSR-JAVS) 26.
[195] Onoriode O Emoyan (n.192).
[196] Friends of the Earth (n.182).
[197] *ibid*.
[198] Erin Gordon, 'History of The Modern Environmental Movement in America' [2012] American Centre <https://photos.state.gov/libraries/mumbai/498320/fernandesma/June_2012_001.pdf> accessed 21 March 2019.
[199] USA's Environmental Protection Agency (EPA), 'History of Reducing Air Pollution from Transportation in the United States' (*Environmental Protection Agency*, 2018) <https://www.epa.gov/transportation-air-pollution-and-climate-change/accomplishments-and-success-air-pollution-transportation> accessed 21 March 2019.
[200] Arthur C Stern, 'History of Air Pollution Legislation in the United States' (1982) 32 Journal of the Air Pollution Control Association 44.
[201] *ibid*.
[202] *ibid*. p.48.
[203] Mark Wilson, 'The British Environmental Movement: The Development of an Environmental Consciousness and Environmental Activism, 1945- 1975' (PhD, Northumbria University 2014) p.8.

represented in developments in environmental science, public awareness and the emergence of the environmental lobby.[204] There was also an ongoing process of 'greening' of political parties, defined by Robinson as "*the translation of ideas, attitudes, motivations, symbols and ways of thinking from the constituent cells of the environmental movement to the mainstream political parties in terms of rhetoric, policy and ideology*."[205] An example of this political attitude to environmental issues was represented in the 'Leaders Speech' made by Prime Minister Wilson during the 1969 Labour Party Conference in Brighton whereby he stated: "*There is a two-fold task: to remove the scars of 19th century capitalism - the derelict mills, the spoil heaps, the back-to-back houses that still disfigure so large a part of our land. At the same time, we have to make sure that the second industrial revolution through which we are now passing does not bequeath a similar legacy to future generations. We must deal with the problems of pollution - of the air, of the sea, of our rivers and beaches. We must also deal with the uniquely 20th century problems of noise and congestion which will increasingly disturb, unless checked, our urban life.*"[206] Moreover, as stated earlier, the NPE was only formulated in 1989. It could therefore, be implied that environmental consciousness was relatively low at the time the Secretary of State made the above statement in Nigeria.

Several years later, it is evident that gas flaring has continued in Nigeria despite the market availability for gas resource globally,[207] and the availability of pipelines and storage tanks in the Nigerian oil and gas industry.[208] This creates a doubt as to whether there was any intention to actually end gas flaring. It also gives insight into the passiveness of the Nigerian government in decisively dealing with this pollution source. The reason for describing it as a strong source of pollution is argued below.

Friends of the Earth argued that gas flaring in Nigeria has caused the emission of the two greenhouse gases (methane and carbon dioxide) which have contributed to over 80% of global warming.[209] They have also suggested that gas flaring in the Niger Delta generates significant heat, in this way causing thermal pollution in the region.[210] In line with this, it is

[204] Rachel Godfrey, 'The Political Aspects of Environmentalism in The UK' (Institution of Environmental Sciences (IES) 2012) <https://www.the-ies.org/sites/default/files/documents/political_aspects_environmentalism.pdf > accessed 11 June 2020.
[205] Mike Robinson, *The Greening of British Party Politics* (1st edn, Manchester Univ. Press 1992).
[206] *ibid.*
[207] Friends of the Earth (n.182).
[208] *ibid*.
[209] *ibid*.
[210] *ibid*.

believed that an estimated 45.8 billion Kilowatts (kws) of heat is discharged daily into the atmosphere.[211] Similarly, it has been alleged that the heat temperature from the Isoko site alone is as high as 400 degrees centigrade from an approximate distance of 43.8 metres.[212] It is believed that the harsh heat emitted from these sites has killed vegetation and destroyed the mangrove swamps in the region. Moreover, the toxic gases emitted at the sites have exposed the inhabitants of the affected areas to serious health risks such as asthma, bronchitis, etc.[213] Furthermore, the high concentration of acid rain in the Niger Delta region had negatively impacted the viability of crops that grow in the region.[214]

Nwaomah argued that the toxic gas emitted into the atmosphere from leaking corroded pipelines has caused a significant source of air pollution in the Niger Delta.[215] In addition, another writer has recently argued that atmospheric emissions from gas flare sites are the most significant form of air pollution in the Niger Delta (and indeed, Nigeria).[216] This is because in the Niger Delta, the flaring process is usually located very close to communities and their farmlands, hence invariably has direct negative environmental implications on the region.[217] Upon conducting an investigation into the effects of gas flaring, Bankoff, Frerks and Hilhorst concluded that gas flaring in the Niger Delta had caused significant environmental and health risks.[218] In 2006, the United Nations summarised its view of the environmental risk associated with gas flaring in the Niger Delta, in a Human Development

[211] Francis M Onu and Michael E Ikehi (n.194).
[212] *ibid*.
[213] Elisha J Dung, Leonard S Bombom and Tano D Agusomu, 'The Effects of Gas Flaring on Crops in the Niger Delta, Nigeria' (2008) 73(4) Geo Journal 297.
[214] John K Nduka, Vincent N Okafor and Isaac O Odiba, 'Impact of Oil and Gas Activities on Acidity of Rain and Surface Water of Niger Delta, Nigeria: An Environmental and Public Health Review' (2016) 7(4) Journal of Environmental Protection 587.
[215] Sampson Nwaomah, 'Eschatology Of Environmental Bliss In Romans 8: 18- 22 And The Imperative Of Present Environmental Sustainability From A Nigerian Perspective', *International Conference on "Recreate, Replace, Restore: Exploring the Intersections between Meanings and Environments"* (2011) <https://www.researchgate.net/publication/289218936_Eschatology_of_environmental_bliss_in_Romans_818-22_and_the_imperative_of_present_environmental_sustainability_from_a_Nigerian_perspective> accessed 8 March 2019.
[216] Obinna A and others, 'Contributions of Gas Flaring to a Global Air Pollution Hotspot: Spatial and Temporal Variations, Impacts and Alleviation' (2015) 118 Atmospheric Environment 184.
[217] Marcus O Edino, Godwin N Nsofor and Leonard S Bombom (n.185).
[218] Clifford Chuwah and David Santillo, 'Air Pollution Due to Gas Flaring in The Niger Delta: A Review of Current State of Knowledge' (2017) Greenpeace Research Laboratories Technical Report <http://www.greenpeace.to/greenpeace/wp-content/uploads/2017/06/Niger-Delta-flaring_GRL-TRR-04-2017.pdf> accessed 8 March 2019.

Report whereby they stated: "*there is a strong feeling in the region that the degree and rate of degradation are pushing the delta towards ecological disaster.*"[219]

A comprehensive study of the Nigerian pollution (including noise pollution arising from gas flaring activities) will be discussed in section 3.1 of this study. However, based on the incidences of pollution mentioned in the literature review above (and other forms of environmental violations during upstream operations that will be described in this study), the challenge has been to what extent Nigeria has utilised its criminal sanctions and enforcement to regulate the environmental aspects of upstream operations. This is what this study will discover. If, however, it is discovered that Nigeria has not effectively utilised criminal sanctions and regulatory enforcement to regulate, this study will explore the possible deficiencies contributing to the defective regulation and consider aspects of the USA and UK regimes that can proffer solutions to some of the identified deficiencies.

1.4 Research Methodology

Methodology is a significant component of any research.[220] This is because the methodology section provides the structure and underpinnings of the research.[221] It has been argued that the relevance of arguments made in a research can only be justified in its methodology section.[222] In line with this, writers have asserted that the core methodologies of undertaking research in an academic paradigm are quantitative, qualitative or mixed method.[223] Creswell believes that qualitative research is based on the interpretation persons ascribe to a social or human problem.[224] He defines qualitative research as "*a type of educational research in which the researcher relies on the view of participants, asks broad, general questions,*

[219] United Nations Development Program (UNDP), 'Beyond Scarcity: Power, Poverty and The Global Water Crisis' (United Nations Development Program 2006) <http://hdr.undp.org/sites/default/files/reports/267/hdr06-complete.pdf> accessed 8 March 2019.
[220] Karin Hammarberg, Maggie Kirkman and Sheryl de Lacey, 'Qualitative Research Methods: When to Use them and How to Judge them' (2016) 31 Human Reproduction 498.
[221] Caroline Morris and Cian Murphy, *Getting a PhD in Law* (1st edn, Hart 2011) p.29.
[222] Mark Van Hoecke, Maurice Adams and Dirk Heirbaut, *The Method and Culture of Comparative Law* (1st edn, Hart 2015) p.38.
[223] Norman K Denzin and Yvonna S Lincoln, *The landscape of Qualitative Research* (4th edn, Sage 2013) 5 – 7; Virginia Braun and Victoria Clarke, *Successful Qualitative research* (1st edn, Sage 2014) pp.3-4, 20–30.
[224] John W Creswell, *Research Design* (4th edn, Sage Publications 2008) p.17.

collects data consisting largely of words (or texts) from participants, describes and analyses these words for themes, and conducts the inquiry in a subjective, biased manner."[225]

Bryam argued that in quantitative research, a solution is gained from the collection and analysis of data, whereas qualitative research involves an in-depth analysis of theories.[226] Onwuegbuzie & Leech have argued that while researchers in the quantitative school believe "*in a single reality that can be measured reliably and validly using scientific principles*," qualitative researchers believe "*in multiple constructed realities that generate different meanings for different individuals, and whose interpretations depend on the researcher's lens*."[227] Hence, Creswell & Clark argue that the role of a quantitative researcher is to maintain a passive stance to his preconceived views on the research subject, while conducting the research objectively from the background.[228]

On the other hand, they believe that in qualitative research, the values of the researcher would largely influence the research.[229] It is believed that a qualitative researcher would determine his opinion on a research topic subject to how his experiences and background shape his interpretation of the research subject.[230] This position therefore implies that while quantitative research concerns itself with deductive reasoning,[231] qualitative methodology concerns itself with inductive reasoning.[232] This has influenced the reason why several legal researchers infer qualitative research as primarily exploratory research.[233] Indeed, it has been asserted that qualitative research enables the researcher to show a clearer picture of the research subject better than the previous picture on the subject.[234] A writer has argued that most law researchers adopt the qualitative approach because it enables the researcher to gain an understanding of the underlying reasons, opinions, and motivations behind the

[225] *ibid*. p.39.
[226] Alan Bryam, *Social Research Methods* (4th edn, Oxford University Press 2012) p.35.
[227] Anthony J Onwuegbuzie and Nancy L Leech, 'Taking The "Q" Out of Research: Teaching Research Methodology Courses Without the Divide Between Quantitative and Qualitative Paradigms' (2005) 39 Quality & Quantity 270.
[228] John Creswell and Vicki Clark, *Designing and Conducting Mixed Methods Research* (2nd edn, Sage Publications 2007) p.250.
[229] Anthony J Onwuegbuzie and Nancy L. Leech (n.227) p.271
[230] *ibid.*
[231] Lisa Webley, Qualitative Approaches to Empirical Legal Research in Peter Cane and Herbert M. Kritzer (eds), *The Oxford handbook of empirical legal research the Oxford handbook of empirical legal research* (Oxford University Press 2010) p.929.
[232] Martyn Denscombe, *Good Research Guide* (Open University Press 2017) p.6–7.
[233] Robert A Stebbins, *Exploratory research in the social sciences* (E-Book, Sage Publications 2001) p.24.
[234] Karen Soiferman, 'Compare and Contrast Inductive and Deductive Research Approaches' (2010) Educational Resources Information Centre <https://files.eric.ed.gov/fulltext/ED542066.pdf>accessed 22 March 2019.

subject.[235] It provides insights into the problem or helps to develop ideas or hypotheses for potential quantitative research.[236] This has also encouraged the increased use of qualitative research in studies.[237]

Either way, the research methodology chosen often largely depends on the research aim, objectives and questions.[238] To this, Onwuegbuzie and Leech have argued that both forms of research make use of research questions addressed through some form of observation.[239] Sechrest and Sidani noted that the observation in both research methods would always make the researcher query the reason for their observation.[240] Moreover, in the interpretation of data, both use some measure of analysis to verify and interpret data.[241] To this extent, one can infer that there are some similarities in both forms of research.

Based on this, writers argue that quantitative research seeks to test the validity of theories by deductively searching for evidence to prove or disprove the theory.[242] On the other hand, qualitative research assembles data on the research subject from which it identifies themes that enable it develop the research theory inductively.[243] In the same vein, the quantitative researcher utilises the review of past literature to justify the research and identify the reason for conducting the research.[244] Hence, one can identify the research questions (which determine the research hypothesis) from the literature review.[245] To this effect, it has been asserted that the literature review of quantitative research is always more elaborate and precise than qualitative research.[246] On the other hand, the literature review in a qualitative research provides corroboration with the overall aim of the research study and points to the questions in the research.[247]

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[235] *ibid*.
[236] *ibid*.
[237] *ibid*.
[238] William Trochim, 'Social Research Methods - Knowledge Base - Home' (*Socialresearchmethods.net*, 2006) <http://socialresearchmethods.net/kb/> accessed 22 March 2019.
[239] Anthony J. Onwuegbuzie and Nancy L. Leech (n.227).
[240] Lee Sechrest and Souraya Sidani, 'Quantitative and Qualitative Methods:' (1995) 18 Evaluation and Program Planning 78.
[241] Anthony J Onwuegbuzie and Nancy L. Leech (n.227).
[242] *ibid*. p.280-282.
[243] *ibid*.
[244] Karen Soiferman (n.234).
[245] *ibid*.
[246] *ibid*.
[247] *ibid*.

To this effect, this study will adopt qualitative research methodology as its research approach. It is noteworthy that the researcher is a Nigerian lawyer who has some previous knowledge of the Nigerian environment. Indeed, most of the inquiries that the researcher will make will be based on this knowledge. While this researcher will conduct this study from the viewpoint of his knowledge of this Nigerian environment, he will not input the sentiments arising from his knowledge of this into the study so as not to create some form of bias in the interpretation that will be made at the conclusion of the analysis. This research will make these inquiries through its research questions and determine an answer from the analysis of the literature that will be reviewed in the study. Moreover, this literature will serve as corroboration of the researcher's observations identified from his analysis. The researcher believes that an in-depth analysis of the Nigerian environmental criminal regime would expose the possible deficiencies associated with the regime. Also, an analysis of the UK and USA regimes would enable the researcher to develop ideas by way of solutions which could be proffered to the Nigerian regime to solve some of its deficiencies. Specific methods of data collection and analysis constitute a major component of the methodology of every research.[248] Furthermore, outlining the research justification as well as the research structure[249] enables a reader to understand the viewpoint of the research and its relationship with other related scholarly works on the subject.[250] This research will subsequently discuss the process it will adopt in gathering and analysing its data for the study.

1.4.1 Data Collection and Analysis

This legal research is a pertinent and systematic search for knowledge and information in the environmental and criminal law fields. The research process for this study will be undertaken through inquiry, close scrutiny and discovery, hence the need for adequate and suitable data. Data is the information, facts, observation, measurements or materials that are collected by a researcher for the purpose of generating results for his research.[251] It has been asserted that quantitative research makes use of interviews, questionnaires, attitude scales or observational tools to gather its data.[252] It is also believed that the most common

[248] John Creswell and Vicki Clark (n.228).
[249] Mathias M Siems and Daithí Mac Síthigh, 'Mapping Legal Research' (2012) 71 The Cambridge Law Journal 651.
[250] Caroline Morris and Cian Murphy (n.221) p.29.
[251] Murtala G Murgan, 'A Critical Analysis of the Techniques for Data Gathering in Legal Research' (2015) 1(3) Journal of Social Sciences and Humanities 266–274
[252] Michael Coughlan, Patricia Cronin and Frances Ryan, 'Step by-Step Guide to Critiquing Research. Part 1: Quantitative Research' (2007) 16 British Journal of Nursing 661.

of these strategies is the use of the questionnaire which involves the utilisation of close-ended questions.[253] Indeed, some quantitative researchers even post questionnaires through the mail to maintain some measure of anonymity.[254] Other quantitative researchers conduct face-to-face interviews or over the telephone.[255]

Data analysis in quantitative research studies has been viewed as cumbersome as a result of the complex language and large statistics used during analysis.[256] It has been asserted that while conducting quantitative research, the researcher must clearly determine the statistical tests used the reason for their use and the result achieved from their use.[257] Moreover, a writer has shared the view that quantitative research does very little to identify the level of significance of research subjects.[258] Hence, quantitative researchers show their research findings and analysis of data under their research questions towards establishing whether the results achieved have actually answered the research questions.[259] Russell also argues that a researcher who makes use of tables and graphs to accentuate his research must ensure that they are accurate and clearly shown to enhance the presentation of results.[260] Moreover, at least fifty percent of the persons who were sampled for the research must actually participate, or else the result determined on fewer responses could be viewed as biased.[261]

On the other hand, qualitative research often utilises textual data for its analysis. The pre-existing texts can be in the form of reports, policy documents, legislation, and text books.[262] Qualitative data is also situated in a researcher's transcribed interview or focus group data.[263] Hence, qualitative and quantitative research might share the use of similar sources of data. The difference however is in the expression of the data.[264] While quantitative analysis would

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[253] *ibid.*
[254] *ibid.*
[255] *ibid.*
[256] *ibid.* p.662.
[257] Frances Clegg, *Simple Statistics: A Course Book for the Social Sciences* (2nd edn, Cambridge University Press 1990) p.56.
[258] *ibid.*
[259] Cynthia Russell, 'Evaluating Quantitative Research Reports' (2005) 32 Nephrol Nursing Journal 61-64.
[260] *ibid*.
[261] Michael Coughlan, Patricia Cronin and Frances Ryan *(*n.252).
[262] Nicola K Gale and others, 'Using the Framework Method for the Analysis of Qualitative Data in Multi-Disciplinary Health Research' (2013) 13 BMC Medical Research Methodology https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3848812/> accessed 23 March 2019.
[263] *ibid*.
[264] Office of Data, Analysis, Research & Evaluation, 'Qualitative Research Methods in Program Evaluation:' (Office of Data, Analysis, Research & Evaluation, 2013) <https://www.acf.hhs.gov/sites/default/files/acyf/qualitative_research_methods_in_program_evaluation.pdf> accessed 23 March 2019.

predominantly utilise numerical statistics in expressing its data, qualitative research would make use of words.[265] The analysis of data would usually involve the extraction of themes, patterns, groups and case samples.[266]

For most of the study, this research data gathered was documentary, hence desk based. This researcher generated the data for this study from textbooks, law journals, statutory documents, legislative materials, law reports, law monologues, and online public documents of environmental agencies and departments in Nigeria. This researcher will also determine the result of his study from extraction of the commonalities and differences between the Nigerian environmental regime and other jurisdictions. To achieve this, this study will explicitly categorise the laws and case laws relating to each regime and analyse them individually. The study would then pair the themes generated from the analysis to determine aspects of the more developed regime(s) that had been determined to be adaptable and the present solution to the deficient regime (identified).

1.4.2 Legal Research Method

A writer has defined research to be the continuous investigation into a subject towards securing a result.[267] Such a result will involve either a new finding or special knowledge about an existing fact.[268] In this vein, legal research is a systematic investigation and analysis of legal theories, doctrines, cases and rules.[269] Legal research therefore, seeks to determine the nature and purpose of legal rules regarding a social problem towards determining possible amendments that can be utilised to resolve the problem or recommend a new law on the subject entirely.[270] In this context, legal research will study how existing legal rules have tackled social problems. Hence, through the spectrum of the problem, the research would determine the extent to which the legal rule has been effective. Based on this, it will determine whether the rule needs to be amended or even changed entirely.

[265] Michael Coughlan, Patricia Cronin and Frances Ryan *(*n.252).
[266] *ibid*.
[267] Debashree Chakraborty, 'Empirical (Non-Doctrinal) Research Method and its Role in Legal Research' (2015) 3 International Journal Advances in Social Sciences 23.
[268] *ibid*. p.23-24.
[269] *ibid*.
[270] *ibid*.

In essence, legal research reviews legislation, legal principles and precedents established by courts towards determining their scope of application.[271] Furthermore, legal research enables the verification of old facts of law, the discovery of new facts, the development of legal theories, and the interpretation of legal ideas.[272] The strength of a law researcher is his ability to investigate, analyse, criticise, theorise and synthesise law discussions.[273] This ability would enable the researcher to formulate a hypothesis that gives meaning to an existing legal rule.[274] Relying on this premise, legal scholarship therefore concerns itself with the manipulation and examination of such theoretical concepts.[275]

To this effect, the different forms of research methods in a law research are the doctrinal research method, the non-doctrinal research method and comparative study. Indeed, some research might choose to adopt one of these methods or adopt the combination of more than one method.[276] This section will however, limit its scope of discussions of the doctrinal research and comparative study since they are the two tools of legal research utilised for this study.

1.4.2.1 Doctrinal Research

The doctrinal research method involves research into a legal phenomenon or the legal principles guiding rules, cases or statutes.[277] A writer has asserted that it relates to the analysis of case laws, the development and arrangement of legal doctrines and the study of legal institutions.[278] In essence, it enables the critical analysis of legal propositions and legal concepts.[279] Writers have also asserted that this normative research methodology develops legal doctrines for legal publications and journals.[280] To this effect, doctrinal research would

[271] *ibid*.
[272] *ibid*.
[273] Mike McConville and Wing Hong Chui, *Research methods for Law* (1st edn, Edinburgh University Press 2007) p.4.
[274] *ibid.* p.21.
[275] Andrew Knight and Lex Ruddock, *Advanced Research methods in the Built Environment* (1st edn, Wiley-Blackwell 2008) p.37.
[276] Debashree Chakraborty (n.267).
[277] Vijay Gawas, 'Doctrinal Legal Research Method: A Guiding Principle in Reforming the Law and Legal System Towards the Research Development' (2017) 3 International Journal of Law 128.
[278] SN Jain, 'Doctrinal and Non Doctrinal Legal Research' (1975) 75 Journal of the Indian Law Institute 516.
[279] *ibid*.
[280] Salim Ibrahim, Zuryati Yusoff and Zainal Ayub, 'Legal Research of Doctrinal and Non-Doctrinal' (2019) 4 International Journal of Trend in Research and Development 493.

usually seek to determine what the law is regarding a particular legal subject.[281] It would also seek to determine the solution to a legal issue.[282] Hence, the research would simply inquire into a legal issue and review how laws relating to the issue have provided a form of solution to the legal issue.[283] The tools of doctrinal research include: statutory material, committee reports, legal precedents, judgements and case reports, law text books and journals, law periodicals, commentaries and parliamentary debates.[284] This might have contributed to the reason why it is also referred to as law research or armchair research or even library based research.[285]

Indeed, since the 19th century, the doctrinal research method has dominated legal research.[286] It is otherwise referred to as black letter analysis and is arguably the traditional legal methodology.[287] It concerns itself with the internal consistency of the law.[288] Doctrinal research would inquire about the position of the law in a jurisdiction.[289] Indeed, doctrinal research would critically analyse all relevant statutes and case laws regarding a statement of law apposite to the subject of research.[290] Considering that traditionally, legal research methods are taught at the beginning phase of legal training, law scholars will easily utilise the available techniques from the foundation legal research methods to initiate their graduate research.[291] To this effect, it has been argued that it is still a core research base for research in most law schools.[292] This is because it is considered to be established research, which if utilised by a law researcher, would make the research study more manageable and contribute to his expected results being more predictable.[293]

This study will apply doctrinal research methodology towards determining possible deficiencies identified in the Nigerian regime. In attempting this, the study will review to what extent the existing environmental criminal regime in Nigeria (enacting environmental

[281] Vijay Gawas (n.277).
[282] Salim Ibrahim (n.280).
[283] *ibid*.
[284] Vijay Gawas (n.277) p.130.
[285] Salim Ibrahim (n.280).
[286] *ibid*.
[287] Caroline Morris and Cian Murphy (n.221) p.30.
[288] Andrew Knight and Lex Ruddock (n.275) p.29.
[289] Mike McConville and Wing Hong Chui (n.273) p.4-5
[290] Vijay Gawas (n.277) p.129.
[291] *ibid*.
[292] *ibid*.
[293] *ibid*.

criminal sanctions) has been sanctioning criminal actions. For this purpose, just as is common in doctrinal research mentioned above, this study will be desk based. The reasons why this study will be library based (and no empirical study will be conducted) include:

1) There is considerable doubt that operators in the Nigerian oil and gas sector will be transparent enough to provide information regarding their pollution acts or that enforcement bodies will be open to discuss whether they have performed their duties to standard or not.
2) There is a considerable availability of resources to the researcher, in the form of data that can be accessed in legal texts, statutes, law journals and instruments of environmental law. Relying on the discussion of doctrinal research above, it would then imply that these legal resources relied on are primary data used for this research.
3) Conducting an empirical research to gather primary data on the effects of pollution in the Niger Delta will raise ethical concerns about the security of the researcher considering the concerns identified in the literature review section of this study regarding security challenges caused by pollution in the region.
4) There is an opportunity for future research on the scientific aspects of this subject beyond the scope of this study.

1.4.3 General View of Comparative Study and Legal Transplant

This study is of the view that the utilisation of comparative study will best fit the purpose of deriving solutions for any possible deficiencies identified to have limited the ability of the regime to regulate effectively. To justify this view, this section will first seek to find out what comparative legal study is all about. Watson defined comparative law study as "*an academic discipline in its own right*" regarding "*a study of the relationship, above all, the historical relationship, between legal systems or between rules of more than one system*"[294]

Similarly, Rainer asserted that comparative law is a sub-discipline of jurisprudence which engages in the study of different phenomena in the different legal systems of the world and comparatively examines and analyses them.[295] A comparative study in law would indicate the consideration of the similarities and differences of the different legal systems of the

[294] Alan Watson, *Legal Transplants* (2nd edn, University of Georgia Press 1993) p.9.
[295] Michael J. Rainer, *Introduction to Comparative Law* (Wien Mainz 2010) p.2.

world.[296] Recommendations from the comparative study of a developed country can in turn, impact the policy decisions of other nations.[297]

Comparative study therefore, analyses the similarities and differences of different legal systems, and explains the rationale for such similarities and differences.[298] Zweigert and Kötz stated that functionality is the fundamental methodological principle of all comparative law study.[299] Moreover, all the other rules that determine the choice and extent of the undertaking of the laws to be compared are generated from this principle.[300] The scholars premise the importance of comparative analysis because most legal systems of different societies face fundamentally the same problems.[301] A comparative study helps in standardizing specific areas of law, or in determining defective aspects of a law.[302] This necessitates the need for legal transplants from one regime to another. Firstly, in conducting a legal transplant, the jurisdiction borrowing the law or legal system of another must be confident that its legal system is capable of accommodating the borrowed laws or systems of the lending jurisdiction.[303]

1.4.3.1 General Views on Legal Transplant

Pierre Legrand defined legal transplant as involving the transfer of law(s) from one jurisdiction to another.[304] It would therefore naturally entail that legal transplant would require the comparative study of two jurisdictions to be able to carry out such a transfer of law. To determine whether this natural position has been entirely shared by major scholars on the subject, this study will mainly review the opinions of Watson and Kahn-Freund on this subject.[305] To adapt aspects of the UK and USA model regimes, this study must first

[296] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Tony Weir translated, Oxford University Press, Oxford 1998) p.2.
[297] Mathias M Siems, 'Legal Originality' (2008) 28 Oxford Journal of Legal Studies 147-165.
[298] Rudolf B Schlesinger, 'The Past and Future of Comparative Law' (1995) 43 The American Journal of Comparative Law 477.
[299] Konrad Zweigert and Hein Kötz (n.296) p.16.
[300] *ibid.* p.34.
[301] *ibid.*
[302] Susan Kiefel, 'English, European and Australian Law: Convergence or Divergence' (2005) 79 Australian LJ 220, 227.
[303] John Basten, 'International Influence on Domestic Law: Neither Jingoistic Exceptionalism nor Blind Servility' in Justin Gleeson and Ruth Higgins (eds.), Constituting Law: Legal Argument and Social Values (Federation Press 2011) 202.
[304] Pierre Legrand, 'The Impossibilities of Legal Transplants' (1997) 4 Maastricht Journal of European Comparative Law 111.
[305] Both scholars are prominent proponents and critics of the doctrine of legal transplant.

determine why we must conduct a legal transplant and explore the possibility of transplanting the legal doctrines of an alien regime to another. This is after the study has determined the existence of any possible deficiency limiting the existing Nigerian regime. This is in line with the questions raised by Kahn-Freund during a lecture at the London School of Economics in June 26, 1973, where he asked: "*what are the uses and misuses of foreign models in the process of law making? What conditions must be fulfilled in order to make desirable or even make it possible for those who prepare new legislations to avail themselves of rules or institutions developed in foreign countries?*"[306]

Similarly, Watson argued that the laws of all societies were simply borrowed from one another.[307] Hence for Watson, legal transplant involved the movement of rules from one society to another.[308] According to him, transplants are beneficial to countries with defective legal regimes because they contribute to their legal development by strengthening the areas of deficiency in the regime.[309] He further asserted that it was not really necessary for the borrowing state to be concerned about the legal and political structure of the donor state, although such knowledge would make the transplant process more efficient.[310] According to him, the, "*[s]uccessful legal borrowing could be made from a very different legal system, even from one at a much higher level of development and of a different political complexion. What, in my opinion, the law reformer should be after in looking at foreign systems was an idea which could be transformed into part of the law of his country. For this a systematic knowledge of the law or political structure of the donor system was not necessary, though a law reformer with such knowledge would be more efficient. Successful borrowing could be achieved even when nothing was known of the political, social or economic context of the foreign law*."[311] As implied from Watson's argument, although it would be more efficient for a country that is borrowing a legal system to know the socio-political and economic environment in which the foreign rules were enacted, such knowledge is not absolutely necessary. It is apparent that Watson's argument sought to dissociate the direct link between law and society. It could also be implied that he placed priority on the deficiency existing in the borrowing country's system being corrected rather than the externalities that were

[306] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 the Modern Law Review 1-2.
[307] Edward M Wise, 'The Transplant of Legal Patterns' (1990) 38 American Journal of Comparative Law 1.
[308] Alan Watson, *Legal Transplants* (n.294) p.21.
[309] John W Cairns, 'Watson and the History of Legal Transplants' (2013) 41 Georgia Journal of International and Comparative Law 638.
[310] Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 Law Quarterly Review 79.
[311] *ibid.*

involved during the transplant (such as the question as to whether there was sufficient knowledge of the foreign rules).

He further stated that "*The Reception [of Roman law] shows that legal rules may be successfully borrowed where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system. Indeed, the recipient system does not require any real knowledge of the social, economic, geographical and political context of the origin and growth of the original rule. [W]here a rule of Roman law was inimical to the political, social or economic circumstances of a later state, its chances of being borrowed by that later state would be greatly diminished. But this reduced possibility of being borrowed existed . . . usually only when the rule was inimical and not also when the Roman context of the rule was simply different from the circumstances prevailing in the later state. ... One might deduce the proposition: However historically conditioned their origins might be, rules of private law in their continuing lifetime have no inherent close relationship with a particular people, time or place*."[312] By this assertion, he implied that while he believed that the borrowing of an entirely different legal system will still be beneficial to a borrowing country, such benefits will be diminished where the borrowed rules are detrimental in nature.[313] By such, the borrowed rules might also be detrimental to the legal system of the borrowing country.[314]

On the other hand, Kahn-Freund faulted the view of Watson regarding the ease of carrying out a legal transplant.[315] He argued that it would be totally difficult to transplant the legal rules of one country to another without a comprehensive knowledge of the socio-political and economic climate in which the rules were made.[316] He summarised this argument in his statement that: "*we cannot take for granted that rules or institutions are transplantable….Any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection. The consciousness of this risk will not, I hope deter legislators in this or any other country from using the comparative method. All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its*

[312] Alan Watson (n.310) p.80-81.
[313] John W Cairns (n.309) p.647.
[314] *ibid.*
[315] John W Cairns (n.309) p.644.
[316] Otto Kahn-Freund (n.306) pp.6-10.

social, and above all, its political context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of law."[317] Kahn-Freund rather suggested that a country seeking to borrow legal rules must reflect on the environment within which the rules were enacted and how it had been applied in the foreign legal system. Therefore, unlike Watson, Kahn-Freund sought to unite law and society in a way that one cannot do without the other, and from this generate a basis for a legal transplant to take place.

It is evident that Watson and Kahn-Freund agreed on the benefits of legal transplant for the development of a defective regime. It is also evident that both scholars sought to propose the best way to approach the process of legal transplant. Watson's argument placed huge consideration on the benefit of the transplant, regardless of the extent of difference in the legal systems of the transferring jurisdictions. On the other hand, Kahn-Freund's argument is predicated on the ground that while legal transplant is essential to legal development in a country, it would be inconceivable to expect that the transplantation of an entire system or rule would be easily applicable in the borrowing country.[318] This is because it is believed that legal rules could become difficult to apply as they pass from one culture to another.[319] Hence there has to be a reasonable relationship between the comparator jurisdictions that will show that an adaptation of the regime would fit into the other. Kahn-Freund also argued that it is best to adapt specific aspects of the lending regime that can correct the specific deficiencies identified in the borrowing regime.[320]

This study agrees with the view of Watson to the extent that if the regime of a borrowing country has significantly deficient rules, it would only be expected that the deficient system is corrected by adopting the legal systems of a regime better developed in those aspects. This is however, on the basis that the borrowing regime can be convinced that the system being borrowed is worth borrowing. Hence, the study does not agree that a legal transplant should be carried out without a consideration of the adaptability of the aspect being transplanted to the borrowing country. To this effect, this study also agrees with the view of

[317] *ibid.* p.27.
[318] Muradu Abdo, 'Legal History and Traditions: Teaching Material' (*Chilot Word Press*, 2009) <https://chilot.files.wordpress.com/2011/06/legal-history-and-traditions.pdf> accessed 25 April 2018.
[319] Pierre Legrand, 'What Legal Transplants in Adopting Legal Cultures' in David Nelken and Johannes Feest, *Adapting Legal Cultures* (Hart Publishing 2018) p.55.
[320] *ibid.*

Kahn-Freund that it is necessary for a country seeking to borrow legal rules from the regime of another country to consider the applicability of the rules in its regime. Hence, there should be some similarity between the comparator regimes propelling such comparison *ab-initio*. Moreover, only specific aspects that present solutions to the deficiencies in the defective regime should be adapted. This is in line with the suggestion of Cohn that the best way to conduct a successful legal transplant is by adapting aspects of the legal regime that would provide solutions for the identified deficiencies in the defective regime.[321] To this effect, the legal system/rules to be adapted must be harmonised to fit into the system already in place in the borrowing country.

1.4.3.2 The Utilisation of Comparative Study and Legal Transplant in this Study

For the purposes of deriving solutions to the possible deficiencies of the Nigerian environmental criminal regime, the study will utilise the tool of comparative legal research whereby it will identify possible aspects of the UK and USA regimes that present solutions to the specific defects identified in the Nigerian regime. This is because both Watson and Kahn-Freund agreed with the fact that comparative study is an essential tool to correcting the deficiencies of a defective regime (a major objective this study seeks to accomplish). However, as has been argued by Kahn-Freund, the study cannot just compare the UK and USA model regimes with Nigeria without first establishing some form of relationship propelling such comparison.

As will be seen, this study is mainly concerned with oil and gas pollution. For this reason, the study has utilised three comparator regimes which are all oil and gas producing nations and have established applicable environmental criminal regimes to regulate oil and gas operations in their jurisdictions (regardless of whether the regimes have been effective or not).[322] This study has already established Nigeria to be endowed with oil and gas resources.

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[321] Margit Cohn, 'The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 American Journal of Comparative Law 629.

[322] Phiilip Mace and others, 'Oil and Gas Regulation in the UK: Overview' [2019] Thomas Reuters <https://uk.practicallaw.thomsonreuters.com/55245349?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1> accessed 28 March 2019; E Allison and B Mandler, 'US Regulation of Oil and Gas Operations' (American Geosciences Institute 2018) <https://www.americangeosciences.org/critical-issues/factsheet/pe/regulation-oil-gas-operations> accessed 15 April 2019; Ojide Makuachukwu Gabriel and others, 'Impact of Gas Industry on Sustainable Economy in Nigeria: Further Estimations through Eview' (2012) 12(21) Journal of Applied Sciences 2244-2251.

Similarly, the USA and UK are notable for their upstream oil and gas operations.[323] It is also believed that both jurisdictions underwent significant reforms as a result of significant environmental disasters that occurred in their countries.[324] Based on this, it is suggested that the UK and USA regimes have developed environmental criminal regimes (at least better developed when compared to Nigeria). It is for this reason the researcher has chosen them as model jurisdictions for the legal transplant. However, one could argue that there could be other developed regimes, hence why compare with and transplant from the UK and USA regimes?

Indeed, the UK, USA and Nigeria are common law jurisdictions, and for this reason have similar styles of legal system. This creates some form of historical background to the legal systems of the comparator jurisdictions. This research is of the view that the similarity in the UK and USA legal systems to the Nigerian system would enable a reasonably smooth comparison. Moreover, just as in Nigeria relevant regulation in the form of criminal sanctions and regulatory enforcement mechanisms have been established to regulate the environmental aspects of the oil and gas industry. It has been asserted that the UK has utilised adequate environmental criminal sanctions and regulatory enforcement mechanisms to regulate environmental commitment in its oil and gas industry.[325] It is therefore, the view of this study that adapting aspects of such developed sanctions and enforcement mechanisms in the UK regime (in the context of the Nigerian identified deficiencies) will inspire a correction of some of the deficiencies identified in the Nigerian regime. As has been mentioned above, for a legal transplant to be carried out, the researcher must first adequately explore the aspects of the developed jurisdiction to ensure that it is able to fit into the borrowing jurisdiction. Moreover, this study agrees with Kahn-Freund that it will be inconceivable to transplant the entire enforcement system or statutory sanctions into the Nigerian regime. For this reason, the study has only chosen to adapt specific aspects of the UK regime that inspires solutions to some of the deficiencies in the Nigerian regime.

[323] Michael P Joy and Sashe D Dimitroff, 'Oil and Gas Regulation in The United States: Overview' [2016] Thomas Reuters <https://content.next.westlaw.com/Document/I466099551c9011e38578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 13 October 2019.
[324] Engobo Emeseh (n.37) p.200.
[325] Michael Watson, 'The Enforcement of Environmental Law: Civil or Criminal' (2005) 17 ELM Journal 3.

Furthermore, this study will seek to utilise an adaptation of aspects of the USA regime in correcting some of the deficiencies identified in the Nigerian regime. Unlike Nigeria, that has specifically mandated a duty on the government to protect the Nigerian environment,[326] the USA Constitution has not incorporated this provision.[327] This might be because the drafters of the USA Constitution in 1787 did not foresee the severe effect that the unprecedented expansion of population, technology and economic power would have on the environment.[328] However, in a bid to develop even further in this regard, there has been an increasing demand for environmental obligations to be included in the USA Constitution.[329] In choosing the USA as a comparator regime to Nigeria, the study observes that just like Nigeria, environmental legislation and policy frameworks in the USA are formulated at federal, state and local levels. Hence, just like Nigeria, the USA has federal environmental legislations prohibiting different hues of environmental crime in its oil and gas industry and stipulating penalties relevant to each offence.[330] This study concentrates on the USA federal environmental laws because unlike the state and local laws, the federal laws apply to all inhabitants and companies in the USA. This position was argued in the case of *Butz* v *Economou*,[331] whereby it was held that all US individuals were subject to federal law. Furthermore, scholars believe that the USA environmental regime has effectively utilized criminal enforcement against environmental harm in its oil and gas industry.[332] In addition, since after independence, Nigeria has adapted features similar to the USA system such as the utilization of a republican constitution.[333] Nigeria is also a federal state with its federal environmental structure tailored to the one applicable in the USA.[334] Hence, it is appropriate to compare the USA's model of enforcement of environmental standards with the Nigerian model.

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[326] This is stipulated in Section 20 of the Nigerian Constitution (as amended) 1999.
[327] Lynton K Caldwell, 'The Case For An Amendment To The Constitution Of The United States For Protection Of The Environment Affirming Responsibilities Rather Than Declaring Rights May Be The Most Promising Route To The Objective' [1991] Duke Environmental Law & Policy Forum <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1198&context=delpf> accessed 16 July 2019.
[328] *ibid*.
[329] Lynton K Caldwell, 'A Constitutional Law for the Environment: 20 Years with NEPA Indicates the Need' (1989) 31 Environment: Science and Policy for Sustainable Development 6.
[330] Victoria Kajo, 'An Evaluation of the Need for and Functioning of the Federal Sentencing Guidelines in the United States and Nigeria' [2008] 14 Cornell Law School Inter-University Graduate Student Conference Papers <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1042&context=lps_clacp>accessed 12 August 2019.
[331] *Butz* v *Economou*, 438 U.S. 478, 506, 98 S. Ct. 2894, 2910, 57 L.Ed.2d 895 (1978).
[332] Michael Hertz, 'Structures of Environmental Criminal Enforcement' (2019) 7 Fordham Environmental Law Review 679-681.
[333] Engobo Emeseh (n.37) p.200.
[334] *ibid*.

1.5 Justification for the Study

In justifying this research, this study will first establish the scope of the oil and gas industry which it will concentrate on. It has been asserted in section 1.3.1 that this study will concentrate on the extraction of conventional energy resources. Hence the discussion in this study will focus on operations that occur during the upstream stage. The study also observed in section 1.3.2 that most of the Nigerian extraction activities occur in the onshore areas of the Niger Delta. Similarly, issues arising from the Nigerian upstream oil and gas operations (particularly in the Niger Delta region of Nigeria) have mainly occurred during such onshore operations. It will also be observed in chapter 3 that distinct environmental statutory provisions in the Nigerian regime relate to the onshore oil and gas industry. In the same light, distinct environmental regulators (enforcement agencies) regulate the environmental aspects of onshore operations in the industry (as will be seen in this study). Similarly, the UK onshore industry is regulated as will also be discussed in chapter 5. Scholars have mentioned different environmental agencies that carry out enforcement in the onshore oil and gas industry for the extraction of conventional resources to include: the Environment Agency (EA) in England, Scottish Environment Protection Agency (SEPA) in Scotland and Natural Resources Wales (NRW) in Wales, and also the Health and Safety Executive (HSE).[335] Similarly, as will be seen in chapter 5 of this study, the USA onshore industry is regulated which is exemplified in the roles of the EPA and the Bureau of Land Management (BLM).

However, both the UK and USA regimes are largely offshore.[336] Environmental regulatory structures for the UK Continental Shelf (UKCS) are 3 tiered (international, regional and national).[337] It is also noteworthy that significant oil pollution that has been recorded in the UK has occurred on its coastal areas (as will be recorded in chapter 5 of this study). Moreover, the environmental criminal provisions in some UK environmental statutes such as the Environmental Protection Act 1990 relate to both onshore and offshore operations. Also, the requirement of well integrity in other predominantly offshore instruments such as the Offshore Installations and Wells (Design and Construction, etc.) Regulations 1996 (DCR)

[335] United Kingdom Onshore Oil and Gas (UKOOG), 'Regulation' (United Kingdom Onshore Oil and Gas 2017) <http://www.ukoog.org.uk/regulation> accessed 23February 2020.
[336] Department for Business, Energy and Industrial Strategy (BEIS), 'Background And Recent Developments' (Crown Copyright 2020) <https://www.gov.uk/government/publications/extractive-industries-transparency-initiative-payments-report-2018/upstream-oil-and-gas-in-the-uk>> accessed 23 February 2020.
[337] Health and Safety Executive, 'Decommissioning Topic Strategy' in Offshore Technology Report 2001/032 (Crown Copyright 2001) p.2.

apply to all wells drilled with a view to the extraction of petroleum regardless of whether they are onshore or offshore.[338]

Similarly, the USA upstream conventional oil and gas regime is predominantly offshore.[339] Pursuant to Section 3(3) of the USA's Outer Continental Shelf Lands Act 1953, "*the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs*." It has been asserted that offshore oil and gas in the Gulf of Mexico is a major source of oil and natural gas in the USA.[340] According to the Energy Information Administration, "*Gulf of Mexico federal offshore oil production accounts for 17% of total USA crude oil production and federal offshore natural gas production in the Gulf accounts for 5% of total U.S. dry production*."[341] Furthermore, it will be observed that most environmental regulation utilised in the USA in the form of statutory instruments and enforcement agencies mostly cover offshore operations.

Hence, this research will also occasionally refer to environmental aspects relating to the offshore industry. In effect, the study will mainly concentrate on environmental aspects of the onshore industry but also use environmental aspects of the offshore industry to build its literature on regulation.

Having established the scope of the oil and gas industry in which this study will focus on, it is necessary to justify the reason for carrying out this research. It has been earlier observed that the oil and gas sector constitutes a significant portion of the Nigerian economy. The activities of the sector have a disproportionate impact on politics in Nigeria, hence carry greater weight. In the literature review section, this study has identified the argument by

[338] United Kingdom Onshore Oil and Gas (UKOOG) (n.335).
[339] USA Energy Information Administration, 'Offshore Oil and Gas - USA Energy Information Administration (EIA)' (*EIA.Gov*, 2019) <https://www.eia.gov/energyexplained/oil-and-petroleum-products/offshore-oil-and-gas.php> accessed 24 February 2020.
[340] Mike Celata, 'Deep Water Gulf of Mexico' (Bureau of Ocean Energy Management 2017) <https://www.boem.gov/sites/default/files/boem-newsroom/BOEM-Deepwater-Operation-Presentation.pdf> accessed 24 February 2020.
[341] USA Energy Information Administration, 'Offshore Oil and Gas - USA Energy Information Administration (EIA)' (*EIA.Gov*, 2019) <https://www.eia.gov/special/gulf_of_mexico/> accessed 24 February 2020.

writers that environmental violations such as pollution have been inherent during the upstream stages of oil and gas activities, particularly in the onshore areas. This creates a necessity for the utilisation of effective regulatory measures in compelling compliance with environmental standards in the industry. Writers have argued in favour of the utilisation of criminal sanctions and administrative enforcement to achieve this.[342] It is believed that strong sanctioning and enforcement will ensure a robust regulatory structure for environmental management in the industry.[343]

This study is essential to determine the regulatory performance of criminal sanctions and administrative enforcement in compelling compliance with environmental standards in the Nigerian oil and gas industry. This determination is important considering the repeated allegations of violations in the industry, particularly in the form of pollution. While the study has given an example of violation in the form of pollution in the literature review section, the study will further discuss in chapter 3, other possible forms of violation that have occurred during the Nigerian upstream oil and gas operations. This research will utilise an identification of the violation to establish the defectiveness of the Nigerian environmental regulatory system. The study will further seek to identify deficiencies that have contributed to the defective regulatory system identified. Upon identifying the deficiencies, the study will explore possible aspects of other model regimes (the UK and the USA) that proffer solutions to the deficiencies. The adaptation of aspects of these model regimes will aid in correcting some of the deficiencies contributing the poor performance of the Nigerian environmental regulatory regime.

1.5.1 Contribution of Thesis to Body of Knowledge/Research Impact

In section 1.0 of this study, regulation was identified to be a tool of enforcing environmental standards. The study further identified two distinct forms of regulation in the Nigerian environmental regime as being criminal enforcement through sanctioning and administrative enforcement. While these regulatory tools are inherent in Nigerian environmental law, environmental standards have been continually breached in the Nigerian oil and gas industry. This study therefore seeks to prove that this continued breach translates to an inherent

[342] This has been discussed in section 1.3 of this study.
[343] Engobo Emeseh (n.37) p.338.

defect in the form and/or utilisation of these significant regulatory tools in the Nigerian regime (particularly with relation to the environmental aspects of the Nigerian upstream oil and gas industry).

Scholars such as Emeseh have undertaken research that identified defects in criminal enforcement as a regulatory tool in the Nigerian environmental regime.[344] However, unlike this study, such previous research has been more general rather than comprehensively dealing with such defects in the scope of upstream oil and gas operations. Moreover, such previous research has failed to explicitly identify deficiencies that have contributed to such defects. On the other hand, this study seeks to identify both the defects of the regulatory tools and the deficiencies that have contributed to the defectiveness. In particular, Emeseh's research was carried out in 2005. This study argues that this is a long time ago and several developments relating to the regulatory tools could have occurred in the Nigerian regime since that period. An example of such new occurrence were the enactments of the National Oil Spill Detection and Response Agency (Establishment) Act 2006 and the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 which were not in place at the time of her research.

In addition, this study is necessary to point out some defects that have persisted since previous observations in previous researchers. For example, while Emeseh's study pointed out that the Nigerian government was attempting to prosecute oil and gas criminal polluters at the time,[345] this study might discover the possibility that no such prosecution has occurred to date. This study therefore serves as a litmus test on the progress of the Nigerian environmental regulatory regime in line with previous observations and recommendations for its improvement.

1.6 Limitation of the Study

This study is limited by its significant reliance on the well documented 'big picture' of environmental violations in the Nigerian oil and gas industry and the possible inability of

[344] *ibid*.
[345] *ibid*. p.171.

agencies to perform properly. This limitation is a result of the reluctance of the relevant enforcement agencies to provide information regarding the extent and progress on their enforcement and the extent of compliance by the companies. As a result, the study relies on this existing well documented evidence on the subjects. This limitation is partly caused by the volatility of the Niger Delta environment discussed further in the study and the seeming unwillingness of both the oil and gas companies operating in the region and enforcement agencies in the Nigerian environmental regime to make accessible, information regarding enforcement and compliance with environmental standards in the industry.

Chapter Two

Environmental Standards, Criminal Sanctions and Administrative Enforcement in the Nigerian Regime

2.0 General Overview of Environmental Principles

This chapter will first provide a general overview of environmental principles that are central to environmental law in environmental regimes.[1] In effect, environmental principles are the framework for environmental protection in the regimes. Subsequently, it will examine environmental law provisions in Nigeria that stipulate environmental standards reflecting environmental principles such as the prevention principle and the public participation and environmental awareness principle. Hence, this chapter will be divided into two parts- (a) a general overview of environmental principles; (b) an identification of environmental standards in the Nigerian regime that reflect some of the principles and establish criminal sanctions that prohibit violations of the standard. The general overview is necessary as it gives insight into principles that can be explored by future research towards formulating new environmental law provisions to regulate the Nigerian oil and gas industry. Hence, it is notable that some of the principles that will be discussed in the first part of this chapter may not be presently reflected in the Nigerian regime. Furthermore, the analysis of some principles in this chapter will relate to offshore examples which is understandable considering that the UK and USA oil and gas regimes have been established to be predominantly offshore.

2.1 No-Harm Principle

As has been earlier mentioned, this study will also extend its focus to environmental regulation in offshore operations. Article 2 of the 1982 United

[1] Client Earth, 'What Are Environmental Principles?' (Client Earth 2019) <https://www.clientearth.org/what-are-environmental-principles-brexit/> accessed 5 March 2020; Eloise Scotford, 'Environmental Principles as Legal Foundations of UK Environmental Policy: Bedrocks or Minefields? - Brexit & Environment' (*Brexit & Environment*, 2017) <https://www.brexitenvironment.co.uk/2018/07/30/environmental-principles-legal-foundations-uk-environmental-policy-bedrocks-minefields/> accessed 5 March 2020; Philippe Sands, Principles of International Environmental Law I: Frameworks, Standards and Implementation (Vol. 1, Manchester University Press 1995) p.183.

Nations Convention on the Law of the Sea (UNCLOS) stipulated the sovereignty of a coastal state to extend beyond its land territory, internal waters archipelagic waters, territorial sea, and air space over the territorial sea as well as to its bed and subsoil.[2] This provision affirmed the 1952 United Nations General Assembly (UNGA) Resolution regarding the free right of states to own and exploit their natural resources.[3] However, Article 2(3) of the UNCLOS limited the sovereignty of states to be subject to the provisions of the convention and other rules of international environmental law. In effect, Article 2(3) obligates that the operations undertaken by a host state in exploiting its natural resources must be done in a manner that would not breach the sovereign environment of other states.

This is supported by Principle 2 of the Rio Declaration which stipulates that: "*states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction*."[4] In effect, this principle is premised on the grounds that every state has the right to exploit the resources within its territories. However, such exploitation must not cause environmental damage to other states or the international community.

The responsibility that emanates from this principle however, precedes the Rio Declaration. Prior to this, there was an obligation on all states to protect the rights of other states situated in the *Trail Smelter* case,[5] whereby it was stated that: "*under principles of international law . . . no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or*

[2] United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982.
[3] United Nations General Assembly – 'Right to exploit freely natural wealth and resources', 21 December, 1952. GA Res. 626 (VII).
[4] This Declaration was produced at the United Nations Conference on Environment and Development (UNCED) at Rio de Janerio, Brazil, 3 to 14 June 1992 AGENDA 21 (also known as the Earth Summit) [hereinafter Rio Declaration].
[5] Trail Smelter, Report of the United Nations Conference on the Human Environment, 11 I.L.M. 1416 (June 16, 1972).

to…properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[6]

This principle was later set out in Article 194 (2) of the UNCLOS which stipulated that: "*States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to…. their environment*." Similarly, Principle 21 of the Stockholm Declaration[7] provided that while states had the sovereign rights over their resources in line with their environmental policies, they owed an obligation to avoid causing environmental harm in the process of utilising such resources.

Based on these instruments, one can assume that regardless of any rights to utilise and maximise oil and gas resources, oil and gas participants including the host states are required to have recourse to this obligation. This study argues that this obligation imposes a standard on states in which a project with significant environmental risk is being carried out, to draw out an environmental legislative framework regulating such a project and also enforce such a framework on the participants of such project. Such a framework must be worded in such a way that obligates the participants to prevent pollution at all costs. In that case, such a state would be operating a regime that clearly regulates the operators against polluting at all. This regime would clearly establish that there is no room for pollution in the first place, something that will be referred to as the preventive principle of environmental law. This study will therefore examine how this prevention can be applied as an environmental principle.

2.2 Preventive Principle

The preventive principle (also referred to as the prevention principle) is very similar to the no-harm principle.[8] However, the preventive principle went beyond requiring just an avoidance of environmental damage to mandate the reduction

[6] *United States* v *Canada* 3 R.I.A.A. 1907 (1941).
[7] This Declaration was produced at the United Nations Conference on the Human Environment (UNCHE) held in Stockholm, Sweden from June 5-16, 1972.
[8] Philippe Sands and others, Principles of International Environmental Law (3rd edn, Cambridge University Press 2012) p.200.

and control of activities that might actually cause the environmental damage.[9] Hence this principle seeks to prevent pollution, and in the event of an occurrence of pollution, control and reduce it. This is in line with Principle 7 of the Stockholm Declaration which provides that "*States shall take all possible steps to prevent pollution….by substances that are liable to create hazards to human health, to harm living resources and marine life.*"

This study believes that the requirement to take steps (as mentioned in Principle 7 above) would entail some measure of diligence in the form of action to be undertaken by the host state and operator.[10] For the operator it would include undertaking tangible commitments towards the prevention, reduction or control of pollution or all of them. This requirement for diligence in preventing environmental damage was underscored in the *Pulp Mills Case*[11] whereby the ICJ noted that "*the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a state in its territory*."[12]

Similarly, Article 3 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities mandates states to exercise all proper measures at preventing pollution and minimising its risk.[13] This duty is emphasized in Regulation(s) 2-3 of the Offshore Installations (Emergency Pollution Control) Regulations 2002 which empowers the UK government to intervene in an accident involving offshore facilities to prevent and reduce the likelihood of pollution. Incidental to this right, Regulation 2 empowers the Secretary of State to direct the operator (or the operator's agent)[14] of an offshore installation to take or refrain from taking any action, in line with the objective of preventing pollution.[15] In view of this, the Secretary of State can direct the operator to relocate the installation (or parts of the installation), not cause the discharge of any oil[16] or substance,

[9] *ibid*.
[10] *ibid*.
[11] *Pulp Mills on the River Uruguay* (*Argentina* v *Uruguay*), Judgment, ICJ Reports 2010, p. 14 ('Pulp Mills'), para. 101.
[12] *ibid*.
[13] Art. 3 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001 stipulates that "*the State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof*."
[14] Regulation 3(2) of the Offshore Installations (Emergency Pollution Control) Regulations 2002.
[15] *ibid*. Regulation 3(3).
[16] Pursuant to Regulation 2 of the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005, oil is defined as: "any liquid hydrocarbon or substitute liquid hydrocarbon, including

and take remedial measures when pollution has occurred.[17] If the Secretary of State is dissatisfied with the adequacy of the direction, he may take "*any action of any kind whatsoever*"[18] such as taking over control of the relevant facility,[19] or destroying the facility (or its parts).[20]

Another major component of preventing pollution in the oil and gas industry is the decommissioning of oil and gas facilities after the production life cycle. In any oilfield operation, some assets are routinely decommissioned when they are no longer useful to production.[21] Decommissioning involves decoupling of oil rig installations or oil wells.[22] An oil well can be decommissioned when it has reached its economic limit.[23] The process of decommissioning often involves the removal of the tubing of the well and sections of the wellbore filled with concrete.[24] The environmental consideration for proper decommissioning is that idle structures used previously for development could be damaged, then cause environmental pollution.[25] There are two types of decommissioning, namely onshore and offshore decommissioning.[26] Onshore decommissioning involves the operator plugging well bores with cement to prevent ground water contamination; dismantling of storage tanks, wellheads, waste handling pits, processing equipment and pump jacks and securing any exhausted or non-producing wells.[27]

dissolved or dispersed hydrocarbons or substitute hydrocarbons that are normally found in the liquid phase at standard temperature and pressure, whether obtained from plants or animals, or mineral deposits or by synthesis.

[17] Regulation 3(3) (a), (b) and (c)of the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations.

[18] *ibid*. Regulation 3(4).

[19] *ibid*. Regulation 3(4) (c).

[20] *ibid*. Regulation 3(4) (b).

[21] United Nations Environment Programme (UNEP), 'Environmental Assessment of Ogoniland' (United Nations Environmental Programme 2011) p.99.

[22] *ibid*.

[23] *ibid*.

[24] *ibid*.

[25] Ayoade M Adedayo, 'Environmental Risk and Decommissioning of Offshore Oil Platforms in Nigeria' (2011) 1 NIALS Journal of Environmental Law 2.

[26] *ibid*.

[27] James Pittard, 'Field Abandonment Costs Vary Widely World-Wide' (1997) 95 Oil and Gas Journal 84.
On the other hand, offshore decommissioning involves four distinct stages: a comprehensive planning process to determine the options; termination of oil and gas production, and safe plugging of the wells; dismantling of all or part of the installation; and disposal or recycling of the dismantled parts. Unlike fixed platforms, a demobilised Floating Production Storage and Offloading (FPSO) structure only requires the decommissioning of subsea equipment and pipelines; and the plugging and abandonment of wells.

It is asserted that most states provide domestic regulations guiding decommissioning in their onshore operations.[28] On the other hand, the system in the offshore industry is regulated by international treaties and rules.[29] The standard of decommissioning for offshore installations is specified in Article 60 of the UNCLOS which provided that: "…*any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States*." This provision imposes an even higher standard on the operator by requiring a consideration of environmental issues during the operation. Hence, the expectation goes beyond just removing disused structures, to removing it in a manner that does not cause pollution to the environment.

Similar to this, the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) Decision 98/3 prohibited the "*dumping and the leaving wholly or partly in place, of disused offshore installations within the maritime area*."[30] In the Decision, the competent authority of relevant contracting parties can only permit the leaving of a disused installation or parts of it when such an installation falls under the categories described in Annex 1,[31] is subject to assessment (as stipulated in Annex 2) and consultation (as provided for in Annex 3) and with implementation reporting (in Annex 4). As a way of implementing the Decision, OSPAR has maintained a revised inventory of all oil and gas offshore installations in the OSPAR maritime area.[32] The inventory specifies the name and identification number, location, operator, water depth…..of the installation.[33]

[28] Marc Hammerson, *Oil and Gas Decommissioning: Law, Policy and Comparative Practice* (1st edn, Globe Business Publishing Ltd 2013) p.284.
[29] *ibid*.
[30] The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) was open for signature at the Ministerial Meeting of the Oslo and Paris Commissions in Paris on 22 September 1992. The Convention entered into force on 25 March 1998 and replaced the Oslo and Paris Conventions.
[31] The categories specified under Annex A includes: a. steel installations weighing more than ten thousand tonnes in air; b. gravity based concrete installations; c. floating concrete installations; d. any concrete anchor-base which results, or is likely to result, in interference with other legitimate uses of the sea.
[32] Marc Hammerson (n.28) p.54
[33] *ibid*.

In 1989, former Intergovernmental Maritime Consultative Organisation (IMCO), (currently IMO) published its Guidelines and Standards regarding the removal of installations in the exclusive economic zone (EEZ) or on the continental shelf, while requiring coastal states to subjectively consider whether or not each of the installations is permitted to remain on the seabed.[34] Two of the other factors expected to be considered by coastal states in accordance with the Guidelines are the extent of degradation a failure to decommission could cause; and the potential harmful effect such failure could have on the marine environment.[35] To this effect, the Standards gave the directive that "*all abandoned or disused installations or structures……should be entirely removed*."[36]

Two other prominent words that feature in the preventive principle (as can be seen from the definition of preventive principle above) are 'reduction' and 'control.' This means that while this principle requires due actions to guarantee that pollution does not occur, it includes the duty to remedy and limit the effect of the pollution after it has occurred. Principle 1 of the Stockholm Declaration provides the responsibility to "*improve the environment for present and future generations*." Similarly, Principle 6 of the Stockholm Declaration makes this clear by stating that: "*The discharge of toxic substances or other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted*." Improvement is generally defined as value added or an amelioration and repair of an existing state.[37] This entails a measure of correcting an existing deplorable state. Applying this understanding of improvement to Principle 6 of the Stockholm Declaration, it could be interpreted that the provision also stipulates the requirement for diligence to correct an already polluted environment.

This study is of the view that the required diligence (as established in the *Pulp Mills Case*) and the expected 'measures' (as established in the ILC Draft Articles) on the part of a host state would best be exercised through clear actions of regulations to control and minimise pollution within its territory. With respect to

[34] Bernard Taverne, *Petroleum, Industry and Governments* (2nd edn, Kluwer Law International 2008) p.339.
[35] *ibid.*
[36] *ibid.* p.340.
[37] Black's Law Dictionary Free Online Legal Dictionary (*2nd edn, Black Law*) <https://thelawdictionary.org/improvement/>accessed 8 March 2019.

oil and gas operations, it implies that the diligence would elicit some form of environmental vigilance by the state over the actions of operators that develop oil and gas resources within its territory. The best way to exercise this vigilance would therefore be to regulate the activities of oil and gas operators within its territory such that they show tangible actions towards preventing pollution and when they have caused pollution, they clean it up and remediate the environment.

This was expressed in the *Pulp Mills Case* whereby it was emphasized that states must adopt rules and measures to regulate public and private operators and be vigilant in their administrative enforcement over private and public operators within their territory.[38] An exercise of the apparatus of vigilance could include utilising the command and control approach to compel the oil and gas operator to comply with the obligation to prevent pollution. The command and control approach of regulation has often utilised the polluter pays principle of environmental law to achieve this purpose. This study will therefore discuss the polluter pays principle as an apparatus through which the state will regulate the environmental aspects operations within its territory.

2.3 Polluter-Pays Principle

Pollution is defined as the degradation of the quality of the environment with hazardous substances by a person.[39] The OECD also, views pollution as "'…*the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects*."[40] In this vein, the European Commission defines a polluter as "'*someone who directly or indirectly damages the environment...*"[41] Bleeker argued that the increase in economic activities, together with population growth precipitated the unprecedented damage to the environment and public health.[42]

[38] *Pulp Mills on the River Uruguay* (*Argentina* v *Uruguay*) (n.11) para.97.
[39] Jude Eeanokwasa, 'An Appraisal of the Conformity of the 2007 Nigerian Minerals and Mining Act to the Polluter Pays Principle1' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 66.
[40] *ibid*.
[41] *ibid*.
[42] Arne Bleeker, 'Does the Polluter Pay? The Polluter-Pays Principle in the Case Law of the European Court of Justice' (2009) 18 European Energy and Environmental Law Review 289.

The polluter-pays principle therefore indicates that environmental cost for pollution be borne by a polluter.[43] Indeed, the implications and interpretation of the principle has been open to discussion.[44] However, Gaines noted that the increasing demand to protect the global environment has facilitated the issue of who bears the pollution costs that could arise.[45] To this effect, the polluter-pays principle seeks to ensure that the polluter bears the costs of pollution.[46] Similarly, Steven argued that in response to the increased environmental concerns facing countries (especially concerning corporate pollution), governments such as the USA and UK had implemented regulations or taxes to compel polluters to bear the cost of preventing and remedying their pollution.[47] Hence, the polluter-pays principle could be assumed to incorporate the cost of preventing pollution at the decision making level of an organisation.[48] According to Bleeker, the common issues that must be determined in applying the polluter-pays principle are: who should bear the cost of pollution; the scale/extent of pollution/potential pollution to determine the pollution cost; and the cost of pollution.[49]

The polluter-pays principle became significant in Europe in 1972 when the Organization of Economic Cooperation and Development (OECD) recommended it to become the principle guiding the economic standards for every environmental policy.[50] In line with the recommendation, there is a requirement that the cost of pollution has to be included while considering the costs of goods and services.[51] Furthermore, Paragraph 4.0 of the Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution required operators of hazardous installation to bear the cost of prevention and control of their accidental pollution, subject to the domestic law of the jurisdictions of their

[43] Philip Sands and others (n.8) p.230.
[44] *ibid*.
[45] Sanford Gaines, 'The Polluter-Pays Principle: From Economic Equity to Environmental Ethos' (1991) 26 Texas International Law Journal 463.
[46] Philip Sands and others (n.8) p.228.
[47] Candice Stevens, 'Interpreting the Polluter Pays Principle in the Trade and Environment Context' (1994) 27 Cornell International Law Journal 577.
[48] Barbara Luppi, Francesco Parisi and Shruti Rajagopalan, 'The Rise and Fall of the Polluter-Pays Principle in Developing Countries' (2012) 32 International Review of Law and Economics 135-144.
[49] Arne Bleeker (n.42).
[50] Organisation for Economic Co-operation and Development (OECD) Council Recommendation concerning the Application of the Polluter-Pays Principle to Accidental Pollution C (72)128 (1972), 14 ILM 236 (1975).
[51] *ibid*. Annex, para. A.4.

operations.[52] Similarly, the Waste Framework Directive (2008/98/EC) has applied the polluter-pays principle to the illegal discharge of hazardous waste and waste oil.[53]

The above declaration set out the stance of action that European member states are required to adopt for the environment.[54] The declaration sets out the polluter-pays principle as significant in developing the European environmental policy.[55] Subsequent to this, the principle has been permanently adopted in environmental legislation.[56] For instance, it became a constitutional principle by virtue of the enactment of Article 130 (r) of the Single European Act 1987.[57] Affirming the principle as a general principle of environmental law, the European Council adopted at union level, the Recommendation which states that: "*natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it so as to comply with the standards or equivalent measures laid down by the authorities*."[58]

The Council also recommended that its member states incorporate this ideology of the polluter-pays principle into their national legislation.[59] The campaign for the incorporation of this principle into the national laws of states was further emphasized in Principle 16 of the Rio Declaration which states that: "*national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment*." It has been reported that several states have incorporated this principle into their national legislation.[60]

[52] OECD Council Recommendation concerning the Application of the Polluter-Pays Principle to Accidental Pollution, C (89)88/Final, para. 4 (1989).
[53] Directive 2008/98/EC on waste (Waste Framework Directive).
[54] Jude Eeanokwasa (n.39).
[55] *ibid*.
[56] *ibid.*
[57] Single European Act 1987.
[58] OECD Council Recommendation Concerning Cost Allocation and Action by Public Authorities on Environmental Matters, 75/436/EURATOM, ECSC, EEC (1975), Annex, para. 2; OJ L169 (1987).
[59] *ibid.*
[60] Jude Eeanokwasa (n.39).

In effect, the principle can be viewed as a sanction mechanism used to mitigate pollution.[61] For this reason, it would be expected that the cost is determined proportionately to the extent of the pollution risk.[62] By such, the principle would be serving as a form of deterrence to polluters. This is because in considering the high cost that can be appropriated to significant pollution, the polluter will make efforts at reducing and controlling the acts that can result in significant pollution. Indeed, in the oil and gas industry, the internalisation of pollution cost at the decision making/planning stage of operations will entail the operator spending more in maintaining good oilfield practice and investing more in the Best Available Technique (BAT) of oil and gas development instead of paying high pollution costs such as the cost of remediation.

Anderson argued that the polluter-pays principle has become significant in the environmental policy of the USA.[63] According to him, the Oil Pollution Act 1990 which governs pollution discharge from vessels in the USA requires that polluters bear the liability of their pollution by bearing the cost of clean-up and damage.[64] Munir summarises what he believes a polluter should pay in his argument that a polluter ought to pay whatever the government regulation determines as necessary to improve the quality of a polluted environment.[65]

The polluter-pays principle has been adopted in environmental treaties such as: Article 10(d) of the ASEAN Convention;[66] Article 2(1) of the 1991 Alpine Convention;[67] Article 3(4) of the 1992 Baltic Sea Convention;[68] Article 2(2) (b) of

[61] Eric Larson, 'Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle' (2005) 38 Vanderbilt Journal of Transnational Law 541.
[62] Irina Glazyrina, Vasiliy Glazyrin and Sergey Vinnichenko, 'The Polluter Pays Principle and Potential Conflicts in Society' (2006) 59 Ecological Economics 324.
[63] Charles Anderson, 'Marine Pollution and the Polluter Pays Principe: Should the Polluter Also Pay Punitive Damages' (2012) 43 Journal of Maritime Law and Commerce 43.
[64] *ibid.*
[65] Muhammad Munir, 'History and Evolution of the Polluter Pays Principle: How an Economic Idea Became a Legal Principle?' [2014] Institute of Legal Studies, Islamabad <http://file:///C:/Users/Sister%20Hope/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/SSRN-id2322485%20(1).pdf> accessed 8 March 2019.
[66] ASEAN Agreement on Conservation on Nature and Natural Resources on July 9, 1985 <http://sedac.ciesin.org/entri/texts/asean.natural.resources.1985.html> accessed 10 December 2018.
[67] Convention on the Protection of the Alps (Alpine Convention) on November 7, 1991.
[68] Convention on the Protection of the Marine Environment of the Baltic Sea Area signed in 1992 and entered into force on 17 January 2000. (Helsinki Convention).

the OSPAR Convention; and Article 2(5) (b) of the 1992 UNECE Transboundary Waters Convention which stipulates that the parties shall utilise the polluter-pays principle in determine which "*costs of pollution prevention, control and reduction measures shall be borne by the polluter*."[69] It is therefore apparent that the principle has gained global recognition.

In the Nigerian environmental regime, several environmental provisions have provided for this principle. For example, Article 3.3 (IV) of the National Policy on Environment 1988 stipulates the polluter-pays principle as a guiding principle for the Nigerian environmental regime. Similarly, Section 12 (1) of the Harmful Wastes (special Criminal Provisions) Act, 1988 provides that the polluter who discharges or contributes to the discharge of harmful waste in Nigerian waters or on land shall be liable for the damage arising from such pollution. Similarly, Section 8.1 of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002 stipulates that: "*a spiller shall be liable for the damage from a spill for which he is responsible*."

Ezeanokwasa argues that the principle is not aimed at eliminating the chances of pollution occurring because that would be impossible. It rather seeks to ensure that pollution is kept at its barest minimum and does not escalate to a point where it adversely affects the environment.[70] Indeed, the application of this environmental principle and earnest commitment to its application by an operator will entail that such an operator takes necessary precautions against the adverse effects of pollution. This precaution in itself comes as a principle of environmental law and will be discussed in the next section.

2.4 Precautionary Principle

The term 'precautionary principle" is an English translation of the German words '*Vors orgeprinzip*.'[71] Although the principle originated from German environmental

[69] Convention on the Protection and Use of Transboundary Watercourses and International Lakes on 17th March 1992.
[70] Jude Eeanokwasa (n.39) p.48.
[71] David Kriebel and others, 'The Precautionary Principle in Environmental Science' (World Health Organisation 2004) p.146.

policy, it has become a central factor in international environmental treaties regarding North Sea pollution, ozone-depleting chemicals, fisheries, climate change, and sustainable development over the past twenty years.[72] To this effect, the principle is one of the governing principles of environmental laws in the European Union.[73] It has been asserted that: "*when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically*."[74] In emphasising that the precautionary principle is based on the possibility of environmental harm occurring (which in this context becomes a risk), this study will utilise the definition of risk provided by Litmanen whereby he asserted that " *the problem with risk is that it is an abstract concept that refers to the future. It is not entirely here at the present moment; instead, it depends on a multiplicity of choices, which are made at the present moment. It is never entirely concrete and it always leaves room for different interpretations and debate. Parties involved in these debates, such as scientists, experts, journalists, lay people, power companies, or social movements avail themselves to different resources in an attempt to establish their views over the views of others, but looking from sociological perspective they all take part in social construction of risk, which is an ongoing process full of inconsistencies and contradictions*."[75]

The precautionary principle has been defined in many different ways, and from different contexts.[76] However, for the legal purposes of this study, the precautionary principle will be defined as environmental protection based on precaution, even where there is no clear evidence of harm or risk from an activity.[77] Hence this principle suggests that actions be taken to protect the environment from possible pollution that could arise from carrying out an operation even when there is no absolute scientific evidence to prove the pollution

[72] Carolyn Raffensperger and Joel A Tickner, *Protecting Public Health and the Environment: Implementing the Precautionary Principle* (1st Edn, Island Press 1999) p.300.
[73] Consolidated Version of the Treaty on the Functioning of the European Union. 2012/C 326/01. <http://data.europa.eu/eli/treaty/tfeu_2012/oj>accessed 8 March 2019.
[74] Carolyn Raffensperger and Joel A Tickner (n.72).
[75] Tapio Litmanen, 'The Struggle Over Risk. The Spatial, Temporal and Cultural Dimensions of Protest Against Nuclear Technology' (PhD, University of Jyväskylä 2001) p.45.
[76] United Nations Educational Scientific and Cultural Organisation (UNESCO), 'The Precautionary Principle' World Commission on the Ethics of Scientific Knowledge and Technology (UNESCO 2005) <https://en.unesco.org/themes/ethics-science-and-technology/comest> accessed 6 March 2020.
[77] Kimmo Jalava and others, 'The Precautionary Principle and Management of Uncertainties in EIAs – Analysis of Waste Incineration Cases in Finland' (2013) 31 Impact Assessment and Project Appraisal 280.

risk of the operation.[78] This is in line with Principle 5 of the Rio Declaration which states that: "*where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental damage*."

On the above grounds, four actions that exemplify the precautionary principle include: taking preventive action when faced by uncertainty; imposing the burden of proof on the proponents of any project; exploring other alternatives that could lead to the avoidance of harmful actions; and increasing public participation in decision making.[79] To this effect, one of the key objectives of the principle is to remove the potential for excuse by an operator to carry out operations that could cause pollution simply due to the unavailability of scientific evidence to prove that the operation could cause the pollution. This requirement was also put forward in the preamble to the 1984 Ministerial Declaration of the International Conference on the Protection of the North Sea whereby it was stated that: "*states must not wait for proof of harmful effects before taking action*." The precautionary principle can be significant in the environmental regulation of the oil and gas industry. This is because a failure to protect the environment on the excuse of lack of proof of potential pollution could result in significant/extensive environmental pollution which might then become too difficult for the operator to control or remedy.[80]

Beyond this argument, the principle also seeks to ensure that host states and operators protect the environment when there is evidence of pollution risk in an operation. This view was reflected in Article 4(4) of the Convention for The Prevention of Marine Pollution from Land-Based Sources (Paris Convention) which stated that: "*the Contracting Parties may, furthermore, jointly or individually as appropriate, implement programmes or measures to forestall, reduce or eliminate pollution of the maritime area from land-based sources by a substance not then listed in Annex A to the present convention, if scientific evidence has established that a serious hazard may be created in the maritime area by that substance and if urgent action is necessary*."[81]

[78] Philip Sands and others (n.8) p.219.
[79] David Kriebel and others (n.71).
[80] *ibid*.
[81] Convention for The Prevention of Marine Pollution from Land-Based Sources on June 4, 1974 (as amended by the Protocol of 26 March 1986).

For oil and gas operations, this principle raises an expectation on the part of the host state to conduct an environmental impact assessment (EIA) of the intending oil and gas development plans of the operator even before operation commences. EIA simply involves gathering information on the environmental impacts of a project/development before deciding whether or not to progress on such a project.[82] The process utilises the best available sources of objective information through a systematic and holistic process that permits regulatory authorities and the general public to properly understand the impact of the proposed project.[83] The information gathered and presented in an EIA aids in the pollution risk evaluation of projects and by such, reduces the uncertainty surrounding the project.[84] In effect, the EIA as an environmental policy tool reflects the precautionary principle because it seeks to identify and reduce the uncertainties and negative impacts associated with projects with uncertain effects on the environment.[85]

Based on this principle, this study will expect that the EIA requirement is not only embedded within existing environmental laws regulating an oil and gas regime, but also the licence agreements entered into by the operator and the host state. Furthermore, based on the assertion of Article 4(4) above, an application of this principle will mean the host state and operator cancelling the undertaking of an intended oil and gas project/operation that has the possibility of harming the environment. It could also mean both parties engaging in practical measures that would reduce or minimise the potential environmental risk of the said oil and gas project.

Indeed, the precautionary principle has even been linked to the principle of sustainable development. This link was made at the 1990 Bergen conference on Sustainable Development which stated that: "*in order to achieve sustainable*

[82] Friends of the Earth, 'Environmental Impact Assessment (EIA): A Campaigner's Guide' (Friends of the Earth 2015) p.2.
[83] *ibid*.
[84] Ronlyn Duncan, 'Problematic Practice in Integrated Impact Assessment: The Role of Consultants and Predictive Computer Models in Burying Uncertainty' (2008) 26 Impact Assessment and Project Appraisal 53; Ronlyn Duncan, 'Opening New Institutional Spaces for Grappling with Uncertainty: A Constructivist Perspective' (2013) 38 Environmental Impact Assessment Review 151.
[85] David P Lawrence, *Environmental Impact Assessment* (Wiley-Interscience 2003) p.562.

development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. When there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[86] This provision creates the impression that a major aim of the principle is to achieve sustainable development. Relying on the expectation of environmental protection the principle hinges on, it could therefore be assumed that the sustainable development aim will also encompass protection of the environment. For this reason, this study will give an overview of the principle of sustainable development in the next section.

2.5 Sustainable Development Principle

This term 'sustainable development' has been mentioned in several environmental literatures.[87] In line with this, it has been asserted that the principle has been recognised globally in environmental treaties and instruments.[88] Rosencrantz and others have viewed sustainable development as an important paradigm for most discussions on environmental law and policy.[89] In this study, sustainability is all about development, healthy and steady development. Among other definitions, sustainability as development was particularly set out in the publication of the Brundtland Report in 1987 whereby the concept was defined as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*."[90]

Two ideals embedded within this definition include: the ideal that the resources available to satisfy man's needs are scarce, hence requiring a balance in its

[86] Paragraph 7 of the Bergen Ministerial Declaration on Sustainable Development in the United Nations Economic Commission for Europe (UNECE) Region on the 16th of May 1990.
[87] Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (1st edn, Routledge 2008) p.256; Christina Voigt, *Sustainable Development as A Principle of International Law* (Martinus Nijhoff Publishers 2009) p.428; Alan E Boyle and David Freestone, *International Law and Sustainable Development* (Oxford University Press 1999) p.408.
[88] Jo Burgess and Edward Barbier, 'Sustainable Development' [2001] International Encyclopaedia of the Social & Behavioural Sciences 15329.
[89] Armin Rosencrantz, Paul Kibel and Kathleen D. Yurchak, 'The Principles, Structure, And Implementation of International Environmental Law' (*Ucar.edu*, 1999) <https://www.ucar.edu/communications/gcip/m3elaw/m3html.html#chapter1> accessed 3 December 2018.
[90] World Commission on Environment and Development, 'Our Common Future' (1987) Oxford University Press p.43.

utilisation so as not to extinguish the existing resource; and the ideal that industrialisation used to utilise the resources might affect the environment in a way that makes it uninhabitable for the future generations.[91] This was reiterated in Principle 3 of Rio Declaration which stipulated that: "*The right to development must be pursued so as to equitably meet developmental and environmental needs of current and future generations*." This principle therefore asserted the utilisation of resources in a reasonable manner and the consideration of environmental issues while utilising the resources. It means that all oil and gas projects must take into account the environmental aspects of its operations. This is regardless of the other spheres of development such a project will improve. An operator is expected under this principle, to consider the consequence of oil and gas operations on the environment such that it does not become uninhabitable for persons living around the development sites.

The consideration of environmental issues will include the integration of the economic and other development plans of an operation.[92] Hence, this principle also asserts the inclusion of environmental consideration at the decision making level of any project. The above assertions were reflected in the preamble to the 1968 African Nature Convention which requires the utilisation of natural resources to "*aim at satisfying the needs of man according to the carrying capacity of the environment.*"[93] Similarly, it was restated in Article 33 of the 1989 Lomé Convention which stated that: "...*the protection and the enhancement of the environment and natural resources, the halting of the deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the [states parties] concerned shall strive to achieve with community support with a view to bringing an immediate improvement in the living conditions of their populations and to safeguarding those of future generations*."[94]

Indeed, sustainable development has also been found in several other guiding principles. For example, the principle of intergenerational equity acknowledges the

[91] Philip Sands and others (n.8) p.206.
[92] *ibid*. p.207
[93] African Convention on the Conservation of Nature and Natural Resources on the 15th of September 1968.
[94] *ibid*.

long duration of sustainability to meet the demands of future generations.[95] Furthermore, the polluter-pays principle stipulates that "*governments should require polluting entities to bear the costs of their pollution rather than impose those costs on others or on the environment*."[96] Hence, it is expected that violators found responsible for pollution bear the costs of preventing and controlling it rather than allowing its effect to negatively impact others. To this effect, a critical objective that the Brundtland Report identified as essential for the development of any state has been the consideration of environmental issues and economics in decision-making.[97] This placed environmental protection at the very heart of any plan for resource exploitation. It therefore means that a state must consider the environmental effects of its resource maximisation operations and assess the potential risks of such effects while planning for such an operation. The issue therefore becomes ensuring that an integration of environmental concerns does not adversely affect other developmental indices (such as profit maximisation) of the host state and operators both in the present and future generation.

The National Policy on Environment (NPE) is one of the fundamental frameworks providing the sustainable development principle under the Nigerian environmental regime.[98] Paragraph 8 of the NPE described the legal framework as: "….*an instrument that recognises the need to achieve a balance between environment, development and socio-economic considerations."*[99] In the same vein, Paragraph 4.1.4 of the NPE stipulates that: "*the sustainable development of the oil and gas sector is, therefore, of utmost importance, especially since virtually all of the activities in both the upstream and downstream sectors are not only pollution-prone, but readily provoke social discord*." In effect, the environmental regime sets out the sustainable development principles guiding the oil and gas sector in the NPE.

[95] John C Dernbach, 'Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decision-making' (2003) 10 Indiana Journal of Global Legal Studies 248.
[96] John C Dernbach, 'Sustainable Development as A Framework for National Governance' (1998) 49 Case Western Reserve Law Review 58.
[97] World Commission on Environment and Development (n.90) pp.49-65.
[98] Armin Rosencrantz, Paul Kibel and Kathleen D Yurchak (n.89).
[99] Federal Environmental Protection Agency, *National Policy on Environment* (Revised, Federal Environmental Protection Agency 1999) p.39.

2.6 Access to Environmental Information, Public Participation and Access to Environmental Justice Principle

The principle of access to environmental information, public participation, and access to environmental justice is relatively new in international environmental law.[100] This principle is found in United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).[101]

Article 19 of the Universal Declaration of Human Rights empowers all persons with a right to freely express their opinions, convey and receive information.[102] Article 3 (9) of the Aarhus Convention requires that the public should: "*have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities*." These combined principles were also provided under Principle 10 of the Rio Declaration which stipulated: *"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided*."

It therefore entails that this provision stipulates three salient principles being:

1) Access to environmental information;
2) Public Participation in environmental decision making; and
3) Access to environmental justice.

[100] Shawkat Alam and Others, *Routledge Handbook of International Environmental Law* (1st edn, Routledge 2012) p.58.
[101] The Aarhus Convention opened for signature 25 June 1998, 2161 U.N.T.S. 447 (entered into force 30 October 2001). The Convention was signed in the Danish city of Aarhus. As of March 2014, it has 47 parties (composed of 46 states and the European Union).
[102] Universal Declaration of Human Rights (UDHR) on 10 December 1948, Art.19.

2.6.1 Access to Environmental information

From the provision of Article 3(9) of the Aarhus Convention, this study observes a requirement on host states and other public authorities (such as enforcement agencies) to make available environmental information to all citizens. Indeed, it is believed that facilitating easy access to information regarding the state of the environment and activities that can cause pollution enhances public confidence in environmental regulation.[103] In line with this pillar principle, Principle 2 of the Stockholm Declaration requires "*the free flow of up-to-date scientific information and transfer of experience*." Similarly, Principle 9 of the Rio Declaration stipulates the "*exchanges of scientific and technological knowledge*"; Principle 10 of the Rio Declaration stipulates the "*individual access to environmental information*."

In line with this pillar principle, Article 205 and 206 of the UNCLOS stipulates that: "*when states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the…environment, they shall as far as practicable, assess the potential effects of such activities….and shall communicate reports of the result of such assessments at appropriate intervals to the competent international organisations, which should make them available*." Similarly, Article 9(2) of the OSPAR Convention requires regulatory/enforcement authorities to provide the public with available information regarding activities that can potentially affect the environment. The Kiev Protocol on Pollutant Release and Transfer Registers (PRTRs) reflects this principle by requiring its parties to establish coherent, nationwide PRTRs as a way of promoting public access to information.[104]A PRTR is a publicly accessible database or inventory of chemicals or pollutants released to air, water and soil and transferred off-site for treatment.[105] It gathers information

[103] Michael Baram, 'Risk Communication Law and Implementation Issues in The US and EC' (1988) 6 Boston University International Law Journal 21; Melissa S Padgett, 'Environmental Health and Safety - International Standardization of Right-to-Know Legislation in Response to Refusal of United States Multinationals to Publish Toxic Emissions Data for Their United Kingdom Facilities' (1992) 22 Georgia Journal of International and Comparative Law 701.

[104] Parliamentary Office of Science and Technology, 'Aarhus Convention' (Parliamentary Copyright 2006) <http://bailey.personapi.com/PublicInquiries/Brent%20Cross%20No.%203/Other%20Parties/Proofs%20of%20Evidence/John%20Cox/JC502%20-%202006-01%20Aarhus%20Convention.pdf> accessed 30 July 2019.

[105] Organisation for Economic Co-operation and Development (OECD), 'Pollutant Release and Transfer Register - OECD' (*Oecd.org*, 2020) <http://www.oecd.org/chemicalsafety/pollutant-release-transfer-register/> accessed 6 March 2020.

on the extent of pollutants discharged, where, how much and by whom.[106] PRTRs typically require facility owners or operators who release pollutants to quantify their releases and to report them to government regularly.[107] Although the PRTRs seem to have regulatory effect only on pollution information as against the actual pollution, it was envisaged that it will enhance the accountability of companies since most companies will not want to be seen as significant polluters.[108]

This study appreciates the ability of the Environmental Information Regulations (EIRs) 2004[109] to successfully transpose this principle into UK national legislation.[110] Parts 2 and 3 of the EIRs provide not just a requirement for public authorities to disseminate environmental information but also specify various means through which such disseminations can occur including electronic means. The statutory attention paid to access to environmental information in UK law is further evidenced by the provision stipulated in Regulation 5(6) of the Regulations that no other existing law will prevent the disclosure of information required under the Regulations. Similarly, Section 1 of the UK's Freedom of Information Act 2000 gives a general right of access to information held by public authorities. Furthermore, Section 1(1) of the Freedom of Information Act requires public authorities to write back to the person requesting such information as to whether they have the information of the description being requested.

It has however been reported that although the Information Commissioner's Office (ICO) has generated guidance to the public regarding its environmental information rights in line with the Aarhus Convention,[111] the task of informing the public about such rights should be left to Non-Governmental Organisations (NGOs).[112] On the other hand, some EU state governments have been actively involved in the dissemination of environmental information through environmental

[106] OECD, 'Introduction to Pollutant Release and Transfer Registers (PRTRs) - OECD' (*Oecd.org*, 2020) <https://www.oecd.org/env/ehs/pollutant-release-transfer-register/introductionto-pollutant-release-and-transfer-registers.htm> accessed 6 March 2020.
[107] *ibid*.
[108] Parliamentary Office of Science and Technology (n.104).
[109] This transposition is provided in Part 2 and Part 3 of the Environmental Information Regulations.
[110] *ibid*.
[111] Information Commissioner's Office, 'What Are the Environmental Information Regulations?' (*Ico.org.uk*, 2019) <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/what-are-the-eir/> accessed 31 July 2019.
[112] Parliamentary Office of Science and Technology (n.104)

information centres known as 'Aarhus Centres' which offer their citizens adequate information in line with the Aarhus Convention.[113]

As part of implementing this principle, some governments in Eastern Europe, the Caucasus and Central Asia (EECCA), and the South-Eastern Europe (SEE) regions have established Aarhus Centres towards providing a platform for public awareness and dialogue on environmental issues between NGOs, the public and state officials and promoting environmental education.[114] One such Aarhus Centre is the Yerevan Centre in Armenia, which has become a model to the region.[115] This is because many of the Centre's activities (including information exchange) have extended beyond Armenia to other states.[116] This inter-state exchange of information and public awareness was previously expressed in Article 9(2) of the OSPAR Convention which requires enforcement authorities to provide the public with available information regarding activities that can potentially affect the environment.

Based on the provisions above, it can be summarised that major techniques to facilitate environmental information include:

1) Impact Assessments;
2) Exchange of information between states; and
3) Dissemination of environmental information to the public.

2.6.2 Public Participation in Environmental Decision Making

Regarding public participation, there have been measurable global and regional legal instruments that have also reflected the principle.[117] For instance, Article 4 (i) (ii) of the UNFCC obliges parties to "*encourage the widest participation in this*

[113] Organisation for Security and Co-operation in Europe (OSCE), 'Aarhus Centres | OSCE Aarhus' (Aarhus.osce.org, 2020) <https://aarhus.osce.org/> accessed 6 March 2020.
[114] OSCE, 'Aarhus Centres by Country | OSCE Aarhus' (Aarhus.osce.org, 2020) <https://aarhus.osce.org/countries> accessed 6 March 2020.
[115] OSCE 'Aarhus Centre Yerevan | OSCE Aarhus' (Aarhus.osce.org, 2020) <https://aarhus.osce.org/armenia/yerevan> accessed 6 March 2020.
[116] *ibid*.
[117] Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Geneva, Switzerland, 14–16 January 2002, *Background Paper No. 1: Human Rights and Environment Issues in Multilateral Treaties Adopted Between 1991 and 2001* (prepared by D. Shelton). <http://www2.ohchr.org/english/issues/environment/environ/bp1.htm > accessed 10 December 2018.

process, including that of non-governmental organisations."[118] Furthermore, Article 6 of the UNFCC obligates states to enable public access to environmental matters and also give the inhabitants an opportunity to participate in environmental decision making.[119] Enunciating the necessity for public participation in the environmental impact process, Article 2 (6) of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context provides that the State will: "*provide … an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin*."[120]

It is therefore evident, that the principle does not only require public authorities to be more transparent and accountable in their decision making process,[121] but also requires that the authority will include the general public in the decision making process.[122] The public authorities are expected to do this by first making environmental information available, educating the public on the relevance and implications of such environmental issues, and then encouraging the public to actively participate in the environmental decision making process.[123]

The importance of this principle is further accentuated in Article 5 (6) of the Aarhus convention whereby operators engaging in operations with the potential of huge environmental risk are required to disseminate information regarding measures to

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[118] United Nations Conference on Environmental Development: Framework Convention on Climate Change 31 ILM 849 9 May 1992 Art. 4(i) ('UNFCCC').
[119] *ibid*. Arts. 6(a), 6(a) (ii)-(iii).
[120] Convention on Environmental Impact Assessment in a Transboundary Context, opened for signature 25 February 1991, 1989 U.N.T.S. 309 Art. 2(6) (entered into force 10 September 1997) (Espoo Convention).
[121] 'Public Authority' is defined in Art. 2(2) of the Aarhus convention as meaning, *"(a) Government at national, regional and other level; (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above; (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.*"
[122] 'Public' in Art. 2(4) is defined as meaning, "*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.*
[123] Jonas Ebbesson, 'The EU and the Aarhus Convention: Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' [2016] Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571357/IPOL_BRI(2016)571357_EN.pdf>accessed 10 December 2018.

protect the environment for the public. Article 6(6) of the Aarhus Convention also requires the public authority to give any concerned member of the public free, easy access to environmental information (as soon as it becomes available). A significant instance of this dissemination of information is reflected in the increased adoption of Pollutant Release and Transfer Registers (PRTRs), requiring governments to release gathered data on environmental pollutants to the public.[124] Stephan argued that the PRTRs enable the effective gathering data on pollution and dissemination to the public.[125] Moreover DeVito observed an increase in the number of countries disclosing PRTRs.[126]

The public participation principle has become a household concept in environmental law over the past two decades.[127] The provision of 'public participation' in the above provisions suggests the significance of this principle as it cuts across the bridge between international law and environmental law. Interestingly, it has been asserted that there are various legal instruments (in the form of treaties),[128] that have given firm basis to this principle in other aspects of international law.[129] For example, the public participation principle was used to interpret the legal provision of Article 8 of the European Convention on Human Rights[130] in the case of *Tatar* v *Romania*[131] as well as *Taskın and others* v *Turkey*.[132] This understanding would normally have suggested an inference to some customary grounds for the principle. However, the ICJ in *Argentina* v *Uruguay*,[133] rejected such a view on the grounds that "…*no legal obligation to consult the affected populations arose*….' from European Convention on Human Rights;[134] a

[124] David Banisar and others, 'Moving from Principles to Rights: Rio 2012 And Access to Information, Public Participation, And Justice' (2012) 12 Sustainable Development Law & Policy 8-14, 51.
[125] Mark Stephan, 'Environmental Information Disclosure Programs: They Work, But Why?' (2002) 83 Social Science Quarterly 44.
[126] Steve DeVito, 'Steve Devito, US EPA: US Toxics Release Inventory (TRI)' (*YouTube*, 2012) <https://www.youtube.com/watch?v=fXg43mOk76Y> accessed 2 April 2019.
[127] Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (1st edn, Cambridge University Press 2016) p.75.
[128] *ibid*. p.76.
[129] Philippe Cullet and Alix Gowlland-Gualtieri, 'Local Communities and Water Investments' in: Brown Weiss, E and Boisson, L and Bernasconi-Osterwalder, N, (eds.), *Fresh Water and International Economic Law.* (Oxford: Oxford University Press 2005) pp. 303-330.
[130] European Convention on Human Rights, as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010.
[131] *Tatar* v *Romania*, ECtHR Application no. 67021/01, Decision (27 January 2009), para. 69
[132] *Taskın and others* v *Turkey*, ECtHR Application no. 46117/99, Decision (10 November 2004), paras. 99-100.
[133] *Pulp Mills on the River Uruguay* (*Argentina* v *Uruguay*) (n.11).
[134] *ibid*.

statement which still fails to expressly affirm or deny the customary strength of the public participation principle.

Indeed, in international law, public participation has been recognized as being essential to sustainable development.[135] In this vein, the principle has been embedded into several other international and regional legal instruments such as: Article(s) 16 and 23 of the 1982 World Charter for Nature,[136] Article(s) 2(6) and 4(2) of the 1991 Convention on EIA in a Transboundary Context,[137] Principle 10 of the Rio Declaration, the 1992 Convention on Biological Diversity[138] and the Aarhus Convention (discussed above). Agenda 21, adopted at the Earth Summit in Rio in 1992 which declares: *"One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work."*[139]

Despite its international recognition, it has been asserted that although some states like the USA have shown high compliance with the public participation principle by institutionalising it in their law and policy,[140] other states have delayed implementing it.[141] It is believed that this delay is a result of the unwillingness of some states to recognise the principle in their national laws hence limiting the applicability of the principle within such jurisdiction.[142] Writers have argued that

[135] Chilenye Nwapi, 'A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' (2010) 54 Journal of African Law 192.
[136] United Nations General Assembly (UNGA) Res37/7 (annex), UNGAOR 37th session supp. no. 51at17, UN doc A/37/51 (1982), 22 ILM 455 (1983).
[137] Convention on Environmental Impact Assessment in a Transboundary Context25 February 1991, 30 ILM 800 (1991).
[138] Convention on Biological Diversity entered into force 5 June 1992.
[139] This is stated in the Preamble to chap 23 of Agenda 21, approved by the UN Conference on Environment and Development on 13 June 1992: UN doc A/CONF.151/26 (vols. I–III) (1992).
[140] Celia Campbell-Mohn, 'The human dimension in twenty-first century energy and natural resources development: The new law of 'public rights' in private development in the United States' in Donald Zillman, Alistair Lucas and George Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, (Oxford University Press 2002) p.233.
[141] Chilenye Nwapi (n.135).
[142] *ibid*.

there should be a binding requirement on public authorities to understand and enforce the right to public participation.[143] On this ground, states have been encouraged to incorporate the principle especially in their environmental impact assessments for developmental projects.[144] This would encourage social acceptance of projects and particularly, the legitimacy of oil and gas developments by inhabitants of host states. This view emphasises the position previously expressed by the World Bank that "*public participation in EIA facilitates project design, environmental soundness and social acceptability*".[145]

2.6.3 Access to Environmental Justice

Regarding easy access to environmental justice, Article 3 (2) of the Aarhus Convention provides that States should "*endeavour to ensure that authorities assist and provide…….access to justice in environmental matters*."[146] Environmental justice entails that everyone ought to have access to seek redress for environmental harm done to them.[147] By 'everyone', this study means 'anybody' that has suffered environmental harm from an action. It also implies that environmental justice is expected to utilise proper sanctioning mechanisms (whether civil, criminal or administrative) to address environmental harm committed by companies.[148] It is believed that generally, environmental justice has influenced government policies and regulations and has enabled communities to protect their environment from corporate polluters.[149] According to Dobson, "*no theory of justice can henceforth be regarded as complete if it does not take into account the possibility of extending the community of justice beyond the realm of*

[143] John Glasson, Riki Therivel & Andrew Chadwick, *Introduction to environmental impact assessment* (3rd edn, Routledge 2005) p.138.
[144] Aloni Clinton and others, 'The Importance of Stakeholders Involvement in Environmental Impact Assessment' (2015) 5(5) Academic Publishing 148.
[145] Mutemba S, 'Public Participation in Environment Assessment in Bank–Supported Projects in Sub-Saharan Africa', *Proceedings of the Durban World Bank Workshop* (June 25, 1995) p.42.
[146] *ibid*.
[147] Ronald D Sandler and Phaedra C Pezzullo, *Environmental Justice and Environmentalism* (Massachusetts Institute of Technology Press 2007) p.29.
[148] Matthew Hall, 'Criminal redress in cases of environmental victimisation: A Defence.' (2016) 49(2) Revue Criminologie 141.
[149] Ronald D Sandler and Phaedra C Pezzullo (n.147).

present generation human beings."[150] His assertion emphasises the importance of this pillar principle to present and future generations.

2.7 General Overview of Environmental Regulation of the Nigerian Oil and Gas Industry

This study has discussed principles of environmental law that are used to ensure environmental protection. This section will therefore seek to discover the extent to which the Nigerian environmental regime has provided for environmental principles as obligations of its environmental law. On this basis, the study will utilise one of two indices to determine the extent to which such international environmental law provisions have been applied to the Nigerian regime. The indices are:

1) Has Nigeria incorporated the international treaties into its national law; or
2) Has Nigerian environmental law stipulated provisions reflecting the tenets of the environmental principles synonymous with the principles of international environmental law discussed above?

In the case of index 1, it would have been expected that Nigerian would have implemented Treaties and Conventions that it has ratified. However, Section 12 of the Nigerian Constitution stipulates that: "*No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly*." In effect, any such international instrument providing for the environmental principle has to be adopted as Nigerian law before it can have binding effect. Upon enactment, such a treaty will have the same force as a Nigerian statute. The status of undomesticated treaties in the Nigerian legal system was controversial until it was seemingly settled in the case of *Abacha* v *Fawehinmi*,[151] whereby the Supreme Court held that undomesticated treaties have no force of law whatsoever in Nigeria. However, Section 6(2) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 seems to have reopened the controversy. The

[150] Andrew Dobson, *Justice and the Environment.* (Oxford University Press 1998) pp.244-245; Carolyn Stephens, Simon Bullock and Allister Scott, 'Environmental Justice: Rights and Means to A Healthy Environment for All' (Friends of the Earth UK 2001) <https://friendsoftheearth.uk/sites/default/files/downloads/environmental_justice.pdf> accessed 1 August 2019.
[151] *Abacha* v. *Fawehinmi* (2000) FWLR (Pt 4) 586F-G25.

provision states that "*the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining the application of any international convention with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified*."

In effect, the status of ratified but undomesticated treaties in Nigeria is currently controversial. Until this controversy is settled, the ratification of international treaties providing for environmental principles would not be deemed as making such treaty principles binding in Nigeria. This becomes significant considering that although Nigeria has signed and ratified various international instruments providing for environmental principles,[152] the only domesticated instruments have been the International Convention for the prevention of pollution of the Sea by Oil 1954 implemented in the Oil in Navigable Waters Act 1968; and the African (Banjul) Charter on Human and Peoples' Rights 1981 implemented in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983. In any case, this portends a bleak environment for instruments like the Aarhus Convention instrument. This is because although Nigeria is yet to ratify the Aarhus Convention,[153] such ratification will be useless unless the instrument is either domesticated or the current controversy on ratified but undomesticated instruments is resolved.

[152] International agreements signed and ratified by Nigeria include: the Framework Convention on Climate Change signed on June 1992 and ratified November 1994; Convention on Biological Diversity (Rio Conference) signed on June 1992 and ratified November 1994; United Nations Convention on the Law of the Sea (UNCLOS) signed on December 1982 and ratified November 1994; African Convention on the Conservation of Nature and Natural Resources signed September 1968 and ratified June 1974; Agreement on the Joint Regulations on Fauna and Flora signed December 1977 and ratified December 1977; Convention for the Protection of the Ozone Layer (Vienna Convention) ratified in January 1989; Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) signed in March 1990 and ratified in May 1990; Protocol on Substances that deplete the Ozone Layer (Montreal Protocol) ratified in January 1989; United Nations Conference on the Human Environment (UNCHE) signed in May 2001 and ratified in May 2004; United Nations Framework Convention on Climate Change ratified in October 207; International Convention for the prevention of pollution of the Sea by Oil 1954 signed by Nigeria in 1968 and ratified same month; African (Banjul) Charter on Human and Peoples' Rights ratified by Nigeria in 1983 and others.

[153] Information regarding states that have ratified the convention can be found at: United Nations Treaty Collection, *Environment: Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*(United Nations Treaty Collection 2019) Chapter 13 <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en>> accessed 7 July 2019.

This study will not delve into the challenges that can be associated with ratified but undomesticated environmental treaty provisions in Nigeria. This is to avoid a detour outside the scope of discussion in the study. In effect, this study will not rely on the domestication of the provisions of the international treaties discussed above but will discuss environmental standards that exemplify the principles discussed above. As will be seen below, the Nigerian environmental legislation bearing the standards are all framed in similar form. They specify the standards together with criminal and administrative provisions enforcing the standards. The study will examine the legislation in a chronological order of the year in which each of the legislative instruments were formulated. Furthermore, to properly examine the effect and significance of the monetary sanctions utilised in the instruments, this study will convert the Naira currency indicated on all the instruments to its British Pound Sterling equivalent(denoted as £ hereafter).[154]

2.7.1 Mineral Oil (Safety) Regulations 1963

For the purposes of discussion in chapter 3, this study will point out the stipulation of Regulation 7 of this secondary legislation which states that: "*Where no specific provision is made by these Regulations in respect thereof, all drilling, production, and other operations necessary for the production and subsequent handling of crude oil and natural gas shall conform with good oilfield practice which for the purpose of these Regulations shall be considered to be adequately covered by the appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute Codes or the American Society of Mechanical Engineers Codes*."

The American Petroleum Institute (API) and American Society of Mechanical Engineers (ASME) formulated the integrity management (IM) standards for high consequence areas (HCAs).[155] The criteria for HCAs are in line with the USA regulations on Pipeline Integrity Management in High Consequence Areas.[156] In addition, the API developed the ISO 29001 in 2003 as a certification standard for EMS by stakeholders operating in the USA oil and gas industry represents a

[154] This conversion is considered in light of the fact that this study has been carried out in the UK (which is also one of the comparator jurisdictions utilised by the study).
[155] Division of Spill Prevention and Response, 'Best Available Technology' (*Dec.alaska.gov*, 2019) <https://dec.alaska.gov/spar/ppr/contingency-plans/bat> accessed 7 March 2019.
[156] 49 CFR 195.425

significant opportunity for standardisation and improvement.[157] Similarly, the Alaska legislature formulated the Best Available Technology (BAT) requirement towards oil pollution prevention and response.[158] Together, these industry standards form the global standards for pipeline management referred to as 'good oil field practice' for operators.[159] The IM is required to protect all HCAs (including highly populated areas, navigable waterways, and environments that are adversely affected by oil spills).[160] By virtue of these standards, oil and gas corporations are required to assess their pipelines (located in all HCAs) towards ensuring the integrity of the pipelines.[161] It is therefore, apparent that Regulation 7 of the Mineral Oil (Safety) Regulations exemplifies best practice of the Precautionary Principle as reflected in Article 4(4) of the 1974 Paris Convention requiring implementation of programmes to forestall, prevent or reduce environmental harm.

2.7.2 Oil in Navigable Waters Act 1968

Pursuant to the section 1 of the Act, the discharge of crude oil into prohibited sea areas is proscribed.[162] Furthermore, Section 3 of the Act prohibits the discharge of oil or oily mixtures into Nigerian waters.[163] As stipulated in the preamble section of the statute, the Act was enacted to implement the terms of the International Convention for the Prevention of Pollution of the Sea by Oil 1954 and to prohibit discharge into Nigerian navigable waters. Hence, this standard exemplifies the prevention principle by reflecting the provision of Article III of the Convention prohibiting the discharge of oil or oily mixtures into navigable waters. As has been stated earlier, the preventive principle requires practical action towards controlling or reducing pollution.

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[157] Lloyd's Register, 'Quality Standard for The Oil and Gas Industry: ISO 29001 Oil and Gas Certification' (*Lloyd's Register*, 2019) <https://www.lr.org/en-gb/iso-29001/> accessed 17 April 2019.
[158] Division of Spill Prevention and Response (n.155).
[159] Richard Steiner, 'Double Standard - Friends of the Earth International' (Spill' (Milieu Defensie: Report on Behalf of Friends of the Earth 2010) p.10.
[160] Barisere Konne, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland' (2014) 47 Cornell International Law Journal 193.
[161] *ibid*.
[162] Section 2 of the Act describes prohibited sea area to be an area of the sea outside the territorial waters of Nigeria designated by the Minister of State as prohibited for the purposes of protecting the coast and territorial waters of Nigeria from pollution by oil.
[163] Pursuant to Section 3(2) (b) of the Oil in Navigable Waters Act, Nigerian waters include: "*all other waters (including inland waters) which are within those limits and are navigable by sea-going ships.*"

This requirement is evidenced in Regulation 25 of the Petroleum (Drilling and Production) Regulations 1969 which stipulates that licensees in the Nigerian oil and gas industry should: "*adopt all practicable precautions, including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, watercourses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life*.." This provision manifests the preventive principle by requiring licensees to utilise precautionary measures (such as the provision of up-to-date equipment approved by the Director of Petroleum Resources) towards preventing environmental harm. In line with this, Regulation 37(a) and (d) of the Regulations stipulates that an operator must keep all the facilities used in the petroleum development operation in good condition, conduct the development operation in accordance with relevant regulations acceptable to the DPR and take all practicable steps to prevent discharge of avoidable waste and petroleum discharge.

Section 3 of the Oil in Navigable Waters Act finds an operator guilty of an offence of discharging crude oil into Nigerian navigable water in contravention of the standard above. In line with this, Section 6 thereby stipulates a penalty not exceeding N2,000 (£4.20) for such discharge and an amount not exceeding N400 (£0.84) for failure to report the discharge. Similarly, Sections 1 (3), 2(3), 5(1) & (3), 7(1) & (2) of the Act empowers the Minister of Transport to make regulations that operators must provide details of pollution discharge from their vessels. Section 7 (5) (a) thereby prohibits failure to comply with such ministerial regulations and provides that a person who fails to comply with the regulations made by the Minister will be criminally liable to a fine of up to N1,000 (£2.10).

2.7.3 Petroleum Production and Distribution (Anti Sabotage) Act 1975

Section 1 of the Act prohibits the intentional illegal sabotage of oil facilities in a manner that disrupts the flow of production and distribution and causes harm to the natural environment and public health of Nigerians. By seeking to prevent

pollution caused by sabotage, this statute manifests the prevention principle. On this ground, Section 2 of the Act stipulates the death penalty or an imprisonment term of 21 years as punishment for an offender who is in breach of the standard.

2.7.4 Associated Gas Re–Injection Act 1979

This Act mandates all oil and gas companies in Nigeria to submit preliminary programmes for gas re-injection and detailed plans that outline the steps that will be involved in the implementation of gas re-injection by October 1, 1980 and cease the flaring of gas by January 1, 1984.[164] In effect, this Act stipulates the standard of preventing pollution through the phasing out of gas flaring. This re-affirmed the pre-existing obligation under Regulation 43 of the Petroleum (Drilling and Production) Regulations 1969 requiring the operator to submit a feasibility plan for the re-injection and utilisation of natural gas, whether associated with oil or not, "*not later than five years after the commencement of production from the relevant area*." These constitute the standards regarding gas flaring required to be complied with on the part of operators. Section 3 of the Associated Gas Re–Injection Act prohibited the continued flaring of gas in Nigeria beyond 1984. Section 4 further stipulated an administrative penalty of loss of licence and production entitlements for an offender that fails to end flaring within the stipulated time.[165] It is however, observed that there was no formal criminal sanction established under the Act to prohibit the offence. Subsequently the Associated Gas Re-Injection (Amendment) Decree 1984 was promulgated because of the inability of the Associated Gas Re-Injection Act to end gas flaring. Section 7 of the Decree thereafter introduced a penalty of 2 kobo (less than £0.00002) per 1000 standard cubic feet (SCF) of gas flared in any site. This provision was introduced to curtail the extent of gas flared.

As has been established in the literature review section, gas flaring is a significant form of pollution. Hence in seeking a prohibition of gas flaring, this standard seeks to prevent pollution thus exemplifying the prevention principle discussed above.

[164] This is stipulated under Section 2 of the Act.
[165] An offender in this regard is a person who is in breach of Sections 1 and 2 of the Act.

2.7.5 Harmful Waste (Special Criminal Provisions Etc.) Act 1988

Section 1 of this Act prohibits anyone from depositing, dumping, storing and transporting solid, semi-solid or liquid harmful waste on Nigerian land and territorial waters. In line with this, Regulation 13 of the Petroleum Regulations 1967 stipulates that: "*no petroleum shall be discharged or allowed to escape into the waters of the port*." To achieve this, Regulation 40 of the Petroleum (Drilling and Production) Regulations 1967 provides the precautionary measure for ensuring such prevention of pollution by stipulating that operators: "*shall use approved methods and practices acceptable to the Director of Petroleum Resources for confining the petroleum obtained from the relevant area in tanks, gasholders, pipes, pipelines or other receptacles constructed for that purpose; and, except as a temporary measure (for which the prior consent of the Director of Petroleum Resources has been obtained)*." An interpretation of Section 1 of the Harmful Wastes Act clearly shows that the statute manifests the prevention principle. Indeed, just as the prevention principle dwells on the prevention or reduction of actions that can result to environmental degradation, so does Section 1 through its prohibition of the deposition or discharge of harmful waste. Section 1(2) (d) finds any person guilty of the offence strictly liable. In line with this, Section 6 imposes the penalty of life imprisonment on such an offender.

2.7.6 The Federal Environmental Protection Agency Act (FEPA) 1988 (now repealed)

The FEPA Act established the enforcement agency– FEPA. The law empowered the agency to protect the environment, ensure the conservation of Nigeria's natural resources and ensure the achievement of sustainable development in line with the NPE.[166] The law also provided a mechanism through which the agency would actualise the set objectives by requiring the agency to ensure that all corporations align with the national environmental policy for air quality,[167] water quality,[168] ozone protection,[169] and noise control.[170] The law required the agency to set

[166] This is provided for in Section 5 of the Act.
[167] This is provided for in Section 18 of the Act.
[168] This is provided for in Section 16 of the Act.
[169] This is provided for in Section 19 of the Act.
[170] This is provided for in Section 20 of the Act.

standards ensuring that corporations apply the best practicable technology that would prevent pollution, and prosecute a corporation that is in breach of such standards.[171] In other words, this Act provided the preventive principle of environmental law. It also entails that this Act spelt out the standard of BAT regarding oil and gas operations (discussed above). Moreover, the Act required the agency to ensure the protection of the Nigerian environment through regulation and enforcement.[172] This Act also clearly manifested a requirement for the agency to ensure sustainable conservation of resources (which is part of sustainable development as described above)

Section 23 of the repealed FEPA Act specified that the President must enact regulations that outline methods of cleaning-up pollution, the national contingency plan for regulating pollution, and even penalties for criminal pollution. Similarly, Section 24 of the FEPA Act required the Petroleum Minister and the Department of Petroleum Resource (DPR) to ensure the clean-up of all oil and gas waste discharge in Nigeria (a role now performed by the DPR and National Oil Spill Detection and Response Agency).

Furthermore, Section 22 of the Act required FEPA to ensure that a person/corporation who has caused a discharge; bore the cost of the clean-up for the discharge,[173] rehabilitated the damaged environment,[174] and compensated the victim.[175] Section 21 (1) of the Act strictly prohibited the illegal discharge of hazardous waste.[176] The Act stipulated a criminal fine of N100,000 (£210.52) or an imprisonment term of 10 years for individual offenders[177] and a penalty of up to N500,000 (£1043.7) for corporate offenders. For a corporate offence, the Act also stipulated an additional fine of up to N1000 (£2.10) for each day the offence continues.[178] Indeed, the Act provided regulation for virtually all components of criminal pollution relating to the oil and gas industry. This is not surprising considering that the Act was the foremost environmental legislation in Nigeria at

[171] *ibid.*
[172] This is provided for in Section 26 and 27 of the Act.
[173] This is provided for in Section 22 of the Act.
[174] This is provided for in Section 37 of the Act.
[175] This is provided for in Section 22 and 37 of the Act.
[176] This is provided for in Section 21 (1) of the Act.
[177] This is provided for in Section 21 (2) of the Act.
[178] This is provided for in Section 21 (3) of the Act.

the time. The Act has been replaced by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007. Unlike the FEPA Act, the NESREA Act does not cover the oil and gas sector. It is however notable that as at the existence of the FEPA Act, oil and gas pollution existed at a significant rate in Nigeria. In effect, the FEPA Act failed to serve the purpose of prohibiting pollution as it stipulated. Possible deficiencies that caused this inability will be discussed in the next chapter.

2.7.7 Environmental Impact Assessment Act (EIA) Act 1992

The EIA Act was enacted to address environmental concerns associated with industrial operations in Nigeria.[179] Section 1 of the Act stipulates that the EIA process is established to ensure that environmental issues are considered before any operation of possible significant effect to the environment is undertaken. Section 2 of the Act require companies to conduct an EIA on any public or private project that is likely to significantly affect the environment to determine possible environmental risks such project poses.[180] In effect, this Act stipulates the EIA standard as a protective measure against pollution. This study therefore regards this Act as exemplifying the precautionary principle.

The assessment is to determine the potential environmental effects of such activity towards ascertaining whether such operations can be permitted by the Federal Ministry of Environment (FME) or not.[181] Section 5 of the Act stipulates that the level of priority given to the examination of assessments will be in the order of environmental significance for each development. Section 6 of the Act stipulates that the FME will examine the information provided as part of the EIA process and the eventual report submitted by the company in conclusion of the assessment towards determining whether the project can continue. Pursuant to Section 21 of the Act, based on an assessment of the prior information and that provided in the assessment report submitted by the company, the FME can permit or disallow the development of the project if it is discovered to have significant adverse effect on

[179] This is provided for in Section 2 (1) of the Act.
[180] These operations are listed out in Sections 2 (2), 12 and 13 of the Act.
[181] This is provided for in Section 2 (1) of the Act.

the environment or refuse to issue permits to a company that has not submitted the EIA report. This permission will be in the form of an impact assessment certificate (IAC) issued to the company pursuant to Section 41 of the Act.

In line with producing an impact assessment report, Section 3 (1) of the Act also requires that the operators prepare an environmental management plan (EMP) to describe how they address any potential negative environmental impacts arising from their operations. In other words, the EMP is a relevant precaution required under the Act. The EMP would enable the regulator to assess the effectiveness of pollution mitigation measures designed by the operator.[182] This entails that beside the prevention principle through the EMP, this Act mandates compliance with the precautionary principle through EIA.

Section 7 of the Environmental Impact Assessment Act reflects the public participation principle by stipulating that: "*before the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on the environmental impact assessment of the activity*." In effect, the public ought to be made well aware of the environmental impact of operations before such operations are carried out. In particular, this will provoke the requirement that the Niger Delta indigenes be made aware of the oil and gas projects of oil companies in their region before such projects are carried out. Furthermore, Section 24 stipulates the provision for an access to environmental information by requiring the FME to publish the outcome of their investigation of the projects (codified in a mandatory study report) to the general public showing the date of the study of report, the place(s) where the report can be obtained and the deadline and address for filing comments and recommendations concerning the report.

This Act also provides for the pillar of environmental principle requiring access to public information. Section 7 of the Act sets out the provision of public participation by stipulating that: "*before the Agency gives a decision on an activity*

[182] Madu Akintunde and Akin Olajide, 'Environmental Impact Assessment of Nigerian National Petroleum Corporation (NNPC) Awka Mega Station' (2011) 2 American Journal of Scientific and Industrial Research <http://www.scihub.org/AJSIR/PDF/2011/4/AJSIR-2-4-511-520.pdf> accessed 10 December 2018.

to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on the environmental impact assessment of the activity."

Pursuant to Section 60 of the Act, anyone found guilty of breaching the environmental standard of undertaking and making a report on EIA before commencing operations is strictly liable. This offence is punishable by a fine not exceeding N100,000 (£210.52) or imprisonment for a period of five years. Similarly, a corporation that is found guilty is strictly liable to a fine of not more than N1,000,000 (£2105.21).

2.7.8 The Nigerian Constitution 1999 (as amended)

Section 44 (3) of the Constitution vests the sovereignty and ownership of mineral resources in Nigeria on the Nigerian state, Section 20 of the Constitution mandates the state (through its government) to "*protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria*." This provision implies that the provision inputs a requirement for adequate regulation on the government. In effect, the provision holds the government accountable (through its established state agencies) for the enforcement of environmental standards in the regime. Hence, even when such agencies are under-performing, the provision requires the government to make extra efforts to find a long-lasting solution to the under-performance. In the recommendation section, this study will explore measures through which this can be carried out.

2.7.9 Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002

The EGASPIN sets out environmental standards and requirements that must be met by operators during the project approval, operations, and closure or decommissioning phases.[183] Since its enactment, the EGASPIN has remained an

[183] Damilola S Olawuyi and Zibima Tubodenyefa, 'Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)' [2018] OGEES Institute, Afe Babalola University

important document in the Nigerian oil and gas sector.[184] The EGASPIN will be discussed in the light of the two salient standards it stipulates- decommissioning and clean-up. The decommissioning requirement of this principle in relation to the Nigerian oil and gas industry is included in Part VIII-B (Decommissioning of Oil & Gas Facilities) Section 1.1 of the EGASPIN which stipulates that: "*All abandoned installations…. shall be removed entirely……The process of removal shall avoid significant adverse effects upon navigation or the marine environment*."

Furthermore, Part VIII-A (Decommissioning of Oil & Gas Facilities) of the EGASPIN stipulates the processes through which an operator will successfully decommission in the Nigerian oil and gas regime. The significant aspect of the decommission process as stipulated in Part VIII-A (Decommissioning of Oil & Gas Facilities) Section 2.0 is for the operator to "*appropriately decontaminate, dismantle and remove structures from oil and gas installations and facilities after such installations/facilities have been abandoned and decommissioned*." Part VIII-A (Decommissioning of Oil & Gas Facilities) Section 2.1 specifies that this process must commence one year after abandonment and be completed within 6 months of its commencement. Part VIII-A (Decommissioning of Oil & Gas Facilities) Section 1.1.1 requires the operator to carry out an environmental impact assessment (EIA) on the proposed decommission plan before commencement. Furthermore, the operator is required to submit a report on the environmental evaluation which will be attached to the decommissioning plan report.

Pursuant to Section 1.1.1, the decommissioning must be carried out in a manner that avoids significant negative impact on navigation or the marine environment. Part VIII-B (Decommissioning of Oil & Gas Facilities), Sections 2.1.1 and 2.4 of the EGASPIN also require the operator to obtain an appropriate permit from the Director of Petroleum Resources for well abandonment and on strategies that will be utilised for the decommissioning programme. This corresponds with the provision of Regulation 36(1) of the Petroleum (Drilling and Production) Regulations which stipulates that: "*No borehole or existing well shall be re-drilled, plugged or abandoned, and no cemented casing or other permanent form of casing*

<https://www.iucn.org/sites/dev/files/content/documents/2019/review_of_the_environmental_guidelines_and_standards_for_the_petroleum_industry_in_nigeria.pdf> accessed 16 January 2020.

[184] *ibid.*

shall be withdrawn from any borehole or existing well which it is proposed to abandon, without the written permission of the Director of Petroleum Resources." Similarly, Regulation 2of the Petroleum (Drilling and Production) Regulations stipulates that: "*Every borehole or existing well which the licensee or lessee intends to abandon shall, unless the Director of Petroleum Resources otherwise permits in writing, be securely plugged by the licensee or lessee so as to prevent ingress and egress of water into and from any portion or portions of the strata bored through and shall be dealt with in strict accordance with an abandonment programme approved or agreed to by the Director of Petroleum Resources*." The above analysis entails that the Nigerian environmental regime through the EGASPIN stipulates decommissioning (which has been earlier described to be a significant action in the prevention principle) as an important requirement in the oil and gas industry.

While the EGASPIN as a rule has provided no explicit criminal sanction for the failure to decommission properly, PART IX (Schedule of Implementation, Permits Enforcement Powers and Sanctions) Section 4.5 stipulates that "*any person or body corporate who contravenes any provisions of the environmental guidelines and standards, commits an offence and shall on conviction, where no specific penalty is prescribed therefore, be liable to a fine, imprisonment and/or revocation of licence/permit by the Minister. (a) where the offence is committed by a body corporate or by a member of a partnership, firm or business, every director and/or relevant management staff, shall be liable*."

Furthermore, the EGASPIN provides for the removal of pollution or contaminants from environmental components such as soil, groundwater, sediment, or surface water. This is otherwise referred to as remediating environmental pollution. Pursuant to PART III (Production Operations) Section 7.1.1, all oil spill must be reported to the Director of Petroleum Resources, in accordance with the Oil Spillage/Notification. Section 7.1.1.1 stipulates that subsequent to this, a Joint Spillage Investigation (JSI) team, comprising the Licensee/Operator/Spiller, Community, and the Department of Petroleum Resources (DPR) shall within 24 hours of the notification, be constituted to investigate the spill.

Furthermore, Part VIII-B (Contingency Planning for the Prevention, Control and Combating of Oil and Hazardous Substances Spills) Section 2.6 stipulates that: "*clean-up shall commence within 24 hours of the occurrence of the spill*." The responsibility to carry out the clean-up and remediation of affected sites is imposed on the company on whose facility the spill occurs pursuant to PART III (Production Operations) Section 2.6.3. Hence, the defaulting company must commence clean-up immediately after investigation of the clean-up has been conducted. In line with this, Part VIII-B (Contingency Planning for the Prevention, Control and Combating of Oil and Hazardous Substances Spills) Section 2.11.1 stipulates that: "*it shall be the responsibility of a spiller to restore to as much as possible the original state of any impacted environment*."

Similarly, concerning all waters, Section 2.6 stipulates that upon clean-up, "*there shall be no visible oil sheen after the first 30 days*;" and for swamps, "*there shall not be any sign of oil stain within the first 60 days.*" Pursuant to Section 5.1.2.1 of the EGASPIN, clean-up and a remediation certification was originally to be issued by the DPR to the company upon certification that the remediation has been adequately completed. This power was later to be handed to the National Oil Spill Detection and Response Agency (NOSDRA) as will be seen below. However, Section 5.1.2.2 of EGASPIN stipulates that: "*appropriate approval shall be granted by the Director, Petroleum Resources for any remediation/rehabilitation method used to clean-up/restore impacted site(s)*."

In penalising avoidable oil spill pollution committed in Nigeria, PART IX (Schedule of Implementation, Permits Enforcement Powers and Sanctions) Section 4.6.2 stipulates that such avoidable oil spills shall: "*(a) attract a royalty not less than N500,000, to be deducted at source and additional fine of N100,000 (£210.52) for every day the offence subsists; (b) The spiller (operator or owner of vessel) shall pay adequate compensation to those affected and; (c) The spiller shall restore/remediate the polluted environment to an acceptable level as shall be directed by the DPR.*"

2.7.10 National Oil Spill Detection and Response Agency (Establishment) Act 2006

Section 1(1) of this Act established the NOSDRA. Pursuant to Section 5 of the Act, the agency is required to ensure the co-ordination and implementation of the National Oil Spill Contingency Plan towards the reduction and remediation of oil spill pollution in Nigeria. The objectives that must be achieved under this plan include (but are not limited to):[185] (a) ensuring a safe, prompt, effective and suitable response to significant oil pollution; (b) identifying high-risk and priority areas for protection and clean up; (c) establishing an appropriate means of monitoring, assisting, and directing the response of oil and gas companies towards protecting a polluted environment by ensuring the clean-up of the affected site to the best practical extent;(d) co-operating with the International Maritime Organization (IMO) and other national, regional and international organisations in the promotion of the exchange of scientific results and research relating to oil pollution preparedness and response "*including technologies, techniques for surveillance, containment, recovery, disposal and clean up to the best practical extent.*" This study views a summary of the purpose of the above plan and the duties of NOSDRA as the reduction of pollution which exemplifies the prevention principle.

Section 6 (1) (a) of the Act mandates the agency to investigate oil spills and their remediation process and ensure that oil spill defaulters comply with all existing environmental legislation regarding oil spill, its detection and clean-up. Similarly, Section 6 (1) (b) mandates NOSDRA to receive reports on oil spillages, co-ordinate and direct the clean-up and remediation process. Similarly, Section 17 of the Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations 2011 requires NOSDRA to issue certification for the completion of such remediation upon properly monitoring and evaluating the completion of the process. This replaced the pre-existing provision requiring such certificates to be issued by the DPR under the EGASPIN 2002. Comparing this provision to Section 5.1.2.2 of the EGASPIN above, it implies that there is a joint approach by the DPR and the NOSDRA in the coordination of the clean-up process. While the DPR is required to approve the process and technique utilised, the NOSDRA is required to coordinate

[185] This is set out in Section 5(a) – (n) of the Act.

and supervise the actual implementation of the process. It could therefore be assumed that this Act, similar to the EGASPIN empowers NOSDRA to carry out duties relating to the prevention and control of oil spill in Nigeria.

Section 6(2) finds a person who fails to report an oil spill to the agency in writing not later than 24 hours after the occurrence of the oil spill strictly liable for an offence and imposes a penalty of not more than N500,000 ((£1043.7) for each day the offence subsists. Similarly, Section 6(3) stipulates an additional penalty of not more than N1,000,000 (£2105.21) for an offender who fails to clean up the impacted site, to all practical extent.

2.7.11 National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007

Section 1(1) of this law established the National Environmental Standards and Regulations Enforcement Agency (NESREA) and empowered it with the responsibility of conserving the ecosystem and ensuring sustainable development of Nigeria's natural resources as well as sharing environmental information relating to the enforcement of environmental standards and policies with other stakeholders in and out of Nigeria. Section 2 of the Act goes further to obligate NESREA to coordinate and liaise with other relevant stakeholders within and outside Nigeria regarding enforcement of environmental standards, guidelines, regulations and laws thus manifesting the requirement for exchange of information between states in line with the principle of co-operation and the spirit of good neighbourliness discussed above. Section 8m of this Act further requires enforcement agencies to develop and utilise research experiments, surveys and studies in enforcement towards preventing, reducing and eliminating pollution. This manifests the requirement for precaution and prevention in line with the prevention and precautionary principles discussed above. Section 29 requires collaboration between NESREA and other enforcement agencies towards ensuring environmental protection.

Section 20 of the Act also empowered NESREA to formulate regulations setting specifications and standards to enhance air quality and reduce atmospheric

emissions. However, Section 7 (g) (h) (j) (k) (l), and 8 (g) (k) (m) of the NESREA Act precludes oil and gas regulation from its scope of enforcement. It therefore entails that the duty of NESREA as specified in Section 20, to set regulatory standards does not relate to the oil and gas industry. On the other hand, Section 7(c) of the Act requires NESREA to enforce provisions of international environmental treaties and agreements regarding environmental protection (including oil and gas related instruments). Technically, if applied, this will entail environmental regulation of the Nigerian oil and gas industry under this Act. However, considering the earlier mentioned controversy of ratified but undomesticated treaties in Nigeria, this study will discuss the confusion arising from the seeming contradictions between Section 7(c) of the NESREA Act and Section 12 of the Nigerian Constitution, in chapter 4.

Pursuant to Section 20(3) of the Act, an offender who violates the regulations made by NESREA in line with Section 20 of the NESREA Act is guilty of an offence and strictly liable to a fine not exceeding N200,000 (£408) or to imprisonment for a term not exceeding one year or to both such fine and imprisonment and an additional fine not more than N20,000 (£40.8) for every day the offence subsists. Section 20 (4) of the Act stipulates that if the offence is committed by a corporation, it will on conviction be strictly liable to a fine not exceeding N2, 000,000 (£4083) and an additional fine of not more than N50,000 (£104.3) for every day the offence continues.

Similarly, under the Act, an individual who has committed a water pollution crime, is criminally liable to a fine not exceeding N50,000 (£104.3) and an additional fine not exceeding N5,000 (£10.40) for each day the pollution continues or an imprisonment term not exceeding one year.[186] Similarly, under the Act, a corporation that is criminally responsible for water pollution crime is liable to a penalty not exceeding N500,000 (£1043.7) and an additional fine of N10,000 (£21.05) every day the pollution continues.[187] Even more, except where permitted under any law in force, the Act forbids the discharge of hazardous substances into the air or territorial lands.[188] An individual found guilty of violating this provision

[186] This is provided for in Section 23 (3) of the Act.
[187] This is provided for in Section 23 (4) of the Act.
[188] This is provided for in Section 27 (1) of the Act.

is criminally liable for an offence punishable on conviction by a fine not exceeding N1,000,000 (£2105.21) or to an imprisonment term not exceeding five years.[189] For a corporation, the Act stipulates a criminal fine not exceeding N1,000,000 (£2105.21) and an additional fine of N50,000 (£104.3) for every day the offence continues.[190]

The NESREA (Establishment) Act prohibits noise pollution and imposes a criminal fine of up to N50,000 (£104.3) or an imprisonment term not exceeding one year, an additional fine of N5,000 (£10.43) for every day the offence continues.[191] Similarly, the NESREA (Establishment) Act imposes a fine not exceeding N500,000 (£1043.7) as penalty for a corporation that commits a noise pollution crime, and an additional N10,000 (£21.05) for any day the pollution crime continues.[192]

2.7.12 Minerals and Mining Act 2007

Section 118 (a) of the Minerals and Mining Act regulates all aspects of the exploration and exploitation of solid minerals in Nigeria and by such mandates all licensees to reduce, manage and mitigate any environmental impact resulting from their exploitation activities. Furthermore, Section 118 (b) of the Act mandates the licensee to rehabilitate, reclaim land that has been disturbed as a result of the exploitation activities. Sections 120 and 121 of the Act require that the rehabilitation of affected sites will be conducted in line with the Environmental Protection and Rehabilitation Programme (EPRP). Section 121 further stipulates that this will be coordinated and enforced by the Mines Environmental Compliance Department. Section 4(a) (b) and (h) requires the Petroleum Minister to ensure that the oil and gas resources are exploited in a sustainable manner, by drawing out as part of the licensing programme, a coherent sustainable development policy. It is therefore evident that the statute exemplifies the Sustainable Development Principle by requiring rehabilitation actions towards making the damaged environment fit for future use.

[189] This is provided for in Section 27 (2) of the Act.
[190] This is provided for in Section 27 (3) of the Act.
[191] This is provided for in Section 22 (3) of the Act.
[192] This is provided for in Section 22 (4) of the Act.

2.7.13 National Environmental (Access to Genetic Resources and Benefit sharing) Regulations 2009

Regulations 1 and 2 prohibit the carrying out of operations that adversely impact the ecosystem, resulting in the extinction of any species or leading to the unsustainable use of natural resources without an environmental impact statement. In line with this, Regulation 23 provides that an offender who is in breach of the Regulations will be liable to a fine ranging from N1,000,000 (£2105.60) to N10,000,000 (£21,050.60) or imprisonment for a term not exceeding one year or both fine and imprisonment and an additional fine of N1,000,000 (£2105.60) for every day the offence subsists. Similarly, Regulation 23 stipulates that where the offence is committed by a corporation, it will on conviction be liable to a fine not less than N10,000,000 (£21,050.60) and not exceeding N100,000,000 (£210,500.60) and an additional fine of N1,000,000 (£2105.60) for every day the offence continues.

2.7.14 National Governmental (Noise standards and Control) Regulations 2009

This regulation has been included since the study will subsequently establish noise pollution as a physical effect of the oil and gas industry in chapter 3.[193] Regulation 1 of the National Governmental (Noise standards and Control) Regulations seeks to guarantee a healthy environment for all Nigerians, maintain the calmness of their surroundings including their psychological wellbeing by setting a maximum limit of noise levels which a corporate facility as well as any individual must not exceed. Regulation 12(1) empowers the NESREA to enforce the standard for noise levels and sanction a noise pollution offender who causes noise pollution above the maximum standards. In line with the Regulations, an individual offender is liable to a fine not exceeding N5,000 (£10.43) for every day the offence continues and shall on conviction be liable to a fine not exceeding N50,000 (£104.3) or to imprisonment for a term not exceeding one year or both. A corporate offender will on conviction, be liable to a fine of not more than N500,000 (£1043.7) and an additional fine of N10,000 (£21.05) for every day the offence continues.

[193] This is mentioned in section 3.1 of chapter 3.

2.7.15 National Environmental (Wetland, River Banks and Lake Shores Protection) Regulations 2009

Regulation 3 provides for the conservation and sustainable utilisation of resources from the wetlands in Nigeria. This exemplifies the Principle of Sustainable Development described above. Pursuant to Regulation 2, it is the duty of all individuals and corporations to: guarantee that the wetlands are protected as habitats for species of flora, minimize and control pollution. Regulation 31 criminalises anyone who neglects to comply with this environmental obligation on precaution regarding the protection of the wetlands. Furthermore, Regulation 38 prescribes that on conviction, an offender will be liable to an imprisonment term of not less than three months or a fine not exceeding N500,000 (£1043.7) or both.

2.7.16 Freedom of Information Act 2011

Similar to the UK, the Nigerian Freedom of Information Act 2011 sets out the general right to access to information held by public authorities. Section 1(1) of the Act stipulates that: "*notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information…...which is in the custody or possession of any public official, agency or institution howsoever described, is established*." This is in consonance with the provision of Section 24 of the Nigerian Environmental Impact Assessment Act mentioned above. Both instruments exemplify best practice as reflected in Principle 10 of the Rio Declaration, Article 4.1. It is therefore expected that environmental enforcement agencies in Nigeria publish reports on their enforcement to the general Nigerian public. It is also expected that upon requesting environmental information, the relevant public authority make it available. This statutory provision in the Freedom of Information Act manifests the principle of access to environmental information described above. This implies that the provision exemplifies best practice reflected in Principle 10 of the Rio Declaration and Article 3(9) of the Aarhus Convention.

From the overview above, this study observed that the different standards set out under Nigerian environmental law exemplify some of the principles of environmental law set out earlier in this chapter such as the precautionary principle, the preventive principle and the public participation principle. Since the

study has argued that the environmental principles are the framework for environmental protection, then it also implies that the environmental standards exemplified in the Nigerian regime are the framework for environmental protection. This relevance creates a justification for an examination of regulatory enforcement measures enforcing the standards in the form of criminal sanctions and administrative enforcement. Based on the sanctioning and enforcement techniques employed by the regime, it is expected that at a minimum, even if rather unwillingly, the industry would have complied with the standards so as not to be found liable of an environmental offence. The question will therefore be whether the industry has complied with the standards. This study will make this determination in chapter 3 by seeking to identify alleged incidents of violations in the industry.

2.8 Criminal Liability of an Environmental Criminal Violator in Nigerian Law

This study has earlier discussed the statutory provisions of sanctions under the Nigerian environmental criminal law. The study however, argues that the liability of a Nigerian environmental criminal violator can only be established after it is proven that the environmental violation is indeed criminal in line with the statutory provisions discussed above. This chapter will therefore examine the criminal liability of Nigerian environmental violators. This discussion will be divided into two parts. The first part will be a general overview of criminal liability (the elements that must be present to establish the liability of an offender). The second part will examine the criminal liability of environmental offenders in line with Nigerian environmental criminal law.

2.8.1 General Overview on Elements of Crime

A significant issue in traditional criminal law has been the determination of the liability of an accused person. Every crime has its element. Hence, the guilt of an accused person can only be established after a prosecutor has proven each and every essential element for that crime. A general overview of the elements of crime in criminal law will be explained below.

A) *Actus Reus*

In order for an *actus reus* to be committed there has to have been an act. Several common law jurisdictions define 'act' differently but generally, an act is a "*bodily movement whether voluntary or involuntary*."[194] The USA Supreme Court held that a Californian law making it illegal to be a drug addict was unconstitutional because the mere status of being a drug addict was not an *act*, hence not criminal.[195] Commentator Dennis Baker asserts:[196] "*Although lawyers find the expression actus reus convenient, it is misleading in one respect. It means not just the criminal act but all the external elements of an offence. Ordinarily, there is a criminal act, which is what makes the term actus reus generally acceptable. But there are crimes without an act, and therefore without an actus reus in the obvious meaning of that term. The expression "conduct" is more satisfactory, because wider; it covers not only an act but an omission, and (by a stretch) a bodily position. The conduct must sometimes take place in legally relevant circumstances. The relevant circumstances might include consent in the case of rape. The act of human sexual intercourse becomes a wrongful act if it is committed in circumstances where one party does not consent and/or one or more parties concerned are below the age of consent. Other crimes require the act to produce a legally forbidden consequence. Such crimes are called result crimes. ... All that can truly be said, without exception, is that a crime requires some external state of affairs that can be categorized as criminal. What goes on inside a person's head is never enough in itself to constitute a crime, even though it might be proven by a confession that is fully believed to be genuine*."

From the above assertion, one can infer that a criminal conduct is (by way of action) the commission of a criminal act. In other words, an act can involve commission. However, it can also involve omission. Omission involves a failure to engage in a required action resulting to harm.[197] As with commission acts, omission acts can be viewed using the *but for* approach.[198] Hence, '*but for not having acted*, *the injury would not have occurred*.[199] The Model Penal Code

[194] Model Penal Code: Official Draft and Explanatory Notes Ch. 900, Section 1.13[2] [American jurisprudence].
[195] *Robinson* v *California*370 USA Sc. 660 (1962).
[196] Dennis J Baker, *Glanville Williams Textbook of Criminal Law* (Sweet & Maxwell, London, 2012) p. 167.
[197] Model Penal Code (n.193) Sec 2.01[3].
[198] Dennis J Baker (n.196).
[199] *ibid.*

however, specifically outlines specifications for criminal omissions including:[200] the omission is expressly made sufficient by the law defining the offence; or a duty to perform the omitted act is otherwise imposed by law.

B) Intention (*Mens Rea*)

A famous Latin legal maxim puts the principle of intention succinctly by stating that: '*actus non facit reum nisi mens sit rea*' – '*the act does not make one guilty unless there is a guilty mind.*'[201] *Mens rea* is the state of mind indicating the culpability of an offender, and must be statutorily required as an element of the crime.[202] It therefore implies that under crimes requiring *mens rea*, an offender must have some intention or knowledge to commit the crime.[203] In effect, it is one of the essential ingredients of criminal liability.[204] According to Clause 6 of the Report and Draft Criminal Code Bill (Vol.1, No.177) 1989, to establish the liability of an offender, one must prove the element of the offence consisting of a criminal state of mind with which the offender has acted.

Intention means that the state of mind of the offender would have been such that he actually intended to commit the offence. It is generally agreed that one intends to commit an offence where he acts with the purposes of committing the offence.[205] To this effect, it is sufficient that committing the crime was his object of purpose, that he wanted to commit the crime and that he acted in a manner as to commit the crime.[206] This is regardless whether the said action was a spontaneous act.[207] Indeed, the ordinary interpretation of intention restricts the intention element to be only direct (hence, it is the purpose of the committer to cause the harm and he acted in order to cause the harm through his actions).[208] In this case, such an offender intended the consequential harm that occurred as a result of the criminal act. However, the courts have recently extended the limits

[200] Model Penal Code (n.194) Sec 2.01[3].
[201] William A. Stadler and Michael L. Benson, 'Revisiting the Guilty Mind' (2012) 37 Criminal Justice Review 496; *Brown* v *State* 23 Del. 159. 25 L.R.A (N.S.) 66.
[202] *Staples* v *United States*, 511 US 600 (1994).
[203] *State* v *B.D. Meattle*, AIR 1957 Punj 74; 1957 Cr LJ 427.
[204] *State of Maharashtra* v *Mayer Hans George*, AIR 1965 SC 72.
[205] John C Smith, Brian Hogan and David Ormerod, *Smith & Hogan Criminal Law* (13th edn, Oxford University Press 2011) p.108.
[206] Anthony Duff, *Intention, Agency and Criminal Liability* (1st edn, Basil Blackwell 1990) p.61.
[207] Mordechai Kremnitzer, 'On Premeditation' (1998) 1 Buffalo Criminal Law Review 627.
[208] John C Smith, Brian Hogan and David Ormerod (n.204) p.107.

of its interpretation on intention to include an indirect approach whereby the harm is a natural consequence of the voluntary act of the offender, and the offender foresaw the possibility of such harm as highly probable or most certain to occur, even if achieving the harm was not his direct intention.[209] In the UK case of *R* v *Woollin*,[210] the trial judge directed the jury that oblique intention exists if there is "*an appreciation of a substantial risk of injury*," which resulted in the jury deciding that exposing somebody to a risk of harm was sufficient to amount to intention. It has been asserted that intention is generally viewed in terms of foresight of particular consequences and a desire to act or fail to act so that those consequences occur.[211] Similarly, it has been held that for intention to exist, the offender has made a "*decision to bring about a prohibited consequence.*"[212]

According to Clifford, "*an environmental crime is an act committed with the intent to harm or with a potential to cause harm to ecological and/or biological systems and for the purpose of securing business or personal advantage*."[213] This view has been reiterated by other writers who asserted that environmental crime is a deliberate destruction of the environment for political and financial gain.[214] In these definitions the terms 'deliberate' and 'intentional' featured. It therefore implies that environmental offenders in this class possess the criminal mind to pollute and commit environmental harm even before carrying out the actual pollution. To this effect, it is the direct purpose of the environmental offenders to cause 'environmental harm' or 'destruction to the environment' by virtue of their actions.

In February 2006, Richard Cheney, ex-Vice-President of the United States, shot and seriously wounded a hunting companion, yet no assault charges were filed.[215] This scenario suggests that criminal punishment is not imposed on every person

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[209] Victor Tadros, *Criminal Responsibility* (Oxford University Press 2010) pp.215-218; 228-229; Anthony Duff, 'The Politics of Intention: A Response to Norrie' [1990] Criminal Law Review 637.
[210] [1999] 1 AC 82.
[211] *R v Moloney* [1985] AC 905.
[212] *R v Mohan* [1976] QB 1 (Court of Appeal).
[213] Mary Clifford, *Environmental Crime: Enforcement, Policy, and Social Responsibility* (Aspen, Gaithersburg, USA 1998) p.26.
[214] Sally M Edwards, Terry D Edwards and Charles B Fields, *Environmental Crime and Criminality* (E-Book, Taylor and Francis 2013) p.246.
[215] Anne Kornblut, 'Cheney Shoots Fellow Hunter in Mishap on a Texas Ranch' (*Nytimes.com*, 2006) <http://www.nytimes.com/2006/02/13/politics/cheney-shoots-fellow-hunter-in-mishap-on-a-texas-ranch.html> accessed 19 April 2017.

who harms others.[216] This raises the question: Why? One reason is that for most offences, something other than just a harmful act is required before such an act is considered criminal.[217] Hence, one can only be convicted of a crime after it has been proven that he acted with a wrongful state of mind and in the absence of any justification or excuse for his conduct.[218] In particular, it would then entail that where the offender fully intended to commit the crime, he would have greater blame/fault for the offence.

C) Criminal Negligence

Criminal negligence involves the offender departing from the standards expected of a reasonable person by committing the crime. In negligence, the offender has a lower form of *mens rea* to commit the crime by virtue of being aware of the expected standards and yet committing the act. In this case, the offender will still be guilty for the offence.

D) Criminal Recklessness

This liability for criminal recklessness arises where the offender is expected to foresee the risk of the offence but still performed the act resulting to the offence. In effect, the accused has a deliberate lack of concern regarding the risk of harm resulting from his actions. This suggests that a known risk has been ignored thus is indicative of subjective recklessness. The leading case on subjective recklessness is *R* v *Cunningham*.[219] In the case, the court applied a subjective test based upon whether the defendant had 'foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it'.[220] The court held that the defendant could only be liable if he realised that there was a risk arising from his action.[221] Based on the position in *Cunningham*, it can be deduced that subjective recklessness is only established if the accused is aware of a risk of a particular type of harm arising from his actions.

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[216] *ibid.*
[217] Model Penal Code (n.194) Section 1.01.
[218] Gary Becker, 'Essays in the Economics of Crime and Punishment' (1974) Nber Books <http://www.nber.org/books/beck74-1> accessed 10 March 2017.
[219] [1957] 2 QB 396.
[220] *ibid.* at 399 *per* Byrne LJ.
[221] *ibid.*

In other areas of criminal law, the courts have taken a wholly different approach to recklessness. The House of Lords formulated an objective test of recklessness that was not based on whether the defendant recognised a particular risk but on whether a reasonable person would have recognised a risk of harm.[222] If the risk of harm was obvious to the reasonable person, the defendant will be found to have been reckless even if he did not realise that there was a risk of harmful consequences occurring as a result of his conduct.

On the other hand, the House of Lords in *Reid* held that the accused can be indifferent to a risk without being aware that it exists.[223] It has been asserted that an accused who deliberately ignores the risks that were obvious to other people is equally blameworthy of taking a risk that had been recognised.[224] In supporting this view, writers have asserted that when an accused goes about his business without considering the possible consequences of the action, this form of recklessness can occur.[225] This notion of objective recklessness as a deliberate blindness to obvious risks could legitimately be described as wanton indifference to the consequences of one's actions.

E) Strict Liability

In this category, the guilt of an offender is established simply by virtue of the offensive action committed and the prohibition of the criminal act under law rather than the establishment of *mens rea* or recklessness.[226] All that needs be proven is that there is a law creating the offence and that the offence has been committed. In 1798 Lord Kenyon CJ in an oft cited dictum in *Fowler* v *Padget*[227] delivered what might have become a canonical text of English law, stating that: "*It is a principle of natural justice, and of our law, that actus non facit reum nisi mens sit rea. The intent and the act must both concur to constitute the crime*..."[228] This statement reflected a fundamental principle of criminal law being that blame, and

[222] *Metropolitan Police Commissioner* v *Caldwell* [1982] AC 341.
[223] *R* v *Reid* [1992] 3 All ER 673. In *Reid*, the defendant had caused death whilst driving in a manner which most people would consider carried a risk of harm but had asserted that he had not been reckless because he had not been aware of the risk.
[224] Diane Birch, 'The Foresight Saga: The Biggest Mistake of All' [1988] Criminal Law Review 4.
[225] Leonard Leigh, 'Recklessness after Reid' (1993) 56 Modern Law Review 208.
[226] John C Smith, Brian Hogan and David Ormerod (n.205) p.155.
[227] *Fowler* v *Padget* (1798) 7 Term Rep 509.
[228] *ibid*.

punishment, was not to be employed against a blameless defendant. However, the strict liability doctrine has been proven to be an exception to this principle as it requires only the commission of the prohibited conduct for an offence to arise.[229] For strict liability offences, the mental state of the accused is irrelevant in determining the guilt of the offender.[230] Hence, the prosecution need only prove that the accused did a wrongful act that has been prohibited under law.[231] This position was emphasized in *Brend* v *Wood*,[232] whereby Lord Goddard, CJ stated: "*It is of utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind*."[233]

General principles of strict liability can be gathered from examining a few cases of strict liability in the UK and USA. In the UK case of *Alphacell Ltd* v *Woodward*,[234] a factory owner was appealing the factory's conviction of discharging polluted matter into a river contrary to the provision stipulated under the Rivers (Prevention of Pollution) Act 1951. Indeed, it was established in the case, that the appellant was not aware of the pollution, nor was it alleged that it was negligent. In upholding the conviction, Lord Salmon held that "*If this appeal succeeded and it were held to be the law that no conviction be obtained under the 1951 Act unless the prosecution could discharge the often-impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred to the relief of many riparian factory owners. As a result, many rivers which are now filthy would become filthier still and many rivers which are now clean would lose their cleanliness. The legislature no doubt recognised that as a matter of public policy this would be most unfortunate. Hence, Section 2(1)(a) which encourages riparian factory owners not only to take*

[229] GR Sullivan, 'Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention On Human Rights' [2005] Appraising Strict Liability in AP Simester, *Appraising Strict Liability* (Oxford University Press 2007) p.195.
[230] Robert W Thomas, 'On Strict Liability Crimes: Preserving A Moral Framework for Criminal Intent in an Intent-Free Moral World' (2012) 110 Michigan Law Review 650.
[231] Thomas Reuters 'Criminal Law: American Jurisprudence' [2008] Thomas Reuters 132.
[232] *Brend* v *Wood* (1946) 62 TLR 462.
[233] *ibid*.
[234] *Alphacell Ltd* v *Woodward* [1972] AC 824.

reasonable steps to prevent pollution but to do everything possible to ensure that they do not cause it."[235]

In the case, it is obvious that despite the defence of lack of knowledge of the pollution crime, as well as the inability of the prosecution to prove that the appellant acted wilfully or negligently, the court still upheld the appellant's conviction on the grounds that it was an issue that affected public policy. To this effect, it was not the mental state of the appellant that was used to adjudge his guilt, but rather the prohibition of the criminal action by the relevant law. Hence, it could be adduced that strict liability crimes are regulatory crimes, requiring only a proscription of the criminal act by law.[236]

Similarly, in the USA case of *People* v *Lardie*,[237] it was held that for strict liability offences, all that needs to be proven is that the offender did the wrongful act regardless of intent. The Supreme Court held that "*for a strict-liability crime, the people need only prove that the act was performed regardless of what the actor knew or did not know. On this basis, the distinction between a strict-liability crime and a general-intent crime is that, for a general-intent crime, the people must prove that the defendant purposefully or voluntarily performed the wrongful act, whereas, for a strict-liability crime, the people merely need to prove that the defendant performed the wrongful act, irrespective of whether he intended to perform it*."[238] Hence, this form of liability is in contrast with the general intent liability whereby it must be proven that the defendant voluntarily and intentionally committed the wrongful act.[239] This view was reiterated by Roe who asserted that criminal liability in a strict liability offence is determined by the commission of the offence and the regulatory sanction proscribing the offence.[240]

In the early 19th century, city congestion and industrial development brought with it environmental and public health challenges.[241] As a response to this, the US

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[235] *ibid*.
[236] Rick Libman, 'Is Presuming Guilt for Regulatory Offences Still Constitutional but Wrong? R v Wholesale Travel Group Inc. and Section 1 of the Charter of Rights and Freedoms 20 Years After' (2012) 43(3) Ottawa Law Review 455.
[237] *People* v *Lardie* 452 Mich. (1996).
[238] *ibid*.at 257.
[239] *ibid*.at 259.
[240] Diana Roe, *Criminal Law* (3rd edn, Hodder Arnold 2005) p.42.
[241] Michael Reitz, 'Strict Liability and Public Welfare Offenses' (*Mackinac.org*, 2013) <https://www.mackinac.org/19579> accessed 10 December 2018.

championed the creation of 'public welfare offences' as a form of regulatory offence.[242] A creation of this category of regulatory offence was to "*heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare*."[243] Public welfare offences do not require the prosecution to prove any criminal intent or *mens rea* on the part of the accused.[244] These offences are punishable regardless of the state of mind of the accused at the time of committing the crime.[245] All that would matter is that there be an existing statute prohibiting such criminal acts and that the criminal act is dangerous enough to adversely affect public interest.[246]

Environmental offences are regarded as public welfare offences.[247] This categorisation is not surprising considering that environmental offences pose potential harm to the natural environment. Moreover, it has been established that the harm to the natural environment often impacts the inhabitants of such an environment (as had been seen in the Nigeria scenario). Hence, treating it as a strict liability crime would make a significant contribution to dealing with the harm and risks it could potentially cause the public and the natural environment. In that light, environmental offences do not need *mens rea* to sustain the liability of the offender. All that needs to be proven is that the offender actually did commit the environmental offence and that there is a regulatory sanction proscribing the environmental offence. This corresponds with the opinion that "*[o]ne…. does not have to be bad to do bad when it comes to environmental crime. The 'black heart' requirement commonly associated with other criminal activity is not necessary to sustain a conviction*."[248] In any case, a criminal polluter cannot plead that he was ignorant of the relevant law sanctioning the pollution crime as ignorance of the law is no excuse under the law.[249]

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[242] *ibid.*
[243] *Morissette* v *United States* 342 U.S. at 214 (1952).
[244] Francis Sayre, 'Public Welfare Offences' (1933) 33 Colorado Law Review 55.
[245] Glen Borre, 'Public Welfare Offenses: A New Approach' (1961) 52 The Journal of Criminal Law, Criminology, and Police Science 418.
[246] *ibid.*
[247] Nicola Franklin, 'Seismographs Recording Public Upheavals' (*www5.austlii.edu.au*, 1990) <http://www5.austlii.edu.au/au/journals/CICrimJust/1990/23.pdf> accessed 10 December 2018.
[248] Judson W Starr and Thomas J Kelly Jr, 'Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and it is Hard Time' (1990) 20 Environmental Law Report News and Analysis: Environmental Law Institute 10096, 10104.
[249] This was established in *United States* v *Balint*, 258 U.S. 250 (1922); *Shevlin-Carpenter Co.* v *Minnesota*, 218 U.S. 57 (1910).

Woods and Macrory have criticized the: "*wholesale' use of strict liability in environmental criminal law … This can lead to indignation on the part of businesses which are found 'guilty' of offences without having a real sense of moral fault, or an inclination to treat such offences akin to a business overhead because guilt is applied automatically*."[250] It is also notable that in jurisdictions like the UK, judges have been permitted to apply the purposive approach to the interpretation of seeming strict liability provisions. Previously the courts were not allowed to refer to Hansard[251] in interpreting legislation.[252] In this case, Lord Kilbrandon held that: "*It has always been a well-established and salutary rule that Hansard can never be referred to by counsel in court and therefore can never be relied on by the court in construing a statute or for any other purpose*."[253]

Furthermore, Lord Scarman asserted that two reasons for which the courts should not regard parliamentary comments in the interpretation of statutes include: (i) the unreliability and vagueness of such materials as guide to statutory enactments;[254] and (ii) the presence of the rule maintained by Parliament which precludes counsel from referring to Hansard in court arguments, hence also precluding judges from utilising such parliamentary proceedings for the judicial use of interpreting statutes.[255] In line with this, Viscount Dilhorne further stated: "*While, of course, anyone can look at Hansard, I venture to think that it would be improper for a judge to do so before arriving at his decision and before this case I have never known that done. It cannot be right that a judicial decision should be affected by matter which a judge has seen but to which counsel could not refer and on which counsel had no opportunity to comment*."[256] However, the courts departed from this position and took a purposive approach to interpretation by ruling that Hansard may be referred to in legislative interpretation.[257]

Regarding the purposive approach, Lord Griffiths held that: "*The days have passed*

[250] Michael Woods and Richard Macrory, 'Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach'(Centre for Law and the Environment University College London 2003) p.28.
[251] Hansard is the official report of all parliamentary debates. It is named after Thomas Curson Hansard, a London printer and publisher, who was the first official printer to the Parliament at Westminster.
[252] *Davis* v *Johnson* [1978] 2 WLR 553 House of Lords.
[253] *ibid*. at 277.
[254] *ibid*. at 278.
[255] *ibid*.
[256] *ibid*. at 279.
[257] *Pepper* v *Hart* [1992] 3 WLR House of Lords.

when the courts adopted a literal approach. The courts use a purposive approach, which seeks to give effect to the purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."[258] Similarly, Lord Browne Wilkinson on reference to Hansard adduced:[259] "*My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament as at present, I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria*."

It therefore entails that under common law, in the utilisation of strict liability provisions, credence could be given to the parliamentary intentions behind the enactment of the strict liability provisions. This reduces the ambiguity in the strict liability provision. It therefore entails that such provisions could be examined in the light of other surrounding legislative documents relating to the provision. This view is however, contradicted in Nigerian law. Section 3(3) of the Nigerian Interpretation Act 1964 stipulates that "*Words in an enactment descriptive of another enactment shall not be used as an aid to the construction and interpretation of the other enactment and are intended for convenience of reference only*." In effect, such parliamentary materials that are extraneous to an enactment sought to be interpreted cannot be utilised to give purpose to the enactment.

[258] *ibid*. at 1032.
[259] *ibid*.

However, other writers have argued that the application of strict liability will make companies and their officers take more care in their actions understanding that their liability will simply be established by virtue of proof of their committing the criminal offence.[260] Hence the understanding that a strict liability regime will make their conviction easier could make companies more environmentally accountable for their actions.

2.8.2 Criminal Liability of the Nigerian Polluter

Based on the wordings of the criminal liability of environmental offenders under the Nigerian environmental criminal legislation discussed in section 2.7, it can be observed that the Nigerian environmental criminal regime predominantly imposes strict liability for the environmental offences they prohibit. Indeed, it is also observed that is only the Petroleum Production and Distribution (Anti Sabotage) Act that requires a proof of intention to be established under its offence.[261] Hence the elements of environmental crime stipulated under relevant laws relating to the Nigerian oil and gas industry are intention and strict liability. Hence, while the elements of criminal liability discussed above are all important paradigms to the development of criminal law, this study will subsequently limit its concentration to the criminal liability of a Nigerian environmental violator in line with existing environmental criminal provisions in the Nigerian regime discussed above. The elements of criminal liability for environmental violation in Nigeria include:

i) Intention

Subject to Section 24 of the Nigerian Criminal Code Act (CCA),[262] some wrongful acts can only be deemed offences after a wrongful party has intentionally committed an offence. In line with this, some relevant statutory instruments under Nigerian environmental criminal law have provided the requirement of intent in criminal offences. According to Okonkwo and Naish, the provision of a Nigerian criminal statute requiring a determination of intention must be worded in a way that the requirement of intention would be clearly shown under the criminal

[260] Cyrus CY Chu and Yingyi Qian, 'Vicarious Liability under a Negligence Rule' (1995) 15 International Review of Law and Economics 305.
[261] This is set out by the use of the term ‘intentionally’ as mentioned above.
[262] Criminal Code Act Chapters 77 Laws of the Federation of Nigeria 1990.

provision.[263] For example, most of the criminal provisions in the CCA requiring intent would phrase their provisions for the commission of offence as 'knowingly'; 'intentionally' or 'with the intent to' committing the offence. For example, Section 244(2) of the CCA stipulates that anyone who "*knowingly sells the whole or part of the carcass of any animal which has died of any disease, or which was diseased when slaughtered*" is guilty of an offence. Similarly, Section 332 of the CCA stipulates that: "*any person who, with intent to maim, disfigure or disable, any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person" is guilty of an offence*.

This study discovered that the only known environmental criminal provision in the Nigerian regime that stipulates the requirement of intent to determine liability in pollution crimes is the Petroleum Production and Distribution (Anti Sabotage) Act which provides that for the sabotage act of a third party polluter to be considered criminal, it has to be a wilful action of the third party.[264] This is relevant considering the allegation that has been made by operators like the SPDC that most pollution at their facilities is caused by the sabotage and vandalism of oil pipelines by other third parties from the Niger Delta region.[265]

ii) Strict Liability under the Nigerian Environmental Criminal Regime

Akpotaire observed that several environmental offences existing within the Nigerian regime are treated purely as strict liability offences.[266] For example, Section 245 of the CCA stipulates that: "*any person who corrupts or fouls the water of any spring, stream, well, tank, reservoir, or place, so as to render it less fit for the purpose for which it is ordinarily used, is guilty of a misdemeanour, and*

[263] Cyprian O Okonkwo and Michael E Naish, *Okonkwo and Naish on Criminal Law in Nigeria* (2nd edn, Sweet and Maxwell 1980) p.67.
[264] This is stipulated in Section 1 of the Act.
[265] Peter C Nwilo and Olusegun Badejo, 'Oil Spill Problems and Management in the Niger Delta' (2005) 15 International Oil Spill Conference Proceedings 567-570; Royal Dutch Shell, 'Shell Sustainability Report 2016' (Royal Dutch Shell 2016) <http://reports.shell.com/sustainability-report/2016/managing-operations/our-activities-in-nigeria/spill-prevention-and-response.html>accessed 7 March 2019.
[266] Vincent Akpotaire, 'Strict Liability and The Nigerian Criminal Codes: A Review' (*Nigerianlawguru.com*) <http://nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW.pdf> accessed 12 March 2019.

is liable to imprisonment for six months."[267] This provision (just like most other criminal provisions in Nigerian environmental law) is a strict liability offence requiring no other element of crime to constitute an offence. This is backed up by the evidence shown in section 2.7 above whereby most of the environmental criminal provisions regulating the oil and gas are strict liability in nature. As can be observed in most such provisions, the phrases used in the prohibition of the offences and imposing of sanctions do not denote intention or negligence or even recklessness as would be other instruments that have provided for either of these other elements. They simply criminalise the offence by virtue of the offence being committed and impose sanctions. In the UK, a popular phrasing that can be found in several strict liability environmental provisions is 'caused the'. An example is Section 3 of the Prevention of Oil Pollution Act 1971 which provides that an offender who 'causes' oil pollution by the discharge of oil from a pipeline or during exploration is guilty of a crime and is liable to a fine of up to £50,000.

Indeed, there would be no need for this study if having determined statutory provision on the criminal liability of a Nigerian violator of environmental standards, there is no actual record of violation identified. In line with this, this study will seek to identify instances of alleged violations that have occurred in the upstream sector of the Nigerian oil and gas industry. As has been earlier mentioned in chapter 1, significant attention will be given to such violations as it relates to developments in the onshore areas of Nigeria. This evidence will establish a justification for the determination of deficiencies that might have contributed to such violations.

[267] Ikenga KE Oraegbunam and Julian NK Chukwukelu, 'Section 24 of the Criminal Code and its Effect on Criminal Liability in Nigeria' (2015) 3(1) Journal of Law and Criminal Justice 130.

Chapter Three

Alleged Violations of Environmental Standards in the Nigerian Oil and Gas Industry

3.0 Synopsis

In section 2.7 above, this study has identified environmental standards established under the Nigerian environmental regime to regulate the oil and gas industry. The study also identified complementary criminal provisions established under the relevant statutes to criminalise violation of the standards as environmental offences and provide penalties for offenders. The study also observed enforcement agencies that have been established in the regime to implement the standards on the regulated oil and gas companies. The issue therefore remains whether the standards have been complied with in the oil and gas industry. If there is actually a violation, there is a question as to whether the violation is significant, extensive or not. A determination of this will help determine whether the prohibition of the criminal violations by the sanctions has reduced such violations and whether the enforcement agencies have actually carried out their enforcement roles, or not. This study will mainly utilise information from Amnesty International reports as data for this chapter. Recently, NGO Monitor was quoted as asserting that "*Amnesty International is perhaps the most prestigious international non-governmental organization (NGO) dedicated to furthering human rights. Amnesty's campaigns and publications are quoted by political leaders, journalists, diplomats, and academics*."[1]

3.1 Oil Spills and Gaseous Emissions

This study has discussed an overview of some such pollution in the oil and gas industry as an instance of the violation. This section will further discuss this violation and the challenges it has portended to the inhabitants of the Niger Delta.

[1] NGO Monitor, 'Amnesty International' (NGO Monitor 2015) <https://www.ngo-monitor.org/books/amnesty_internationalcorruption_and_anti_israel_bias/> accessed 17 January 2020.

Based on a study carried out by Gbadebo and others, it was discovered that a significant quantity of exploratory waste (in the form of drilling muds and cuttings) was generated from the Igbokoda onshore oil wells operated by the SPDC.[2] The waste contained levels of total hydrocarbon (TPH), aliphatic hydrocarbon (AH), polycyclic aromatic hydrocarbon (PAH) that were higher than the standard set by the DPR for those wells.[3] According to them, although the drilling muds were primarily disposed of in reserve pits, most of the waste got into adjacent soil and water bodies during precipitation and run-off.[4] It was even reported that on some occasions, the oil waste were deposited directly on lands meant for farming[5] and such waste were often difficult to clean up.[6] This is only one such example of the waste pollution that has been discharged by the oil industry in the Niger Delta region.[7] To this effect, the EGASPIN has summarised most of the oil and gas wastes that occur during the E&P stages of Nigeria's oil and gas operations to include: *spent drilling fluid/wastes, well treatment wastes, drill cuttings, oil/product/chemical spillage and leaks, oil/hydrocarbon product sludge/debris/scales, organic sludge/residue (sanitary wastes), spent oil/catalyst, produced sand/formation water, garbage and gaseous emission*."[8]

There have also been incidents of significant oil spills and well blowouts in the onshore areas of the region. For instance, Bodo West suffered two major oil spills from SPDC's pipelines between 2008 and 2009.[9] The volume of oil waste discharged during both oil spills has been estimated to almost equal the Exxon Valdez spill in Alaska in 1989.[10] Although some of these pollution incidents have been mentioned in section 1.0 of the introductory chapter, some other incidents

[2] Gbadejo M Adeleke and others, 'Environmental Impacts of Drilling Mud and Cutting Wastes from the Igbokoda Onshore Oil Wells, South-western Nigeria' (2010) 3 Indian Journal of Science and Technology 504.
[3] *ibid*.
[4] *ibid*.
[5] Neal E. Thurber, 'Waste Minimization for Land-Based Drilling Operations' (1992) 44 Journal of Petroleum Technology 542-547.
[6] Gbadejo M Adeleke and others (n.2).
[7] Ibama Brown and Eyenghe Tari, 'An Evaluation of the Effects of Petroleum Exploration and Production Activities on the Social Environment in Ogoni Land, Nigeria' (2015) 4 International Journal of Scientific Technology Research p.276.
[8] Part II-C (Exploration and Development Operations: Sources and Characteristics of Wastes) Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) Section 2.1.1.
[9] Amnesty International, 'The True 'Tragedy' Delays and Failures in Tackling Oil Spills in the Niger Delta' (Amnesty International 2009) <https://www.amnestyusa.org/files/afr440182011en.pdf> accessed 10 December 2018.
[10] *ibid*

of oil pollution that have occurred in the Niger Delta include: the then Royal Dutch Shell's Forcados Terminal storage tank failure in 1979 which caused a discharge of approximately 580,000 barrels of crude oil into Niger Delta lakes,[11] the 1980 Texaco Funiwa oil well blow-out of 1980 which caused a discharge of 421,000 barrels of crude oil into the Funiwa lake in the Niger Delta region,[12] the 1980 Oyakama pipeline spill which caused a discharge of 30, 000 barrels of crude oil on over 32 hectares of land in Oyakama in the Niger Delta,[13] the SPDC operated Abudu pipeline spill which caused a discharge of 5240 barrels of oil waste into the Abudu lands of the Niger Delta,[14] the 1986 SPDC operated Funiwa oil well blowout which caused a discharge of 200, 000 barrels of crude oil into over 350 hectares of mangrove in Funiwa, Niger Delta,[15] the SPDC operated Agoda Brass Oil Pipeline oil breakout in 1994 which caused an unascertained discharge of crude oil into over 10sq km of farmlands as well as polluted ponds and lakes around the Agoda area of the Niger Delta,[16] the 1998 Mobil Idoho spill which caused a discharge of 401, 000 barrels of crude oil offshore,[17] the 2003 SPDC Kwale oil well explosion, suspected to be as a result of poorly maintained facilities, which caused an unascertained discharge on several farmlands around the Kwale area,[18] the SPDC Kalabilema oil spill explosion in 2003 which caused an unascertained discharge of crude oil and inferno in the Kalabilema area as well as causing the death of five persons.[19]

The oil waste and crude oil discharged in the industry are clear violations of the environmental standards not to pollute embedded within legislation like the Oil in Navigable Waters Act and the Harmful Waste (Special Criminal Provisions etc.) Act described in chapter 2. Writers have argued that Nigerian oil pollution has negatively affected the Nigerian environment at a considerable rate and has also caused significant health harm to the inhabitants of the areas affected by the

[11] Godwin Eshagberi, 'The Effects of Oil Pollution on the Environment' (2012) 23 The Nigerian Academic Forum<http://www.globalacademicgroup.com/journals/the%20nigerian%20academic%20forum/THE%20EFFECTS%20OF%20OIL%20POLLUTION.pdf> accessed 7 March 2019.
[12] *ibid*.
[13] *ibid*.
[14] *ibid*.
[15] *ibid*.
[16] Godwin Eshagberi (n.11).
[17] *ibid*.
[18] *ibid*.
[19] *ibid*.

pollution.[20] For example, it is believed that in the affected areas of the Niger Delta, there has been poor plant growth[21] and reduced chances of plant survival.[22] This deficiency was caused by the fact that either the oil spills produced microbial organisms that competed with the plants for soil nutrients or suffocated them as a result of the exclusion of oxygen by the oil deposit.[23] Upon conducting a study in a contaminated area, Esurusuoso, Nwoboshi and Ogunwale discovered that crops like yam and cassava took 6-8 months to grow as against the usual 2-4 months.[24] Osuji, Erondu, and Oguli also discovered that the seeds of mangrove plants were suffocated as a result of the deprivation of oxygen by the oil deposits in the soil.[25] Eshagberi observed that a significant portion of the Niger Delta oil spill incidents have also affected fresh water habitats (including the mangroves, swamps, river, stream and lakes) in the region.[26]

Activities such as the dredging of canals for oil wells have contributed to this degradation of the fresh water environment.[27] Moreover, the fresh water habitat mainly serves as a source of drinking water for the Niger Delta inhabitants and also as a habitat for aquatic life.[28] The pollution of the body of water has not only denied the inhabitants their drinking water, but also denied the aquatic life their natural habitat.[29] Ejituwu argued that before the pollution incidents made it impossible, inhabitants used to easily gather crabs, oysters, cockles and periwinkles from the roots of the mangrove.[30] Omoweh also observed that cat fish, manatee, electric fish, hippopotami and sharks were fast becoming extinct in the

[20] Gbadebo O Odularu, 'Crude Oil and the Nigerian Economic Performance' [2008] Oil and Gas Business <http://www.ogbus.ru/eng/authors/odularo/odularo_1.pdf> accessed 28 December 2018.
[21] Essien J Udo and Adeboyejo A Fayemi, 'The Effect of Oil Pollution of Soil on Germination, Growth and Nutrient Uptake of Corn1' (1975) 4 Journal of Environment Quality 537-540.
[22] Akuro Adoki and Token Orugbani, 'Influence of Nitrogenous Fertilizer Plant Effluents On Growth of Selected Farm Crops in Soils Polluted with Crude Gasoline Hydrocarbons' (2019) 2 African Journal of Agricultural Research 569-573.
[23] *ibid.*
[24] Godwin Eshagberi (n.11).
[25] Leo C. Osuji, Ebere S. Erondu and Regina E. Ogali, 'Upstream Petroleum Degradation of Mangroves and Intertidal Shores: The Niger Delta Experience' (2010) 7 Chemistry & Biodiversity 116-128.
[26] Godwin Eshagberi (n.11).
[27] Elijah Ohimain, Tunde Imoobe and Dorcas Bawo, 'Changes in Water Physico-Chemical Properties Following the Dredging of an Oil Well Access Canal in the Niger Delta' (2019) 4 World Journal of Agricultural Science 757.
[28] Donald Mackay and others, 'Development and Calibration of an Oil Spill Behaviour Model' (US Coast Guard Research and Development Centre 1982) <https://apps.dtic.mil/dtic/tr/fulltext/u2/a133693.pdf> accessed 8 March 2019.
[29] *ibid*.
[30] Nkparom Ejitiwu, 'Andoni Women in Time Perspective', in NkparomEjitiwu and A. Gabriel, *Women in Nigerian History: The Rivers and Bayelsa States Experience* (Onyoma Research Publications 2003) p.56.

Niger Delta.[31] It has even been asserted that the decimation of marine life has recently extended to edible frogs, iguana and crayfish.[32] This is interesting, considering that the Niger Delta inhabitants (especially in the Ogoni area) are predominantly farmers and fishers.[33] Jemimah and Ike argued that the inhabitants of the region not only feed on the crops and the marine organisms, but also sell them for a livelihood.[34] Hence, the pollution has not only denied the inhabitants their drinking water source, but also their food and revenue.

A major part of the discussion on gas flaring in this study has been done in the literature review section of this study.[35] It is therefore valid to regard gas flaring in Nigeria as a major upstream pollution in the Niger Delta.[36] According to an Oil Producing and Exporting Countries (OPEC) report, Nigeria produced an estimated total of 22.8 billion barrels of crude oil between 1958 and 2003 (and in this production ratio, an average of 22.8 trillion cubic feet was flared).[37] The continued gas flaring is in violation of the standard to cease flaring stipulated under the Associated Gas Re–Injection Act discussed in chapter 2 above. Indeed, there have been reports that gas facilities (such as the SPDC's Bille and Bormu sites) are located very close to residential areas.[38] The United Nations Environment Programme (UNEP) observed that most facilities in the Niger Delta are situated in the residential areas with many families living close to such facilities.[39] UNEP have suggested the lack of clarity as to whether the residences were set up before or after the installations were established.[40] There have therefore been reports that

[31] Daniel Omoweh, 'Shell and Land Crisis in Rural: A Case Study of the Isoko Oil Areas' (1998) 17 Scandinavian Journal of Development Alternatives and Area Studies 26.
[32] *ibid*.
[33] Michael Ikehi and Julie Zimoghen, 'Impacts of Climate Change on Fishing and Fish Farming in the Niger Delta Region of Nigeria' (2017) 3(1) Direct Research Journal of Agricultural and Food Science 2.
[34] Ekanem Jemimah and Nwachukwu Ike, 'Sustainable Agricultural Production in Degraded Oil Producing and Conflict Prone Communities of Niger Delta, Nigeria' (2015) 8 Journal of Agriculture and Sustainability 15.
[35] The literature review section can be found in chapter 1.
[36] Oyelara-Oyeyinka Banji and Antonia T Okoosi, 'Conflict and Environmental Change: Response of Indigenous Peoples to Oil Exploration in the Nigeria's Delta Basin' *Conference on Environment and Development in Africa* (1995) pp.14-16.
[37] Nelson Takon, 'Environmental Damage Arising from Oil Operations in Niger Delta of Nigeria: How Not to Continually Live with Their Specific Impact on Population and Ecology' (2014) 3(9) International Journal of Development and Sustainability 1881.
[38] Jerome Nriagu and others, 'Health Risks Associated with Oil Pollution in the Niger Delta, Nigeria' (2016) 13 International Journal of Environmental Research and Public Health 346; Emmanuel A Ajao and Sam Anurigwo, 'Land-Based Sources of Pollution in the Niger Delta, Nigeria' (2002) 31 AMBIO: A Journal of the Human Environment 442.
[39] United Nations Environment Programme (UNEP), 'Environmental Assessment of Ogoniland' (United Nations Environmental Programme 2011) p.96.
[40] *ibid*.

gas flaring operations cause high ambient noise pollution which has often caused harsh psychological and physiological effects on victims living in such areas of the Niger Delta.[41] This is in clear violation of the standard to maintain a calm environment stipulated in the National Governmental (Noise standards and Control) Regulations.

A writer expressed the view that the loud noise from oil and gas activities in the region (such as gas flaring) is slowly making residents of such areas deaf.[42] In any case, even relatively low levels of noise affect human health adversely.[43] This is because such low noise could cause hypertension and hinder cognitive development in children.[44] This necessitates wondering what greater effects excessive noise would have on human health considering that it has been alleged to cause permanent loss of memory or psychiatric disorder.[45] Medical jurisprudence has found loud noise pollution to be a slow and subtle killer.[46] It is therefore, implied that noise pollution (regardless of whether it is loud or low) could cause environmental harm.

3.2 Failure of Operators to Properly Decommission Disused Facilities

As has been discussed above, decommissioning is an important aspect of the prevention principle towards preventing potential pollution that could arise from disused facilities. The processes involved in decommissioning have also been discussed. At present, the Nigerian offshore oil and gas industry has not reached the maturity seen in the Gulf of Mexico and the North Sea, hence, its fields are still in their productive phase.[47] Therefore, no decommissioning of offshore

[41] Layi Egunjobi, 'Urban Environmental Noise Pollution in Nigeria' (1986) 10(3) Habitat International 238.
[42] Soni-Ehi Asuelimen, 'The Challenge of Noise to Public Health' *The Guardian Newspaper* (1984) p.9.
[43] Vincent Kieran, 'Noise Pollution Robs Kids of Language Skills' [1997] New Scientist<https://www.newscientist.com/article/mg15420810-300-noise-pollution-robs-kids-of-language-skills/> accessed 10 December 2018.
[44] Narendra Singh and S C Davar, 'Noise Pollution- Sources, Effects and Control' (2004) 16(3) Journal of Human Ecology 182.
[45] Michael Bond, 'Plagued by Noise' [1996] New Scientist<https://www.newscientist.com/article/mg15220562-200-plagued-by-noise/> accessed 10 December 2018.
[46] Narendra Singh and S C Davar (n.44).
[47] Ayoade M Adedayo, 'Environmental Risk and Decommissioning of Offshore Oil Platforms in Nigeria' (2011) 1 NIALS Journal of Environmental Law 2.

structures has taken place.[48] It is however reported that some oil and gas operators in Nigeria have failed to decommission onshore facilities in the Niger Delta region.[49] This is in clear violation of Part VIII-A (Decommissioning of Oil & Gas Facilities) of the EGASPIN discussed above. For example, it has been reported that when Shell left the Ogoni area of the Niger Delta (where most of their facilities are located), many such facilities were not properly decommissioned and made safe.[50] This is despite the fact that it has been more than 18 years since Shell ceased operations in Ogoni.[51] SPDC has internal guidelines on 'Well and Field Assets Abandonment Standards and Strategy.'[52] However, the process of decommissioning has been rather complex in the Ogoni area.[53] This is because the SPDC left most of the oilfields in the area in an abrupt and unplanned manner, as a result of the security challenges in the region.[54] As a result, subsequent decisions were taken to abandon other facilities.[55] This was in clear violation of Part VIII-A (Decommissioning of Oil & Gas Facilities) Section 2.1.1 and 2.4 of the EGASPIN and Regulation 36(1) of the Petroleum (Drilling and Production) Regulations discussed above.

Upon investigation, the United Nations Environmental Programme (UNEP) discovered that while the SPDC database shows a number of such assets as 'abandoned' or 'decommissioned', the way in which such facilities were left in a hurry contravened decommissioning standards in the EGASPIN.[56] This is because UNEP observed oilfield assets which had evidently been abandoned in a scattered manner.[57] Such assets vary from oil pipelines left open and lying in trenches (possibly abandoned midway through pipe laying operations), to oil facilities left

[48] *ibid*.
[49] Stakeholder Democracy Network, 'White Paper on Sustainable Closure and Decommissioning of Oil and Gas Assets in Nigeria' (Stakeholder Democracy Network 2015) <https://www.stakeholderdemocracy.org/wp-content/uploads/2016/06/Sustainable-Closure-and-Decommissioning-of-Oil-and-Gas-Assets-in-Nigeria.pdf> accessed 31 August 2019.
[50] Amnesty International, 'Memorandum: Amnesty International's Concerns Regarding Shell's Response to The United Nations Environment Programme Report, Environmental Assessment of Ogoniland' (Amnesty International 2012) <https://www.amnesty.org/download/Documents/16000/afr440082012en.pdf> accessed 5 October 2019.
[51] Amnesty International, 'No Progress: An Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoniland, Three Years On' (Amnesty International 2014) p.3.
[52] UNEP (n.39) pp.99-100.
[53] *ibid*.
[54] *ibid*.
[55] *ibid*.
[56] The standard has been previously discussed in section 2.8.9 of this study.
[57] United Nations Environment Programme (n.39) pp.99-100.

standing but without subsequent maintenance.[58] This action contravenes the provision of Regulations 35 of the Petroleum (Drilling and Production) Regulations (mentioned above) which requires an oil company to obtain a prior permit for abandonment of wells. Even more, such action violates the standard stipulated in Section 1 of the Harmful Waste (Special Criminal Provisions, etc.) Act prohibiting the dumping of solid, semi-solid or liquid harmful waste in the Nigerian Exclusive Economic Zone. While oil and gas structures have not been specifically mentioned, 'harmful waste' has been described as toxic substances such as the radioactive substances found in deactivated installations.[59]

The UNEP further noted that the improperly abandoned assets constitute environmental and safety risks.[60] One important reason to decommission is that no matter how used up an oil and gas field might seem, there will always be residual hydrocarbons left under-surface.[61] Unless made safe underground, such residual substance might emit to the surface and pollute the surrounding land (soil sediments) and water bodies.[62] Concerning this, the UNEP have observed the lack of any indication that the several container like metallic objects lying around the area are full or empty, or what they contain(ed).[63] Moreover, their other argument has been that corrosion of such metallic objects results in ground contamination.[64] Moreover, the uncontrolled abandonment of the facilities have left them vulnerable to accidental or deliberate tampering.[65] This contravenes the requirement that Shell exercises adequate due diligence towards preventing any third-party interference with their facilities considering the associated environmental risk.[66] Attempts by criminal vandals to recover parts of such metals for sale as scrap could result in further environmental and health risks.[67]

[58] *ibid*.
[59] Ayoade M Adedayo (n.47) p.12.
[60] UNEP (n.39).
[61] Stakeholder Democracy Network (n.49).
[62] *ibid*.
[63] UNEP (n.39).
[64] *ibid*.
[65] Amnesty International (n.51).
[66] *ibid*.
[67] UNEP (n.39).

Shell has excused their inability to properly decommission because of lack of access to the areas of the Niger Delta where they have installations.[68] This excuse has been refuted by Amnesty International who insisted that while access may have been sometimes denied in Ogoniland, Shell has had access to the area.[69] Moreover, 18 years (with the possibility that it has lasted more) has been more than enough time to make safe the area.[70] Amnesty International's research has shown that such claims to lack of access are incredible and do not stand up to interrogation.[71]

This study noted that the EGASPIN mandates that sanctions be imposed on offenders. It has also been observed that the EGASPIN empowers the Minister of State under the Nigerian government to revoke the licence of operators that fail to decommission. This study therefore wonders why no sanction has been found to be imposed for the violations nor any licence of defaulting operators revoked considering that operators such as Shell found to have defaulted is still very active in the Nigerian oil and gas industry.[72] This study believes that this has enhanced the crass manner in which this violation has occurred. In chapter 4, the study shall identify deficiencies that might have contributed to the inability of the Nigerian government to revoke the licences of some companies such as Shell, found to be guilty of this violation.

3.3 Failure to Conduct EIA and Submit Report

As can be seen in chapter 2, the Nigerian EIA Act has stipulated standards requiring companies to conduct and submit reports on impact assessments for their proposed developments to determine the potential environmental risk. The Act also required the FME to deny violating companies an Impact Assessment Certificate (IAC) permitting their operations. In contravention of this, some

[68] Royal Dutch Shell, 'SPDC Action on Matters Addressed in The UNEP Report' (Royal Dutch Shell 2012) <https://www.business-humanrights.org/en/amnesty-intl-memorandum-on-shells-activities-in-niger-delta-alleged-failure-to-respect-human-rights-the-environment-0#c64311> accessed 5 October 2019.
[69] Amnesty International (n.50).
[70] Amnesty International (n.51).
[71] Amnesty International (n.50).
[72] Kerry Gilblom, 'Shell Tries to Come Clean On Its Dirty Past in Nigeria' (Bloomberg Businessweek 2018) <https://www.bloomberg.com/news/articles/2018-09-28/shell-tries-to-come-clean-on-its-dirty-past-in-nigeria> accessed 4 November 2019.

companies have clearly violated this standard. There have been circumstances whereby fake EIA reports have been submitted and the FME failed to investigate further or detect the fake report.[73] Moreover, it has been reported that there have been times when the FME permitted the commencement of projects, even when EIA has not been conducted or a report submitted.[74] In 1993, the Oil Mineral Producing Area Development Commission (OMPADEC) produced a report confirming the degradation of the Niger Delta environment.[75] A major instance cited in the report was the destruction of aquatic life in the Gbaran community of Bayelsa state, as a result of blocked natural drainage.[76] The blocked drainage was caused by an unregulated construction of oil field roads by Wilbros Eng. Ltd (a company contracted by SPDC to construct oil field roads in the Gbaran community) without first conducting and submitting an EIA on the environmental implications of the construction.[77] This study argues that this is clear violation of the standard requiring that EIA reports be submitted for all such projects by the company.

Even when impact assessments have been carried out, such processes have not complied with the detailed procedure laid down in the Section 7 of the EIA Act regarding consultation.[78] An instance of such an occurrence involved a notorious dispute between the FME and some coastal towns along the Imo River.[79] The Nigerian government awarded a contract for dredging the river to facilitate vehicular access to the aluminium smelting factory at Ikot Abasi.[80] However, most communities along the river (which the construction will pass through) protested against the project on the grounds that they were not consulted in the approval of the EIA report and that the contents of the report showed certain processes in

[73] Aloni Clinton and others, 'The Importance of Stakeholders Involvement in Environmental Impact Assessment' (2015) 5(5) Academic Publishing 148.
[74] Frank Ikpefan, 'Fed Govt to Sanction Companies with Fake EIA Certificate' *The Nation* (2015) <http://thenationonlineng.net/fed-govt-to-sanction-companies-with-fake-eia-certificate/> accessed 15 December 2018.
[75] Terry Andrews Odisu, 'The Nigerian State, Oil Multinationals and the Environment: A Case Study of Shell Petroleum Development Company (SPDC)' (2015) 7 Journal of Public Administration and Policy Research <https://www.grin.com/document/334514> accessed 10 December 2018.
[76] *ibid*.
[77] *ibid*.
[78] Onyenekenwa Cyprian Eneh, 'Managing Nigeria's Environment: The Unresolved Issues' (2011) 4 Journal of Environmental Science and Technology 259.
[79] Ifeanyi, Anago, 'Environmental Impact Assessment as a Tool for Sustainable Development: The Nigerian Experience *'Proceedings of the FIG XXII International Congress, Washington, D.C. USA* (April 19-26, 2002) p.13.
[80] *ibid*.

the course of the project that would cause environmental harm to their communities.[81] Interestingly, even before the protest, the report had already been certified by the FME and the project commenced.[82]This study argues that this is not surprising considering that the EIA Act fails to establish any sanction for an authorisation based on an improperly conducted EIA. This study believes that such a *lacuna* is an easy escape route for this violation to continue unless corrected.

Indeed, this study is of the view that the existing criminal sanctions have obviously failed to prevent these violations of full compliance with EIA requirements in line with the EIA Act. The study will discover reasons that might have facilitated the inadequacies of the sanctions in chapter 4.

3.4 Failure of Oil Companies to Give Accurate Report on Oil Spills

Every year, there are hundreds of oil spills in the Niger Delta, caused by obsolete and faulty pipelines or criminal activity such as oil facilities sabotage.[83] These spills degrade the Niger Delta environment, contaminate the drinking water and expose the inhabitants to serious health risks.[84] However, it has been asserted that operators such as the SPDC have repeatedly failed to report such oil spills resulting in an inaccurate record of the number of oil spills from most such facilities in Nigeria.[85] This is in direct contravention of PART III (Production Operations) Section 7.1.1 of the EGASPIN and Section 6 (1) (b) of the NOSDRA described in chapter 2 above. This study will utilise Figure 2.0 below to better explain this failure.

Figure 1.0: The Number of Oil Spills by Onshore Operators as Recorded by NOSDRA

Year	Agip on NOSDRA database	Shell on NOSDRA Database	Shell on Shell's Website	Total E&P on	Overall NOSDRA record/Overall

[81] *ibid*.
[82] *ibid*.
[83] Amnesty International, 'Clean it Up: Shell's False Claims about Oil Spill Response in the Niger Delta' (Amnesty International 2015) p.4.
[84] This has been discussed in section 3.0 in this study.
[85] Amnesty International, 'Bad Information on Oil Spill Investigations in the Niger Delta' (Amnesty International 2013) p.11.

				NOSDRA Database	Companies Records of Spills
2007	180	171	320	3	354/503
2008	235	95	210	3	333/448
2009	258	118	190	2	378/450
2010	323	188	170	1	512/494
2011	400	207	207	1	608
2012	474	207	192	7	688/673
2013 to end September	471	138	138	-	
Overall	2341	1124	1427	17	

Source: Amnesty International, 'Bad Information on Oil Spill Investigations in the Niger Delta' (Amnesty International 2013) p.10.

According to Amnesty International, the statistics gathered in Figure 2.0 were generated from the NOSDRA, Shell's database and Agip's database after repeated refused requests.[86] From the Figure, one can clearly observe a discrepancy in the reports concerning the number of onshore oil spills that have occurred in the Niger Delta. While NOSDRA has fewer oil spills recorded for Shell in 2007 (171) and 2009 (118), Shell has more spills reported on their database as 320 in 2007 and 190 in 2009. Moreover, from the records, it is also evident that NOSDRA has a lower total record of oil spills than the oil companies put together. For instance, while NOSDRA has a total record of 378 oil spills in 2009 recorded for Agip, Shell and Total, the companies have a total record of 450. Interestingly, Amnesty International claims that it shared the NOSDRA records with Agip who maintained that the records were grossly inaccurate as they have significantly fewer operations and a lower production ratio in the Niger Delta than Shell.[87]

Moreover, on a similar note, it has been recorded separately, that even Royal Dutch Shell has given different details of the number of oil spills from Shell's facilities in the Niger Delta as against its subsidiary, the SPDC.[88] For example,

[86] *ibid*.
[87] *ibid*.
[88] *ibid*.

while the Royal Dutch Shell Sustainability reports recorded 182 spills in 2011 and 173 spills in 2012, the SPDC recorded 207 spills in 2011 and 192 spills in 2012.[89] This shows that for companies like Shell, the inaccuracy even starts from within the company. There have been attempts to estimate the number of spills and the volume of oil spilt in the onshore and offshore areas of Nigeria since the inception of oil and gas operations.[90] For example, the company's report of a spill in the Bodo community of the Niger Delta in 2008 claimed that only 1,640 barrels of oil were spilled.[91] However, based on an independent assessment published by US firm Accufacts Inc., Amnesty International calculated the total volume to exceed 100,000 barrels.[92] This is not surprising considering that upon obtaining an independent assessment in April 2012, they discovered that the reported volume was only counted from 5th October 2008, which was 72 days after the spill had already begun.[93] This contradicted the information NOSDRA and the DPR already had that the spill commenced on the 28th of August.[94] While believed to be grossly less than the actual figure,[95] it is approximated there have been over 10,000 spills in Nigeria since the late 1950's.[96] Furthermore, upon available data, some independent oil and gas environmental experts estimated 9 to 13 million barrels of crude oil to have been spilt in the onshore and offshore areas of Nigeria between 1958 and 2009.[97] It is therefore evident that the oil spill data reporting in the Niger Delta is inaccurate, unreliable and needing detailed investigation.

Most such oil and gas operators have reported their pollution to be as a result of the sabotage and bunkering activities of third parties.[98] This is the illegal tapping of the infrastructure on oil and gas facilities so as to procure oil illegally.[99] For

[89] *ibid*.
[90] *ibid*. p.12.
[91] *ibid*. p.45.
[92] *ibid*. pp.49-53.
[93] *ibid*.
[94] *ibid*. p.47.
[95] *ibid*.
[96] *ibid*.
[97] Nigerian Conservation Foundation, WWF UK and International Union for Conservation of Nature, Commission on Environmental, Economic and Social Policy, with Federal Ministry of Environment 'Niger Delta Natural Resources Damage Assessment and Restoration Project:Phase I Scoping Report ' (Federal Ministry of Environment 2006) <http://www.ipsnews.net/topics/niger-delta-natural-resource-damage-assessment-and-restoration-project/>accessed 5 October 2019.
[98] Amnesty International, 'Niger Delta: Shell's Manifestly False Claims about Oil Pollution Exposed, Again' (Amnesty International 2015) <https://www.amnesty.org/en/latest/news/2015/11/shell-false-claims-about-oil-pollution-exposed/> accessed 8 August 2019.
[99] UNEP (n.39) p.101.

example, it is noteworthy that some abandoned SPDC oil wells are located in the Ogoni creeks.[100] Such wells still contain oil and are self-flowing, hence once such third parties illegally operate the well valves, crude oil (along with gas and water) can be produced.[101] On one of its visits, the UNEP assessment team claimed to observe some third parties tapping into the defunct wells and transferring oil from such wells.[102] Furthermore, the SPDC and NNPC still have crude oil pipelines transporting oil through the lands in the Ogoni area.[103] There have been reports of such pipelines being tapped illegally often resulting in oil spills.[104] These observations signify that there are existing incidents of oil facilities sabotage occurring in the Niger Delta. Such oil pipeline sabotage causes significant oil spill pollution of the surrounding areas in which the pipelines are located.[105] Such sabotage is in direct contravention of the provision stipulated in Section 1 of the Petroleum Production and Distribution (Anti Sabotage) Act as highlighted in chapter 2.

Furthermore, it has been reported that on some occasions, when such third parties have bunkered the oil and gas facilities,[106] they illegally refine the hydrocarbon using very crude means which usually result in infernos and the emission of toxic gases causing harm to both the environment and public health.[107] However, this study argues that blame for such sabotage goes back to the companies, as the third-party actions are a result of their inability to exercise due diligence in protecting their facilities from illegal sabotage acts. For example, this study argues that if most of the disused facilities were decommissioned properly in line with the regulatory standard, there would not even be a reason for most such sabotage acts to have occurred.

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[100] *ibid.*
[101] *ibid.*
[102] *ibid.*
[103] *ibid.*
[104] *ibid.*
[105] Augustine Ikelegbe, 'The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria' (2005) 14(2) Nordic Journal of African Studies 209, 221.
[106] Drew Hinshaw and Sarah Kent, 'Niger Delta Avengers' Sabotage Oil Output' [2016] Wall Street Journal <https://www.wsj.com/articles/niger-delta-avengers-sabotage-oil-output-1465165361> accessed 10 December 2018.
[107] Shell Nigeria, 'Security, Theft, Sabotage and Spills' (Shell Nigeria 2017) <http://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/security-theft-and-sabotage.html> accessed 10 December 2018.

This study further argues that if most such facilities are not laid on the topsoil of farmlands in the Ogoni areas, it might be difficult for such third parties to illegally access the pipelines as easily as they do currently in the region. This is in line with the record of pollution in the region discussed in this study. This is also a confirmation of an existing observation made by Professor Richard Steiner in relation to oil pollution in the USA and Nigeria.[108] He considered the Niger Delta a High Consequence Area (HCA) for oil spills due to the susceptibility to facilities sabotage by third parties.[109] By virtue of being an HCA, the Niger Delta should require additional risk reduction measures from oil companies in line with US Integrity Management standards codified in the API and considered international good oil field practice.[110]

Moreover, as has been observed in this study, the standard has been embedded within Regulation 7 of the Mineral Oil (Safety) Regulations, hence required of operators statutorily.[111] By domesticating the API guideline in the Mineral Oil (Safety) Regulations, there is a requirement for operators like the SPDC to adopt sabotage prevention measures such as: securing sabotage resistant pipe specifications, thicker walled pipe, higher grade steel, adopting pipe-bundle technology, laying pipelines in areas distant from HCAs, burying pipelines deeply underground, casing the pipelines solidly with cement concrete, rigorous and frequent inspections, and decommissioning disused facilities properly.[112]

The issue remains how this violation has continued despite its prohibition under the NOSDRA (Establishment) Act and the sanctions stipulated in the Act to penalise it. This study believes that its alleged persistence is evidence of the inability of the existing sanctions in the Act to compel companies in the industry to report their pollution. This necessitates the question as to deficiencies in the sanctions that might have contributed to the inadequacy of the sanction in achieving this purpose. This will be discussed in chapter 4. Furthermore, although Amnesty argued the failure of oil and gas companies to present accurate records

[108] Richard Steiner, 'Double Standard: Shell Practices in Nigeria Compared with International Standards to Prevent and Control Pipeline Oil Spills and the Deepwater Horizon Oil Spill' (Milieu Defensie: Report on Behalf of Friends of the Earth 2010) p.35.
[109] *ibid*.
[110] Amnesty International (n.85) p.54.
[111] Richard Steiner (n.108).
[112] Amnesty International (n.85) p.54.

of their oil spills, this study argues that even if the companies do not report the spills, the NOSDRA (Establishment) Act has clearly stipulated a requirement for NOSDRA to investigate the oil spills. In effect, NOSDRA is accountable for its failure to investigate the spills in line with statutory provision. This study therefore wonders how violators of the standard to report oil spills can be sanctioned if the enforcement agencies themselves are not even aware of the number of spills that have occurred.

3.5 Failure to Clean-Up Affected Sites and Remediate Oil Spills

Pursuant to Part VIII-B (Contingency Planning for the Prevention, Control and Combating of Oil and Hazardous Substances Spills) Section 2.6.3 of the EGASPIN, oil spill clean-up and remediation is the responsibility of the oil company on whose facility an oil spill occurred. Amnesty International however, pointed out that some oil and gas companies such as Shell have a limited concept as to what clean-up and remediation should be.[113] It has been reported that on Shell's website, the statement on clean-up and remediation reads as follows: "*After the JIV, SPDC's spill response team makes the necessary repairs and recovers as much of the spilled oil as possible. This is called the clean-up*."[114] Amnesty International argued that this definition is a limited interpretation of what is involved in the process to mere containment and recovery.[115] Amnesty International cited a better definition that has been stated by Total as: "*the removal of the free-phased oil in the impacted environment, removal of the contaminated soil /vegetation, carrying out soil and water analyses to check the level of [hydrocarbon] contamination, and based on the analyses results launch remediation / treatment of the residual oil in the impacted area, to achieve the target level of [hydrocarbon] content as specified in the DPR's EGASPIN 2002 (revised) and the NOSDRA guidelines*."[116]

Similarly, Agip stated: "*Methods of clean up include manual cleaning, use of mechanical equipment, low pressure wash, use of sorbents, vacuum skimming as well as deployment of containment booms, when needed, as safe guard measure*

[113] *ibid*. p.62.
[114] *ibid*.
[115] *ibid*.
[116] *ibid*.

during the clean-up job. After clean-up, a Post Clean-up Inspection (PCI) is carried out…"[117]

The argument therefore, is that if a company like SPDC has a limited view as to what remediation is, it will be difficult for it to effectively remediate. This study argues that the extent to which a company will carry out remediation will be subject to its understanding of what remediation entails. Hence, a vague understanding of the obligations required under it will translate to a poor approach to its implementation.

Despite the significant oil spills, it has been alleged that companies operating in the onshore areas of the Nigerian Delta like the SPDC are yet to clean-up most of the affected sites in the Niger Delta.[118] This is in contravention of the requirements of Part VIII-B (Contingency Planning for the Prevention, Control and Combating of Oil and Hazardous Substances Spills) Section 2.6 the EGASPIN requiring clean-up and remediation to commence within 24 hours of the spill and to be concluded within 60 days of the commencement. In 2015, following litigation in a UK court, Shell was instructed to clean-up and remediate its oil pollution in the Bodo community (that had suffered two huge oil spills caused by the corporation between 2008 and 2009).[119] However, it has been observed that Shell failed to comply with the clean-up and remediation instruction.[120] Another example is the allegation by Amnesty International that despite claims by the SPDC to have cleaned up pollution in six areas of the region (the Bomu Manifold, Kegbara Dere, Barabeedom, Kegbara Dere, Okuluebu–Ogale, and Boobanabe–Kegbara Dere) and clean-up and remediation certificates having been issued, there were still significant remains of oil spill pollution at the certificated sites.[121]

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[117] *ibid*.
[118] Jedrzej G Frynas, *Oil in Nigeria Conflict and Litigation Between Oil Companies and Village Communities* (Politics and Economics in Africa Series Volume 1, Munster: London LIT 2002) p.196; Oliver Tickell, 'Niger Delta Oil - Shell Ignores Horrendous Pollution' [2014] The Ecologist <https://theecologist.org/2014/aug/04/niger-delta-oil-shell-ignores-horrendous-pollution> accessed 27 July 2019; Emily Gosden, 'Why Shell's Bodo Oil Spill Still Hasn't Been Cleaned Up' *The Telegraph* (2017) <https://www.telegraph.co.uk/business/2017/01/08/yet-clean-nigerian-oil-spills-two-years-compensation-deal/> accessed 10 December 2018.
[119] Leigh day 'Shell Fails in High Court Bid to Halt Nigerian Community's Legal Fight Over Clean-Up' (*Leighday.co.uk*, 2018) <https://www.leighday.co.uk/News/News-2018/May-2018/Shell-fails-in-High-Court-bid-to-halt-Nigerian-Com> accessed 10 December 2018.
[120] Amnesty International (n.51).
[121] *ibid*.

Amnesty International reported that 45 years after the spill of the Bomu Well 11 at Boobanabe, experts discovered waterlogged areas with oily sheen and black soil encrusted with oil. This is despite Shell's claim to have remediated the site completely in 1975 and 2012.[122] Oil soaked soil was also discovered on the perimeter of the Bomu Manifold at Kegbara Dere (arising from the 2009 spill on the site) which Shell claimed to have completely remediated in 2012.[123] Furthermore, experts discovered visible crude oil contamination in the Barabeedom swamp even after NOSDRA had certified it to be clean.[124] Experts also discovered patches of oil blackened soil at various spots in the Okuluebu, Ogale, despite the site certified by NOSDRA to have been remediated in 2012.[125]

Indeed, a contractor who had been previously been employed by the SPDC told Amnesty International that the SPDC only took a half-hearted and superficial approach to clean-up. He asserted that the efforts were "*just a cover up. If you just dig down a few meters you find oil. We just excavated, then shifted the soil away, then covered it all up again*."[126] This report was a sequel to a previous joint report made by the Friends of Earth Europe, Amnesty International, Environmental Rights Action, Platform and the Centre for Environment, Human Rights and Development (CEHRD) in 2014 showing a gross lack of action on the part of Shell and the Nigerian government to clean up the Niger Delta environment that has been contaminated with oil spill[127] despite recommendations made by the United Nations in 2011 for a speedy clean-up of the affected sites in the region.[128]

This study has identified the DPR and the NOSDRA to be jointly responsible for clean-up investigation, direction and certifications by virtue of the EGASPIN and the NOSDRA (Establishment) Act. As earlier observed, oil spill clean-up and remediation is the responsibility of the oil company on whose facility an oil spill occurred. Unlike the NOSDRA (Establishment) Act which requires NOSDRA to be

[122] *ibid.*
[123] *ibid.*
[124] *ibid.*
[125] *ibid.*
[126] *ibid.*
[127] Friends of the Earth International, 'Shell: No Progress in Niger Delta Clean-Up' (Friends of the Earth International 2014) <https://www.foei.org/news/shell-no-progress-in-niger-delta-clean-up> accessed 27 July 2019.
[128] UNEP (n.39) p.207.

part of the process, it has been observed that often, when any such company assess the site as completely remediated (implying that the oil content in the soil and water has dropped at least below the regulatory intervention level for remediation),[129] it reports back to NOSDRA.[130] If NOSDRA is satisfied that the company has adequately restored the land to as much as can be similar to the original state, it issues a certificate declaring the clean-up and remediation efforts as completed.[131]

It is therefore interesting that sites that have been marked as completed will be discovered to still be polluted. Only recently, a member of the National Coalition on Gas Flaring and Oil Spills in the Niger Delta (NACGOND)-an 'independent verification' team set up by the Nigerian government to examine the extent of remediation in the affected zone informed Amnesty International that it had found that most such sites were still contaminated, despite Shell's clear assurances to have remediated them. According to the team, 8 of the 12 sites the team tested still contained hydrocarbons above the Nigerian government's regulatory level.[132] This failure collaborates the previous observation made by UNEP that: "*Ten out of the 15 investigated sites which SPDC records show as having completed remediation, still have pollution exceeding the SPDC (and government) remediation closure values. At eight of these sites the contamination had migrated to groundwater*."[133]

This study wonders how NOSDRA certifies sites that have not been adequately remediated as completed and how it issues certificates of completion of remediation without investigating the remediated areas to ascertain the veracity of the claims of remediation. The certification by NOSDRA of sites discovered to

[129] The regulatory 'target level' in Nigeria is 50 mg/kg total petroleum hydrocarbons (TPH), while the 'intervention level' of 5,000 mg/kg TPH. However, there is an internal contradiction within the EGASPIN on which level should be utilised. Part VIII Section 2.11.3 of the EGASPIN states that to be considered successful, remediation needs to bring the hydrocarbon level down to the target level. But section Part VIII Section 6.6 states that the goal for a successful remediation should be the intervention level. NOSDRA has however often utilised the intervention level.
[130] Amnesty International (n.85) p.14.
[131] This is pursuant to Section 6 (1) (b) of the NOSDRA (Establishment) Act.
[132] Amnesty International (n.51) p.14.
[133] UNEP (n.39) p.150.

still be polluted entails that the agency failed to properly investigate and ensure the proper clean-up and remediation of such sites before certifying them. This is a clear breach of the obligation to investigate cleaned-up sites codified in PART III (Production Operations) Section 7.1.1 of the EGASPIN and Regulation 17 of the Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations 2011.

In January 2013 an International Union for Conservation of Nature (IUCN) Panel that was requested by Shell to review environmental issues in the Niger Delta discovered, once again, that regulators had signed off on a site as cleaned up that was still polluted.[134] The panel stated: "*in a recently concluded remediation site in Soku, the [Chemicals of Special Concern] levels were far higher than standards of EGASPIN (2002), even though all the authorities had signed off on the certificate for a clean bill of health for that site*."[135] In conclusion, the panel stated that: "*Based on the observations by the Panel, the current remediation practices in oil impacted areas in the Niger Delta are not satisfactory. Oil spill responses and remediation are not implemented fast enough and the methods and regulatory standards for biodiversity and habitat rehabilitation have not been adequately established. Some of the issues that are not properly addressed in the current context need a different approach consistent with best practice in the industry*."[136] The study views this as a contravention of the requirement of Section 6 of the NOSDRA (Establishment) Act which mandates the agency to investigate and certify that remediation has been properly carried out.

Moreover, this study also wonders how most such remediation operations were carried out improperly since the EGASPIN clearly mandates the DPR to approve the method of remediation. It begs the question as to whether in such circumstances, the DPR (through its director), approved a method of remediation that is substandard or even faulty; or whether the companies have failed to utilise the approved method of remediation. In any case, if the company fails to utilise

[134] Amnesty International (n.85) p.67.
[135] International Union for Conservation of Nature (IUCN) 'Niger Delta Panel (IUCNNDP) to the Shell Petroleum Development Company of Nigeria Ltd (SPDC)' (IUCN 2013) p.4.
[136] *ibid.*

the approved method, it should have been the duty of NOSDRA to investigate the process and by such means detect such violation. It therefore entails that the NOSDRA under such circumstances, had either not directed and supervised the process at all or had not done so properly. Furthermore, with regard to the reckless manner in which the companies have abandoned their assets in the Niger Delta, this study wonders whether the DPR through its director are actually carrying out their role of issuing permits for the abandonment process and formulating regulation on the process to be utilised in abandonment. If they are, and the company is simply violating the regulation, why is there no public record showing that the DPR has utilised some administrative penalties stipulated in the EGAPSIN such as the revocation of the licence of such an operator?

Based on the above facts, this study concludes that there have clearly been incidents of violations of the environmental standards described. Since it has previously been asserted in the study that the regulatory enforcement tools of criminal and administrative sanctions are supposed to be utilised to enforce compliance with the standards, these violations contribute to a failure to properly utilise the tools for this desired purpose. It is therefore necessary to identify possible deficiencies causing the failure. This is because, if the deficiencies are corrected, then the resulting failure will also have been corrected.

Chapter Four

Identification of the Deficiencies Contributing to the Regulatory Failure

4.0 Synopsis

This study has observed environmental standards embedded in Nigerian environmental legislation to regulate its oil and gas industry. The study further observed a utilisation of criminal sanctions by the Nigerian environmental regime to prohibit a violation of such standards. Judging from the evidence of environmental violations identified in chapter 3 of this study, it is obvious that the Nigerian criminal sanctions have failed to prevent a continued violation of the standards by oil and gas companies operating in Nigeria and their officers. This chapter will therefore, seek to identify deficiencies that have contributed to the failure. Furthermore, the study observed the failure of enforcement agencies to properly carry out administrative enforcement duties required of them under their enabling statutes. Field and Field have argued that generally there is a natural tendency for people to expect laws to simply rectify environmental problems without the creation of an appropriate mechanism of enforcing such laws.[1]In line with this assertion, this study argues that it is possible for an environmental regime to have abundant robust environmental laws and policies, and yet be unable to achieve its environmental protection purpose if the mechanism required to implement them is lacking. In effect, it is necessary that every environmental regime establishes an effective means of implementing/enforcing its legislative provisions, or else they will be ineffective. For this, enforcement agencies are required to implement the standards in the Nigerian environmental legislation; else the standards will merely be empty words with no real application.

This study will therefore seek to identify deficiencies that have impeded criminal and administrative enforcement in the Nigerian environmental regulatory regime for its upstream oil and gas industry. In order to accomplish this, the study will

[1] Barry C Field and Martha K Field, *Environmental Economics: An Introduction* (5th edn, Mc-Graw Hill 2009) p.48; Zephnaiah Edo, 'The Challenges of Effective Environmental Enforcement and Compliance in the Niger Delta Region of Nigeria' (2012) 14 Journal of Sustainable Development in Africa 265.

break the chapter into two parts. The first part will discuss deficiencies that have impeded criminal enforcement in the regulatory regime while the second part will discuss deficiencies impeding administrative enforcement in the regime.

4.1 Deficiencies Contributing to the Inadequate Utilisation of Criminal Enforcement

This study has observed repeated violations of environmental standards in the Nigerian oil and gas industry. The violations reflect badly on the existing Nigerian environmental criminal regime. The study has identified criminal sanctions embedded in several Nigerian environmental legislative instruments that prohibit such violations. This study therefore argues that the seeming weakness of the criminal sanctions to effectively prohibit the violations as it is supposed to, portrays the regime as having a deficient criminal structure for enforcing its standards. This study will therefore identify deficiencies that have contributed to the deficient criminal enforcement mechanism in the Nigerian environmental regime (particularly relating to its onshore upstream oil and gas sector). The identification of these deficiencies is essential towards strengthening the environmental criminal structure of the Nigerian environmental regime.

4.1.1 Weak Environmental Criminal Sanctions that Fail to Adequately Punish and Deter Environmental Violation

In properly determining what a weak sanction is, this study will qualify the strength of a sanction in the punishment and deterrence it provides. According to Garland, punishment is the "*legal process whereby violators of criminal law are condemned and sanctioned in accordance with specified legal categories and procedures*."[2] This assertion tallies with the argument made by Flew that punishment in the form of sanctions for criminal offences should:[3] be against an offender, be unpleasant to the offender, be meted out for a criminal offence, and be established by a relevant authority. In line with this view, Benn and Peters

[2] David Garland, *Punishment and Modern Society* (1st edn, Oxford, England: Oxford University Press 1990) p.17.
[3] Anthony Flew, 'The Justification of Punishment' (1954) 29 Philosophy 291.

stressed that the unpleasantness of the punishment imposed by criminal sanctions is an essential element of punishment.[4] This view is also set out by Hudson who argued that criminal punishment should be deserved by an offender hence be meted out to displease such an offender.[5] This theory is referred to as the retributive theory of punishment.[6] This retributivist school argues that there is a moral link between punishment and guilt.[7] They argue that retribution operates on a societal model that acts 'rightly' through a legal system of rules aimed at condemning 'wrong' criminal acts.[8] In effect, theorists of this idea emphasize the past by regarding punishment as a deserved consequence of criminal actions.[9] Theorists of the idea also seem to be un-interested in making any social change but only concentrate on the blameworthiness of criminal acts.

Over time, this retributive approach to punishment has shifted to enable criminal punishment to incorporate other purposes of utilising criminal sanctions to punish an offender.[10] Such other purposes of punishment have been established to include: deterrence (propounded in the utilitarian theory), just desserts, rehabilitation, incapacitation, and more recently, restorative justice.[11] However, for this section, this study will concentrate on the purpose of deterrence and to what extent the Nigerian environmental criminal regime has prevented the future commission of environmental offences through deterrence. The reason for this concentration is that:

1) This study recognises Bentham's argument that punishment is only justified if it prevents a greater harm than the harm such punishment inflicts on the offender.[12] Bentham's exact words were that "*pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the*

[4] Stanley I Benn and Richard S Peters, *Social Principles and the Democratic State* (1st edn, Allen and Unwin 1959) p.100; Philip Bean, *Punishment: A Philosophical and Criminological Inquiry* (1st edn, Oxford, England: Martin Robertson 1981) p.6.
[5] Barbara Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory.* (1st edn, Open University Press 1996) p.3.
[6] Hugo A Bedau, 'Retribution and the Theory of Punishment' (2019) 75 Journal of Philosophy 601.
[7] Philip Bean (n.4) pp14-15.
[8] *ibid*. p.17.
[9] David J Crossley, 'Bradley's Utilitarian Theory of Punishment' (1976) 86 Ethics: International Journal of Social, Political and Legal Philosophy 200.
[10] *ibid*.
[11] *ibid*.
[12] Jeremy Bentham and James T McHugh, *The Rationale of Punishment* (Prometheus Books 2009) p.220.

consequence of an act he is acted on in such manner as tends with a certain force to withdraw him as it were from the commission of that act. If the apparent magnitude be greater than the magnitude of the pleasure expected he will be absolutely prevented from performing it."[13] This argument implied that punishment would only contribute further to human suffering without achieving any real purpose if it fails to deter an offender from committing a crime. This view was further emphasised by Becarria who argued that "*the aim of punishment can only be to prevent the criminal committing new crimes against his countrymen and to keep others from doing likewise*."[14]

2) This study has already established the prevention of pollution to be a fundamental component of complying with the environmental principles provided under the regime, and in effect, achieving environmental protection. Moreover, a significant way of preventing pollution is by deterring polluters from polluting. A major approach to effecting deterrence to pollution in the Nigerian environmental regime has been the utilisation of criminal sanctions to prohibit such pollution. It is therefore necessary (considering the persisting pollution in the Nigerian oil and gas industry despite the presence of the criminal sanctions) that this study determines a possible weakness in the sanctions to prohibit and prevent the criminal pollution.

The theory that views the purpose of criminal punishment to be the prevention of future crime (deterrence) is referred to as the Utilitarian theory.[15] People are said to have been deterred from an action when they refuse to carry out such action as a result of their aversion to the possible consequences of carrying out the action.[16] To this effect, this school of thought views punishment as a means to the end of preventing crime rather than the actual end in itself. Rather than focus on the punishment that ought to be meted out to offenders, it focuses on the ability to utilize punishment to achieving the overall end of preventing crime. Hence, the

[13] *ibid*.
[14] Cesare Beccaria, *On Crimes and Punishments* (3rd edn, Seven Treasures Publications 2009) p.10.
[15] Fredrick Rosen, 'Utilitarianism and the Punishment of the Innocent: The Origins of a False Doctrine' (1997) 9 Utilitas 23.
[16] *ibid*.

essence of punishing criminal polluters under this theory would be towards preventing criminal pollution in the long-run. Deterrence has also been argued to either be individual or general.[17]

Generally deterrence (which applies to both individual and corporate offenders), seeks to reduce or prevent an offence by attaching specified punishment provisions to offences towards deterring potential offenders from offending.[18] Often, such provision will be in the form of legislation imposing criminal sanctions for specific offences with the view that such criminal sanctions will deter offenders from committing the crime.[19] Indeed, as has been established in the methodology section of this study, most of the issued identified in this study relate to the pollution crime of corporate bodies. In other words, the deterrence that will be discussed in this section will mostly relate to corporate offenders with little emphasis on individual offenders.

It is trite that in certain legislative contexts, the word person has been construed as referring only to individuals.[20] However, as a general rule of law (and as it applies to the UK and Nigeria as comparator jurisdictions in this study), there is a presumption that reference in any Act of Parliament to a 'person' will include both natural persons and juristic persons (in the form of natural individuals and bodies-corporate and incorporate [such as companies, associations and partnerships]).[21]

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[17] *ibid*.
[18] Kelly D Tomlinson, 'An Examination of Deterrence Theory: Where Do We Stand?' (2016) 80 Federal Probation 33-35.
[19] *ibid*.
[20] Anand Ballabh Kafaltiya, *Interpretation of Statutes* (1st edn, Universal Law Pub Co 2008) p.80.
[21] This can be found in Schedule 1 of the UK's Interpretation Act 1978 whereby it stated that "*person includes a body of persons corporate or unincorporated*". Similarly, it has been provided for under Section 18(1) of the Nigerian Interpretations Act 1990 whereby it stated that: "*person includes anybody of persons corporate or unincorporated*." Furthermore, as can be seen in most of the Nigerian law examples used in this study, offences and punishments for individual offenders are distinguished from those for corporate offenders thereby not only explicitly recognising both as legal persons both also demarcating what punishment should be imposed for their liability in the criminal act. Also, Section 31 of the NESREA Act 2007 recognises the violation of the NESREA provision by a corporate offender as well as by an individual offender and outlines the different punishment accruable to the separate categories of offenders. This can also be found in Section 34 of the Nigerian Company and Allied Matters Act 2004. Furthermore, Nigerian statutory provisions such as Section 7 of the Harmful Waste (Special Criminal Provisions etc.) Act explicitly stipulate corporate bodies as liable persons under the Acts. In the Nigerian case of *Government of Midwestern State* v *Mid Motors Nig. Co. Ltd* (1977) 10 S. C. 4, it was held that a company is a legal person which can be liable for an offence and can sue and be sued. However,

In the UK, this is unless there is a contrary indication (express or implied) in the Act itself[22] or any accompanying subordinate legislation as to the inclusion of this category into the scope covered in the legal term 'persons'.[23] By virtue of their juristic personality, companies can be liable for criminal acts, subject to certain limitations such as assault, manslaughter, murder and rape.[24] This necessitates the adoption of the definition given by Kramer which states that corporate crimes are illegal acts, omissions or commissions by corporate organisations themselves as, social or legal entities or by officials or employees of the corporations acting in accordance with the operative goals or standard.[25] It is an argument in this study that deterrence by means of punishment will reduce or prevent the occurrence of such corporate crimes. Similarly, in line with the assertion above, deterrence regardless of whether it is individual or general will have the same effect on crimes committed by individual persons. It is therefore noteworthy that as discussed in this chapter, individual and general deterrence applies to both individual and corporate offenders.

Individual deterrence is directed at the person (individual or corporate) being punished and aims at preventing the offender from repeating the offensive behaviour.[26] In effect, punishment under this category seeks to give an individual offender an idea of the consequence of his criminal action if it happens again. For an individual criminal polluter, this form of deterrence gives such polluter an idea of punishment that accrues from polluting towards preventing the polluter from polluting again.

On the other hand, general deterrence seeks to dissuade others from following the offender's example.[27] This form of deterrence is less concerned with the future

in *Njemanze* v Shell *B.P. Port–Harcourt* (1966) 1 All NLR 8, it was held that the action must be in the name by which the Company is registered.

[22] This is pursuant to Section 5 of the UK Interpretation Act.

[23] This is pursuant to Section 11 of the UK''s Interpretation Act.

[24] Samson Erhaze and Daud Momodu, 'Corporate Criminal Liability: Call for a New Legal Regime in Nigeria' (2015) 3 Journal of Law and Criminal Justice pp.64, 65.

[25] Ronald C Kramer 'Corporate Criminality: The Development of an Idea'
in Ellen Hochstedler (ed.), *Corporations* as *Criminals* (Beverly Hills: Sage Publications 1984) pp.13, 37.

[26] Kelly D Tomlinson (n.18).

[27] *Tran* [2012] VSCA 110; *DPP v Russell* [2014] VSCA 308; Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen [2014] VSCA 342 at [123].

behaviour of the offender himself. The interest in general behaviour rather than a single individual is on the grounds that most individuals are rational, and should calculate the risk of being similarly caught, prosecuted, and sentenced for the commission of a crime.

Deterrence theory has proven difficult to validate, however, largely due to many intervening factors which makes it difficult to prove unequivocally that a certain punishment has prevented someone from committing a given crime.[28] Nevertheless, writers insist that penal laws and criminal sentences for offences usually have a strong deterrent effect on criminal behaviour of not just an individual offender, but also the general public.[29] For example, it has been argued that in the UK, laws designed to prevent driving under the influence of alcohol (e.g., by setting a maximum legal level of blood alcohol content) can have a temporary deterrent effect on a previous offender, and indeed, the wide population, especially when coupled with mandatory penalties and a high probability of conviction.[30]

Andenaes however, argues that it is necessary to distinguish classes of offences and their punishment as offences vary with the motivation of offenders.[31] Hence any reasonable discussion on deterrence should consider the specific norms and circumstances of each class of the offence.[32] This will entail legal drafters formulating legislation sanctioning offences which will consider these factors. On this ground, some offences might bear higher punishment than other offences. Nevertheless, upon researching into the economic and sociological models of general deterrence, Tullock concluded that increasing the frequency or severity of punishment for an offence definitely reduces the possibility of the offence being committed.[33] In line with this, scholars have argued that at the barest minimum,

[28] Chin L Ten, *Crime, Guilt and Punishment* (1st edn, Clarendon Press 1989) p.9; Nigel Walker, *Why Punish?* (Oxford University Press: Oxford 1991) p.16.
[29] Johannes Andenaes, 'Does Punishment Deter Crime?'in Gertrude Ezorsky, *Philosophical Perspectives on Punishment* (Albany: State University of New York Press 1972) p.345.
[30] *ibid*.
[31] *ibid*.
[32] *ibid*.
[33] Gordon Tullock, 'Does Punishment Deter Crime?' (1974) 36 Public Interest Journal 109.

an optimum penalty should be imposed for offences.[34] Optimum penalty entails that the penalty for an offence should equate to the total social cost of the crime. The above assertion implies that to effectively achieve general deterrence, the penalty/punishment meted out for the offence should at the minimum be equal to the extent of harm caused by the offence and severe enough to deny the polluter the benefits accruing from the criminal profit, such as some measure of the polluter's profits. In examining the severity of the existing sanctions, it is noteworthy to be reminded of the observation in chapter 3 that most of the existing oil and gas companies in Nigeria are subsidiaries of multinational parent firms. It is therefore not surprising that the companies will be wealthy by virtue of their global profits. However, this study notes that even in Nigeria, they make huge profits from their share of the exploitation of oil and gas resources. For example, in 2018, the SPDC posted a report showing revenue of approximately £34 million.[35] It would therefore be unrealistic to attempt to deter the company with weak fines. Hence, in the analysis below of some of the existing sanctions, this study will seek to determine whether the sanctions are too weak to not just punish the criminal polluting companies, but also to deter a general commission of the pollution crimes.

The weakness of most sanctions under the regime is laughable considering the extensive violation that has occurred in the oil and gas industry. Indeed, the significant manner in which most of the violations described above has occurred shows persistence on the part of the offenders. For instance, the failure of defaulting companies that cause oil spill to remediate the environment properly has lingered giving the significant time gap in carrying out the remediation processes in affected sites as observed in chapter 3. This study therefore wonders how such poor sanctions can deter a persistent violator. The obvious reasoning for the persistence is that there is a motivation for the criminal violation. This study argues that for the motivation to look unattractive, sanctions must be tough enough to take away the attraction. Having examined the existing sanctions in the

[34] Jonathan M Karpoff and John R Lott, 'The Reputational Penalty Firms Bear from Committing Criminal Fraud' (1993) 36 the Journal of Law and Economics 757; Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169.
[35] Shell Petroleum Development Company, 'Annual Report: Providing Energy for a Changing World' (*Royal Dutch Shell*, 2018) <http://file:///H:/shell_annual_report_2018.pdf> accessed 18 March 2019.

Nigerian regime, this study argues that some of the sanctions are simply unable to create this deterrence. For example, Section 6 of the Oil in Navigable Waters Act only stipulates a penalty of N2000 (£4.20) for an offender who discharges oil waste into Nigerian navigable waters. This is interesting considering the extensive discharge of oil waste into the navigable waters of the Niger Delta. The penalty is grossly insignificant when compared to the consequential harm that has been suffered by the Niger Delta inhabitants as a result. Similarly, in only introducing a penalty of 2 kobo (less than £0.00002) per 1000 standard cubic feet (SCF) of gas flared at any place, the Associated Gas Re-Injection (Amendment) Decree 1984 has failed to provide a sufficient penalty that will present general deterrence to the offence. For this reason, gas flaring has apparently continued beyond 1984 despite the requirement to phase it out.

Furthermore, in stipulating a weak penalty of N100,000 (£205.30) for an individual offender and not more than N1,000,000 (£2052.30) for a corporate offender who is found guilty of failing to submit an EIA on a proposed project, the EIA Act presents a very weak deterrence to the criminal act. Indeed, considering the volatility of oil and gas operations to the Nigerian environment, and the extensive pollution caused by such oil and gas projects, it is obvious that this sanction provided by the legislation is grossly inadequate to deter a company or individual that might choose not to submit their EIA despite the project they seek to engage in being risky to the environment.

Similarly, even if the NESREA Act were to cover the oil and gas pollution sphere, the criminal penalty for the offence of noise pollution in the Act is also too weak to effect any deterrence. Pursuant to the Act, an individual offender guilty of the offence of causing noise pollution is criminally liable to a fine not exceeding N200,000 (£408) or to imprisonment of up to one year or to both penalties.[36] If however, this offence has been committed by a corporate organisation, the Act finds the corporate organisation criminally liable to an amount not exceeding N1,000,000 (£2050.60).[37] In the same vein, it can be observed from chapter 3 that the National Governmental (Noise standards and Control) Regulations 2009

[36] This is provided for in Section 26 (3) of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act.
[37] This is provided for in Section 26 (4) of the Act.

prohibit noise pollution above maximum statutory standards. In particular, the Regulations stipulate the penalty of a fine of not more than N500,000 (£1025.7) for companies that are guilty of the crime and an additional fine of N10,000 (£20.50) for every day the offence continues. The study also argues that the penalty neither provides sufficient punishment for the extent of crime committed nor sufficient deterrence for a wealthy corporation (such as the SPDC) if found guilty of the crime. This is despite the earlier observed allegations that some companies site their facilities close to residential areas.

Indeed, it is not all legislation in the regime that has provided for such weak sanctions. There are other legislations that have rather provided for extremely severe sanctions (as will be discussed in the next section of this chapter) such as Section 6 of the Harmful Wastes Act which stipulates the penalty of life imprisonment for an offender who discharges harmful waste into the Nigerian environment or Section 2 of the Petroleum Production and Distribution (Anti Sabotage) Act 1975 stipulates the death penalty or 21 years' imprisonment for the sabotage act of third parties causing pollution and harm to public health. Hence, this study will not refer to the utilization of weak sanctions by the regime as pervasive. This study is however of the view that while a few environmental criminal provisions have provided these severe sanctions, there is rather a high rate of the utilization of weak sanctions by the regime as is obvious from the sanctions mentioned in section 2.8 of this study. This study believes that considering this, such violations of environmental standards might still occur regardless of the presence of such criminal sanctions prohibiting the violations. This study concludes this section of this chapter by repeating the assertion of Nancy Firestone, a former Deputy Assistant Attorney General at the United States Department of Justice: "*You want to make criminal offences serious, or criminality becomes meaningless*."[38] This agrees with the argument of Tullock (observed above) that the penalty should be made severe to achieve better deterrence.

[38] William Wilson, *Making Environmental Laws Work: An Anglo-American Comparison* (3rd edn, Hart Publishing Oxford 1999) pp.107, 110.

4.1.2 Other Criminal Sanctions that are not proportional to Crime Committed and that Fail to Rehabilitate Offenders

This study has observed the provision for long incarceration in the form of long prison terms (life imprisonment) in the Harmful Waste (Special Provisions) Act to punish the offence of the discharge of hazardous waste.[39] This observation is notable considering that this statute is significant for the prohibition of harmful waste discharge in Nigeria. With regard to exactly which offenders will probably be affected by this statutory provision, it will obviously affect individual offenders and bodies corporate in line with Section 18 (1) of the Nigerian Interpretations Act identified above. However, since a company cannot be sent to prison,[40] it will involve piercing the veil of corporate liability to identify and impose criminal liability on responsible corporate officers in the company. The doctrine of corporate personality is a term used to describe the separation of a corporation from its owners. As a separate entity, a corporation is set up to 'shield' its owners from personal liability for the debts or negligence of the business. This is on the basis that corporations are separate entities from their shareholders, and under normal circumstances, the individual shareholders and officers cannot be brought into a lawsuit involving the corporation.[41] The piercing of the corporate veil on the other hand, describes the action of a court to hold the 'responsible corporate

[39] Sections 2 and 15 of the Harmful Wastes Act prohibit the discharge of hazardous waste.

[40] The above reasoning was asserted in the celebrated case of *Lennards Carrying Co.* v *Asiatic Petroleum Ltd.* [1915] A.C 705 at 713-714 where Viscount Haldane L.C held: "*a corporation is an abstraction; it has no mind of its own any more than it has a body of its own...*"

[41] This principle was enunciated in the celebrated case of *Salomon* v *Salomon and Co Ltd* [1897] AC 22, whereby the learned Lord MacNaghten in the Court of Appeal held that: "*when the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith", of exercising all the functions of incorporated company". Those are strong words; there is no period of minority on its birth, no interval of incapacity. I cannot understand how a body corporate such as this made capable by statute can lose individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The Company is at law a different person altogether from the subscriber… Nor are the members (subscribers) liable*…" On the premise of the ratio given above by the Learned Lord Justice, the doctrine of corporate personality has been settled to confer the toga of *personae juris* on a company. By such, a company can create *personae juris* capable of enjoying legal rights to own property, has a perpetual succession and its liabilities limited.

In the USA case of *Milan Kosanovich* v *Worcester Street Associates, LLC and Another* Mass. App. Div. 93 (2014), "*the trial court pierced [the company's] corporate veil and found [the defendant] personally liable..." for the damages. The sole reason for this piercing of the corporate veil was because "corporate records did not exist or were not properly kept by the defendant.*" Similarly, in the Nigerian case of *Akinwunmi Alade* v *Alic Nigeria Ltd* [2010] 19 NWLR (Pt. 1226) 111, Galadima J.S.C stated that "*the consequences of recognizing the separate personality of a company is to draw a veil of incorporation over the Company. One is therefore generally not entitled to go behind or lift this veil. However, since a statute will not be allowed to be used as an excuse to justify illegality or fraud it is a quest to avoid the normal consequences of the statute which may result in grave injustice that the Court as occasion demands have to look behind or pierce the corporate veil."*

officers' of a corporation personally liable for the debts and liabilities of the corporation. To rely on the dictum of Devlin J, in the UK case of *Bank Handel* v *Slatford*,[42] it was opined that: "… *the legislature can forge a sledge hammer capable of cracking open the corporate shell*…" In *Re H*,[43] the court was of the view that the corporate veil can be set aside on the grounds that the company has been used to carry on an unlawful activity or in order to avoid the impact of an order of court. Usually in such cases, if the veil is lifted, the principle of limited liability is not affected. In this context, 'responsible corporate officers' are officers who are either the owners of company or in charge of the functioning of the company (such as the company directors)[44] or other officers directly involved in the harmful waste discharge act. In this case, such officers will be found liable for the company's discharge offence and therefore punishable by a long prison term as stipulated in the Harmful Waste (Special Provisions) Act. It is noteworthy that the application of corporate officer liability in the UK and USA will be explored in sections 5.1.1 and 5.2.2 of this study respectively, with a view to understanding its applications in the comparative model jurisdictions (the UK and the USA).

This study argues that such long prison terms imposed as punishment might not serve the purpose of rehabilitating such corporate officers. Morris argued that offenders are incapacitated for long periods of time to protect the public from suffering from the offensive act in future.[45] In the Utilitarian theory, incapacitation is regarded as a suitable punishment that removes the offender from committing further offence in the society.[46] Arguing in favour of this, Hudson argued that an offender should be treated severely for his offence.[47] However, it has been argued

[42] [1953] 1 Q.B 248 at 278.
[43] [1996] 2 ALL E.R. 291 CA.
[44] This dimension was enunciated in *Denning L.J in Bolton (Engineering) Co. Ltd.* v *Graham and Sons* (1934) 1 K.B 57 whereby it was held that: "*a company may in many ways be likened to a human body. It has a brain and nerve center, which controls what it does. It also has hands, which holds the tools and act in accordance with direction from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will.*" This view was similarly set out in *Lennards Carrying Co.* v *Asiatic Petroleum Ltd*. whereby it was held that any corporation's "*active and directive will must consequently be sought in the person of somebody who for some purposes may be called an agent but who is really the directing mind and will of the corporation, the very ego and centre of personality of the corporation*."
[45] Herbert Morris, 'A Paternalistic Theory of Punishment ' in Antony Duff and David Garland, *A Reader on Punishment* (Oxford, England: Oxford University Press 1994) p.238.
[46] Chin Liew Ten (n.28) p.8
[47] Barbara Hudson (n.5) p.29.

that the essence of criminal sanctions is not only to punish or deter offenders, but also to reform the offender.[48] According to Bean, crime is the symptom of a social disease, while rehabilitation is the treatment of the disease.[49] He argued that rehabilitation does not only treat the offender for his social vices but also creates new thinking in an otherwise rigid penal system.[50] In recent times, theorists of rehabilitation argue that punishment must seek to prevent crime and at same time maintain the right of the offender.[51] In line with this, Rotman argued that while an offender might deserve imprisonment as punishment for his offence, he also has a right to "*return to society with a better chance of being a useful citizen and staying out of prison*."[52] In line with this, Section 2(4) of the Nigerian Prison Act 1972 stipulates that the Nigerian prison system must seek to: identify the reason for such anti-social behaviour of the offender; and rehabilitate and reform the offender towards becoming a responsible and useful member of society.

In light of the above, Levitt has argued that the utilisation of long prison terms might result in the offenders getting used to a prison environment rather than being remorseful and correcting their ways as a result of the long duration of such imprisonment terms.[53] He argued that often an incarcerated offender adapts to prison conditions, and suffers less than in the beginning as he would become comfortable with the prison environment, made friends there and become used to the segregation.[54] It has also been argued that by sharing criminal experience with other convicted persons in the prison, the offender might become smarter in committing crime and grow even more hardened and strong-willed in his criminality than he initially was before the imprisonment.[55] By that, a convicted criminal violator (who is fairly naïve in the ways of violating standards and getting away with it), who has been sentenced to a long prison term of 10-20 years might simply learn better ways to mask his pollution crime so that he would not be

[48] *ibid*. pp.7-8
[49] Philip Bean (n.4) p.54.
[50] *ibid*. p.64.
[51] Hugo A Bedau (n.6).
[52] Edgardo Rotman, 'Beyond Punishment' in Antony Duff and David Garland, *A Reader on Punishment* (Oxford, England: Oxford University Press 1994) p.286.
[53] Steven D Levitt, 'Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six that Do Not' (2004) 18 Journal of Economic Perspectives 163-165.
[54] *ibid*.p.70.
[55] Civil Liberty Organisation, 'Annual Report on Human Rights in Nigeria' (Civil Liberty Organisation 1993) pp.1-6.

caught subsequently. Hence, the corrective measure sought after in the imprisonment of the offender would not be achieved. To this effect, this study argues that while imprisonment terms have remained a strategic mechanism for retribution and deterrence to a criminal polluter, very long prison terms will fail to achieve this very important purpose of rehabilitation required to correct the ideology of violation inherent in the offender. In penalising a criminal violator of environmental standards, this study argues that the focus must not be limited to punishing the offender so as to deter future commission of the offence, or even removing the environmental offender from society to keep society safe, but also to correct the offender so that the offender voluntarily ceases to violate environmental standards. In effect, in the long run, the punishment must be such that someday there would not be need to compel the offender, rather the offender will wilfully comply.

Furthermore, this study observed the death penalty stipulated in Section 2 of the Petroleum Production and Distribution (Anti Sabotage) Act for the illegal sabotage of oil facilities in a manner that disrupts the flow of production and distribution, as well as causing harm to the natural environment and public health of Nigerians.[56] A writer has argued that one of the fundamental goals of criminal law is equitable sentencing.[57] In effect, it has been argued that sentencing laws should be reformed to ensure that sentences are appropriate to the particular offence committed.[58] A major advantage of equitable and appropriate sentencing refers back to the earlier argument made in this study that it will restore legitimacy to the criminal justice system in Nigeria. The Nigerian public will have confidence in the approach of the courts to imposing punishments for environmental criminal acts. In line with the analogy, this study argues that stipulating the death penalty as possible punishment for environmental violation is simply not appropriate. The sanction is not commensurate with the violation. Applying such punishment during

[56] Section 1 of the Petroleum Production and Distribution Anti Sabotage Act 1975 prohibits the illegal sabotage of oil facilities in a manner that disrupts the flow of production and distribution, as well as causing harm to the natural environment and public health of Nigerians.
[57] Yair Listokin, 'Crime and (With a Lag) Punishment: Equitable Sentencing and the Implications of' (2007) 552 Yale Faculty Scholarship Series 116.
[58] Open Agenda, 'Check Out @Oppagenda Report with Policies on Transforming Criminal Justice #Transforms' (*Transforming the System*, 2019) <https://transformingthesystem.org/criminal-justice-policy-solutions/encouraging-equitable-sentencing/> accessed 7 August 2019.

court sentencing can further create dissatisfaction in the criminal justice system among the Nigerian public. It must be noted that the death penalty has been viewed as a cruel punishment generally for any crime.[59] Countries are increasingly abolishing it for all crimes.[60] Countries have abolished the death penalty even for more significant crimes such as murder.[61] In line with the assertion of United Nations Human Rights, the death penalty should have no place in the 21st century.[62]

This study argues that if the penalty under the Act is applied, it will fail to achieve the purpose of rehabilitation discussed earlier. This study argues that the aim of sanction must not be only to punish offences, but also to correct the offender. Such correction will be non-existent if the person is simply killed for committing an environmental violation regardless of the extent of violation. It is a different issue if the penalty is for a more grievous offence like murder[63] arising from the criminal action of the offender. An example is the conviction of a third-party polluter for wilfully causing an explosion on an oil and gas facility with the intent to cause the death of another person.[64] In this case, it becomes a murder case rather than a criminal matter of environmental violation. Another example is where the spill arising from the sabotage act causes the death of another, though not with the intent to spill. It becomes a manslaughter case.[65] However, if the subject is simply about causing an oil spill as a result of the sabotage act, then the death penalty is certainly a disproportionate penalty for the offence. Hence, although capital punishment and long terms of imprisonment may deter and apparently incapacitate an offender, it may delay or even limit the rehabilitation

[59] Amnesty International, 'Death Penalty' (*Amnesty International*, 2019) <https://www.amnesty.org/en/what-we-do/death-penalty/> accessed 7 August 2019.
[60] For instance, in 2004, the 13th Protocol to the European Convention on Human Rights prohibiting the restoration of the death penalty became binding on the United Kingdom (for as long as the UK is a party to the Convention).
[61] The UK abolished the death penalty for murder in Section 1 of the Murder (Abolition of Death Penalty) Act 1965.
[62] Office of the United Nations High Commissioner for Human Rights, 'Death Penalty' (United Nations Human Rights: Office of the High Commissioner 2018) <https://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx> accessed 19 October 2019.
[63] Pursuant to Section 319 of the Criminal Code Act "…*any person who commits the offence of murder shall he sentenced to death.*"
[64] Intention has been discussed in section 2.9.1 of this study.
[65] Pursuant to Section 325 of the Criminal Code Act "*Any person who commits the offence of manslaughter is liable to imprisonment for life*."

of offenders as rehabilitation can only occur after the incarcerated offender has been re-integrated into society.

4.1.3 Failure to Apply Criminal Sanctioning through Proper Prosecution

This study found no public record of any criminal prosecution for the criminal violations of environmental standards analysed in chapter 3. This observation supports an earlier observation previously made that most offenders guilty of environmental offences in Nigeria are yet to be prosecuted.[66] For example, considering the assertions of SPDC that some of the oil spill from their facility had been caused by the sabotage and bunkering acts of third parties, this study wonders why there is yet no record of investigation into and prosecution against the third parties accused of carrying out the sabotage acts causing the oil spills or even why the SPDC that has failed to carry out all possible precautions to prevent such sabotage and bunkering acts. The study even wonders why no single culprit of the act has been identified to date. This raises the issue as to how the existing criminal sanctions in the environmental criminal regime can even be applied to offenders if there is no proper arraignment of such offenders. This study argues that the inability of criminal sanctions for environmental offences to be applied on offenders through the prosecution of offenders impedes the functionality of such sanctions. Hence, it causes a dormancy of the sanctions in achieving their purpose of enactment. It reduces the sanctions to mere words on paper with no possibility of effecting compliance.

The importance of prosecuting criminal offences cannot be overstated. Shoemaker argued that prosecution is a mechanism utilised in a criminal law regime to ensure the settlement of criminal disputes and protect society against social harm.[67] Hence, prosecution upholds deference to societal laws. In this light, it has been argued that: "*the obligation to participate in prosecutions went deep into the ranks of propertied societies, assuring not only the involvement of a fair number of persons but also their interest in upholding deference to the law*."[68] Similarly, it

[66] Onyenekenwa C Eneh, 'Managing Nigeria's Environment: The Unresolved Issues' (2011) 4 Journal of Environmental Science and Technology 258.
[67] Robert B Shoemaker, *Prosecution and Punishment* (Cambridge Univ. Press 1999) p.4.
[68] *ibid.*

has been asserted that criminal law utilises prosecution to promote the specific interests of society.[69]

Oil and gas matters fall under the exclusive list in the 1999 Nigerian Constitution (as amended), hence they are strictly Federal matters.[70] Likewise, environmental offences in the oil and gas industry are Federal criminal matters, hence are regulated by the Administration of Criminal Justice Act (ACJA) 2015 rather than the procedural law of states. This is because the ACJA is the procedural law that guides the Federal criminal law system.[71]

To this effect, environmental offences related to oil and gas are different from other general environmental offences as they are federal criminal matters that can only be tried in the Federal High Court.[72] This position was justified in *Okoni* v *Nigerian Agip Oil Co. (Nigeria) Ltd*[73]where the court re-established the position that all matters relating to oil and gas pollution were to be held at the Federal High Court. The court affirmed the ruling of Justice Acholonu in the case of *C.G.G (Nig) Ltd* v *Asaagbara*[74] that "*any unsavoury result is actionable in consequence of the activities of the companies engaged in operation and relating to prospection in oil, mines, minerals, gas exploration and related geophysical works or activities comes within the exclusive jurisdiction of the Federal High Court. In this regard pollution caused by oil spillage comes within the exclusive jurisdiction of the Federal High Court. This is because it is the pipelines that carry the oil. When the pipelines burst and spill all over the place, such an accident arises from the natural usage of the pipelines connected, with and pertaining to mineral oil prospecting and pipelines carriage*."

[69] *ibid.*
[70] This is provided under the second schedule of the Nigerian Constitution.
[71] This is stipulated under the Purpose section of the Administration of Criminal Justice Act 2015.
[72] This is stipulated under Section 251 of the Nigerian Constitution 1999 (as amended).The position was also stated in *SPDC* v *Isaiah* (2001) FWLR (Pt. 56) 608, (2001) 11 NWLR (Pt. 723) 168, (2001) 5 SC (Pt. 11) whereby it was stated that "*for the Federal High Court to have exclusive jurisdiction under Section 7(1) (p) of the Federal High Court (Amendment) Decree, 1991, the cause of matter should be connected with or pertain to mines and minerals including on fields, oil mining, geological surveys and natural gas and the jurisdiction shall be construed to include jurisdiction to hear, entertain and determine all issues relating to, arising from or ancillary to mines and minerals, oil fields, oil mining, etc*." The lack of jurisdiction of the State High Court over oil pollution matters was also emphasized in *SPDC Nigeria Ltd.* v *Helleluja Bukuma Fishermen Multi-Purpose Co-Operative Society Ltd.* (2001) LPELR-5168 (CA).
[73] *Okoni* v *Nigerian Agip Oil Co. (Nigeria) Ltd* (2009) CA/PH/131.
[74] *C.G.G (Nig) Ltd* v *Asaagbara* (2001) 1 NWLR (pt 693) 155.

Furthermore, Section 104 (b) of the ACJA stipulates that all criminal matters to be prosecuted at the Federal High Court must be instituted by the Attorney-General and (any other person appointed by the Attorney-General) in the Federal High Court.[75] Specifically, Section 106 of the ACJA explicitly hands over the power to prosecute criminal matters to: (a) the Attorney-General of the Federation or anyone in his department; (b) a legal practitioner working for the Attorney-General under the Ministry of Justice; (c) a legal practitioner authorised by the Attorney-General; (d) a legal practitioner authorised under the ACJA or any Act of the National Assembly, subject to the Attorney-General.

The above statutory provisions clearly provide an institutional framework for the prosecution of environmental matters relating to oil and gas operations. It is therefore interesting that despite such explicit provisions, there seems to be no record of such prosecution against environmental offenders in the industry. This study argues that this limits the capacity of the regime to actually apply criminal sanctioning towards enforcing environmental standards. This inadequacy is made significant by the inability of enforcement agencies to impose such criminal sanctions. One might have wondered whether there were circumstances in which the enforcement agencies could impose criminal sanctions in light of the fact that virtually all fines in the environmental statutes are criminal fines. Moreover, there could be times when the process of prosecution could be cumbersome. For this, Nigerian case law as discussed below, has made it clear that there is no such provision in the Nigerian criminal regime.

In *NOSDRA* v *ExxonMobil*,[76] it was determined that enforcement agencies lacked both the powers to impose criminal sanctions and to prosecute environmental offences unless decided by a competent judicial arm.[77] The dispute in this case

[75] This is in line with Sections 174(1) and (2) of the Nigerian Constitution (as amended) which puts the responsibility of prosecuting all criminal offences established under any Nigerian criminal statute into the hands of the Attorney-General and other officers he designates such authority to. However, Section 174 (3) of the Nigerian Constitution stipulates that: "*the Attorney-General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.*" While the provision of Section 74 (3) of the Constitution could mean that the Attorney-General would ensure that the prosecution of the offence covers the public attitude and expectations regarding the matter and that everyone gains justice from the prosecution, it does not particularly imply that the Attorney-General would defer to private persons to litigate on criminal matters.

[76] *NOSDRA* v *ExxonMobil* (2018) LPELR-44210CA.

[77] *ibid.*

arose because of oil spillage that occurred at ExxonMobil's facility.[78] During the trial, ExxonMobil alleged that the spill was accidental and that they immediately shut down the affected tanks as soon as they were aware of its occurrence.[79] The company also alleged that it activated its Emergency Response Procedure (ERP) and carried out a clean-up, remediation and assessment of the impacted site in accordance with the stipulated standards of the NOSDRA (Establishment) Act.[80] The company further alleged that NOSDRA rated the ERP as satisfactory and certified the clean-up and remediation exercise.[81]

NOSDRA on the other hand, argued that the company failed to comply with the standards established in Sections 6(2) and (3) of the NOSDRA Act requiring the company to report an oil spill within 24 hours of its occurrence and sanctioning an inability of the company to clean up and remediate impacted sites.[82] Hence the agency imposed the sum of N10,000,000 (ten million Naira) as a penalty on the company for the violation.[83] On these grounds, the company queried whether the Nigerian judiciary has the exclusive powers to impose fines and penalties, and wondered if NOSDRA, as a non-judicial entity, could impose such a fine.

In its judgment, the Court decided that the imposition of a criminal penalty by NOSDRA was *ultra vires* (outside the scope) of its powers stipulated in the NOSDRA (Establishment) Act.[84] In its decision, the court ruled that:[85]

1. *"….. the imposition of penalties by the Appellant was ultra vires its powers, especially where no platform was established to observe the principles of natural justice.*
2. *Penalties or fines are imposed as punishment for an offence or violation of the law. The power as well as competence to come to that finding belong to the courts, and the Appellant is not clothed with the power to properly exercise that function in view of the law creating the Appellant (NOSDRA). There is, therefore, a lacuna in that law establishing the Appellant.*

[78] *ibid.*
[79] *ibid.*
[80] *ibid.*
[81] *ibid.*
[82] *NOSDRA* v *ExxonMobil* (n.76).
[83] *ibid.*
[84] *ibid.*
[85] *ibid.*

3. *The said law also prevents NOSDRA from even prosecuting environmental offenders as it must be reported to the Attorney-General or members of his office."*

Relying on this precedent, it is apparent that prosecution for environmental criminal violations in the oil and gas industry is solely left to the Attorney-General and designates in his office. The question therefore remains why such prosecutions have not been adequately carried out. The study suggests a number of reasons for this below.

4.1.3.1 Corruption Limiting Detection of Environmental Crime

A major challenge that has impeded the quick prosecution of oil and gas pollution offenders is the inability to actually identify the culprits of the offences as a result of corruption. Indeed, the SPDC has alleged that the perpetrators of intentional oil sabotage acts that contribute to Nigerian pollution crime are often inhabitants of the Niger Delta communities.[86] Moreover, the group that has been mainly carrying out the identification of the sabotage criminals in Nigeria is the Joint Task Force (JTF) which is an arm of the Nigerian police force.[87]In line with Section 4 of the Police Act 1967, it is the duty of the JTF to detect such inhabitants perpetrating the sabotage acts. It has however been asserted that often the JTF have failed in their duty to discover the perpetrators of oil pipeline sabotage.[88] This study argues that corruption in the force has also contributed to this inability to detect crime. Firstly, corruption is prohibited by Section 19 (a) (11) of the Independent Corrupt Practices Act 2000 which states that: "*any public officer who uses his office or position to gratify or confer any corrupt or unfair advantage upon himself or any relation or associate of the public officer or any other public officer shall be guilty of an offence and shall on conviction be liable to imprisonment for five years*

[86] Jedrzej G Frynas, *Oil in Nigeria Conflict and Litigation Between Oil Companies and Village Communities* (Politics and Economics in Africa Series Volume 1, Munster: London LIT 2002) p.196; Shell Nigeria, 'Oil Theft, Sabotage and Spills' (Shell Nigeria 2014) <https://s05.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2014bnotes/spills.pdf> accessed 12 March 2019.
[87] Pulse Nigeria, 'JTF Warns Community Leaders Over Attacks On Oil and Gas Facilities' (Pulse Nigeria 2016) <https://www.pulse.ng/news/local/niger-delta-jtf-warns-community-leaders-over-attacks-on-oil-gas-facilities/n3kpcq9> accessed 14 April 2019.
[88] *ibid.*

without option of fine." However, despite this provision, the corruption of the public officers (such as members of the police force) is an open secret. There have been repeated allegations of corruption at different times among Nigeria's public officers.[89]

In 2005, Tafa Balogun, the then inspector general of police was sentenced to six months imprisonment for corrupt enrichment, stealing and embezzlement of public funds totalling a sum of 103 million dollars.[90] Furthermore, in 2008, the National coordinator of the Police Equipment Fund (PEF) Kenny Martins and his deputy Ibrahim Dumuje were charged with the misappropriation of N50 billion donations to enhance police performance by diverting the funds to their personal use.[91]

Furthermore, it has been reported that law enforcement agents in Nigeria sometimes extort offenders rather than sanction them.[92] This deficiency was also emphasized in the criminal case of *Temple Nwankwoala (DSP)* v *Federal Republic of Nigeria*[93]whereby the accused (a Deputy Superintendent of the Nigerian Police) was convicted of extorting large sums of money from a person against whom criminal complaints had been made and were being investigated. In any case, the Worldwide Governance Indicator regarding control of corruption ranging from 0 (lowest control of corruption) to 100 (highest control of corruption) shows that Nigeria scored just 11 on control of corruption in 2012.[94] There was very little variation since the first assessment in 1996 when the country scored

[89] Ogbewere B Ijewereme, 'Anatomy of Corruption in the Nigerian Public Sector: Theoretical Perspectives And Some Empirical Explanations' (2015) 5 SAGE Open 2; Wada Attah Ademu, 'Eradicating Corruption in Public Office in Nigeria: Lessons from the Singapore Experience' (2013) 7(2) Interpersona <https://interpersona.psychopen.eu/article/view/151/html>accessed 10 December 2018; Jide Ibietan,'Corruption and Public Accountability in the Nigerian Public Sector: Interrogating the Omission.' (2013) 5(15) European Journal of Business and Management 44; Uwah E Uwak and Anieti Nseowo Udofia, 'Corruption in Nigeria's Public Sector Organizations and Its Implications for National Development' (2016) 7(3) Mediterranean Journal of Social Sciences 27.

[90] British Broadcasting Corporation, 'Nigerian Ex-Police Chief Jailed' *British Broadcasting Corporation* (2005) <http://news.bbc.co.uk/1/hi/world/africa/4460740.stm> accessed 26 August 2019.

[91] Ayoade Adedayo, 'Environmental Risk and Decommissioning of Offshore Oil Platforms in Nigeria' (2011) 1 NIALS Journal of Environmental Law 213.

[92] Leena K Hoffmann and Raj N Patel, 'Collective Action on Corruption in Nigeria a Social Norms Approach to Connecting Society and Institution' (Royal Institute of International Affairs: Chatham House Report 2017) p.9.

[93] *Temple Nwankwoala (DSP)* v *Federal Republic of Nigeria* (2015) LPELR-24392(CA)

[94] Transparency International, 'Nigeria: Evidence of Corruption and The Influence of Social Norms' (Transparency International 2014) <https://www.transparency.org/files/content/corruptionqas/Nigeria_overview_of_corruption_and_influence_of_social_norms_2014.pdf> accessed 8 August 2019.

approximately 9.[95] This puts the country lower than the sub-Saharan African average of 30 in the management of corruption.[96] This study argues that there cannot be prosecution if the alleged perpetrators have not been identified *ab-initio*. This is because without the identification of such persons, there would no one to prosecute.

4.1.3.2 Lack of Will of the Attorney General (or His Designate) to Prosecute

Despite the statutory capacity of the Attorney-General or his designates to prosecute, it has been alleged that sometimes, they fail to actually perform this role of prosecution. A writer has alleged that there have been circumstances in which the Attorney-General refused to prosecute environmental offences in the oil and gas industry simply because he was too busy with other matters.[97] In this way, inhabitants of the areas can be denied redress for the harm they have suffered or there may be a delay in getting justice for environmental wrong done in the country. This necessitated the question as to whether it is right that a person who had genuinely suffered from pollution "*be prevented from commencing an action to enforce his legitimate rights to a clean and hazard-free environment, if the Attorney-General is unconcerned with his plight*?"[98] This leads to the next point, whether private litigation is permitted under any circumstance in Nigerian criminal law especially considering that there might be circumstances where the designated parties might fail to carry out the role. A determination of the position of Nigerian environmental criminal law on the prosecution by other private parties (not listed in Section 106 of the ACJA) is necessary considering that there is no statutory provision in Nigerian law that specifies that a decision not to prosecute can be challenged by other third parties.

[95] *ibid*.
[96] *ibid*.
[97] Onoriode Emoyan, 'The Oil and Gas Industry and the Niger Delta: Implications for The Environment' (2010) 12(3) Journal of Applied Sciences and Environmental Management 33.
[98] *ibid*.

4.1.3.3 Inadequacy of the Federal High Court in trying Environmental Offences and Lack of a Specialised Environmental Court

In line with the ACJA, environmental offences relating to the oil and gas industry can only be tried at the Federal High Court (FHC). However, it is notable that several matters are also tried in the Federal High Court (including matters of other concerns that do not relate to the oil and gas industry).[99] It is notable that the FHC adjudicates on various other matters besides environmental ones. This study therefore argues that the FHC could be overwhelmed by a large number of other cases which could cause lengthy delays in environmental adjudication and a denial of environmental justice. After all, it has been asserted that "*delay of justice is a denial of justice*."[100] A delay to render justice for an environmental offence committed could invariably limit the possibility of eventually accessing justice on the environmental issue. This reduces the applicability of the access to justice pillar of the Aarhus principle described in chapter 2 of this study.

Writers have argued that even if environmental criminal matters were to be prosecuted, there is a substantial possibility that the court and judges of the FHC might lack the relevant experience required to deal with environmental crimes, especially relating to the exploitation of oil and gas resources.[101] They are of the view that the consequences of pollution that form the basis of the accused person's culpability are often technical in nature, hence requiring adjudicators with expert knowledge of the field and a jury and judge who are experienced in the field.[102] In any case, it has been observed that the technical expertise required for prosecuting environmental criminal matters in the oil and gas industry is often lacking.[103] Noting this insufficiency, it has been observed that most developing countries: "*require the service of the qualified and experienced investigators, professional and especially well trained prosecutors in criminal cases on environment, and expert in various fields is of major importance, as well as a qualified laboratory, supported by sufficient funds, especially in handling water*

[99] This is provided for in Section 251 of the Nigerian Constitution 1999 (as amended).
[100] *Allen* v *Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 245.
[101] Ayoade Adedayo (n.89).
[102] *ibid.*
[103] Michael G Faure, 'Enforcement Issues for Environmental Legislation in Developing Countries' (United Nations University Press 1995) p.18.

and air pollution caused by industry….."[104] It has also been observed that most developing countries such as Nigeria lack necessary environmental laboratories which can serve and provide the data needed to construct an indictment accurately and prove the accused guilty beyond reasonable doubt."[105] Similar to this assertion, the Attorney-General of the Nigerian Federation and members of his department might not necessarily possess the appropriate environmental expertise required to adjudicate environmental offences given that they are trained lawyers not environmentalists. Moreover, even the judges of the courts that make the final decisions (since Nigeria does not operate a jury system) might not possess the required environmental knowledge and expertise to deliver right judgements on environmental criminal matters.

Moreover, the Environmental Rights Action and Friends of the Earth have argued that while there might have been efforts to speak against the failure to prosecute environmental criminals in Nigeria, they acknowledge the current lax judicial system in the country.[106] They observed that the Nigerian judiciary is not totally independent and decisions at court are often influenced by the executive arm of government.[107] This goes against the assertion of Lord Bingham that "*the principle of independence calls for decision-makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties and pressure groups, and their own colleagues, particularly those senior to them. In short, they must be independent of anybody and anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be*."[108]

The inherent deficiency in the FHC being the only court for trying environmental offences related to the oil and gas industry and the possible lack of specialisation

[104] *ibid.*
[105] *ibid.*
[106] Godwin Ojo and Nosa Tokunbor, 'Access to Environmental Justice in Nigeria: The Case for A Global Environmental Court of Justice' (Friends of the Earth 2016) <https://www.foei.org/wp-content/uploads/2016/10/Environmental-Justice-Nigeria-Shell-English.pdf> accessed 27 August 2019.
[107] *ibid.*
[108] Tom Bingham, *The Rule of Law* (1st edn, Penguin Books 2011) pp.91–92.

in the courts necessitates the establishment of an environmental court that could not only effectively deal with environmental offences but grant access to environmental justice for all Nigerians. The reason for the establishment of an environmental court in Nigeria and factors that have to also be considered while setting it up will be discussed in the recommendation section of this study.

4.1.3.4 Absence of Public Interest Prosecution in the Nigerian Regime

Other public persons (besides those listed in Section 106 of the ACJA) lack the capacity to prosecute environmental offences committed in the Nigerian oil and gas industry.[109] This is as a result of the lack of *locus standi* to establish such actions. As has been statutorily established, criminal procedures for environmental offences in the oil and gas industry can only be rightly instituted by the Attorney-General of the Federation or his designates specified in Section 106 of the ACJA. In essence, private persons, NGOs or any such person that has not been statutorily delegated under Section 106 lacks the *locus standi* to prosecute criminal offences (and in particular, environmental criminal offences relating to oil and gas resources) at the Federal High Court.

Indeed, the procedural law in a few Nigerian states empowers private persons to institute criminal complaints against offenders (an example is Section 143 of the Criminal Procedure Code Law of Kwara State 1977 which permits private persons to institute criminal complaints against offenders when they have suffered harm from the crime committed). This position was reflected in *Tolulope Onyide* v *Taiye Ayotunde Onyide.*[110] In the case, the Court of Appeal held that "…*in fact even the roadside petition writer or any person for that matter can prepare and sign a criminal complaint for a complainant under Section 143 (d) and (e) of the Criminal Procedure Code Law of Kwara State*."[111]

[109] *ibid.*
[110] *Tolulope Onyide* v *Taiye Ayotunde Onyide* [2018] LPELR-44240 CA.
[111] Halima Abiola, 'A Private Person Can Initiate Criminal Prosecution Without AG's Consent or Fiat– Court of Appeal - The Loyal Nigerian Lawyer' (*The Loyal Nigerian Lawyer*, 2018) <https://loyalnigerianlawyer.com/a-private-person-can-initiate-criminal-prosecution-without-ags-consent-or-fiat-court-of-appeal/> accessed 6 March 2019.

The inability of Non-Governmental Organizations (NGO) to prosecute under Nigerian criminal law (generally) has also been established under a relevant case law provision.[112] The court argued that unless such powers are delegated to such an NGO, which under Nigerian law is impossible, such an NGO lacks the capacity to prosecute. In *Adesanya* v *President (supra)*,[113] the court argued that while NGOs might have the capacity in other jurisdictions, they lacked the *locus standi* under Nigerian law.[114] The trial judge held that "*the position of the law may have changed to cloak 'pressure groups, NGOs and public spirited taxpayers' with locus standi to maintain an action for public interest, as argued by the Appellant, but that is in other countries, not Nigeria. The truth of the matter is that there is a remarkable divergence in the jurisprudence of locus standi in jurisdictions like England; India; Australia, etc., and the Nigerian approach to same.*"[115]

This exclusion has clearly been extended under case law to environmental enforcement agencies in the regime whereby the Supreme Court ruled that enforcement agencies such as NOSDRA lacked the requisite *locus standi* to prosecute environmental criminal matters in the oil and gas industry as such matters can only be prosecuted by an Attorney-General of the Federation.[116] To this effect, criminal prosecution of pollution offences relating to the oil and gas industry is the responsibility of the Attorney-General of the Federation or his designates, regardless of whether they are incompetent in performing such roles and there is no flexibility for performance by other private persons that might be willing to prosecute. Moreover, writers have argued that the duties of the environmental agencies to regulate should also be interpreted as a measure of the right to prosecute offenders.[117] However, an inherent limitation to such a supposition in the Nigerian environmental regime is that the establishment Act that set up such agencies and listed their scope of duties clearly excluded the possibility of the agencies to prosecute. For example, while Sections 5-7 of the NOSDRA Act fails to specifically stipulate a permission for NOSDRA to prosecute

[112] *Centre for Oil Pollution Watch* v *Nigeria National Petroleum Corporation* (2013) LPELR-20075(CA).
[113] *Adesanya* v *President (supra)* (1981) 2 NCLR 358.
[114] *ibid*.
[115] *ibid*.
[116] *NOSDRA* v *ExxonMobil* (n.76).
[117] Hakeem Ijaiya and O. T. Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 05 Beijing Law Review <http://file.scirp.org/Html/8-3300306_52770.htm> accessed 6 March 2019.

oil and gas firms that fail to remediate and rehabilitate the environment, Section 6 (m) of the Economic and Financial Crimes Commission (Establishment) Act 2004 explicitly empowers the commission to prosecute financial offences, in addition to other duties of enforcement stipulated in the Act.

Hence, on a general note, Nigerian environmental criminal law fails to provide for public litigation of environmental offences. In line with this argument, it has been observed that the existing legislative framework in the Nigerian environmental regime prevents affected communities from easily accessing environmental justice for environmental crimes committed against them.[118] Although Section 3 of the (yet to be passed) Private Prosecutions Bill 2009 gives a private person or NGO the right to prosecute, except when any given law has particularly stipulated that the Attorney-General prosecutes the criminal offence, such *locus standi* is yet to be extended to private persons under the existing regime generally.

This study argues that the limitation to public interest litigation under the Nigerian environmental criminal regime (which has been a major contributor to the absence of prosecutions in the regime) could be viewed as having limited the application of the pillar principle of access to environmental justice in the Nigerian regime. This is based on the argument made in chapter 2 that the principle facilitates easy access for private persons affected by environmental harm to seek redress. This is not surprising considering that Nigeria has neither signed nor ratified the Aarhus Convention nor has it domesticated it (as mentioned in chapter 2). The ratification of this Convention and domestication as Nigerian law would facilitate the ability of the regime to be open to flexible approaches to enhancing environmental justice such as the utilisation of private interest litigation if the Attorney-General fails to prosecute. This study does not seek a replacement of the role of the Attorney-General of the Federation to prosecute environmental offences with public interest litigation. Rather the study argues against the inability of the regime to extend the right to prosecute to other public interest persons that can also be capable of

[118] Onoriode Emoyan (n.97).

prosecuting if permitted, especially considering the perceived inability of the Attorney-General to prosecute on some occasion.

4.1.3.5 Heavy Standard of Proof Required for the Prosecution to Prove their Case against Environmental Offenders

Another factor that has contributed to the gap in the prosecution of criminal pollution in the Nigerian oil and gas industry is the great statutory expectation of the prosecution to prove the guilt of an accused person under Nigerian criminal law. Section 138 (1) of the Evidence Act 2011 requires that the burden of proof in criminal trials must be established by the prosecution beyond reasonable doubt. Hence generally in Nigerian criminal law, the burden of proof can only fall on the accused after the prosecutor has established evidence that helps in proving the crime for which the accused is charged.[119] The interpretation of 'beyond reasonable doubt' was established in the criminal case of *Osetola & Anor* v *The State*[120] to imply a strict burden placed on the prosecution to establish its case against the defendant by proving 'every' element of the offence. However, in some circumstances, an excessively strict burden comes with its demerits.

For instance, the defendant can simply deny the existence of a criminal element or simply sit back and wait for the prosecution to fail to meet its burden of proof; a legal strategy referred to as either a denial or failure of proof defence.[121] At other times, the defendant can assert an affirmative defence that is not connected to the prosecution's burden of proof before or during the trial by raising a new issue that must be proven to a certain evidentiary standard.[122] Either way, the heavy requirement of standard of proof in the prosecution of a legal person who has been accused of committing an environmental offence will always create tedious work

[119] Christopher Brown, ''Burden of Proof' in Criminal Defence Cases' (*The Brown Firm*, 2015) <https://www.brownfirmpllc.com/burden-of-proof-in-criminal-defense-cases/> accessed 17 December 2018; Janet Portman, 'The Burden Of Proof In Criminal Trials' (*Lawyers.com*, 2018) <https://www.lawyers.com/legal-info/criminal/criminal-law-basics/criminal-trials-who-has-the-burden-of-proof.html> accessed 17 December 2018.
[120] *Osetola& Anor* v *The State* (2012) LPELR-9348(SC).
[121] University of Minnesota, '5.1 Criminal Defenses' (*Open.lib.umn.edu*, 2019) <https://open.lib.umn.edu/criminallaw/chapter/5-1-criminal-defenses/> accessed 8 August 2019.
[122] *ibid*.

for the prosecution even when the prosecution might have a good case against the accused person.

Indeed, it has been asserted that the need to prove strict liability offences beyond reasonable doubt has impeded the ability of enforcement agencies to prosecute environmental offences.[123] This is because significant attention (which sometimes might be undue) has to be given to investigation, as each element of the criminal offences being investigated has to be capable of strict proof.[124] In line with this, investigators must establish procedures for conducting any necessary searches, for securing physical evidence, for gathering and storing documentary and other evidence, for holding interviews under caution, for taking the statement of witnesses, for examining their evidence and 'plugging gaps', and for ensuring that these procedures are carried out on time before the evidence goes stale.[125]This study believes that the above reasons have contributed to the inadequate prosecution of environmental offences committed in the Nigerian oil and gas industry.

4.1.3.6 Lack of Sentencing Guidelines in the Nigerian Criminal Law System

The process of enacting legislation in Nigeria is similar to the USA, involving a joint effort of the legislative arms. Furthermore, most such legislation prohibiting particular violations contain within themselves the prescribed punishment for such violations.[126] However, no existing sentencing guideline has been observed in the Nigerian regime that could provide guidance to the sentencing of environmental offenders by the courts even if the regime decided to commence adequate prosecution of its environmental offences in the oil and gas industry.[127] The closest to a Federal Sentencing Guideline in Nigeria are the statutorily prescribed penalties

[123] Michael Watson, 'The Enforcement of Environmental Law: Civil or Criminal' (2005) 17 ELM Journal 5.
[124] William Wilson (n.38) p.111.
[125] *ibid.*
[126] Victoria T Kajo, 'An Evaluation of the Need for and Functioning of the Federal Sentencing Guidelines in the United States and Nigeria' (2008) 14 Cornell Law School Inter-University Graduate Student Conference Papers <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1042&context=lps_clacp>accessed 12 August 2019.
[127] *ibid.*

discussed above.[128] Proponents in favour of this absence have argued that in Nigeria, sentencing is a little less complex than other jurisdictions that might have utilised Sentencing Guidelines, such as the USA.[129] This is mainly as a result of the form of federalism practised in Nigeria involving no jury in its judicial system.[130] Hence, they believe there is really no necessity for a sentencing guideline.[131]

This study will however argue this as a deficiency in line with the purposes of a sentencing guideline in any criminal regime. First, Justice Brewer has argued that by categorizing offenders through the use of 'offence' and 'offender,' sentencing guidelines have reduced disparity in sentencing in the USA.[132] Accordingly, the USA guideline has narrowed the sentencing range to make sure that offenders with similar crime elements and similar criminal histories receive similar punishments upon conviction.[133] It has also been asserted that sentencing guidelines have facilitated accurate sentencing in the USA.[134] Indeed, it has been argued that prior to the introduction of sentencing guidelines in the USA, parole officers had enormous powers to determine the length of time offenders served in prison.[135] This was because despite the prison terms imposed by trial courts, the parole officers could recommend the offenders being let out after a while on account of 'good behaviour.'[136] This made it difficult to know for certain how much actual time an offender was going to serve.[137]

Hence, one such recommendation under the existing USA definitive sentencing guideline is to make sentencing more definite by abolishing parole with minor exceptions, and making the time imposed under the sentencing the actual time served.[138] Most sentencing guidelines also make sentences proportional to the

[128] *ibid.*
[129] *ibid.*
[130] *ibid.*
[131] *ibid.*
[132] Steven Breyer, 'Federal Sentencing Guidelines Revisited' (1999) 11 Federal Sentencing Review 180.
[133] Victoria T Kajo (n.126).
[134] *ibid.*
[135] *ibid.*
[136] *ibid.*
[137] *ibid.*
[138] *ibid.*

offence committed and the financial capacity of the offender.[139] Indeed, the uniformity, accuracy and proportionality of sentencing that has been associated with sentencing guidelines creates some form of consistency which makes the court and criminal justice system legitimate to the general public.[140] For instance, in 2007, Smith discovered that consistency in sentencing was a determinant factor in the confidence of the British people in the judicial system.[141] Furthermore, a national survey in Britain showed most respondents asserting that the most significant issues contributing to the deterrence of crime were the sentencing of criminal acts and the consistency of such sentencing.[142] Hence, not only are sentences pivotal in gaining public confidence in the criminal judicial system, but the consistency that has been associated with sentencing guidelines is equally essential.

The weak sanctioning in the Nigerian regime is worsened by the absence of a Federal Sentencing Guideline in the Nigerian regime. This study has discussed the arguments made in favour of the use of Sentencing Guidelines. In line with the arguments, the study has viewed such Guidelines as necessary to the legitimacy of the criminal justice system based on the proportionality of allocating sentences commensurate to offences. Indeed, while the Nigerian regime has provided for scalable fines, the fines are currently too weak to deter offenders even if they were applied by a sentencing guideline. It is however of note that the Guidelines do not go outside the scope of established statutory sanctions to sentence. Hence there must be the first step of toughening up the Nigerian environmental criminal sanctions as analysed above. Subsequent to this, the study argues that the scalable nature of the environmental criminal sanctions in the Nigerian regime without a sentencing guideline could be detractive. The reason being that since the statutes have only provided a limit which the sanctions cannot exceed with no provision as to the minimum sanction, judges can impose sentences that are very

[139] *ibid*.
[140] Julian V Roberts and Mojca M Plesničar, 'Sentencing, Legitimacy, and Public Opinion' [2014] Trust and Legitimacy in Criminal Justice 37.
[141] Dominic Smith, 'Confidence in the Criminal Justice System: What Lies Beneath?' (Ministry of Justice 2007) 7-10.
[142] Bobby Duffy, Rhonda Wake and Pamela Bremner, 'Losing the Gaps: Crime and Public Perceptions' (Ipsos MORI 2008) <https://www.politieacademie.nl/kennisenonderzoek/kennis/mediatheek/PDF/68798.pdf> accessed 9 October 2019.

minimal when compared to the offence committed (yet still within the scope of scalable sanctions provided under the statute). For example, while it has been argued that the imposition of fines up to N2000 (£4.20) as sanction for the pollution of navigable waters in Nigeria waters[143] is weak, a judge can further decide to sentence the offender to an even lower a fine to half the statutory fine and still be within the statutory scope stipulated in the Act.

Moreover, while the study has acknowledged the apparent lack of prosecution for environmental offences related to the Nigerian oil and gas industry, this study argues that a lack of such guideline could make future sentences heterogeneous in nature. Considering the apparent defectiveness of the Nigerian environmental criminal regime, it would only be expected that the criminal justice system might not be as legitimate as required to collectively ensure the enforcement of environmental standards in Nigeria. A comparative analysis of the applicability of sentencing guidelines in the UK and USA regimes will be discussed in the next chapter.

4.2 Deficiencies Contributing to Poor Enforcement of Environmental Standards

Environmental enforcement is defined as the set of actions that government or its agencies take to ensure compliance with environmental standards.[144] Such enforcement should guarantee full implementation of environmental standards. This study has previously explained that environmental standards in the Nigerian regime are codified in environmental legislation. Based on the discussion in chapter 3, this study observed continued flagrant disregard of environmental standards despite the expectation that sanctions compelling the companies to comply will have been enforced. It is therefore apparent that there is a defect in the existing environmental enforcement process in the Nigerian oil and gas sector.

[143] This is stipulated in Section 6 of the Oil in Navigable Waters Act 1968.
[144] Zephnaiah Edo, 'The Challenges of Effective Environmental Enforcement and Compliance in the Niger Delta Region of Nigeria' (2012) 14 Journal of Sustainable Development in Africa 265.

The flagrant violations raise questions like: have enforcement agencies even gained an accurate record of the extent and volume of violations committed other than the information given by the companies themselves and the individual investigations of NGOs like Amnesty International and Friends of the Earth? Have any such companies found to be liable for criminal violations been prosecuted for their criminal acts? Some of the companies have alleged third-party acts causing pollution; has this been investigated by Nigerian enforcers and culprits charged other than the investigation by external bodies like UNEP? If the environmental enforcement agencies and other agencies that contribute to enforcement in the regime have done this, then why have the violations clearly continued unabated? Most of these un-answered questions will be examined in the next section. The study will establish the answers from its determination as to possible deficiencies that have contributed to the occurrence of violations, despite the presence of enforcement agencies in the regime. The next sections of this chapter will explore these possible deficiencies.

4.2.1 Lack of Environmental Awareness on Enforcement Progress and Compliance Rate

This study observed its inability to gain reliable direct information regarding enforcement progress and compliance rates on standards such as impact assessment and clean-up from the enforcement agencies. This is because such reports (if existing) have not been published. Moreover, the agencies have seemed reluctant to provide such information and have resisted all attempts to gain such information. This has made the study rely mainly on secondary information from other sources like reports from Amnesty International and Friends of the Earth. Although the information from the secondary sources is sufficiently reliable for the big picture of environmental criminal violations painted in this study, such information is still not direct data from the agencies. Moreover, there have been allegations of the same nature from previous research studies.[145] Even where such information was provided, they failed to address the particular environmental

[145] Kayode B Oyende, 'An Appraisal of the Law Relating to Oil Pollution in the Inland, Territorial and Maritime Waters of Nigeria' (PhD, College of Law and Management Studies University of KwaZulu-Natal Pietermaritzburg Campus 2012) p.27.

information requested.[146] Writers have argued that on some occasions it has been apparent that the FME clearly did not have the particular EIA report information being requested.[147] This is a direct violation of the standard stipulated in Section 1 of the Nigerian Freedom of Information Act. Similarly, this contravenes Section 24 of the EIA Act.

In section 3.3 of this study, it was observed that in some circumstances EIA has been approved without the input and consent of other stakeholders required in the EIA Act. One of the reasons for this is the possibility that information regarding such EIA might not even be communicated to the stakeholders. This is interesting considering that some such stakeholders could be members of the local communities in which the oil and gas operations are being carried out. It would be expected that such community members are aware of the pre-existing environmental effects of similar oil and gas projects that have been carried out in their communities. Hence, they could provide first-hand information on such potential environmental issues for future similar oil and gas operations. This study asserts that the best ways to guarantee the stakeholder participation of such communities will be by: making the community aware of potential projects, engaging them on the EIA process to be carried out and involving them in the approval of the EIA report provided by the operator of such project.

Furthermore, this study argues that a failure to create environmental awareness on proposed projects or even permit public participation can limit public confidence on enforcement. This is because inhabitants of the community might fail to believe that any enforcement is actually being carried out to implement the standards if there is no accessible evidence to such enforcement. For example, this study has observed the lack of criminal prosecutions of environmental offenders in the Nigerian oil and gas industry based on the absence of any public record showing evidence of such application. Indeed, even if any such prosecution has been carried out in the past, it cannot be identified and attested if undocumented and accessible. Moreover, the provisions of the Freedom of Information Act remove

[146] Onyenekenwa CyprianEneh, 'Managing Nigeria's Environment: The Unresolved Issues' (2011) 4 Journal of Environmental Science and Technology 259.
[147] *ibid*.

the possibility of any other regulation limiting the public availability of such information since it provided no *caveat* to the extent of its application.

Moreover, if there is no confidence, how will the inhabitants participate in environmental matters such as the Niger Delta inhabitants assisting detection of third-party oil sabotage criminals and reporting them to the police? Furthermore, how will research be conducted towards strengthening the enforcement system if there is unwillingness on the part of agencies to provide the required adequate data to carry out such research? This study views this as a limitation of the regime impeding regulatory enforcement.

4.2.2 Conflicting Statutory Provisions on Enforcement

Another factor limiting enforcement of environmental standards in the Nigerian regime is the conflict of Nigerian environmental legislation regarding exactly which agency is in charge of dealing with the fundamental environmental enforcement obligations such as oil spill control. For example, pursuant to the NOSDRA (Establishment) Act discussed in chapter 2, the NOSDRA is required to coordinate and direct the clean-up and remediation of affected sites through the National Oil Spill Contingency Plan for Nigeria. On the other hand, Part VIII-B (Contingency Planning for the Prevention, Control and Combating of Oil and Hazardous Substances Spills) Section 6.1 (ii) of the EGASPIN mandates the DPR to coordinate and direct the clean-up and remediation of affected sites through the Initial Remedial Action (IRA) Plan. Furthermore, Sections 120 and 121 of the Minerals and Mining Act even introduced the Environmental Protection and Rehabilitation Programme (EPRP) for the rehabilitation of land that has been disturbed as a result of exploitation activities and established the Mines Environmental Compliance Department to enforce the exercise.

The question becomes: which exact plan is to be utilised in the enforcement of an important standard such as clean-up? Who exactly is to follow through on the exercise? In reality, this study believes that the NOSDRA has been performing most of the role since they seem to be the only agency with information regarding oil spills and the only agency that issues certification on remediation. This does

not however, negate the fact that there seem to be a confusion in the regime regarding which agency actually carries out the oversight of oil spill response and which policy and plan is actually utilised for enforcement. This study argues that this could limit the extent of enforcement for compliance by the regulated companies. This is because the companies will fail to know which exact policy is being utilised to carry out remediation and which exact agency is to direct remediation. Moreover, this study wonders how there could be effective criminal enforcement of remediation considering that the law is currently vague on who enforces. Indeed, even if there is a joint effort at enforcement, the roles of each agency in the joint process should be explicitly set out in the rules stipulating them. This is also important considering that the existing state of enforcement on oil spill remediation has created confusion on who is to enforce, and what agency should be held accountable for failing to carry out enforcement relating to remediation.

Furthermore, based on independent research conducted by Isah, it was discovered that the DPR and the NOSDRA have differing interpretations of the provisions for the framework of remediation stipulated in the EGASPIN (which statutorily in the EGASPIN, has been allocated to the DPR).[148] This study believes that this might have contributed to the ease with which most companies abruptly conclude their remediation process undetected and get certified for such half-cleaned sites. The argument is how there can even be detection of violators on remediation if there is no unified understanding as to what is involved in remediation by the agencies required to enforce. Where such detection has not been done as a result of conflict in interpreting the statute, then how can violators be sanctioned?

4.2.3 Neglect by Enforcement Agencies

This study observed that most of the enforcement agencies mandated to enforce environmental standards have failed to perform these duties properly.[149] This is despite the clear stipulations of statutory instruments (such as the NOSDRA Act)

[148] Mohammed N Isah, 'The Role of Environmental Impact Assessment in Nigeria's Oil and Gas Industry' (PhD, Cardiff University 2012) p.159.
[149] Peter O Ebigbo, 'Appraising the Impact of Economic Reform Programme on Micro, Small and Medium Scale Enterprises' *19th Enugu International Trade Fair Colloquium* (2015) p.14.

mandating such enforcement. This study argues that failure to perform such enforcement duties is a deliberate act on the part of the agencies. One clear example of such deliberate failure to enforce lies in the discovery by Amnesty International that some sites certified as remediated by enforcement agencies were still polluted by oil spills.

In the previous chapter this study identified the DPR and the NOSDRA to be jointly responsible for clean-up investigation, direction and certification by virtue of the EGASPIN and the NOSDRA (Establishment) Act. As earlier observed, oil spill clean-up and remediation are the responsibility of the oil company on whose facility an oil spill occurred. Unlike the NOSDRA (Establishment) Act which requires NOSDRA to be part of the process, it has been observed that often when any such company assesses the site as completely remediated (implying that the oil content in the soil and water has dropped at least below the regulatory intervention level for remediation),[150] it reports back to NOSDRA.[151] If NOSDRA is satisfied that the company has adequately restored the land to as far as possible to the original state, it issues a certificate declaring the clean-up and remediation efforts completed.[152]

The certification of sites discovered to still be polluted by NOSDRA entails that it deliberately failed to properly investigate and ensure the proper clean-up and remediation of such sites before certifying them. This is a clear breach of the obligation to investigate cleaned-up sites codified in PART III (Production Operations) Section 7.1.1 of the EGASPIN and Regulation 17 of the Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations 2011. In January 2013 an International Union for Conservation of Nature (IUCN) Panel that was requested to review environmental issues in the Niger Delta discovered, once

[150] The regulatory 'target level' for oil polluted sites in Nigeria is 50 mg/kg total petroleum hydrocarbons (TPH), while the 'intervention level' of 5,000 mg/kg TPH. However, there is an internal contradiction within the EGASPIN on which level should be utilised. Part VIII Section 2.11.3 of the EGASPIN states that to be considered successful, remediation needs to bring the hydrocarbon level down to the target level. But section Part VIII Section 6.6 states that the goal for a successful remediation should be the intervention level. It is however notable that NOSDRA have always rather applied the intervention level.
[151] Amnesty International, 'No Progress: An Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoniland, Three Years On' (Amnesty International 2014) p.14.
[152] This is pursuant to Section 6 (1) (b) of the NOSDRA (Establishment) Act.

again, that regulators had signed off a site as cleaned up that was still polluted.[153] The panel stated: "*in a recently concluded remediation site in Soku, the [Chemicals of Special Concern] levels were far higher than standards of EGASPIN (2002), even though all the authorities had signed off on the certificate for a clean bill of health for that site*."[154] In conclusion, the panel stated that: "*Based on the observations by the Panel, the current remediation practices in oil impacted areas in the Niger Delta are not satisfactory. Oil spill responses and remediation are not implemented fast enough and the methods and regulatory standards for biodiversity and habitat rehabilitation have not been adequately established. Some of the issues that are not properly addressed in the current context need a different approach consistent with best practice in the industry*."[155] This shows evidence that NOSDRA have signed off such sites are fully remediated without first investigating and ascertaining that the remediation has been carried out adequately. This is one such evidences of the failure of enforcement agencies in the Nigerian regime to effectively enforce the standards on companies operating in Nigeria.

Moreover, as was observed in chapter 2, the EGASPIN requires the director of petroleum resource (who is in charge of the DPR) to issue approval for the method to be utilised in the remediation, and the NOSDRA (Establishment) Act requires the NOSDRA to direct and supervise the process. It therefore entails that where such companies have not adequately carried out the process, the method utilised and which had been approved by the DPR would have been faulty *ab-initio*. It also entails that the NOSDRA under such circumstances, had either not directed and supervised the process at all or had not done so properly.

From the failure of NOSDRA to investigate oil spills before certifying clean-up and the failure of DPR to provide a suitable mechanism for clean-up, it is obvious that there is neglect on the part of some of the enforcement agencies to avoid

[153] Amnesty International, 'Bad Information on Oil Spill Investigations in the Niger Delta' (Amnesty International 2013) p.67.
[154] International Union for Conservation of Nature (IUCN) 'Niger Delta Panel to the Shell Petroleum Development Company of Nigeria Ltd (SPDC)' (International Union for Conservation of Nature 2013) p.4.
[155] *ibid*.

implementing the environmental standards of enforcement under Nigerian environmental law. Moreover, this study observed no criminal sanction in any of the legislation imposed on such neglect by enforcement agencies. In other words, any recommendation for the imposition of criminal liability for negligent agencies proposed in line with this deficiency will be novel to Nigerian environmental law system. However, the study argues that a failure to impose environmental criminal liability for agencies that fail to perform will only serve as an encouragement for increased non-performance and will also create a seeming complicity between the agencies and the defaulting companies themselves.

4.2.4 Corruption of Enforcement Agencies

One significant motive for an inability of the enforcement agencies to perform in Nigeria is corruption. A writer has described corruption as a factor limiting general enforcement in Nigeria.[156] Indeed, discussion regarding corruption as a factor contributing to inadequate prosecution has been done in this study. This study therefore, argues that this menace has limited the enforcement of environmental standards in the industry. Although the study has found no abundant literature on incidents relating to corrupt transactions between agencies and the companies, it is only obvious that an agency that receives financial donations from the violating companies will ignore the criminal violations of such company. It has been reported that rather than investigate oil spill, the NOSDRA has on some occasions collected monetary donation to ignore the violations of the multinationals.[157]Moreover, such corrupt transactions that have limited enforcement can make the public lose confidence in the enforcement bodies, hence even when a member of the public detects a possible environmental violation, he will be reluctant to report such incident for the fear that nothing might actually be done about duly punishing the offender.

[156] AB Mustapha, 'Environmental Regulations in Nigeria: A Mini Review' (2017) 1 International Journal of Environmental Sciences & Natural Resources 2.
[157] Oluwadare Oyebode, 'Impact of Environmental Laws and Regulations on Nigerian Environment' (2018) 7 World Journal of Research and Review (WJRR) 13.

4.2.5 Lack of Resources, Manpower and Funding to Enforcement Agencies

Another factor that has limited the ability of the agencies to enforce environmental standards is the lack of manpower and funding required by the agencies to carry out their duties.[158] It has also been alleged that most enforcement agencies lack the necessary equipment to determine who has actually caused pollution when third-party pollution occurs on an already corroded pipeline.[159] For example, based on research carried out by Amnesty International and CEHRD in 2013, it was confirmed that the NOSDRA is unable to carry out rigorous and independent investigations regarding oil spill remediation.[160]

Moreover, Ogbuigwe asserted that the Nigerian government has failed to provide sufficient human and material resources to undertake environmental enforcement.[161] It has been argued that on the few occasions NOSDRA fulfilled its statutory duty to investigate oil spills, the investigation processes were often heavily reliant on the information presented by the oil corporations and their manpower.[162] This has made it difficult for NOSDRA to impartially and effectively perform its function.[163] It has even been asserted that on some occasions, the NOSDRA lacked the necessary equipment to conduct investigations into oil spills and rather relied on the information put forward by the corporations regarding the extent of pollution done.[164] This is interesting considering the allegation that "*Shell and Eni seem to be publishing unreliable information about the cause and extent of spills. The people of the Niger Delta have paid the price for Shell and Eni's*

[158] Ayobami Olaniyan, 'The Law and Multi-Agency Response to Oil Spill Incidents in Nigeria' (*Interspill*, 2015) p.9.
[159] Energy Post Africa, 'Nigeria Lags behind in Response to Oil Spill —NOSDRA' (Energy Post Africa 2018) <https://energypostafrica.net/2018/04/19/nigeria-lags-behind-in-response-to-oil-spill-nosdra/> accessed 13 March 2019.
[160] Amnesty International (n.151) p.15.
[161] Anthony Ogbuigwe, 'Report on The Review of Environmental Protection Agency in Enugu State.' (Anpez Environmental Law Centre Port Harcourt 1996) p.12.
[162] Ayobami Olaniyan (n.158).
[163] *ibid.*
[164] Akpofure Rim-Rukeh, 'Oil Spill Management in Nigeria: SWOT Analysis of the Joint Investigation Visit (JIV) Process' (2015) 6 Journal of Environmental Protection 263; Amnesty International, 'Niger Delta: Shell's Manifestly False Claims about Oil Pollution Exposed, Again' (Amnesty International 2015) <https://www.amnesty.org/en/latest/news/2015/11/shell-false-claims-about-oil-pollution-exposed/> accessed 8 August 2019.

recklessness for too long..."[165] This must have informed the position of the Nigerian National Petroleum Policy 2017 that: "*the current system in Nigeria regarding maintenance, health and safety in the Nigerian petroleum sector is not acceptable. Major safety incidents go without proper investigation and without sufficient responsibilities being apportioned."*[166]

UNEP argued that NOSDRA's lack of resources entailed that, "*the agency has no proactive capacity for oil-spill detection and has to rely on reports from oil companies or civil society concerning the incidence of a spill. It also has very little reactive capacity – even to send staff to a spill location, once an incident is reported*."[167] To this, Amnesty International reported that the lack of vehicles and limited access to the boats and helicopters required to convey the enforcement agency staff to the several spill sites has limited the ability of the NOSDRA to detect the volume of spill and investigate the approach to clean-up.[168] This inability has made the agency rather reliant on information tendered by the defaulting companies regarding oil spill and oil spill control details.[169] Such reliance was confirmed from an interview on 7 May 2013 that was held with the Director of NOSDRA's Rivers state branch. Amnesty reported that during the course of the interview, the director received a text alert from the Agip Oil Company informing him of a spill.[170] The text further notified him of when a spill investigation would take place (which was a date several days later), and notified the director that the NOSDRA workers should be ready to join the Agip team at Agip's own convenience.[171] Interestingly, the director confirmed this to have been a usual procedure for oil spill investigation for a long time.[172] Amnesty International further confirmed that on some occasions, it had discovered that NOSDRA

[165] Amnesty International, 'Nigeria: Amnesty Activists Uncover Serious Negligence by Oil Giants Shell and Eni' (Amnesty International 2018) <https://www.amnesty.org/en/latest/news/2018/03/nigeria-amnesty-activists-uncover-serious-negligence-by-oil-giants-shell-and-eni/> accessed 10 December 2018.
[166] Birgitte Karlsen and others, 'An Overview of the Health, Safety and Environmental Regime in Nigeria's Offshore Oil And Gas Sector' *Wikborg Rein Advokatfirma AS* (2018) <https://www.wr.no/en/news/publications/shipping-offshore-update-desember-2017/an-overview-of-the-health-safety-and-environmental-regime-in-nigerias-offshore-oil-and-gas-sector/> accessed 17 April 2019.
[167] Amnesty International, 'Clean it Up: Shell's False Claims about Oil Spill Response in the Niger Delta' (Amnesty International 2015) p.17.
[168] *ibid.*
[169] United Nations Environmental Programme (UNEP), 'Environmental Assessment of Ogoniland' (United Nations Environmental Programme 2011) p.139.
[170] Amnesty International (n.151).
[171] *ibid.*
[172] Amnesty International (n.151).

delegates unqualified staff on such missions to investigate spills, or assess if remediation is complete.[173] This confirms the assertion of the UNEP that suffers "*from a shortage of senior and experienced staff who understand the oil industry and can exercise effective technical oversight*."[174]

This study argues that the reliance is bad in all aspects. First, NOSDRA's reliance on the companies for such investigations limits the independence of such investigation. Furthermore, the carrying out of investigation several days after the spill contributes to the poor reporting of oil spills hence limiting the proper record as to the extent of spill. Moreover, carrying out such investigations 'several days later' after the spill is in breach of the requirement under the EGASPIN for investigation to occur within 24 hours of the spill.

This study observed no public record of any established mechanism for scientific analysis (such as the existence of a forensics laboratory) utilised in the regime to determining the chemical composition, amount and extent of contamination which will help build the case of the prosecution against an environmental offender. Indeed, without such analysis, how can the agency sufficiently deduce the extent to which a particular action of the environmental offender had contributed to the pollution offence? Furthermore, the study found no public record of any specified platform for storing records of investigations with which enforcement agencies can gather evidence to determine non-compliance.

In addition, on reviewing the allocations reserved in the Appropriation Bill 2018, the researcher observed that the NOSDRA was required to secure its funds from the Ministry of Petroleum Resources.[175] The DPR on its own is required to secure its funds from the Nigerian National Petroleum Corporation (NNPC).[176] The study therefore wonders why this is so, considering that NOSDRA is a statutory enforcement body, independent of the Ministry. One would then wonder how the agency would be expected to function independently since its resources are tied to another ministry of the Nigerian government. Section 44(3) of the Nigerian

[173] *ibid.*
[174] UNEP (n.167).
[175] Ayobami Olaniyan (n.158).
[176] This is specified under Section 10 of the Nigerian National Petroleum Corporation Act 1977.

Constitution (as amended) establishes the NNPC as the main organ through which the government engages in exploration and production activities. A writer has argued that the challenge of lack of finance has limited the ability of most enforcement agencies to adequately enforce the sanctions stipulated under Nigerian environmental law.[177]

In any case, this study wonders how the revenue of an important enforcement agency such as the DPR can be tied to the NNPC considering that the NNPC only gains its revenue from federal government loans, grants or the sale of crude oil.[178] To this effect, the determination of how much revenue the NNPC has made is strictly limited to what the NNPC freely declares as there is no existing provision regulating the minimum amount of revenue expected from the NNPC. Hence, the DPR is left to be funded at the expense of how much revenue the NNPC has gained and declared from the sale of crude oil. In the case that the NNPC does not make enough funds in a given year, it could limit the funds available to the DPR to function, hence limit the capacity of the DPR to enforce properly.

Furthermore, one of the duties of the DPR is to ensure that oil and gas industry participants conform to national and international best oilfield practices.[179] Hence, the DPR is expected to ensure that oil and gas corporations exercise due diligence to prevent pollution from occurring.[180] Furthermore, the DPR is expected to ensure that oil and gas corporations conform to statutory provisions regarding ending gas flaring in Nigeria.[181] This study therefore wonders how the DPR can independently and impartially implement environmental standards on the oil multinationals operating in the Niger Delta considering that the NNPC benefits directly from the existing joint venture agreement with the multinationals on production (an arrangement that has resulted to the operations breaching the environmental standards).

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[177] Adegoroye Adegoke, 'The Challenges of Environmental Enforcement In Africa: The Nigerian Experience', *Third International Conference on Environmental Enforcement* (2019) <http://Nigerianlawguru.Com/Articles/Environmental%20law/THE%20CHALLENGES%20OF%20ENVIRONMENTAL%20ENFORCEMENT%20IN%20AFRICA,%20THE%20NIGERIAN%20EXPERIENCE.Pdf>accessed 6 March 2019.

[178] This is specified under Section 4 of the Nigerian National Petroleum Corporation Act.

[179] Department of Petroleum Resources, 'What We Do' (Department of Petroleum Resources: Petroleum Regulatory Agency of Nigeria 2018) <https://www.dpr.gov.ng/functions-of-dpr/> accessed 11 April 2019.

[180] *ibid*.

[181] *ibid*.

4.2.6 Failure of Internal Distribution of Tasks and Sharing of Data between Enforcement Agencies

There is an allegation that enforcement agencies such as NOSDRA have failed to coordinate with international partners and entities to secure scientific resources and technology for performing their environmental enforcement roles.[182] This might be a deficiency considering the earlier mentioned deficiency of the lack of resources for the agencies to perform. If they have no resources to work with and they cannot reach out for aid to other jurisdictions, how then could they perform? Moreover, considering that other developed regions like the UK and USA regimes discussed in this study might have utilised modern technology to facilitate the efficiency of their enforcement, this study views the perceived inability of the Nigerian enforcement agencies to reach out to such regimes as a possible deficiency on their part.

In the case of NOSDRA, this contravenes the provision of Section 5(d) of the NOSDRA Act, requiring the agency to "*co-operate with the International Maritime Organization (IMO) and other national, regional and international organisations in in the promotion of the exchange of scientific results and research relating to oil pollution preparedness and response*." This also detracts from the principle of co-operation and the spirit of good neighbourliness mentioned in chapter 2. It is therefore interesting that this study found no record of any such exchange of scientific and technical information or resources towards facilitating enforcement in the Nigerian regime. This study argues that the lack of exchange is interesting considering that an avenue has been provided for such exchange through the Convention for Co-Operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region; and Protocol.[183]

Article 3(1) of the Convention stipulates that: "*The Contracting Parties may enter into bilateral or multilateral agreements, including regional or sub regional agreements, for the protection of the marine and coastal environment of the West*

[182] AB Mustapha (n.156).
[183] Convention for Co-Operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region; and Protocol 1981. Entry into Force 1984.

and Central African Region, provided that such agreements are consistent with this Convention and conform to international law...” Similarly, Article 4(1) of the Convention stipulates that: “*The Contracting Parties shall, individually or jointly as the case may be, take all appropriate measures in accordance with the provisions of this Convention and its protocols in force to which they are parties to prevent, reduce, combat and control pollution of the Convention area and to ensure sound environmental management of natural resources, using for this purpose the best practicable means at their disposal, and in accordance with their capabilities*.” In the same vein, Article 4(2) stipulates that: “…*the Contracting Parties shall cooperate in the formulation and adoption of other protocols prescribing agreed measures, procedures, and standards to prevent, reduce, combat and control pollution from all sources or promoting environmental management in conformity with the objectives of this Convention*.”

Indeed, these provisions show evidence of a regional framework for the coordinated approach to enforcement of environmental protection. The above stipulations of the Convention indicate not just a joint approach to enforcement but also cooperation among contracting states. Interestingly, this Convention is yet to be domesticated as Nigerian law, hence has not been applied. Moreover, while the NOSDRA Act have provided some brief stipulation on such transboundary cooperation, it is the only statute that has provided for this. It is therefore obvious that the Nigerian regime have failed to adequately establish legislation providing a framework for the exchange of enforcement information and approach, scientific expertise and technology for all spheres of environmental enforcement rather than a mere mention in the objectives of a clean-up plan. This position was emphasized in Article 4(3) of the Convention which stipulates that: “*the Contracting Parties shall establish national laws and regulations for the effective discharge of the obligations prescribed in this Convention, and shall endeavour to harmonize their national policies in this regard*.” Moreover, this study argues that implementing a regional approach to enforcement in Nigeria might also be limited by the additional requirement for any such soft law provision or instrument to be adopted under the Nigerian legislative regime to be first domesticated under Nigerian law regardless of whether the country is a signatory to it or has acceded to it.[184]

[184] This has been discussed in section 2 of this study above.

4.2.7 Absence of Environmental Watchdog and Penal Sanctions for Agencies for Failing to Perform

There is no statutory watch-dog organisation that has been established under the regime to monitor the actions of the environmental agencies towards ensuring that they carried out their enforcement roles. To this effect, there is no organisation (established under law with binding powers) to monitor the inabilities of the agencies to perform and compel them to perform. While NGOs such as Friends of the Earth (FoE) and Amnesty International have put out a strong message against poor enforcement by the Nigerian agencies,[185] there is no explicit policy framework establishing them as watchdogs in the regime. While these NGOs can repeatedly condemn this ineffectiveness of the agencies, there is no particular organisation that provides a strong strategic monitoring role over the performance of the agencies. Hence, despite repeated condemnations, the agencies can decide to ignore such reports and flagrantly continue in their failure to enforce. This observation is significant considering the observation above that no relevant subsisting legislation stipulates any criminal penalty for failure of the agencies to perform. This creates an impression that there is no repercussion for the failure of such agencies to perform their statutory duties of enforcement.

4.2.8 Lack of Political Will to Regulate the Environment

The ownership and the control of oil and gas resources in Nigeria are vested in the Nigerian government.[186] In the same vein, Nigerian environmental law holds the government accountable for regulating the environment. In effect, there is an expectation that the government regulates activities in the oil and gas industry such that the environment is not polluted as a result of such activities. Pursuant to Section 20 of the Nigerian Constitution, the government is obligated to protect the territorial environment and also ensure that the public health of Nigerians is protected. Furthermore, Section 2 of the Environmental Impact Assessment (EIA) Act further requires regulators established by the Nigerian government (through

[185] Jonathan Wanyanwu, 'Nigeria Are Human Rights in the Pipeline?' (Amnesty International 2004) p.25.
[186] This is provided under Section 1 of the Petroleum Act 1969.

the Federal Ministry of Environment) to investigate the environmental impact of all major projects in Nigeria. The law also requires the government to refuse to issue a permit/licence if it is discovered that the proposed operation poses a potential threat to the environment and the public health of its inhabitants. An EIA report must be produced by the company to the Ministry of Petroleum Resource before it can undertake operations. Section 5 (e) of the repealed Federal Environmental Protections Agency Act (FEPA) 1988 projected co-operation between the government and the Federal Environmental Protection Agency in performing this role.[187] Moreover, as has been established in the Minerals Mining Act discussed above, government ministers are required to ensure sustainable development during the extraction of oil and gas resources. It is therefore evident that statutory provisions stipulate legal responsibility for the Nigerian government to ensure environmental protection in the oil and gas industry.

Considering the extensive nature of oil and gas pollution described above, one would then wonder to what extent the government has shown commitment towards ensuring that the industry stakeholders comply with the obligation to protect the environment while conducting their operations. Indeed, while this study is of the view that oil and gas companies have caused a large share of Nigerian pollution, the study also argues that the government has been complicit in regulating the activities of such companies.[188] Indeed, a writer has argued that the political will to enforce environmental standards, especially in the Niger Delta is lacking because operations of the oil industry generate a significant portion of the country's revenue and, as such, the government is not willing to do anything that will affect the revenue flow coming from such operations.[189] While this view is arguable, this study chooses not to totally ignore the possibility of this reason being a contributor to the perceived lack of will of the Nigerian government to regulate oil and gas multinational companies alleged to violate environmental standards.

[187] Federal Environmental Protections Agency (FEPA) Act 1988 (repealed).
[188] Zik Gbemre, 'Shell and Environmental Degradation of Niger Delta' *Nigerian Observer* (2016) p.15.
[189] Olalekan Adekola, Shittu Whanda and Friday Ogwu, 'Assessment of Policies and Legislation That Affect Management of Wetlands in Nigeria' (2012) 32 Springer Link: Wetlands 667.

The lack of will of the government concerning Nigerian oil and gas pollution is summarised in the case of *Social and Economic Rights Action Committee* (*SERAC)* v *Nigeria*[190] heard before the African Commission on Human and Peoples' Rights (subsequently referred to as the Commission in this Chapter).[191] The case is based on the provision of the African Charter on Human and Peoples' Rights.[192] It has been pointed out in chapter 2 that the charter has been domesticated in Nigeria as it has been enacted as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983. It is also notable that the provisions of the domesticated law reflect the exact provisions of the charter. It could therefore be assumed that the provisions of the charter are binding on the Nigerian regime through the domesticated law.

In this case, the claimant, a class group representing the Ogoni interest alleged that the Nigerian government violated the provisions of Articles 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Article 16 of the Act imposes an obligation on African States to "*take the necessary measures to protect the health of their people.*" Furthermore, Article 24 provides that "*all peoples shall have the right to a general satisfactory environment favourable to their development*." The claimant alleged that by permitting Shell to cause damage to the Ogoni environment and harm to the health of inhabitants of Ogoni land, the Nigerian government was in clear breach of the Act. To this effect, although the oil multinationals polluted the environment, and violated environmental standards in place, the Nigerian government failed to perform the obligation of regulation set out under Article 24 of the Act.

The claimant alleged that SPDC had failed to properly maintain oil facilities, and built the facilities very close to private residences in the Niger Delta communities. Hence, the pollution severely affected not just the natural environment of these inhabitants, but the inhabitants themselves. In their words, the pollution had "*serious short and long-term health impacts, including skin infections,*

[190] *Social and Economic Rights Action Committee (SERAC)*v *Nigeria*, (May 27, 2002) ACHPR/COMM/A044/1, African Commission on Human& Peoples' Rights.
[191] Barisere R Konne, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland' (2014) 47 Cornell International Law Journal 188.
[192] African Charter on Human and Peoples' Rights 1981.

gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems."[193] However, the claimant also argued that the government had failed to compel oil multinationals operating in Nigeria to produce EIA reports before undertaking risk laden operations in the Ogoni area.

While ruling, the trial Commission held that the proven conduct of the Nigerian government was in clear breach of the obligation required of the latter; to respect, protect, and fulfil the provisions of Articles 16 and 24 of the African Charter Act.[194] The Commission agreed that "*the Nigerian government was actively involved in the pollution, contamination of the environment and health problems of the Ogoni people, by condoning and facilitating the activities of the oil companies through placing the legal and military powers of the state at the disposal of the oil companies*."[195] The Commission based this argument on the existing obligation imposed on the Nigerian government by virtue of the Stockholm and Rio Declarations (to which Nigeria was signatory).The obligations are the requirement that the government prevent environmental and public health harm within Nigerian territory by formulating policies that would sanction and enforce the pollution act of individuals and corporations. [196] On this, the Commission found the government guilty of having conspired with the polluting oil corporations to degrade the Ogoni environment and cause harm to the livelihood and health of the Ogoni populace.[197] The Commission found the government guilty of failing to prevent the pollution and failing to promote the attainment of sustainable development (which is the aim of the NPE).[198] It is however, notable that despite these convictions, there has not been much improvement in the deficiencies identified.

The Commission ruled that compliance with this obligation would have required that the Nigerian government:

I) conducted Environmental Impact Assessments (EIAs) (for all state approved projects and licensed projects) or allowed independent experts

[193] *ibid.*
[194] *Social and Economic Rights Action Committee (SERAC)*v *Nigeria* (n.190). pp.50-54.
[195] *ibid*. pp.1, 4.
[196] *ibid*. pp.44-45, 52.
[197] *ibid*. pp.54, 67.
[198] *ibid*. pp.47, 52.

to conduct the EIA so as to correctly deduce the environmental risk of a given project and also provide communities with sufficient information regarding the potential hazards of an approved project.[199]

II) took all appropriate responsible steps towards preventing environmental pollution, securing sustainable use of the country's natural resources and achieving sustainable development.[200]

Conversely, the Commission held that the Nigerian government have rather failed to:[201]

1. regulate the oil and gas operations of multinational corporations in the Ogoni area;
2. implement the domestic and international environmental standards regarding safety considerations (during E&P operations) and the prevention of pollution;
3. implement the clean-up of affected sites or compel polluting corporations to clean up their pollution discharge and bear the cost of such clean-up; and
4. engage in discussions with Ogoni inhabitants on how best to guarantee the sustainable development of the region.

The Commission therefore, advised the Nigerian government to comply with these obligations.[202] Despite the ruling in the *SERAC* case, the government failed to comply with the environmental and public health obligation provided under the African Charter. This failure was reflected in the government's failure to implement tough sanctions on the polluting corporations, despite the continued oil and gas pollution in Ogoni leading to the second case of *Socio-Economic Rights and Accountability Project* (*SERAP) v. Federal Republic of Nigeria*, brought before the Economic Community of West African States Community Court of Justice.[203] In this case the claimant accused the government of violating the socio-economic, environmental and health rights of Niger Delta inhabitants, thus (mainly)

[199] *ibid*. p.53.
[200] *ibid*. p. 52.
[201] *ibid*. pp.54-55.
[202] *ibid*. p.15.
[203] *Socio-Economic Rights & Accountability Project (SERAP)* v *Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, ECOWAS (Dec. 14, 2012).

breaching the provision of Article 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[204] This allegation was based on the failure of the government to enforce existing environmental legislation on sustainable development as set out within the National Policy on Environment.[205] In this dispute, the court held that Nigeria's failure to effectively regulate the oil and gas sector violated the rights established under Article 4.[206] The court further observed that a breach of the Article 24 right inevitably caused a subsequent breach of other rights-such as the rights to the economic and social development of Nigerians.[207] On this note, the court ordered the Nigerian government to:

1. Execute effective measures that would restore the Niger Delta environment to its former status;
2. Execute measures that would prevent future pollution; and
3. Hold oil and gas polluters accountable for their actions by prosecuting them more often.[208]

Indeed, the decision made by the court that the Nigerian government should restore the Niger Delta environment to its former status is in line with Section 2.6.3 of the EGASPIN which mandates the operator to remove all the pollution, such that the affected site is restored to its former state. This study argues that this requirement looks unrealistic as it is literally impossible to restore an already degraded site to exactly how it was before the degradation. The effect of the existing degradation would have affected some natural features associated with the previous state of the environment. Hence, this study rather suggests the implementation of Section 6 (3) of the NOSDRA Act which mandates the operator to utilise all practicable measures to restore the environment.

The above cases show evidence that at a national level, the Nigerian government has been found accountable for the pollution within its territory. It has however, been reported that the government is yet to take sufficient steps towards

[204] *ibid*. p.19 (c) (d).
[205] *ibid*. p.107
[206] *ibid*.
[207] *ibid*. p.101.
[208] *ibid*. p.121.

enforcing the court's decisions in either of the cases.[209] As shown by its failure to implement these decisions, it is the view of this study that the Nigerian government has failed to enforce an effective environmental regulatory regime (especially with regard to its oil and gas industry). The study bases this argument on the failure of the government to effectively monitor enforcement and compliance to environmental standards among oil and gas companies such as the SPDC, hence, indirectly exacerbating the environmental devastation in the Niger Delta region.

Furthermore, this study has earlier identified the failure of the Nigerian government to properly fund enforcement agencies or provide the essential manpower required for them to effectively carry out their enforcement roles. This shows further evidence of the lax attitude of the government to environmental enforcement and protection.

4.2.9 Confusion of NESREA (Establishment) Act Regarding Oil and Gas Regulation

A major limitation of this Act is the confusion as to whether its provisions (especially with regard to sanctioning and enforcement) also relate to the oil and gas industry or not. Indeed, in chapter 2, it was observed that while some provisions within the Act preclude oil and gas from its scope, other provisions specify that enforcement under the Act should cover environmental treaties regarding environmental protection in the oil and gas sector. This creates confusion as to whether this Act really provides for environmental regulation in the oil and gas sector or not. This confusion is significant considering the extent of environmental violation in the oil and gas industry. It is also significant considering: 1) the controversy regarding the unenforceability of ratified but undomesticated treaty provisions provided in Section 12 of the Nigerian Constitution; and 2) the earlier observation that the Nigerian government is yet to domesticate most of the environmental treaties relating to oil and gas that has

[209] Brittany West, *ECOWAS Community Court of Justice Holds Nigerian Government Liable for Human Rights Violations of Oil Companies* (Human Rights Brief 2013) p.18.

been ratified by Nigeria.[210] In effect, excluding oil and gas from the coverage of the NESREA Act weakens the regulatory capacity of the domestic environmental regime governing the oil and gas sector in Nigeria. It has been argued that Nigeria should put in more effort to domesticating its ratified treaties.[211] This is because unless a definite position regarding the enforceability of international instruments in Nigeria is set out, there would still be a contradiction as to whether ratified treaties and conventions are enforceable in Nigeria or not. To this effect, there would still be a doubt as to whether international instruments stipulating environmental protection can be implemented in the Nigerian oil and gas industry by virtue of Section 7c of the NESREA Act.

Interestingly, this study argues that this Act possibly has the best provisions on enforcement which tackle some of deficiencies earlier mentioned in this chapter. For example, the Act requires enforcement agencies to collaborate, a requirement established to be generally lacking in the other environmental regulations governing the oil and gas sector. Furthermore, the Act requires trans-boundary cooperation in enforcement also generally lacking in the other legislations, except the NOSDRA Act that also requires it. The provision under this Act explicitly mandates NESREA to collaborate with other agencies to enforce environmental standards. It is therefore obvious that this Act is free of some of the deficiencies identified in this study to have impeded enforcement. Based on the above facts, this study argues that the confusion in the NESREA detracts from the national policy on enforcement. If the issues of its relationship with the oil and gas industry and the issue of the enforceability of ratified treaties in Nigeria are resolved, the NESREA Act provisions will go a long way to adding to the body of law regarding environmental enforcement in the industry.

[210] In chapter 2, this study observed several international law instruments on climate change, biodiversity, and environmental aspects of oil and gas exploitation which have been ratified by Nigeria. If the stipulation under Section 7c of the Act were to be followed explicitly, then technically NESREA will still be able to enforce environmental issues developed in such international law instruments. However, the study also observed that most such instruments have not yet been domesticated, hence they remain inapplicable in Nigeria. One could therefore assume that the powers of the NESREA in this regard are again limited.

[211] Muhammed T Ladan, 'Review of NSREA Act 2007 And Regulations 2009-2011: A New Dawn In Environmental Compliance And Enforcement In Nigeria' [2013] SSRN Electronic Journal <https://www.researchgate.net/publication/272290396_Review_of_NESREA_Act_2007_and_Regulations_200 92011_A_New_Dawn_in_Environmental_Compliance_and_Enforcement_in_Nigeria>accessed 10 December 2018.

4.3 A Defective Petroleum Industries Bill

Owing to the poor regulation of the Nigerian oil and gas industry (including the defectiveness of the existing environmental regime regulating the industry), there has been an attempt to overhaul the existing system of regulation in the industry by replacing existing regulatory instruments governing the industry with the Petroleum Industries Bill (PIB) 2012.[212] This will invariably entail replacing the environmental statutory provisions regulating the industry with the environmental contents of the PIB. This study expects that most of the existing deficiencies of the Nigerian environmental regime relating to the oil and gas industry would have been corrected in the PIB.

Section 6 (1) of the Bill requires the Federal government to "*honour international environmental obligations*" It is therefore implied that the PIB would require the government to be more accountable for the prevention and control of pollution by oil and gas multinational corporations. This implies that the limitation to the non-binding effect of international environmental obligations that has been ratified by Nigeria would be reduced. Similarly, Section 200 of the Bill compels operators licensed to conduct oil and gas business in Nigeria to:

1. Conduct EIA before embarking on any upstream and midstream oil and gas activity;
2. Provide an Environmental Management Plan (EMP) within three months of operation;
3. Formulate an environmental awareness plan that would disseminate the corporation's environmental policy objectives to all employees of the corporation.
4. Present a detailed account on steps intended to be taking to prevent pollution and control it when necessary.

It is evident from the above that the Bill stipulates succinct obligations in line with the existing EIA Act. The Bill however, fails to criminalise the failure to comply

[212] On 25TH May 2017, after 5 years of delay, the House of Representatives - the Nigerian Federal House of Representative passed the first tranche of the PIB, titled the Petroleum Industry Governance Bill (PIGB) at a plenary session although this is yet to be assented to by the President. Procedurally, Bills must go through both Houses, and get the assent of the Nigerian President to effectively become law. Moreover, what is in the process of being passed into law is only a portion of the original Bill (including the portion concerning environmental issues in the PIB, exactly as it was in the former).

with these obligations. In an instance where an operator refuses to comply, the Bill fails to make such non-compliance a criminal act nor does it provide any penalty for a person in breach of the provision. It is then possible that if the Bill were successfully passed into law, and its provisions strictly followed, an operator can fail to comply with the EIA obligations and not be sanctioned for such failure. In this regard, it seems as if the Bill has reduced the binding force of this obligation under Nigerian environmental law.

Section 200 of the Bill stipulates an obligation on the operator to manage the environment in accordance with their EMP.[213] The issue has however remained to what extent the operators would carry this out. This is so, considering that although the operators have previously submitted EMPs and have always published their sustainability reports, the harmful impacts of their operations have not reflected the environmental management processes included in the EMPs.[214] For example, the Nigerian Agip Oil Company (NAOC) and the SPDC both published their EMPs regarding their joint venture operations in the Egbema community of the Niger Delta in 2015.[215] Regarding this, critics have argued that there has been environmental pollution on the same exploration round.[216] This pollution shows evidence of the failure of the operators to comply with their EMPs.

Section 293 (1) of the Bill also obligates the operator to clean up affected sites when pollution occurs. It is however, observable that this provision fails to impose corresponding criminal sanctions for non-compliance of this standard. It is the view of this study that this failure is a deficiency and detracts from the effectiveness of the Bill to enforce the clean-up of polluted sites.

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[213] This is stipulated in Section 200 of the Bill.
[214] Ephraim I Elenwo and Justine A Akankali, 'Environmental Policies and Strategies in Nigeria Oil and Gas Industry: Gains, Challenges and Prospects' (2014) 05 Natural Resources 893-894.
[215] Shell Petroleum Development Company of Nigeria Limited (SPDC), 'Environmental Impact Assessment (EIA) of The Assa North - Ohaji South Gas Development Project (The Facilities) at Ohaji/Egbema Lga, Imo State' (Shell 2015)<https://www.shell.com.ng/sustainability/environment/environment-impact assessments/_jcr_content/par/textimage.stream/1468247135099/4022d04728984a9a81ded8d5289c7a2418c15678a74895c718fca0de4146cd3f/assa-north-2016.pdf> accessed 27 March 2019; National Agip Oil Company, 'Environment - NAOC' (*ENI*,2018)<https://www.eni.com/en_NG/sustainability/environment/environment.shtml> accessed 27 March 2019.
[216] Ikenna Osumgborogwu, F Okoro and I Oduaro, 'Social Effects of Crude Oil Production Activities in Egbema, Imo State, Nigeria' (2017) 3 Asian Research Journal of Arts & Social Sciences 2-3.

Moreover, Section 293 (3) of the Bill empowers the DPR to make the determination whether the failure of the operator to manage or clean up the environment is criminal or not. Such determination by the DPR is a derogation of an exercise of powers that should be clearly judicial in nature. It is therefore doubtful whether the DPR is the competent authority to make such a determination since it is only an enforcement agency and not a court of law.

Considering the apparent weak sanctions stipulated in extant environmental criminal laws in the present regime, this study argues that the PIB has only provided for similar weak sanctions. For example, this study has argued that not only is gas flaring extensive in light of how long gas had been flared in Nigeria (since 1958)[217] but also severe environmental and health harm has been caused. It is therefore surprising that Section 201 of the Bill stipulates that "*the lessee shall pay such gas flaring penalties as the minister may determine from time to time*." This study argues that this stipulation is inadequate considering that Nigeria has no provision of a sentencing guideline and there is no specific provision under this Bill putting a figure at the minimum penalty the DPR can impose.

Similarly, Section 200 of the PIB mandates an oil and gas operator in Nigeria to submit an Environmental Management Plan (EMP), to the DPR. Furthermore, Section 341 of the Bill criminalizes the failure of an operator to submit the EMP and imposes a fine of N1,500,000 (£3157) on such an offender. However, there is no criminal sanction included for an operator that has not gone through the proper process of authorization for a proposed operation before commencing the operation. This study argues that this criminal fine is not sufficient considering the potential environmental and public health implications of the offence. This sanction is too weak to compel any of the operational multinational oil and gas subsidiaries in the Niger Delta. Moreover, the lack of sanctioning for improperly authorized operations detracts from the regime.

It is therefore evident that the PIB in itself still contains some of the deficiencies observed in the Nigeria regime from the analysis in this study. This entails that

[217] Department of Petroleum Resources, 'Nigerian Gas Flare Commercialization Programme' (*Department of Petroleum Resources*, 2019)<http://www.ngfcp.gov.ng/about-us/historical-background/> accessed 18 March 2019.

the PIB (in its current state) presents no absolute solution to guaranteeing environmental protection in the Nigerian oil and gas industry.

This study is of the view that the deficiencies identified in this chapter have contributed to the failure of the Nigerian environmental regime to regulate the oil and gas industry. The failure of the regime to regulate has been manifested in the examples of such regulatory failure identified in chapter 3. This study will therefore, study the UK and USA regimes to establish aspects of the regimes that can be adapted by the failing Nigerian regime to correct the deficiencies, hence remedy the regulatory. In effect, the study will consider aspects of the UK and USA regimes that directly relates to sanctioning and enforcement of their oil and gas industries.

Chapter Five

Environmental Criminal Sanctions: Comparative Study of the UK, USA and Nigerian Regimes

5.0 Overview of United Kingdom (UK) and United States of America (USA) Environmental Criminal Regimes

This study has identified different violations of environmental standards in the Nigerian oil and gas industry. The study further argued that these violations have continued despite existing laws meant to prevent them and irrespective of existing enforcement mechanisms that have failed to enforce properly. In line with these limitations, the study has identified deficiencies that have contributed to the limitations. This chapter therefore seeks to explore aspects of the UK and USA regimes that present solutions to the defects identified in chapter 4. It is believed that a transplantation of the aspects to the Nigerian regime will correct some aspects of the deficiencies identified. It is however, notable that major recommendations for transplantation generated in this chapter will be enumerated in chapter 6 of this study. This study will therefore give a synopsis on the general application of the environmental criminal law systems of the UK and USA regimes.

A) Synopsis of the UK Environmental Criminal Regime

To gain a knowledge of the UK environmental criminal regime, one must first determine the scope of environmental crime in the regime and the statutory provisions that have provided for its prohibition. There is no precise definition to the concept of environmental crime.[1] The Environmental Audit Committee views environmental crime offences to be regulatory offences established under statutory environmental legislation.[2] The study will examine the offences of illegal

[1] Advameg Incorporated, 'Environmental Crime' (*Advameg Incorporated*, 2019) <http://www.pollutionissues.com/Ec-Fi/Environmental-Crime.html> accessed 18 March 2019.
[2] Environmental Audit Committee, 'Environmental Crime: Wildlife Crime Twelfth Report of Session 2003–04' HC 605 (House of Commons London: The Stationery Office Limited 15th September 2004) <https://www.nwcu.police.uk/wp-content/uploads/2013/04/House-of-Commons-Environmental-Audit-Committee-Environmental-Crime-Wildlife-Crime-Twelfth-Report-of-Session-2003-04.pdf> accessed 10 December 2018.

waste disposal that is neither treated nor stored,[3] illegal discharge of hazardous waste and failing to comply with clean-up notice. This is because they are similar environmental offences that have been established to be existing in the Nigerian regime.

The illegally disposed waste is often shipped to non-OECD countries in regions of Africa and Asia.[4] The illegality of shipping untreated waste to the named zones was generated from the Basel Convention of 1992 which made it illegal to ship hazardous waste from OECD to non-OECD countries.[5] According to the Environmental Services Association Education Trust (ESAET), the most significant waste crimes in the UK seem to include illegal waste discharge and illegal wildlife trade and poaching.[6] The UK has set established authorities charged with the responsibility of enforcing environmental criminal laws against waste crime in the UK. Backed by statutory provisions empowering their functions, the remit for tackling waste crime in the UK lies with environmental regulators such as the Environment Agency (EA), the Scottish Environment Protection Agency (SEPA), the Natural Resources Wales, the Northern Ireland Environment Agency, the Marine Management Organization, the Department for Environment, Food and Rural Affairs (DEFRA), Scottish Natural Heritage (SNH), and Natural England (NE).

Some UK environmental law has been transposed from European Union (EU) directives. For instance, the UK regime for regulating industrial emissions refers to compliance with the EU Industrial Emissions Directive.[7] A recently updated document by the European Commission described the scope of environmental offences in the EU to include: the illegal discharge of harmful gas into the

[3] Sam Taylor and others, 'Waste Crime: Tackling Britain's Dirty Secret' (Environmental Services Association Education Trust (ESAET) 2015) <http://www.esauk.org/application/files/4515/3589/6453/ESAET_Waste_Crime_Tackling_Britains_Dirty_Secret_LIVE.pdf> accessed 17 December 2018.
[4] *ibid.*
[5] United Nations Environment Program (UNEP), 'The Basel Convention Ban Amendment' (Secretariat of the Basel Convention 2011) <http://www.basel.int/Implementation/LegalMatters/BanAmendment/tabid/1484/Default.aspx> accessed 31 July 2018.
[6] Simone Aplin and Jamie Warmington, 'Waste Crime Interventions and Evaluation Project' (Environmental Agency 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/662841/Waste_crime_interventions_and_evaluation_-_report.pdf> accessed 10 December 2018.
[7] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on Industrial Emissions (Integrated Pollution Prevention and Control) (OJL 334, 12.12.2010, pp.17-119).

atmosphere, illegal discharge of waste into the water or soil, illegal trade in wildlife, illegal trade in ozone-depleting substances and the illegal shipment or dumping of waste.[8] In 2008, the UK transposed the EU Directive on protection of the environment through criminal law.[9] The core reason for the adoption of the Directive was that criminal sanctions provided adequate deterrence required to achieve environmental protection.[10] Hence the Directive required EU Member States to treat serious environmental breaches as criminal offences if such breaches were committed deliberately or with at least gross negligence.[11] Article 5 of the Directive stipulates that "*Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties*."

This corresponds with existing statutory provisions in the UK environmental criminal regime prohibiting different ranges of environmental offences. Some such environmental criminal prohibitions have been found in provisions such as: Regulation 62 (1)(a) and (b) of the Hazardous Waste (England and Wales) Regulations 2005, Section 85 Water Resources Act 1991, and Section 2(e) of the Prevention of Oil Pollution Act 1971. It must however be noted that the above statutory provisions are only random representations of the broad UK environmental criminal law provisions.

B) Synopsis of USA Environmental Criminal Statutory Provisions

The USA has like Nigeria, also suffered significant oil pollution.[12] The 1960s saw an outcry against the growing levels of air, water and land pollution, oil and gas

[8] European Commission, 'Environmental Crime - Legislation - Environment - European Commission' (*Ec.europa.eu*, 2016) <http://ec.europa.eu/environment/legal/crime/> accessed 10 December 2018.
[9] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (OJ L 328, 6.12.2008, pp. 28-37).
[10] Andrea Jarolimkova, 'Enforcement of Environmental Protection through Criminal Law' [2013] 3 Common Law Review http://www.commonlawreview.cz/enforcement-of-environmental-protection-through-criminal-law/> accessed 10 August 2019.
[11] *ibid.*
[12] Some examples of the oil spill pollution include: the Keystone Pipeline spill of 16th November, 2017 which discharged approximately 9,700 barrels of oil; the Delta House oil spill of 11th October, 2017 which discharged 9,350 barrels of oil; the Energy Transfer Partners Dakota Access Pipeline Leak of 4th April, 2017 which discharged approximately 2,500 barrels of oil; the Belle Fourche pipeline leak of 5th December, 2016 which discharged approximately 4,000 barrels of oil; the Shell Gulf of Mexico oil spill of 12th May, 2016 which discharged approximately 2,100 barrels of oil ; the Refugio oil spill of 19th May, 2015 which discharged approximately 3,400 barrels of oil; the Yellowstone River oil spill of 17th January, 2015 which discharged

pollution in the USA.[13] Since then, the USA environmental criminal regime has the central aim of prohibiting different forms of environmental offences.[14] Prior to 1967, the USA used civil enforcement processes to a large extent, in implementing its administrative environmental laws.[15] There was also more emphasis on cooperative compliance with environmental principles rather than a coercive approach.[16] To this effect, the imposition of criminal sanctions was only a last option when civil enforcements failed.[17] As a result of the prime consideration of civil enforcement at the time, the USA Attorney, Criminal Division of the Justice Department and the Federal Bureau of Investigation gave very minimal consideration to prosecution of pollution acts as environmental criminal offences and the allocation of sanctions but focused more on ensuring compliance through civil injunctions, civil judicial actions, and civil administrative actions.[18]

However, they soon noted that most USA companies and residents failed to comply with the environmental protection standards set under the Clean Air Act 1963 (as amended in 1990) and Clean Water Act (CWA) 1972.[19] Moreover, these statutes addressed significant sources of USA pollution.[20] Hence non-compliance with the provisions implied continued environmental pollution and an inability of the Acts to protect the environment. In light of this, the USA regime updated the Clean Air Act (CAA) in 1970, 1977 and 1990.[21] In the 1970 amendment, the Act introduced four major regulatory programmes as environmental standards in the regime, which included: The National Ambient Air Quality Standards (NAAQS); the State Implementation Plans (SIPs); the New Source Performance Standards

approximately 1,200 barrels of oil; the Lake Michigan oil spill of 24th March, 2014 which discharged approximately 39 barrels of oil; and the Deepwater Horizon oil spill of 20th April-15th July, 2010 mentioned in the literature review section above.

[13] Department of Justice (DOJ), 'Historical Development of Environmental Criminal Law | ENRD | Department of Justice' (*Justice.Gov*, 2018) <https://www.justice.gov/enrd/about-division/historicaldevelopment-environmental-criminal-law> accessed 10 December 2018.

[14] DOJ, 'Prosecution of Federal Pollution Crimes | ENRD | Department of Justice' (*Justice.gov*, 2018) <https://www.justice.gov/enrd/prosecution-federal-pollution-crimes> accessed 10 December 2018; Environmental Protection Agency (EPA), 'EPA Continues To Exceed Previous Numbers in Civil, Criminal Cases, Penalty Assessments' (Environmental Protection Agency 1990) 1534.

[15] Robert I McMurry and Stephen D Ramsey, 'Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws' (1986) 19 Loyola of Los Angeles Law Review 1136.

[16] *ibid.* p.1137.

[17] *ibid.* p.1136.

[18] *ibid.*

[19] *ibid.*

[20] *ibid.* p.1137.

[21] Environmental Protection Agency (EPA), 'Evolution of The Clean Air Act' (*EPA*, 2017) <https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act> accessed 18 March 2019.

(NSPS); and the National Emission Standards for Hazardous Air Pollutants (NESHAPs).[22] These standards were enforced by the EPA (already established by the NEPA Act).[23] By this, the amendment expanded enforcement authority under the Act.[24] The 1977 and 1990 amendments introduced and modified major permit review requirements to ensure the attainment and maintenance of the NAAQS.[25] Subsequently, the USA regime has utilised several environmental criminal statutes (besides the CAA to implement its environmental standards).

The USA regulates pollution crime that constitutes a breach of its environmental standards through the Resource Conservation and Recovery Act (RCRA) 1976, the CWA 1972, the Marine Protection Research and Sanctuaries Act 1972 (MPRSA), the Oil Pollution Act 1990 and the Act to Prevent Pollution from Ships 1980 (APPS).

The RCRA finds anyone who 'knowingly endangers' the environment by failing to store, treat and dispose hazardous waste or otherwise, obtain an RCRA permit, guilty of a crime.[26] Upon conviction, the offender is subject to a fine or imprisonment.[27] A 1980 Congress amendment to s.3008 of the statute increased the strictness of the statutes (from the former maximum penalty of one-year imprisonment or a $25,000 fine)[28] to a maximum penalty of $50,000 for 'each day of the violation' or imprisonment term of up to 15 years. The amendment also considered the crime as a felony instead of a misdemeanour.[29] This implies that the USA now regards this environmental offence as a serious crime rather than a minor wrongdoing. This study argues that not only is the fine under this statute severe, but also the daily fine penalty utilised is equally severe enough to deter the discharge offence from escalating.

[22] *ibid*.
[23] *ibid*.
[24] *ibid*.
[25] *ibid*.
[26] 42 U.S.C. S 6901 et seq.
[27] 42 U.S.C. S 6928(d) (2) (A).
[28] 45 Fed. Reg. 33066.
[29] Cristopher Harris, Patrick O Cavanaugh and Robert L Zisk, 'Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" Of Corporations and their Executives' (1988) 23 Wake Forest Law Review 207.

The CWA also sanctions intentional illegal waste discharge into USA waters.[30] The Act also sanctions the discharge of crude oil waste into USA waters.[31] The Act further sanctions the failure to report a discharge of oil or other hazardous substances.[32] The Act sanctions a discharge to a Publicly Owned Treatment Works (POTW) in violation of*: "federal pre-treatment standards*;"[33] "*local pre-treatment program*;"[34] and a "*discharge to a POTW causing harm to the system*."[35] The penalty for these illegal discharge offences include: 1 year and $2,500-$25,000 for each day the offence subsists and for subsequent convictions, 2 years and/or $50,000 per day (for negligent violations); or 3 years and $5,000-$50,000 for each day the offence subsists, and for subsequent convictions 6 years and/or $100,000 per day (for violations intentionally committed by the offender).[36]

The knowing endangerment of another person under the Act attracts a penalty of 15 years and/or $250,000 ($1,000,000 for corporations) and for subsequent convictions, doubled.[37] By this, the Act increases the penalty for an offender if such offender knowingly or negligently causes harm to public health and safety by virtue of the pollution offence. The making of false statements under the Act attracts a criminal penalty of 2 years and/or $10,000 with an option for subsequent convictions of 4 years and/or $20,000 per day of the offence.[38]

Similarly, the MPRSA 1972 prohibits the transportation of waste material from the US with the intent of dumping such waste into ocean waters (without a permit). The Act stipulates a maximum fine of $250,000 and/or maximum imprisonment 5 years.[39] Even more, the APPS of 1980 prohibits the offence of knowingly violating the International Convention for the Prevention of Pollution from Ships of 1973 (MARPOL Protocol) or any other USA statute (relating to the discharge of waste

[30] 33 U.S.C. 1319 (1) & (2).
[31] 33 U.S.C. 1319(1) & (2) & 1321 (b) (3).
[32] 33 U.S.C. 1321(b) (5).
[33] 33 U.S.C. 1319 (1) (A) & (2) (A).
[34] 33 U.S.C. 1319(1) (A) & (2) (A).
[35] 33 U.S.C. 1319(1) (B) & (2) (B).
[36] *ibid.*
[37] 33 U.S.C. 1319(3).
[38] 33 U.S.C. 1319(4).
[39] 33 U.S.C. 1411.

materials from ships, including garbage, oil, etc.)[40] Under the Act, the offence attracts a penalty of an imprisonment term of up to 10 years and/or fines.

5.1 Comparative Study of the UK and USA Regimes

This study identified the defects of the Nigerian environmental crime regime including: weak penalties for environmental offences, vagueness of statutory provisions, inadequate prosecution of environmental offences, arbitrary power held by a single authority, and the inability of enforcement agencies to perform. This study will therefore, examine present UK and US statutes dealing with these themes which are seen to be lacking in Nigerian law. With this, the study will determine aspects of the UK and US environmental criminal laws that can be adopted to solve the defects identified in the Nigerian regime.

5.1.1 Tough Sanctions that Deter Violators

Deterrence to an environmental offence would be possible if there was severe punishment attached to the offence.[41] This study has previously emphasised the need for tough sanctions to deter offences under its discussion in chapter 4. The study observed that while a strict environmental regime with tough sanctions could constitute deterrence, a poor regime with weak sanctions would fail to provide the same deterrent effect. It is therefore necessary to provide adequate punishment that would generally discourage the commission of a criminal offence. However, the study discovered that some criminal sanctions provided in the Nigerian regime were too weak to deter an environmental criminal violator. In the end, this has apparently impeded the ability of the criminal sanctioning tool to contribute in guaranteeing environmental protection in Nigeria.

A) UK Deterrence through Tough Sanctions in Statutes

The UK has robust strict sanctions under its environmental law. For example, Section 33(1) (a) of the UK's Environmental Protection Act 1990 prohibits the

[40] 33 U.S.C. 1908(a).
[41] Michael Hertz, 'Structures of Environmental Criminal Enforcement' (2018) 7 Fordham Environmental Law Review 685.

intentional illegal disposal of waste. Furthermore, Section 33 (8) of the Act provides that a person who commits the offence shall be liable—on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding £40,000 or both; and on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both. Furthermore, while Regulations 12 and 38 (1), (2) and (3) of the Environmental Permitting (England and Wales) Regulations 2010 prohibit a violation of the required standards of discharge set in an environmental permit and failing to obtain an environmental permit under Environmental Permitting (England and Wales) Regulations 2010; Regulation 39 of the Environmental Permitting (England and Wales) Regulations imposes a liability of a fine not exceeding £50,000 or imprisonment for a term not exceeding 12 months, or to both for an offender convicted summarily; or a fine or imprisonment term not exceeding 5 years for an indicted offender. Similarly, Section 131(3) of the Merchant Shipping Act 1995 stipulates a criminal fine of £250,000 for the discharge of oil into UK waters. This study views these sanctions as tough especially when applied against individual offenders or Smaller Oil Companies convicted of committing environmental violation. The fines might not be very tough for multinational oil companies that are very rich. However, if such fines are consistently applied to multinational companies that are repeated offenders (in line with the Sentencing Guideline discussed below), it can certainly hinder the finances of such company and discourage repeated violations.

As will be seen in section 5.1.3 of this study, the UK has suffered fewer oil spill pollution incidents when contrasted with the Nigerian examples previously noted. Moreover, it will also be observed that the oil spill pollution has also occurred less frequently. For instance, the most recent significant offshore oil spill pollution was the 2011 Gannet Alpha spill. This was preceded only by the 1993 Braer spill. In other words, the Gannet spill occurred 18 years after the previous spill. This is totally different from the Nigerian spills that have been observed to occur more regularly. Indeed, there is no direct evidence that the lower rate of occurrence of the spills have been as a result of tough sanctions in the regime such as the high criminal fine of £250,000 stipulated for the discharge of oil into UK waters under Section 131(3) of the Merchant Shipping Act 1995. However, this study argues that such high fines should be encouraged and even higher criminal sanctions should be imposed in jurisdictions with more frequent violations such as Nigeria.

B) USA Deterrence through Tough Sentences

Based on the synopsis of the USA regime described in section 5.0 above, one can observe tough environmental sanctions stipulated in the USA regime. Firstly, this study observes the use of daily fines in the USA regime. Indeed, as can be observed in chapter 2, this has also been applied in the Nigerian regime. The study believes this to be a suitable sanctioning tool and should be continued in the Nigerian regime. Writers have argued in favour of day fines (which has otherwise been referred to as structured fines).[42] It has been asserted that this form of fine is dependent on the consideration that punishment should be proportionate to the offence.[43] Furthermore, a writer noted that regarding the use of day fines, "*judges and other criminal justice practitioners who have become familiar with structured fines are impressed by the essential equity of the concept. Although they may be simpler to use, tariff fines are inherently unfair because, all too often, the fine amounts are too low to be meaningful to affluent offenders but high enough to exceed the ability of some defendants to pay*."[44]

However, these sanctions have not only been restricted to mere laws written on paper, but have also been converted to sentences imposed on offenders. This study will therefore review some environmental criminal cases that have been prosecuted as a result of the collaborative efforts of the ECS, Attorney's office and the ENRD. For this, the study will concentrate on the Environmental Crime Reports of the years 2013 and 2014. This is because there were major environmental pollutions in the oil and gas industry in these years and also several criminal litigations that accompanied them.

i) *United States* v *Transocean Deep Water, Inc.*,[45]

Transocean pled guilty to a charge brought against the company for the negligent discharge of oil pollutants into USA waters (in breach of the CWA) during the

[42] Bureau of Justice Assistance, 'How to Use Structured Fines (Day Fines) As an Intermediate Sanction' (Department of Justice 1996) <https://www.ncjrs.gov/pdffiles/156242.pdf>accessed 28 August 2019.
[43] *ibid*.
[44] *ibid*.
[45] *United States* v *Transocean Deep Water, Inc.*, NO. 2:13-cr-00001-JTM-SS (2014).

Deepwater Horizon oil spill pollution.[46] During pleading, Transocean admitted that its employees on board the Deepwater Horizon, acted on the instruction given by BP's 'well site leaders' and negligently failed to fully investigate indications that the Macondo well was insecure and that oil and gas substances were leaking into the well.[47] The corporation was sentenced to five years of probation, ordered to pay a $100 million criminal fine and a $150 million community service payment as restitution to the National Academy of Science (NAS) for oil spill prevention in the Gulf of Mexico. The corporation was also ordered to make a restitution of $150 million community service payment to the National Fish and Wildlife Federation (NFWF).

The trial judge observed that the sentence was commensurate with the pollution offence committed and would serve as deterrence to future polluters. The judge also observed that the criminal payments directed to the NAS and NFWF were contributions (in the form of restitution) made by the company towards helping to remedy the harm done as a result of the oil spill pollution in the Gulf of Mexico caused by Transocean's actions.[48] The judge also observed that the penalties provided just punishment and constituted sufficient deterrence to the offence.[49] It is therefore evident that this sentence would constitute sufficient retribution to the corporate offender and deter other corporations from polluting.

ii) *United States* v *BP Exploration and Production, Inc*.;[50]*United States* v *Mix*[51]

In admitting guilt of other crimes charged under this case, BP pled guilty to one count of a felony obstruction of Congress,[52] a violation of Section 1319 (c) (1) (A) of the CWA[53] and a violation of the migratory bird preservation standard established under the Migratory Bird Treaty Acts 1918[54] based on their role during the Deepwater Horizon pollution incident. BP was sentenced to five years of

[46] 33 U.S.C. § 1319(c) (1) (A) and 33 U.S.C. § 1321(b) (3).
[47] Department of Justice, 'Closed Criminal Division Cases: United States v Transocean Deepwater Inc.' (*Justice.gov*, 2018) <https://www.justice.gov/criminal-vns/case/transocean> accessed 10 December 2018.
[48] *United States v Transocean Deep Water, Inc.*, NO. 2:13 at 44.
[49] *ibid.*
[50] *United States* v *BP Exploration and Production, Inc*. NO. 2:12-cr-00292-SSV-DEK (2013).
[51] *United States* v *Mix* NO. 2:12-cr-00171-SRD-SS (2013).
[52] 18 U. S. C. 1505.
[53] 33 U. S. C. 1319 (c) (1) (A).
[54] 16 U. S. C. 703.

probation and to pay criminal fines totalling $4 billion.[55] The corporation was also ordered to make a restitution of $350 million as community service payment to the NAS for oil pollution prevention and a $2.4 billion community service payment to the NFWF towards the repair of the Gulf of Mexico habitat.[56] It was observed that the criminal fines imposed on BP far exceeded any other imposed by the USA environmental regime.[57] It was also noted that the sentence constituted significant deterrence to BP against committing a similar offence in the future.[58] Moreover, the trial court insisted that the probation was to enable a close watch on BP's future conduct. According to Assistant Attorney General Lanny A. Breuer of the Justice Department's Criminal Division, "*The Deepwater Horizon explosion was a national tragedy that resulted in the senseless deaths of 11 people and immense environmental damage. Through the tenacious work of the Task Force, BP…received just punishment for its crimes leading up to and following the explosion*."[59]

iii) *United States* v *Pacific International Lines*[60]

Pacific International Lines pled guilty to the offences of: making false statements to the USA Coast Guard, violating the APPS 1980 by falsifying an oil record book concealing waste water operations and discharges and intentionally operating a vessel in USA waters without a functioning separator (which USA environmental law require operators to use as a pollution control device).

The corporation was sentenced to 36 months' probation, and ordered to pay $2,000,000 as a criminal penalty fine. The corporation was also ordered to make a community service payment of $100,000 each as restitution to the NFWF and the NMSF. The corporation was also required to implement an environmental compliance plan. The trial judge argued that the penalty amounted to sufficient sanction for the environmental crime offence committed. Similarly, Matterson[61]

[55] *United States* v *BP Exploration and Production, Inc*. NO. 2:12-cr-00292 at 44.
[56] *ibid*.
[57] EPA, 'Summary of Criminal Prosecutions | Enforcement | USA EPA' (*Cfpub.epa.gov*, 2020) <https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=2468> accessed 24 February 2020.
[58] *ibid.*
[59] *ibid.*
[60] *United States* v *Pacific International Lines* NO. 1:13-cr-00019-TFH (2013).
[61] He was Special Agent in Charge of Coast Guard Investigative Service-Pacific Region at the time.

observed that the case was the third of its kind since 2011.[62] He believed that the penalty imposed on the offender sent "*a clear message to shipping companies and mariners who wilfully cut corners and violate the laws enacted to protect the oceans*."[63]

iv) *United States* v *Colombia ShipManagement Ltd.*;[64] *United States* v *Colombia ShipManagement GmbH*;[65] *United States* v *Lupera;*[66] *United States* v *Shapavalov*;[67] *United States* v *Kondratyev*[68]

Colombia ShipManagement Ltd. and Colombia ShipManagement GmbH pled guilty to the illegal discharge of oil waste from their ships in contravention of the APPS 1980 and obstruction of justice. The shipping corporations admitted that some of their vessels had intentionally evaded the use of required pollution prevention equipment and had also provided a false oil record book. U.S. Coast Guard.[69] Capt. Fish[70] stated that the act "*was a case of wilful pollution and deliberate falsification of records designed to deceive the Coast Guard*."[71]

Both corporations were sentenced to 48 months of probation. Colombia ShipManagement Ltd. was instructed to pay a $3 million fine and to pay a community service fine of $1 million to the NFWF. Colombia ShipManagement GmbH was sentenced to a $4.8 million fine and instructed to pay a $1.6 million community service fine to the NFWF.[72] The settlement in this case has been adduced to be the largest settlement for pollution involving vessels in both New Jersey and Delaware as of 2013.[73] Reacting to the penalty handed down by the

[62] JOC Staff, 'Pacific International Lines Fined for Criminal Oil Pollution | JOC.Com' (*JOC.com*, 2013) <https://www.joc.com/maritime-news/container-lines/pacific-international-lines/pacific-international-lines-fined-criminal-oil-pollution_20130227.html> accessed 10 December 2018.
[63] *ibid*.
[64] *United States* v *Colombia ShipManagement Ltd.* NO. 2:13-cr-00193-SDW (2013).
[65] *United States* v *Colombia ShipManagement GmbH* NO. 2:13-cr-00205-SDW (2013).
[66] *United States* v *Lupera* NO. 2:12-cr-002816-SDW (2013).
[67] *United States* v *Shapavalov* NO. 1:13-cr-00079-SLR (2013).
[68] *United States* v *Kondratyev* NO. 1:13-cr-00080-SLR (2013).
[69] NPS Corporation, 'USA (UPDATE): Columbia ShipManagement Handed $10 Million Fine | News | Lubetech' (*Npscorp.co.uk*, 2013) <http://www.npscorp.co.uk/6/news/article/732/usa-update-columbia-shipmanagement-handed-10-million-fine> accessed 10 December 2018.
[70] He was Chief of Investigations for the Coast Guard at the time.
[71] JOC Staff (n.62).
[72] *ibid*.
[73] *ibid*.

trial judge, Moreno[74] emphasized that the environmental offences committed by the companies were serious criminal offences as they damaged the marine environment.[75] He asserted that the prosecution and tough sanctioning of waste discharge offences send the message that pollution of the natural environment is considered serious and punished severely.[76] Similarly, Fisherman[77] believed that the tough penalty imposed in the case would deter other shipping companies from repeating the same crime.[78] Moreover, it was stated that the prosecution was a "*fine example of multi-district cooperation in enforcing federal environmental law and achieving a just sentence*."[79]

Lupera (who was the second engineer aboard one of the ships) was convicted of obstructing justice, and not accurately keeping the oil record book. He was sentenced to 24 months' probation. Vladimir Kondratyev (who was the first engineer aboard another of the ships) was accused of the same offence as Lupera as well as misinforming the USCG on the details of the oil record book. He was sentenced to 24 months' probation and a $500 fine. Likewise, Shapavalov (who was the second engineer aboard the M/T Nordic Passat) was convicted of misinforming the US Coast Guard on the usage of oil water equipment on board the ship and was sentenced to 24 months' probation.[80]

v) *United States* v *W&T Offshore*[81]

W&T Offshore Inc. pled guilty to washing spilled oil from its platform into the Gulf of Mexico instead of informing the National Response Centre of the spill. The corporation was sentenced to 36 months' probation and ordered to pay a criminal penalty of $700,000. The corporation was also ordered to make restitution of $50,000 to the Southern Environmental Enforcement Network towards funding environmental enforcement training (against similar criminal pollution) and $250,000 to the NMSF towards funding projects aimed at restoring the Gulf of

[74] Moreno was the Assistant Attorney General for the Justice Department's Environment and Natural Resources Division at the time.
[75] JOC Staff (n.62).
[76] *ibid.*
[77] The US Attorney for the District of New Jersey.
[78] JOC Staff (n.62).
[79] JOC Staff (n.62).
[80] *ibid*.
[81] *United States* v *W&T Offshore* NO. 2:12-cr-00312-EEF-SS (2014).

Mexico. The corporation was also instructed to implement an environmental compliance plan.

vi) *United States* v *Harcros Chems., Inc*.[82]

In this case, Harcros Chems. Inc. was convicted of storing hazardous waste without a permit at the company's laboratory sites for more than two years. This was in contravention of the RCRA. The corporation was sentenced to two years' probation and ordered to pay a fine of $1.5 million.

vii) *United States* v *Action Manufacturing Co.*[83]

Action Manufacturing Co. was convicted of storing 4,570 M608 Explosive Leads without a permit and without properly documenting the storage of such hazardous substance as required under the Pipeline and Hazardous Materials Safety Administration (PHMSA) Regulations. The corporation was sentenced to five years' probation and ordered to pay a $1.2 million fine.[84]

Based on the list of cases decided in the USA regime discussed above, one can observe the imposition of tough sentences as penalties for different forms of environmental crimes It is therefore evident that the USA regime have gone beyond a lettered commitment of tough sanctioning of environmental crime to an application through sentencing of corporate criminal offenders.

5.1.2 Application of Sentencing Guidelines which is Useful in the Deterrence of Offenders

This study will explore the application of Sentencing Guidelines in the UK and USA regimes. The study has earlier observed the absence of any such Guideline in the Nigerian regime. This section therefore seeks to explore the usefulness of the Guideline in the comparative jurisdictions (UK and USA). Any such usefulness discovered will serve as a basis for its recommendation to the Nigerian regime.

[82] *United States* v *Harcros Chems., Inc*. NO. 2:14-cr-20070-CM-DJW (2014).
[83] *United States* v *Action Manufacturing Co.* NO. 2:14-cr-00224-NIQA (2014).
[84] *ibid*.

A) Application of a Sentencing Guideline in the UK Regime

In line with Section 120 of the UK's Coroners and Justice Act 2009, the UK regime has provided a Sentencing Guideline that will apply to individuals of 18 years and above, as well as organisations that are sentenced on or after July 1 2014. Pursuant to Section 125 (1) (b) of the Coroners and Justice Act, "*every court must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function*." Hence, the Sentencing Guideline serves to shape the exercise of discretion of courts within the permitted parameters of statutory sanctions. Offences for which there are detailed guidelines are categorised under Section 33 of the Environmental Protection Act and Regulations 12 and 38(1), 2 and 3 of the Environmental Permitting (England and Wales) Regulations.

Other analogous offences (related to the subject of discussion in this chapter) provided in the Guideline are: breach of an abatement notice[85] under Section 80 of the Environmental Protection Act with a statutory maximum of unlimited fine; breach of duty of care to prevent escape of waste under Section 33 of the Environmental Protection Act and breach of Environmental Permitting Regulations under Section 34 of the Environmental Protection Act both with a statutory maximum of unlimited fine. The Sentencing Council sets out a 12-step Sentencing Guideline for England and Wales to punish and deter environmental offenders, as well as reduce the financial gain associated with environmental offences. It is however notable that all steps in the UK Guideline applies to both individual and corporate offenders except regarding the use of criminal fines set out in step 4. These 12 step guidelines include:[86]

1) The court can make a compensation order (of an amount it considers appropriate) in line with Section 130 Powers of Criminal Courts (Sentencing) Act 2000 requiring the criminal offender to compensate any injury or damage resulting from the offence. In effect, the court can require

[85] An abatement notice is served on the owner(s) or occupier(s) of a property from which a private nuisance arises, warning them of the intention to enter on the land in order to abate the nuisance. Abatement notices can only be issued by enforcement officers.

[86] Sentencing Council for England and Wales, 'Organizations: Unauthorized or Harmful Deposit, Treatment or Disposal etc. Of Waste/ Illegal Discharges To Air, Land And Water' (Sentencing Council 2014) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/organisations-illegal-discharges-to-air-land-and-water-unauthorised-or-harmful-deposit-treatment-or-disposal-etc-of-waste/>accessed 10 August 2019.

that an offender pay compensation for the injury, damage or loss suffered as a result of the offence committed. Indeed, pursuant to Section 130 (2a) (4) of the Powers of Criminal Courts (Sentencing) Act, the court must consider evidence and any representations made by or on behalf of the accused or prosecutor to determine the appropriate amount of compensation to be imposed.

2) The court can consider confiscation of proceeds from the environmental crime if it deems the action appropriate in relation to the environmental offence in line with Sections 6 and 13 Proceeds of Crime Act 2002. This implies that relating to environmental offences, the court can order a forfeiture of all funds related to the commission of an environmental offence. However, pursuant to Section 6(4) of the Proceeds of Crime Act, in order to make this determination, the court must decide whether the defendant has a criminal lifestyle, he has benefitted from his general criminal conduct and he has benefitted from the particular criminal conduct.

3) The court can determine the category of the offence using culpability and harm factors. Section 164 of the Criminal Justice Act 2003 requires that a criminal penalty must reflect the seriousness of the offence committed and the court must consider the financial condition of the offender. In determining whether a criminal penalty reflects the seriousness of offence committed, the UK Sentencing Guideline provides that the courts should consider the culpability and harm factor.[87] This also enables the court to determine the scale of sentencing that fits the category of offence committed. From the UK criminal regime, the culpability of an offender (whereby [a] is high culpability and [c] a lower culpability) is deduced to be:[88]

a) Deliberate act. Under this category, the offender intentionally breaches or flagrantly disregards the law. For a 'responsible corporate officer' within a corporation, such an officer would have intentionally breached statutory

[87] Sentencing Council for England and Wales, Environmental Offences: Definitive Guidelines 2014 <https://www.sentencingcouncil.org.uk/wpcontent/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf> accessed 6 March 2019.
[88] *ibid*.

provision despite knowing that their actions/omissions can rightly be ascribed to the corporation. It is also a deliberate act of a corporation to commit an offence when the corporation fails to enforce all measures that would enable it avoid committing the criminal act.

b) Reckless act. Under this category, the offender foresees the risk of committing an offence through his act, but wilfully turns a blind eye and continues with the offensive act. In the case of a corporation, it foresees such a risk but fails to enforce mechanisms to prevent the offence.
c) Negligent act. Under this category, the offender (especially corporations) fails to take reasonable care by enforcing mechanisms for avoiding the commission of an offence.

Similarly, under the Environmental Offences Definitive Guideline, if the pollutant is dangerous or hazardous, the clean-up and site remediation is expected to be very costly.[89]

4) In distinguishing the starting point and category range of the environmental criminal offences, the Sentencing Guideline relates the criminal fines which the court can impose on offenders to the financial conditions of the offenders. This is because the Guideline seeks to minimise whatever gain had been realised through the Commission of the offence. In the UK case of *R* v *Thames Water Utilities Ltd*,[90] the Court of Appeal held that the most suitable way to pass a strong message to the directors and shareholders of large corporations concerning their environmental responsibilities was to impose huge fines.[91] Making an analysis, the court suggested that where the act of the large corporation causing the crime is deliberate, and adverse harm has been caused, "*fines equal to a substantial percentage (up to 100%) of the company's pre-tax net profit for the relevant year could be imposed*."[92] Furthermore, according to the Guideline, a consideration of the relevant recent convictions and/or a history of non-compliance, repeated

[89] *ibid.*

[90] *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960.
[91] *ibid*.
[92] *R v Thames Water Utilities Ltd* (n.90) at 108.

incidents of offending or offending over an extended period of time, breach of an order and offence committed for financial gain could lead to a move outside the category ranges (mentioned above) into a substantial upward adjustment of the criminal fine.[93]

5) In some other circumstances, the court can ensure that the imposition of financial orders (which could be in the form of compensation, confiscation and/or fine) removes any economic benefit that would have accrued to the offender from the offence.[94] In doing this, the financial order should remove any economic benefit the offender has derived through the commission of the offence including: avoided costs, operating savings, any gain made as a direct result of the offence.[95]

6) The court can determine that the proposed fine is proportionate to the financial means of the offender. This will entail ensuring that the financial order has a real economic impact on the management and shareholder which will instil in them the importance of complying with environmental regulations. Indeed, in some bad cases, it would even be acceptable that the fine will have the effect of putting the offender out of business.[96]

7) In considering the proportionality mentioned in step 6, the court can review other factors that are relevant to guaranteeing such proportionality with due regard to the means of the offender and the seriousness of the offence.[97]

8) The court can consider circumstances which may require a reduction or review of sentence such as assistance to prosecution.[98] This is pursuant to Sections 73 and 74 of the Serious Organised Crime and Police Act 2005.

[93] Sentencing Council for England and Wales (n.86).
[94] *ibid*.
[95] *ibid*.
[96] *ibid*.
[97] *ibid*.
[98] *ibid*.

9) The court can consider potential reduction of the sentence of an offender who has entered a guilty plea.[99] This is pursuant to Section 144 of the Criminal Justice Act 2003.

10) The court will consider the possibility of making ancillary orders such as: the forfeiture of the vehicle used in committing the environmental crime in line with Section 33C of the Environmental Protection Act; the deprivation of property that is a proceed of the environmental crime in line with Section 143 of the Powers of Criminal Courts (Sentencing) Act 2000 where Section 33C of the Environmental Protection Act is inapplicable; and ordering an offender to take steps to remediate within a specified period pursuant to Regulation 44 of the Environmental Permitting (England and Wales) Regulations where the offender is guilty of an unauthorised discharge.[100]

11) The court will consider that sentences are just and proportionate to offending behaviour. This is referred to in the Guideline as the totality principle.[101]

12) The court will give reasons for every sentence in line with Section 174 of the Criminal Justice Act.[102]

Indeed, the UK Sentencing Guideline lends legitimacy to the UK sentencing of crimes. This is because the Guideline encourages proportionality of punishment to the offence committed. It is worthwhile remembering that this is a major deficiency that has been noted in the Nigerian regime. It is the view of this study that such proportionality will in turn encourage deterrence to a criminal offender. From the 12 step UK Sentencing Guideline outlined above, it is obvious that consideration of the level of sentence to be imposed is made in line with the severity of the harm caused by the environmental offence, the level of culpability of the offender and the financial capacity of the offender. Indeed, the determination of sentences using the harm and culpability approach makes the

[99] *ibid.*
[100] *ibid.*
[101] *ibid.*
[102] *ibid.*

penalty more suitable for the particular offence committed. Hence, in line with the Guideline, although a defaulter who deliberately violated environmental standards will be severely penalised, a negligent and reckless violator will equally be punished. Similarly, it entails that a company that commits very serious environmental crime will expect sentences bearing the highest range of sanctions on the statutory parameters for such offences.

This study has earlier identified the deficiency of very weak statutory sanctions in the Nigerian regime. However, it is argued that the absence of a Sentencing Guideline in the Nigerian regime makes matters even worse. A Sentencing Guideline in Nigeria could have matched even the highest scale of the weak sanctions to the significant offences committed in the Nigerian regime. On the other hand, the absence of such Guideline removes what would have been a discretion to courts to impose sentences that reflect at least the highest scale of the existing weak sanctions in the Nigerian regime. In effect, the absence of the Guideline entails that the courts can choose to impose the lowest sanction in the already weak scale of sanctions provided in the Nigerian statutes. Whereas, as in the UK Guideline, where the sentencing is made proportional to severity of the offence and harm caused, environmental violations that result in significant harm will be punished severely in line with the existing tough sanctions in the UK statutes. This will create some form of fear among industry participants not to be in a hurry to cause violations with significant environmental harm knowing that they could suffer a significant amount of statutory sanctions for their action.

This study further noted the possibility of considering the financial ability of the offender during sentencing in the UK regime, hence the proportioning of sentences to the financial strength of the offender. The study reiterates the severe criminal sanctions provided in the UK environmental regime. The range/scale of financial penalties specified in the statutes are severe enough for the environmental offences prohibited. This study welcomes the proportioning of offences (in line with the guidelines) to the financial capacity of the offender as it will entail the severe sentencing of big oil and gas companies that have defaulted. Consequently, a defaulting company will understand that it will suffer the highest range of penalty scaled for the offence in the relevant statute during sentencing. For example, in committing the environmental offence prohibited and sanctioned under Section 34

of the Environmental Protection Act with a statutory maximum of unlimited fine, such an offender will understand that the trial court already has a responsibility to impose a very high fine that will impact the financial resource of the offender. Moreover, such an offender also understands that there is simply no limit to what such a court can impose for the offence. This study welcomes this approach as it will reduce the financial advantage that seem to come with committing environmental offences.

Such an approach to sentencing will instil in the general company, its management and shareholders, the importance of complying with such environmental standards. Moreover, by providing that there are cases whereby the regime can put the offender out of business through severe fines on the company's funds, the Sentencing Guideline seeks to remind all companies in the UK (including those operating in the oil and gas sector) that the punishment that comes with environmental crime is too expensive to bear. By this, such companies are deterred from engaging in such environmental criminal acts that can necessitate such.

B) Application of Sentencing Guideline in the USA Regime

The USA Environmental Protection Agency (EPA) issued its first extensive agency Guideline for proceeding in criminal cases on June 16, 1976[103] and acknowledged the need for the vigorous pursuit of enforcement using criminal sanctions.[104] This position was reiterated by James W Wooreman (then Assistant Attorney General of the Justice Department's Land and Natural Resource Division) who was quoted as stating: "*For these transgressions, the Department of Justice has begun to invoke grand jury investigations both against corporations and against individuals. The Department will prosecute criminal conduct in this area*."[105]

Indeed, building on this move, the USA has greatly increased the discretion of courts to penalise environmental criminal offences even beyond the statutory

[103] Robert I McMurry and Stephen D Ramsey (n.15).
[104] *ibid.*
[105] Robert I McMurry and Stephen D Ramsey (n.15) p.1138.

range provided in the relevant statutes.[106] This has been reflected in the USA Federal Sentencing Guideline by the United States Sentencing Commission which sought to make sentences for pollution crimes tougher.[107] In determining the type of sentence to impose, the sentencing judge should consider the severity of harm caused by the offence and whether it is a repeated offence.[108] In line with the Guideline, punishments that can be imposed on corporations guilty of environmental offences include: criminal fines,[109] probation sentences,[110] community service orders, restitution orders[111] and compliance and ethics programme orders. Imprisonment has been omitted from this list because the scope of discussion in the study has focused on corporate pollution, and companies cannot, in any traditional sense, be incarcerated. Furthermore, community service orders have been omitted from the list outlined below as they cannot apply to a company. Otherwise, most other provisions of the Guideline are applicable to both individual and corporate offenders. These provisions of the Guideline include:

i) Criminal Fines

It is notable that the Corporate Fine Guideline assumes that a corrupt corporation ought to be fined to the extreme if the statutory limit allows.[112] It is notable that the Corporate Fine Guideline states that a corporation found to have been established for criminal reasons or to have operated by criminal means should be fined at a level that will strip such company of all its assets.[113]

[106] Joel A Mintz, *Enforcement at the EPA* (University of Texas Press 2012) p.33.
[107] Formerly United States Sentencing Commission, United States Federal Sentencing Guideline Manual (1992) 18 U.S.C.A application 4 at 64 (West Supplementary 1992); now United States Sentencing Commission, United States Federal Sentencing Guideline Manual (2018-2019 Edition).
[108] *ibid*.
[109] 18 U.S.C. 3571.
[110] 18 U.S.C. 3561(a) (1); U.S.S.G. §8D1.1.
[111] U.S.S.G. §8B1.1.
[112] U.S.S.G. §8C1.1. The Guideline are however, limited to the scope established by Congress. Hence, the Guideline calculation that falls short of a statutory minimum or exceeds a statutory maximum must be adjusted accordingly, U.S.S.G. §§8C3.1, 5E1.2(c).
[113] U.S.S.G. §8C1.1. In *United States v. Najjar*, 300 F.3d 466 (4th Cir. 2002), it was held thus: "*Tri-City was exposed to a $500,000 fine under the statute and what has been called a death penalty fine under §8C1.1 of the Sentencing Guidelines.... It is clear that Tri-City was conceived in crime and performed little or no legitimate activity*".

In lieu of establishing special corporate fine standards for some offences,[114] there are two general statutory provisions for criminal fines in the Guideline.[115] The first sets the maximum limit for any criminal fine[116] while the other establishes the factors that determine the imposition of different levels of fine on either individuals or corporate offenders.[117] In considering the factors that are used to determine the level of fine to be imposed, the court may consider: the ability of the criminal offender to pay the fine;[118] the level of offence committed and the culpability of the offender.[119]

Unless the profit or loss associated with the offence is greater than the fine, the corporate offender's base fine is set at one of 38 levels proportional to the offence.[120] In line with this, the relevant fine range is determined by the score of the corporation's culpability.[121] Based on this, the Guideline has further specified certain factors that must be considered in determining the applicable range of fine that can be imposed on a corporate offender.[122] Generally statutory limits of fines

[114] U.S.S.G. §8C2.10. It is provided that: "*The Commission has not promulgated guidelines governing the setting of fines for counts not covered by §8C2.1*".
[115] *ibid.*
[116] In line with 18 U.S.C.3571(c), a court is permitted to impose a fine to the maximum amount of $500,000 when an organization is convicted of a felony, and a range of $10,000 to $500,000 for misdemeanors. However, 18 U.S.C. 3571(d) provides that the court may impose a fine of not more than twice the gain or loss associated with the offence. This study is of the view that the caveat in 3571(d) can in some cases, exceed the statutory limit set in the 3571(c). Moreover, 18 U.S.C. 3571(c) (1) permits the court to impose higher fines when the congress has approved the increase.
[117] 18 U.S.C. 3553.
[118] U.S.S.G. §8C2.2.
[119] U.S.S.G. §8C2.3 to §8C2.9.
[120] U.S.S.G. §8 C2.4. The base fine is the greatest of the following: the pre-tax gain from the crime, the amount of intentional loss inflicted on the victims, and an amount based on the Sentencing Commission's ranking of the seriousness of the crime (ranging from $5,000 to $72.5 million).
[121] U.S.S.G. §§8C 2.5 to 8C 2.8.
[122] According to U.S.S.G. §8C2.8: "*(a) In determining the amount of the fine within the applicable guideline range, the court should consider: (1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization; (2) the organization's role in the offense; (3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct; (4) any nonpecuniary loss caused or threatened by the offense; (5) whether the offense involved a vulnerable victim; (6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct; (7) any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c); (8) any culpability score under §8C2.5(Culpability Score) higher than 10 or lower than 0; (9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set for in §8C2.5 (Culpability Score); (10) any factor listed in 18 U.S.C. §3572(a); and (11) whether the organization failed to have, at the time of the instance offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program). (b) In addition, the court may consider the relative importance of any factor used to determine the range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factor used to determine the culpability score*."

stipulated in a regulatory instrument that proscribes the offence supersedes any conflicting range of fines stipulated in the Guideline.[123] However, it has also been provided that a major aim of the USA criminal sentencing system is to ensure that the system strips the offender of all gains associated with the offence after financial sanctioning measures (such as fine, restitution order, compliance order and remedial costs) has been applied.[124] In line with this, among other prescriptions, the Guideline prescribes that when the criminal action constitutes harm to the environment, a fine outside its recommended range could be applied.[125]

ii) Probation

Probation was made a sentence in and of itself by the Comprehensive Crime Control Act 1984.[126] According to the Sentencing Guideline, a probation sentence shall be: "*at least one year*[127] *but not more than five years if the offense level is 6 or greater.*[128] Corporations convicted of a federal crime must be placed on probation, where the court decides against fining them.[129] However, in some circumstances, the court might elect to fine such offenders and still sentence them to probation.[130] The Guideline establishes probation as a means of guaranteeing that offenders comply with required obligations to pay a fine or special financial orders, make restitution, set up a compliance programme, engage in community service, or comply with remedial orders.[131] Probation is also found appropriate when: the corporation has been found to have been previously convicted of the offence within 5 years of the subsisting conviction;[132] the responsible corporate officer within a corporation has been found to be involved in the same offence within five years of the subsisting conviction;[133] and applying the probation will reduce the risk of future criminal misconduct being committed by the offender.[134] Indeed, applying the probation will guarantee compliance with the sentencing

[123] U.S.S.G. §8C3.1 (b), (c).
[124] U.S.S.G. §8C2.9.
[125] U.S.S.C. §8C4.4.
[126] 18 U.S.C. § 3561.
[127] U.S.S.G. §8D1.2 (a) (1); 18 U.S.C. 3561(c)(1).
[128] U.S.S.G. §8D1.2 (a); 18 U.S.C. 3561(c).
[129] U.S.S.G. §8D1.1 (a) (7); 18 U.S.C. 3551(c).
[130] *ibid*.
[131] U.S.S.G. §8D1.1 (a) (1), (2), (3).
[132] U.S.S.G. §8D1.1 (a) (4).
[133] U.S.S.G. §8D1.1 (a) (5).
[134] U.S.S.G. §8D1.1 (a) (6).

directives of 18 U.S.C. 3553 (a)(2) regarding the need to:[135] reflect the seriousness of the offence; enhance respect for the law; provide just and adequate punishment; ensure deterrence to the commission of crime; protect the public from future crime; and rehabilitate and correct the offender.

Corporate probation mandates corporations not to engage in further misconduct.[136] In line with the Guideline, the discretionary probationary conditions require corporations to: publicize their conviction at their own cost;[137] establish and sustain a compliance programme;[138] notify their employees and shareholders of their offence and compliance programme;[139] inform the courts or probation services of its finances periodically;[140] carry out periodic audits and bearing the cost of the audits;[141] or pay periodic fines or fulfil restitution orders.[142]

iii) Restitution

Depending on the offence, a court may order a convicted corporation or individual to pay restitution to victims of the crime.[143] In effect, the court may exercise discretion in making this order. At other times, the court may impose the restitution as a condition of probation of the defendant[144] or subject to plea bargain.[145] Environmental matters for which the court might impose an order of restitution include: transportation of hazardous materials[146] and air transportation of hazardous materials.[147]

iv) Community Service Order

The Guideline also provides that an offender may be ordered to engage in community service in relation to the harm caused by the offensive act so long as

[135] U.S.S.G. §8D1.1 (a) (4); 18 U.S.C. 3553(a) (2).
[136] 18 U.S.C. 3563(a) (1), U.S.S.G. §8D1.3 (a) (1).
[137] U.S.S.G. §8D1.4 (a).
[138] U.S.S.G. §8D1.4 (b) (1).
[139] U.S.S.G. §8D1.4 (b) (2).
[140] U.S.S.G. §8D1.4 (b) (4), (3).
[141] U.S.S.G. §8D1.4 (b) (5).
[142] U.S.S.G. §8D1.4 (b) (6).
[143] Charles Doyce, 'Corporate Criminal Liability:' (Congressional Research Service 2013) <https://www.dphu.org/uploads/attachements/books/books_3511_0.pdf> accessed 14 August 2019.
[144] 18 U.S.C. 3563(b) (2).
[145] 18 U.S.C. 3663(a) (1) (A), (3).
[146] 18 U.S.C. 3663(a) (1); 49 U.S.C. 5124.
[147] 18 U.S.C. 3663(a) (1); 49 U.S.C. 46312.

the offender possesses the required skills, facilities, or knowledge suited for the community service task.[148] The Guideline however stresses that the community service task must be related to the harm caused or else monetary sanctions will be a more appropriate penalty.[149]

v) Compliance and Ethics Programme

The Guideline establishes a compliance and ethics programme that may be required to be undertaken by corporate offenders.[150] Indeed, a corporation that has already failed to install such a program in its system might be ordered to do so.[151] The Guideline requires that the programmes must enhance the ethical culture of corporations and increase the detection and prevention of criminal misconduct within the corporation.[152] Components of the programmes as set out in the Guideline include: formation of procedures designed to identify and prevent criminal misconduct;[153] involvement of responsible corporate officers in the programme (particularly the daily operations);[154] reduction of operations of corporations that has been identified to show minimal commitment to ethicality in operations;[155] training of employees and agents on the programme;[156] monitoring, auditing and evaluation of the programme;[157] encouragement and reward for corporations that have performed creditably in line with the programme's goals;[158] disciplining of inconsistent conduct;[159] and prompt response to the identification of in-house corporate criminal conduct.[160]

This study observed the provision under the USA Guideline requiring the imposition of probation during sentencing for repeated offenders. This can ensure that companies do not repeatedly commit environmental crime. This study discovered that not only were the Nigerian violations severe, but they were

[148] U.S.S.G. §8D1.3; U.S.S.G. §8D1.3 (*Commentary*).
[149] U.S.S.G. §8D1.3 (*Commentary*).
[150] Charles Doyce (n.137).
[151] *ibid*.
[152] U.S.S.G. §8B2.1 (a).
[153] U.S.S.G. §8D2.1 (b) (1).
[154] U.S.S.G. §8D2.1(b)(2).
[155] U.S.S.G. §8D2.1 (b) (3).
[156] U.S.S.G. §8D2.1(b)(4).
[157] U.S.S.G. §8D2.1(b)(5).
[158] U.S.S.G. §8D2.1(b)(6).
[159] U.S.S.G. §8D2.1(b)(7).
[160] U.S.S.G. §8D1.3; U.S.S.G. §8D1.3 (Commentary).

repeated such as the failure to clean-up which is still subsisting. The study also observed the discretion permitting courts to impose a requirement on the offending company to publish the conviction. Indeed, this can damage the public image of such companies. This study welcomes this approach as it will discourage companies from committing environmental offence.

Regarding the imposition of criminal fines during sentencing, this study welcomes the toughening of fines for repeated offenders. This will increase the deterrence of committing such offence on existing offenders as they will understand that being caught as a repeated offender carries an even greater penalty. Similar to the UK Environmental Offences Definitive Guideline, the USA Sentencing Guideline makes the sentences for environmental offences proportional to the seriousness of the offence. Again, regarding sentencing, this will prevent the danger of applying sanctions that are either too weak to compel deterrence or too severe to rehabilitate the offender to sentences. Moreover, it is observed that the USA Guideline also provides greater sentencing to repeated offenders. This study argues that this sanctioning mechanism will also provide deterrence to offenders who believe they can always violate environmental standards in order to make profit. Furthermore, similar to the UK, the USA Guideline seeks to take away criminal profits, thereby impacting the finances of a criminal violator. This will further make offenders understand that there is no actual gain in the criminal violation of standards considering that the profits acquired will still be taken away during sentencing. This study argues that applying greater sentencing to repeated offenders and seeking to take away the finances of offenders will deter offenders from believing that criminal violation of environmental standards pays.

5.1.3 **Criminal Liability of Corporate Officers for Pollution Offences**

This study discussed the doctrine of 'piercing of the corporate veil' in chapter 4. The study is of the view that 'piercing the corporate veil' is done in order to bring corporate actors' behaviour into conformity with the statutory environmental standards (of pollution prevention, complying with clean-up notice, etc.) stipulated in any regime. It is therefore necessary to discuss the application of this doctrine in the UK and USA regimes, especially considering that the study found no clear

decided case of environmental violations by corporations and their officers in the Nigerian regime. Hence, beyond establishing the importance of the doctrine, the Nigerian regime can derive guidance from the examples of the applications of the doctrine in the UK and USA regimes. This section will first discuss the application in the UK regime, and the USA regime afterwards.

A) Application of Corporate Sanctioning in the UK

In discussing its application in the UK regime, the study seeks to determine the approach that has been utilised by the UK in the imposition of liability for corporate oil pollution offenders. It has been asserted that some significant environmental pollution has been caused by corporations.[161] Similarly, some significant oil pollution in the UK offshore industry has been caused by ships owned or managed by corporations. Some such pollution that serve as evidence for this assertion include:

a) the 1967 Torrey Canyon Oil spill which caused the discharge of about 119,000 tons of crude oil on the Scilly Isles, contaminating 120 miles of the Cornish coast, 50 miles of French coastline and killing some 15,000 sea birds.[162] At the time of the incident, the super tanker SS Torrey Canyon which caused the spill was owned by Barracuda Tanker Corporation, a subsidiary of Union Oil Company of California but chartered to British Petroleum.[163]

b) the 1996 Sea Empress spill which caused the discharge of about 72,000 tons of crude oil near Pembrokeshire in Wales, causing significant harm to birds and marine life.[164] At the time of the incident, the MV Sea Empress

[161] Stuart Bell, Donald McGillivray and Ole W Pedersen, *Environmental Law* (8th edn, Oxford University Press 2013) p.280.
[162] Adam Vaughn, 'Torrey Canyon Disaster – The UK's Worst-Ever Oil Spill 50 Years On' *The Guardian* (2017) <https://www.theguardian.com/environment/2017/mar/18/torrey-canyon-disaster-uk-worst-ever-oil-spill-50tha-anniversary> accessed 10 December 2018; Fiona McKay, 'The Worst Marine Oil Spills in UK and World History'(*HeraldScotland*,2016)<https://www.heraldscotland.com/news/homenews/15809323.The_worst_marine_oil_spills_in_UK_and_world_history/>accessed 10 December 2018.
[163] *ibid*.
[164] British Broadcasting Corporation 'BBC NEWS | World | Europe | Comparing the Worst Oil Spills' *British Broadcasting Corporation* (2018) <http://news.bbc.co.uk/1/hi/world/europe/2491317.stm> accessed 10 December 2018.

was a single-hull Suezmax Liberian registered oil tanker managed by Sea Tankers Management Co Ltd.[165]

c) the 1993 Braer spill which discharged 85,000 tons of oil on the Shetland Islands and caused high respiratory hazard to seals in the region.[166] The MV Braer that caused the spill was an oil tanker owned by Braer Corporation, operated by Canadian Ultramar Ltd and managed by B+H ShipManagement Company.[167]

d) or even the recent 2011 Gannet Alpha platform spill in the North Sea off the Aberdeen coast which caused a discharge of more than 200 tons of oil.[168] This platform was operated by Shell.[169]

It is therefore trite to review the UK's application of corporate liability for pollution offences. This is necessary considering that if the actions and decision making strategy of corporations and their controlling officers are effectively checked, environmental criminal violations will be greatly reduced. Considering the significant pollution that has been caused by corporate activities (such as oil and gas pollution),[170] the Environmental Audit Committee has noted that sometimes companies criminally pollute because of their neglect of environmental obligations.[171] At other times, the pollution can also be a deliberate and intentional act of the company, taken with the full knowledge of the environmental harm that could result from such an act.[172] In this case, the environmental offences will

[165] David Johnson and Nickie Butt, 'The Sea Empress Disaster- 10 Years On' (World Wildlife Fund 2006) <http://assets.wwf.org.uk/downloads/ma_seaemp10yrson.pdf> accessed 15 February 2020.
[166] Ailsa J. Hall, John Watkins and Lex Hiby, 'The Impact of the 1993 Braer Oil Spill on Grey Seals in Shetland' (1996) 186 Science of the Total Environment 119-125.
[167] John MacGregor, 'Braer' (Asset Publishing Service Gov.UK 1993) <https://assets.publishing.service.gov.uk/media/54c11606e5274a15b3000015/MAIBReport_Braer-1993.pdf> accessed 15 February 2020.
[168] Adam Barnett, 'Shell's £22,500 Fine for North Sea Oil Spill Slammed As 'Paltry' By Campaigners' *Independent* (2015) <https://www.independent.co.uk/environment/shells-22500-fine-for-north-sea-oil-spill-slammed-as-paltry-by-campaigners-a6747536.html> accessed 10 December 2018.
[169] *ibid*.
[170] Environmental Agency, 'Regulating the Waste Industry: 2015 Evidence Summary' (Gov.UK 2016) <https://www.gov.uk/government/publications/regulating-the-waste-industry-evidence-summaries> accessed 10 December 2018.
[171] Environmental Audit Committee 'Corporate Environmental Crime, Second Report of Session' HC 136 (House of Commons London: The Stationery Office Limited 8th Feb 2005) p.5.
[172] *ibid*.

require proof of the company's *mens rea* in order for its guilt to be proven. However, on many other occasions, the liability could be based on merely having 'caused' the prohibited act, and in such case strict liability.

It has been observed above that the requirement for liability in the Nigerian environmental regime is mainly strict liability. Conversely, the UK has utilised both the requirements of *mens rea*, and strict liability in the determination of its environmental offences. For example, under Section 33 (1) (a) of the EPA, it is an offence for a person to 'knowingly' deposit controlled waste on any UK land without obtaining a permit and ensuring compliance with any conditions regulating waste discharge. From the above statutory provision, and the use of the word 'knowingly', *mens rea* can be identified as an element of this offence in the UK.

However, along with Nigeria, the UK also strictly prohibits environmental offences (such as oil pollution offences). For example, Section 3 of the Prevention of Oil Pollution Act 1971 provides that an offender who 'causes' oil pollution by the discharge of oil from a pipeline or during exploration is guilty of a crime and is liable to a fine of up to £50,000. Section 85 of the Water Resources Act 1991 finds an offender criminally liable for 'causing' the discharge of "*poisonous, noxious, polluting or solid matter*" into controlled waters, and punishable on summary conviction to imprisonment for up to three months or to a fine of up to £20,000 or both; and on indictment, to imprisonment not exceeding two years or to a fine or both.[173] There is therefore an expectation that enforcement agencies would enforce the environmental sanctions stipulated for these corporate crimes.[174]

[173] Similarly, Regulation 36 of the Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 finds any person that 'causes' a discharge of oil or oil waste from UK tankers into the Mediterranean Sea, the Baltic Sea, the Black Sea and the Antarctic area (hence, contravening the provisions of Regulations 12, 13 and 16) to be guilty of an offence and liable to a penalty of up to a £50,000 fine. In *National Rivers Authority* v *The Yorkshire Water Services Ltd* [1995] 1 AC 444, Yorkshire Water Services Ltd was found liable for causing the discharge of polluting substances from their system into the river, regardless of the fact that it was a third party that directly caused the discharge through their system. The court also disregarded the fact that they did not necessarily explicitly consent to the pollution act. All that mattered was that the pollution occurred on an existing system they had already set in place. In this case, the court considered the explicit meaning of the word 'caused' to determine that it was an existing system they had already set in place that eventually resulted in the discharge.

[174] Valsamis Mitsilegas and Malgosia Fitzmaurice, 'Fighting Environmental Crime in the UK: A Country Report' (Queen Mary University Press 2018) p.52.

Often, to determine the liability of a company, 'the acts and state of mind' of officers who represent the 'directing mind and will' of the company are imputed to the company itself. Such officers have been described in this study as 'responsible corporate officers' because they are either in charge of the functioning of the company (such as the company directors) or directly involved in the offensive act. Indeed, 'having a controlling mind within the company' entails that the corporate officer must able to influence policies that could have led to the commission of the pollution offence by the company.[175] Tromans and Thornton encouraged a piercing of the corporate veil to impose personal liability on such officers towards compelling companies to proactively consider environmental issues at the policy formation level of the company. The writers have also viewed the doctrine of imposing criminal liability on corporate officers as an effective way of making corporate officers more responsible in complying with environmental laws.[176] Their reason for this belief is that a corporate officer who is responsible for making the decisions of any corporation would rather comply with environmental principles when he understands that he could personally bear a measure of the criminal liability arising from the corporation's breach of the environmental principle.[177] A 'relevant corporate officer' in this purview includes: the director, manager, chief executive, or secretary.[178]

In effect, the UK environmental regime has pierced the veil to impose criminal liability on relevant corporate officers that consent to or connive with their corporation to effect an environmental crime, despite being in a position to prevent it.[179] Hence under the regime, a corporate officer would be liable for an intentional, reckless or negligent act resulting to an environmental offence being caused by

[175] Section 41 (3) (4) of the Petroleum Act 1998; Section 217 of the Water Resources Act 1991; and Section 41 of the Environmental Permitting (England and Wales) Regulation 2016.
[176] Stephen Tromans and Justine Thornton, 'Taking Responsibility; Personal Liability under Environmental Law' (Earthscan Publications Ltd 2001) p.1.
[177] *ibid.*
[178] This is provided for in Section 157 Environmental Protection Act; Regulation 41 Environmental Permitting (England and Wales) Regulation; Section 52 of the Clean Air Act.
[179] This is provided for in Section 157 of the Environmental Protection Act (EPA) 1990; Regulation 16 (6) of the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005; Regulation 65 of the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007; Section 11 (2) of the Continental Shelf Act 1975; Section 4 of the Petroleum Submarine and Pipelines Act 1975; and Section 52 of the Clean Air Act 1993.

its company. In effect, such actions would be deemed that they consented to or connived with the company to commit the environmental offence.[180]

This notion of corporate officer liability was historically provided in the failed Corporate Responsibility Bill 2002. In line with what would have been Section 7 (a) of the Bill, a director was expected to consider the environmental, social and economic impacts of their operations before making any decision for the company to embark on such operation. Section 7 (b) would have required the director to take every reasonable step to mitigate any such implication that might arise. Section 8 was to impose liability on a director who caused pollution as a result of negligence or wilful misconduct. According to Section 12 of the Bill, such a director would have been fined or imprisoned or even prohibited from being a director for a specified number of years. This Bill would have emphasized the strict position of the UK on corporate officers being responsible for environmental issues while directing the operations of their companies. However, generally companies would be found liable for their corporate offences whereby responsible corporate officers within such company lacked the 'directing mind and will' to influence actions that will prevent corporate crime.

For instance, in *Huckerby* v *Elliot*,[181] it was argued that for a corporate officer to be found vicariously liable for the crime of its corporations, such an officer must not only be aware of the environmental offence but also must actively encourage the act causing the criminal pollution and/or participate in it. In the case, the company operated a gaming club without licence. Huckerby as the director of the company was charged with the offence because the offence committed by the company was attributable to her neglect. Indeed, evidence showed that although she was the company director, she lacked knowledge of the company's operations as its co-director and the company manager was handling most such operations. The court however convicted Huckerby because regardless of her lack of knowledge, she ought to have exercised some form of oversight as the co-director and the manager. In this case, connivance was defined as a situation whereby an officer is, "*well aware of what is going on but his agreement is tacit, not actively*

[180] Environmental Audit Committee (n.171).
[181] *Huckerby* v *Elliot* [1970] 1 All ER 189.

encouraging what happens but letting it continue and saying nothing about it."[182] To argue connivance, the prosecution must establish that such an officer was aware of the offence and did nothing to criticize or stop it. This element of criminal liability seeks to ensure that a corporate officer reasonably endeavours to rectify a pollution offence as soon as he is aware of the offence to absolve himself of any allegation of conniving in committing the crime.

The Court however set aside the decision arguing that there was no general rule mandating each director to exercise some degree of control over the company's business. In effect, inasmuch as the director had no reason to distrust her delegate, she was within her right to delegate such a duty to another official of the company. However, it has been stipulated that when a corporate officer (who has the authority to stop the offence or influence a prevention of the offence) consents to an environmental offence committed by his company, he or she is also deemed to have connived to commit the offence.[183] Hence, the responsible corporate officer would in this circumstance, have deliberately committed the environmental offence.

Similarly, in *Woodhouse* v *Walsall Metropolitan Borough Council*,[184] the 'general manager' of a waste disposal site was absolved from guilt for the discharge of waste from the site. The court held that the prosecution failed to establish the fact that the manager possessed the required authority to affect the general policy of the company regarding waste discharge. The court held that for the manager of a company to be held responsible for an environmental offence committed by the company, the manager must be a decision maker capable of influencing the company's policy. Thus, a responsible corporate officer's authority must include an ability to influence company policy and the strategy of operations for the company.[185]

[182] *ibid.*at 193.
[183] *ibid.*
[184] *Woodhouse* v *Walsall Metropolitan Borough Council* [1994] Env. LR 30.
[185] In the appeal case of *R* v *Boal* [1992] 1 QB 591, the initial conviction of the day-to-day 'general manager' of the Foyles bookstore subject to Section 23 Fire Precautions Act 1971, was overturned on the grounds that he lacked the requisite power to determine the corporate policy of the book store. It was rather maintained that criminal liability as specified in Section 23 of the Act only apply to officers who are in authority and are decision makers and strategy developers within a company.

In *Tesco Supermarkets Ltd* v *Nattrass*,[186] the House of Lords emphasized that the litmus test for determining the liability of a corporate officer is whether the corporate officer has sufficient authority in the corporation to influence the commission or prevention of the act that caused the pollution. This view was originally asserted by Lord Denning in *H. L. Bolton (Engineering) Co. Ltd.* v *T. J. Graham & Sons Ltd*[187] whereby he referred to the company as a human body, and the directors as the "*directing mind and will*" of the body. On those grounds, in the *Woodhouse* case, the manager was not the 'directing mind and will' of Woodhouse. This is because he lacked the capacity to influence the company's general policies, including those that cover the site. This position was reiterated in 2012, where a technical manager of a company was absolved from waste discharge because he lacked enough authority to permit the offence.[188]

Relative to the exploration and production of oil and gas, Section 137(2) of the Merchant Shipping Act 1995 provides that the Secretary of State makes regulation holding the captain, pilot or owner of the ship responsible for any oil and gas pollution that occurs from the ship. It is noteworthy that the Regulation bypasses whatever corporation the ship would have been registered with, to target particular persons who are involved with the ship. Emphasizing how seriously the UK seeks to deal with any such 'relevant officer' who fails in this duty of care to prevent oil pollution from a ship, Section 139 of the said Act provides that a person guilty of the Section 137(2) offence will, on summary conviction, be sanctioned by a fine not exceeding £50,000. This study appreciates the piercing of the corporate veil, in this instance by imposing a tough penalty on a person who might have caused an oil and gas pollution offence from a ship. The study further appreciates the penalty imposed as significant enough for a normal individual.

Hence, the burden has been placed on company officials to ensure that they coordinate the company policies in a way that operations arising from such policy would portray corporate social responsibility, good corporate governance and commitment to environmental responsibility.[189] While noting the requirement of

[186] *Tesco Supermarkets Ltd* v *Nattrass* [1972] AC 153 (HL).
[187] *H. L. Bolton (Engineering) Co. Ltd.* v *T. J. Graham & Sons Ltd* [1957] 1 QB 159 (CA), 172.
[188] *R* v *St Regis Paper Co Ltd* [2012] Env LR 16. [2012] 1 CR App R 14.
[189] This was highlighted in the cases of *National Rivers Authority* v *Alfred McAlpine Homes East Ltd* [1994] Env. LR 198; and *Shanks and McEwan (Teesside) Ltd* v *Environment Agency* [1997] EWHC Admin 873.

'sufficient authority' on the part of a relevant corporate officer, it is noted that Section 217 of the Water Resources Act finds a third party whose act or default contributes to the commission of the pollution, guilty of an offence. Hence, in this circumstance, although the third party might not necessarily be a member of the polluting corporation (such as oil pipeline vandals), the fact that such a third-party offender participated in the acts that resulted to the pollution offence is sufficient legal grounds for the criminal liability of the third-party polluter.

B) Application of Corporate Sanctioning in the USA

The application of this doctrine has not been restricted to the UK alone. It has also been applied in the USA regime. The USA Federal environmental laws contain criminal sanctions for the environmental liability of corporations operating within the USA.[190] This statutory position has been reflected in several publicly recorded cases (the lack of decided cases on the prosecution of corporate environmental violators has been observed to be a deficiency in the Nigerian regime). A USA Federal case law that emphasized corporate liability for environmental crime is *New York Central & Hudson River Railroad Co.* v *United States*[191] where the court held that often corporations are responsible for regulatory crimes.[192] In *New York Central*, the court also noted that corporations might be penalised for the criminal actions of their employees (if the employee acted within the authority conferred by the company).[193] The court noted that failing to apply criminal penalties to errant companies would only encourage several criminal offences in breach of criminal law to be unaccounted for.[194] This is because it might be difficult to identify the actual culprits within the corporation who were responsible for

[190] *United States* v *Agosto-Vega* 617 F.3d 541, 552-53 (1st Cir. 2010); *United States* v *Philip Morris USA, Inc.* 566 F.3d 1095, 1118-119 (DC Cir. 2009); *United States* v *Singh*, 518 F.3d 236, 249 (4th Cir. 2008); *United States* v *Jorgensen* 144 F.3d 550, 560 (8th Cir. 1998); *United States* v *Investment Enterprises Inc.*, 10 F.3d 263, 266 (5th Cir. 1994); *United States* v *Twentieth Century Fox Film Corp.* 882 F.2d 656, 660 (2d Cir. 1989); *United States* v *Gold* 743 F.2d 800, 822-23 (11th Cir. 1984); *United States* v *Beusch* 596 F.2d 871, 877-78 (9th Cir. 1979); *United States* v *Carter* 311 F.2d 934, 941-42 (6th Cir. 1963).

[191] *New York Central & Hudson River Railroad Co*. v *United States*, 212 U.S. 481, 494-95 (1909).

[192] In chapter 3, this study has established most regulatory crimes to be strict liability. Buttressing the point of strict liability of corporate crimes, the court argued in *People* v *Fernow,* (1919), 286 Ill. 627, 122 N.E. 155 that for strict liability crimes, it is not necessary that *mens rea* as intent should exist. Rather in a bid to protect the public, the performance of the criminal act can simply constitute the crime regardless of the knowledge or intent of the offender. It is therefore evident that this category of offence that involves a criminal breach of statutory obligations enacted to protect the public does not require a proof of *mens rea* to determine the guilt of the offender.

[193]*New York Central & Hudson River Railroad Co.* v *United States* (n.185) at 491.

[194] *ibid.* at 492.

committing the criminal action.[195] The court noted that what was most important was that the agent acted within his scope of corporate authority and that the corporation stood to benefit from the action of the agent that amounted to the criminal act.[196]

This therefore means that the USA federal environmental criminal system has expanded its prosecution and sentencing scope to include 'relevant corporate officers' within a company that has been found guilty of criminal pollution.[197] The approach evolved from the vicarious liability doctrine which reflects the position that a corporate officer is liable for the acts or omissions of a company in which he/she had a 'relevant share' or 'control'.[198] Abrams commented that the phrase, 'relevant share' in itself, portrays a literal interpretation of some measure of participation in the criminal act.[199] This could be inferred to suggest accessory liability on the part of the offending corporate officer. Accessory liability is borne by a secondary party to the offence other than the principal offender. In that case, the offender is responsible to the extent of his participation in the criminal act. Indeed, as a writer put it, "*the word 'responsible' itself reflects some notion of culpability*."[200]

Just as in the UK, a justification of a corporate officer's 'relevant share' for criminal pollution in the USA, would rely on his extent of participation in the environmental crime. For this, one can observe with the aid of some decided cases, the prosecution and sanctioning of corporate officers who have directly participated in some such environmental crimes in the USA regime. These cases include:

i) *United States* v *Caldwell*;[201] *United States* v *Dingus*[202]

In this case, Ray Caldwell (manager of All Out Sewer and Drain Services, Inc.) was charged with the offences of: knowingly violating the CWA by knowingly and illegally discharging industrial waste from the company's pump to the publicly

[195] *ibid.*
[196] *ibid.*
[197] Lisa A Harig, 'Ignorance Is Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines' (1992) 42 Duke Law Journal 146.
[198] *ibid.*
[199] Norman Abrams, 'Criminal Liability of Corporate Officers for Strict Liability Offenses - A Comment on Dotterweich and Park' (1981) 28 University of California, Los Angeles Law Review 463, 466.
[200] Norman Abrams (n.193) p.465.
[201] *United States* v *Caldwell* NO. 3:13-cr-05308-BHS (2013).
[202] *United States* v *Dingus* NO. 3:13-cr-05410-BHS (2013).

owned treatment works (POTW) and giving a false report of the volume of sewage waste discharged to avoid surcharges. Caldwell was convicted on all counts of the charge. A prison sentence of 27 months was imposed on Caldwell, including a three year probation term, $250, 000 fine to be shared jointly and severally with the company, and $689, 219.28 in restitution to be shared jointly and severally with the company.[203] The restitution was to be paid to the POTW, County and City. Dingus (the main perpetrator in the above pollution) pled guilty to the charge against him and was given a thirty-day prison sentence, one-year probation (including 60 days of electronic monitoring), a $15, 000 fine, and a requirement to complete 40 hours of community service.[204]

ii) *United States* v *Nadel & Gussman Rockies LLC.*;[205] *United States* v *Cartaya*[206]

Nadel & Gussman Rockies LLC pled guilty to negligently causing the illegal discharge of 113 barrels of crude oil from a tank battery used by the company for its oil and gas operations. This was contrary to Section 1319 (c) (2) (a) of the USA Clean Water Act 1972. While emphasizing that a discharge of hazardous waste had grave implications for public health and the natural environment, the trial judge asserted that the CWA prohibits a discharge of hazardous substances in a manner that can cause harm to the environment and/or public health.[207] The judge also stated that oil waste is a major hazardous substance and that its discharge has been known to cause grave environmental and public health challenges.[208]

The corporation was sentenced to three years' probation and ordered to pay a criminal penalty, a fine of $357,500. The corporation was also ordered to make a restitution of $430, 500 and $212, 000 to the Yellowstone Park Foundation and the Grand Teton National Park Foundation, respectively. The corporation was also instructed to implement a regulatory compliance plan.[209] Cartaya (the major

[203] *ibid*.
[204] *ibid*.
[205] *United States* v *Nadel & Gussman Rockies LLC.* NO. 2:13-cr-00211-ABJ (2014).
[206] *United States* v *Cartaya*NO. 2:13-cr-00219-ABJ (2014).
[207] EPA, '01/31/2014: Joint EPA and BLM Investigation Results in Funding for Wyoming Natural Resources and Oil Spill Cleanup (Carbon County)' (*EPAArchive*, 2014) <https://archive.epa.gov/epapages/newsroom_archive/newsreleases/2d1dbd97c8bcce4685257c7100772140.html > accessed 10 December 2018.
[208] *ibid*.
[209] *ibid*.

contractor that handled the operations), pled guilty to the charges of false statement on documents required under CWA and was sentenced to three years' probation, a fine of $10, 000 and 250 hours community service. While the study views the penalty imposed on the corporation as fairly substantial, the study argues that the penalty of the corporate officer that perpetrated the pollution is very small when compared to the ensuing pollution.[210]

iii) *United States* v *Michael H. Weitzenhoff, Thomas W. Mariani* (as defendants-appellants)[211]

The defendants-appellants were convicted of overseeing 40 separate discharges of waste activated sludge (WAS) directly into the ocean from the East Honolulu plant between April 1988 and June 1989 resulting in 436,000 pounds of pollutant solids being discharged into the ocean.[212] This was in breach of the provision of s.1319 (c) (2) (A) of the CWA of 1972.[213] Subject to the statutory provision, the offence of intentionally violating a permit limitation set for the discharge of waste is a felony with a criminal penalty of up to three years imprisonment. The above discharge violated the required 30-day average effluent limit under the National Pollutant Discharge Elimination System (NPDES) permit. They were also recorded as having instructed employees to conceal information about this pollution from the USA Environmental Protection Agency.[214] Following an FBI investigation, the defendants were charged with thirty-one counts of conspiracy and substantively violating the CWA. The district court sentenced Weitzenhoff to 21 months and Mariana, 33 months' imprisonment. On appeal, the Supreme Court affirmed the judgement of the lower court. This study views the penalty imposed on the offender as tough considering the history of sentences imposed in the previous cases examined above.

iv) *United States* v *Egan, et al*.[215]

This case involved a fatal explosion that happened in 2005 on board a petroleum barge owned by Egan Marine Corp., causing a discharge of 4,800 gallons of oil

[210] *ibid*.
[211] *United States* v *Weitzenhoff*, 35 F. 3d 1275 - Court of Appeals, (9th Circuit 1993).
[212] *ibid*.
[213] 33 U.S.C. S 1319(c) (2) (A).
[214] *United States* v *Weitzenhoff* (n.212) at.1282.
[215] *United States* v *Egan, et al*. No. 1:10-cr-00033 (2014).

and 32 tons of oil solids into a canal. During a bench trial in June 2014, Egan Marine Corp. and its captain Dennis Egan were convicted of the negligent discharge of oil pollution into a navigable waterway and negligent manslaughter.[216] The judge observed that the prosecution had sufficiently established that the pollution was directly caused by an instruction given by Dennis Egan to an employee to warm a pump using a propane torch.[217] It is notable that the liability of Dennis Egan directly arose from the instruction given down, to the pollution caused. Hence, Dennis Egan shared in the liability of directly causing the pollution, and in effect violating the Clean Water Act.[218]

According to U.S. Attorney Zachary T. Fardon, the case served as an example to 'relevant corporate officers' and corporations on what to expect when they fail to perform the duty of care that they owe the crew members on their vessels and fail to comply with environmental standards regarding pollution control.[219] The federal district court for the Northern District of Illinois sentenced Dennis Egan to six months in federal prison.[220] Egan Marine Corp. was sentenced to three years of supervised release and ordered to pay more than $5.3 million as restitution to the National Pollution Funds Centre for the cost it incurred towards cleaning up the spill.[221]

v) *United States* v *Barnett*[222]

In this case, Barnett was convicted after pleading guilty to authorising the discharge of waste grease and oil and making false statements to conceal the discharge. In his capacity as the principal agent of Denali Industries Inc. Barnett pled guilty to this charge and was sentenced to 48 months of probation and a payment of $15,000 as restitution. In this case, the trial judge also observed that the pollution caused by the company only occurred as a result of the direct instruction issued by Barnett to the company employees to effect the discharge.[223]

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[216] Lance Duroni, 'Barge Captain Gets 6 Mos. For Fatal Accident, Oil Spill - Law360' (*LexisNexis*, 2018) <https://www.law360.com/articles/673150/barge-captain-gets-6-mos-for-fatal-accident-oil-spill> accessed 10 December 2018.
[217] *United States* v *Egan Marine Corporation, Dennis Michael*15 F. 2d 2477 - Court of Appeals, (7th Cir. 2016).
[218] 33 U.S.C. SS 1321 (b) (3), 1319 (c) (1) (A).
[219] Lance Duroni (n.217).
[220] United States Department of Justice, 'Monthly Bulletin: Environmental Crime Section' (*Justice.gov*, 2018) <https://www.justice.gov/enrd/file/783731/download> accessed 10 December 2018.
[221] *ibid.*
[222] *United States* v *Barnett* No. 2:12-cr 00378-TC (2014).
[223] *ibid.*

vi) *United States* v *Brightwell*[224]

In this case, Patrick Brightwell was charged with substantive CWA violations and permitting the negligent discharge of harmful waste into a river. While justifying his decision, the trial judge established that the negligent discharge of harmful waste by B&P Environmental LLC occurred under the direct supervision and authority of Patrick Brightwell (in his capacity of principal officer of a project B&P Environmental LLC was engaged in). Brightwell pled guilty to each count of the charge and was given a prison sentence of 10 months, probation of 36 months, and a penalty of $270,667 as restitution to the Department of Interior Restoration Fund. Similarly, the guilt of Anderson (the company driver) was established in a separate conviction owing to his singular act of driving down the solid waste wrapped in plastic and dumping it into the river with another employee, 'despite being knowledgeable of the content of the bags.'[225] It was therefore irrelevant as to whether the driver actually knew the direct causes of pollution waste. Anderson was convicted of contributory negligence to the criminal pollution. He pled guilty to negligently contributing to the criminal discharge. He was sentenced to 24 months' probation.[226]

Furthermore, as has been mentioned above, the liability of a corporate officer can arise from the fact that such "*officer was in a position of control, and violation occurred, the officer presumably failed in his duty to prevent that violation*."[227] The case of *United States v. Iverson*[228] nullifies any possible absolution of guilt that could have arisen as a result of the corporate officer's lack of direct participation in the pollution act. In the case it was established that a person can only be regarded as a 'relevant corporate officer' if such a person can influence the company policy permitting the discharge. Hence, regardless that such an officer might not have directly done the act causing the discharge, the officer would still be found guilty of having contributed to the discharge.[229] Thus, if it is

[224] *United States* v *Brightwell* NO. 1:13-cr- 00315-JEB (2014).
[225] *United States* v *Anderson* NO. 13-cr-00046-JEB (2014).
[226] *ibid.*
[227] Thruxtun Hare, 'Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act' (2018) 138 University of Pennsylvania Law Review 972.
[228] *United States* v *Iverson* 162 F.3d 1015, 1025 (9th Cir. 1998).
[229] Seigel L Michael, *White Collar Crime: Law, Procedure, Theory, and Practice* (Wolters Kluwer Law & Business 2014) p.86.

proven that a corporate officer has the authority to make decisions within the company or is empowered to oversee the interest of the company, and he fails to utilise such authority to stop pollution from occurring (despite being aware of it), he is equally fully liable for the pollution offence. It can therefore be argued that just like the UK, the USA regime seeks to influence the corporate strategy and policies of company regarding pollution.

Promoting the doctrine of corporate responsibility even further, it has been argued that the prosecution of corporate officials for criminal pollution achieves deterrence to corporate criminal pollution more than an imposition of criminal fines on corporations.[230] This is in line with the earlier established fact that such corporate officers are the thinking mind of the corporation and hugely influence the decisions of the corporation. The deterrence is important considering that corporate criminal pollution often causes harm to the environment and on some occasions, to public health. An instance of criminal pollution caused by the criminal act of a corporation was the case of the Deep-water Horizon oil spill pollution of 2010 which caused a discharge of 4.9 million barrels of crude oil and the death of 11 persons and the injury of 17 workers.[231] It is the view of this study that merely imposing a criminal fine for significant criminal pollution such as the Deep-water incident does not equate the pollution offence committed with the punishment meted out. Moreover, such a criminal fine becomes less relevant where the offender is a wealthy multinational such as BP that could easily pay the criminal fine (considering the profits it would usually make from its business operations).

Examples of cases that have illustrated the liability and sanction of 'responsible corporate officers' by virtue of their position within the company, even when they have not directly caused the environmental offence include:

a) *United States* v *Lupo*[232]

In this case, the US government charged Hardrock Evacuating LLC and Ben Lupo (the owner of Hardrock Evacuating LLC) for the illegal discharge of waste water

[230] Lisa Ann Harig (n.197).
[231] EPA, 'Deepwater Horizon – BP Gulf of Mexico Oil Spill' (*EPA*, 2017) <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill#information> accessed 10 December 2018.
[232] *United States* v *Lupo* NO. 4:13-cr-00113-DCN (2014).

containing brine and drilling mud from the company's storage tank into a storm drain, severally, from November 2012 to January 2013. Lupo was particularly charged for failing in his duty as owner of the company, to ascertain the environmental standards of his company's operations, which if done, could have prevented the illegal discharge. In justifying his decision, the trial judge stated "*it is an expectation that a stakeholder be accountable to the affairs of his responsibility*." In this scenario, the trial court saw Lupo as having sufficient interest and authority in the affairs of Hardrock Evacuating LLC to have prevented the pollution *ab initio*. Thus, his liability amounted from a failure to do so. Lupo pled guilty and was sentenced, and given a prison sentence of 28 months and ordered to pay a fine of $25, 000 as a criminal penalty for the offence. Furthermore, the company's employee (Goff) was charged with knowingly participating in effecting the discharge.[233] Goff pled guilty to the offence and was convicted.[234] He was sentenced to three years' probation and 300 hours community service.[235]

b) *United States* v *NH Envtl. Grp.Inc.*[236]

Upon pleading guilty, the trial court convicted NH Envtl. Grp. Inc (which operated under the name Tierra Environmental and Industrial Services) and Rott (the company's manager) for illegally discharging waste water into the sewage system (hence, violating the provision of the CWA). In the case involving Rott,[237] despite the fact that he had not directly authorised the pollution (as this was directly carried out by Grad) he was still convicted. This was because the trial court observed that it was his duty (by virtue of his position as company manager) to have ensured that the operations manager acted within the statutory standards regulating waste discharge under US federal law. This emphasizes once more the expectation that US federal environmental laws expect an officer with sufficient authority to exercise sufficient duty of care over his company's operations in preventing pollution crime. The company pled guilty to negligently discharging the waste water, hence violating the provision of the CWA.

[233] *United States* v *Goff* NO. 4:14-cr-00111-DCN (2014).
[234] *ibid*.
[235] *ibid*.
[236] *United States* v *NH Envtl. Grp.* Inc. NO. 2:13-cr-00177-PPS-PRC (2013).
[237] *United States* v *NH Envtl. Grp*. NO. 2:13-cr-00141-PPS-PRC (2014).

The company was sentenced to a probation term of four years, ordered to pay a criminal fine of $70, 000 and ordered to pay a total of $100, 000 as restitution to the City of Hammond and the Hammond Sanitary District. Rott pled guilty to a violation of the CWA and was sentenced to two years' probation and a $4,000 fine. Similarly, on two separate charge sheets, the court convicted Holmes (the company owner)[238] and Grad (the company's operations manager)[239] for failing to prevent the pollution offence on the ground that by virtue of their position, they were 'responsible corporate officers' capable of influencing the pollution decision but rather authorized it in their capacities. Holmes pled guilty to negligently violating the CWA and was sentenced to four years' probation, a $30, 000 fine and 100 hours' community service. Grad also pled guilty to knowingly violating the CWA and was sentenced to one-year probation and a $1,000 fine.

These examples reflect the concerted effort by the USA environmental regime towards prosecuting corporate officers who have either directly participated in causing pollution or other officers who should have exercised the authority embedded within their positions to stop pollution from happening. It is however to be noted that this deduction has been made from a limited number of cases and to sufficiently adjudge the efforts of the USA regime in prosecuting environmental pollution crimes, one must first identify the scale of pollution incidents and contrast it against the overall number of prosecutions. This is a discussion for future studies.

5.1.4 Clear Cut Enforcement Mechanisms Implemented by UK and USA Environmental Agencies

This study has previously observed different forms of environmental crime in the Nigerian oil and gas industry. The study also observed that enforcement agencies have failed to enforce environmental standards that would prevent or compel oil and gas companies in Nigeria to comply with environmental principles and obligations. This study will therefore examine the approach adopted by the UK and USA enforcement agencies towards the implementation of environmental standards. This study will hereafter, discuss the model enforcement of

[238] *United States* v *Holmes* NO. 2:13-cr-00140-PPS-PRC (2014).
[239] *United States* v *Grad* NO. 2:13-cr-00126-PPS-PRC (2014).

environmental standards utilised by the UK and USA regimes for its oil and gas upstream industry.

A) UK Application of Sufficient Enforcement

Firstly, in the UK's onshore oil and gas industry, Minerals Planning Authorities (MPA) [as part of local councils] grant planning permission for the location of any wells and well pads, and impose conditions to ensure that the impact on the use of the land is acceptable.[240] The planning system controls the development and use of land in the public interest.[241] This takes into account the effects (including cumulative effects) of potential pollution on health, the natural environment or general amenity.[242]

In chapter 1, this study has identified the Environment Agency (EA) as a major environmental agency for England and Wales. The EA derives its powers of enforcement from the Environment Act 1995. Section1 (1) and 5 of the Act established the EA to prevent, minimize and even remedy environmental pollution. One of the expectations that arises from this requirement is that the Agency ensures that everybody (including corporations) take precautions against the illegal discharge of hazardous waste. The EA can do this by cleaning up illegal waste sites (at the expense of the polluter) or forcing the polluter to do so or even prosecuting polluting parties. The EA can also ensure that a polluter mitigates the effect of his pollution by cleaning up the pollution, compensating the pollution victims and making restitution to environmental agencies.

As has been stated in chapter 1, occasional references will also be made to the offshore areas for the purposes of discussing environmental regulation in the comparative model jurisdictions of the UK and USA oil and gas industries. The Department for Energy and Climate Change (DECC) used to regulate the environmental aspects of offshore oil and gas exploration and production down to

[240] Department for Communities and Local Government, 'Planning Practice Guidance for Onshore Oil and Gas' (Crown Copyright 2013) p.6.
[241] *ibid*.
[242] United Kingdom Onshore Oil and Gas (UKOOG), 'Regulation' (United Kingdom Onshore Oil and Gas 2017) <http://www.ukoog.org.uk/regulation> accessed 23 February 2020.

decommissioning before its abolition in 2016.[243] However, as a result of a government restructuring in 2016, the department was abolished and replaced by the Department for Business Energy and Industrial Strategy's (BEIS).[244] DECC was responsible for the enforcement of environmental protection in the UK offshore oil and gas upstream and midstream sectors.[245] Proponents have argued that in the UK regime, priority is given to environmental protection above licencing.[246] Hence, DECC as a major enforcement agency in the UK oil and gas industry at the time took its environmental enforcement duties very seriously.[247] DECC provided a guidance that required operators to possess an Environmental Management System (EMS) (in which a regulator can find mechanisms drafted in line with the environmental objectives of the OSPAR Offshore Strategy[248] and aimed at continually improving the quality of the environment.[249] This has not ended with the restructuring of DECC. There is clear evidence that the guidance recommending EMS designed to achieve the general objectives of the OSPAR Offshore Strategy has been continued by BEIS and Offshore Petroleum Regulator for Environment and Decommissioning (OPRED).[250]

DECC also set up standards requiring all operators operating in the UK to implement a verified Environmental Management System (EMS), towards preventing pollution in the offshore oil and gas industry and ensuring that the operators comply with environmental statutory provisions daily.[251] DECC's inspection policies have become integral tools for discovering environmental

[243] Department of Energy and Climate Change (DECC), 'DECC – Offshore Oil and Gas Environment Unit Enforcement Policy' (*Assets.publishing.service.gov.uk*, 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/470442/DECC_Offshore_Inspectorate_Enforcement_Policy_-_October_2015.pdf> accessed 7 March 2019.
[244] Philip Thompson and Julia Derrick, 'United Kingdom: Oil and Gas Regulation 2019' (*International Comparative Legal Guides*, 2019) <https://iclg.com/practice-areas/oil-and-gas-laws-and-regulations/united-kingdom> accessed 15 October 2019.
[245] *ibid*.
[246] *ibid*.
[247] DECC (n.244).
[248] Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) 1992. The Convention sought the prevention and elimination of pollution and required that the contracting parties take reasonable steps towards protecting the maritime areas from the adverse effect of human operations.
[249] *ibid*.
[250] Department for Business, Energy & Industrial Strategy (BEIS) and Offshore Petroleum Regulator for Environment and Decommissioning (OPRED), 'Oil and Gas: OSPAR EMS Recommendation' (*GOV.UK*, 2013) <https://www.gov.uk/guidance/oil-and-gas-ospar-ems-recommendation> accessed 17 February 2020.
[251] Philip Mace and others, 'Oil and Gas Regulation in the UK: Overview' [2019] Thomas Reuters <https://uk.practicallaw.thomsonreuters.com/55245349?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 > accessed 28 March 2019.

offenders in the UK oil and gas sector (for instance, operators that fail to maintain or carry out an Oil Pollution Emergency Plan (OPEP).[252] Furthermore, DECC Environmental Inspectorate was charged with enforcing compliance of operators with environmental obligations.[253] Enforcement by the inspectorate includes:[254]

a) Ensuring that operators carry out measures towards preventing and remedying pollution;
b) Complying with environmental standards regulating operations in the industry; and
c) Ensuring that operators are accountable for a breach of the obligations.

Records of sanction notices issued by BEIS to operators that have defaulted include: Statoil (UK) Limited in line with Sections 21, 23 and 24 of the Health and Safety at Work etc. Act 1974;[255] BP Exploration Operating Company Limited in line with Regulation 13 (1) (A) of the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005;[256] and Canadian Natural Resources (CNR) International (UK) Limited in line with Regulation 13 (1) (A) of the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005.[257]

There is also clear evidence of the dedicated sanctioning strategy of the BEIS has yielded some achievements in the reduction of pollution. For example, it is on record that in 2017 alone, there were 38 improvement notices and 6 prohibition notices issued against offenders by the joint efforts of the BEIS and HSE[258] which positively impacted the environment in the following ways:

a) Reduced minor hydro carbon release to 45 in 2017 as against the 110 it was in 2007;[259]
b) Reduced significant hydro carbon release from 71 it was in 2016 to 23 in 2017;[260] and

[252] *ibid*.
[253] DECC (n.244).
[254] *ibid*.
[255] Health and Safety Executives, 'Offshore Statistics & Regulatory Activity Report 2017' (*Hse.gov.uk*, 2018) <http://www.hse.gov.uk/offshore/statistics/hsr2017.pdf> accessed 7 March 2019.
[256] *ibid*.
[257] *ibid*.
[258] Health and Safety Executives (n.256).
[259] *ibid*.
[260] *ibid*.

c) Reduced major hydro carbon release from 4 in 2015 to 1 in 2017.[261]

An important feature of the developed UK environmental regime is the properly regulated decommissioning system designed in line with Part IV of the Petroleum Act 1998. This study previously noted the poor regulation and implementation of sanctions on operators that fail to decommission in the Nigerian regime. The study has argued that this weakness is an evidence of deficiency in the Nigerian environmental regime. This is a different case in the UK regime. Under the regime, the OPRED is empowered to enforce compliance with the decommissioning standard.[262] By this, they ensure that operators decommission their disused facilities at the end of a field's economic life.[263] There is existing evidence of completed and existing decommissioning programmes currently being undertaken in the UK.[264] Hence, it can be sufficiently assumed that the decommissioning policy in the UK is working.

It is also notable that Section 40-41 of the UK Petroleum Act clearly stipulates sanctions in the form of fine or imprisonment which will be imposed on an offender that fails to comply with decommissioning standards. This study has however, provided no evidence that the working policy is as a result of the existing robust sanctions in the regulatory structure. The study however suggests the possibility of the robust sanctions deterring potential defaulters. This study therefore stresses the relevance of sanctions in ensuring environmental compliance with standards. Other general sanctions that can be utilised by enforcers in the UK oil and gas regime (as stipulated in the BEIS Offshore Oil and Gas Environment Policy) include: enforcement notice, improvement notice, prohibition notice, revocation and prosecution.[265] This study therefore considers the sanctions fundamental to proper regulation for the standard.

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[261] *ibid.*
[262] OPRED, 'Oil And Gas: Decommissioning of Offshore Installations And Pipelines' (Crown Copyright 2013) <https://www.gov.uk/guidance/oil-and-gas-decommissioning-of-offshore-installations-and-pipelines#draft-decommissioning-programmes-under-consideration> accessed 13 October 2019.
[263] *ibid.*
[264] Some approved programmes that have been submitted to the BEIS for decommissioning and published for comments include, but are not limited to: The Ketch and Schooner platforms operated by DNO North Sea (ROGB) Limited, the Ninian Northern Platform (NNP) operated by CNR International UK Ltd, the Curlew B, C and D operated by Shell UK Ltd, and the Brent (Alpha, Bravo and Charlie) Topsides operated by Shell UK Ltd.
[265] BEIS, 'Enforcement Policy: Offshore Petroleum Regulator for Environment & Decommissioning' (Crown Copyright 2020)

Another pillar that has contributed to the proper regulation of decommissioning in the UK is public participation. In a bid to transparently regulate this standard on operators, OPRED publishes the decommissioning programmes and invites the public to comment on proposals set out in each programme.[266] Also, to ensure effective enforcement, OPRED engages with the offshore oil and gas sector on decommissioning regulatory issues and makes presentation on decommissioning to operators and other stakeholders annually.[267] The presentation is made at regular meetings between OPRED and Oil & Gas UK (OGUK), the oil and gas industry representative body.[268] OGUK is usually represented by virtually all the active offshore operators.[269] This shows evidence of public participation in the enforcement of this important standard.

The joint effort has also clearly yielded desired results as records show that all the existing decommissioning programmes recorded above to have been earlier proposed have been completed as of 2017.[270] Public participation has therefore made the UK decommissioning policy represent the ideas of all in industry participants.[271] Further than the involvement of industry participants, there is a requirement for the inclusion of public voice in the development of decommissioning policy in the UK.[272] This is carried out in line with Directive 2003/35/EC on public participation (otherwise known as the Public Participation Directive) requiring that the public be consulted on decisions resulting to relevant

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857913/OPRED_ENFORCEMENT_POLICY_revised_-_03_Jan_2020.pdf> accessed 10 June 2020.

[266] OPRED and BEIS, 'Non-Qualifying Regulatory Provisions Summary Reporting Template: Business Impact Target Reporting Period Covered: May 2016 – May 2017' (Offshore Petroleum Regulator for Environment and Decommissioning2017<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627967/BEIS_-_OPRED_NQRP_Assurance_Statement_-_May_16_to_May_17.pdf> accessed 19 October 2019.

[267] *ibid.*

[268] *ibid.*

[269] *ibid.*

[270] OPRED and BEIS, ' Oil and gas: Inspection Strategy and Enforcement Activity' (Crown Copyright 2013) < https://www.gov.uk/guidance/oil-and-gas-decc-public-registers-of-enforcement-activity> accessed 13 October 2019.

[271] *ibid.*

[272] Oil and Gas UK, 'Decommissioning - Installations - Oil and Gas UK Environmental Legislation' (*Oil and Gas UK Environmental Legislation*, 2020) <https://oilandgasukenvironmentallegislation.co.uk/contents/Topic_Files/Offshore/Decommissioning_installations.htm > accessed 10 June 2020.

consents and permits for decommissioning with the reasons and considerations on which the decisions have been based. [273]

This also similar to the requirement of Article 6 (3) of the Habitats Directive[274] for the European Union (EU) which provides that all projects not otherwise connected with management of a Special Protection Areas (SPA) or a Special Areas of Conservation (SAC) must first be approved through the opinion of the general public. Moreover, the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 apply the Habitats Directive in relation to oil and gas projects that are carried out wholly or partly on the UK's Continental Shelf and territorial waters.[275] Likewise, Article 68 of the Council Directive 85/337/EEC [Environmental Assessment][276] stipulates that: "*member States shall ensure that any request for development consent and any information gathered pursuant to Article 5 are made available to the public within a reasonable time in order to give the public an opportunity to express an opinion before the development consent is given*."

The Offshore Production and Pipelines (Assessment of Environmental Effects) Regulation 1999 amended in the Offshore Production and Pipelines (Assessment of Environmental Effects) (Amendment) Regulations 2007, implemented the Council Directive requiring public participation in the assessment and effects of certain public and private activities on the environment.[277] In the same vein, the Marine Licensing (Pre-application Consultation) (Scotland) Regulations 2013 require marine licence applicants intending to undertake certain marine activities to carry out a pre-application consultation process in Scotland.[278] Such activities usually include large projects that have the potential for substantial impacts on the environment.[279] The requirement allows local communities, environmental

[273] *ibid.*
[274] Council Directive 92/43/EEC implemented by the Conservation (Natural Habitats etc.) Regulations 1994 [SI 1994/2716] (as amended).
[275] Joint Nature Conservation Committee, 'The Conservation of Habitats and Species Regulations 2017' (Joint Nature Conservation Committee 2018) <http://jncc.defra.gov.uk/page-1379> accessed 15 April 2019.
[276] Amended by Council Directive 97/11/EC and Directive 2003/35/EC of the European Parliament and Council.
[277] Council Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.
[278] Oil and Gas UK, 'Environmental Legislation Website' (Oil and Gas UK 2019) <https://oilandgasukenvironmentallegislation.co.uk/legislation-index/eia-and-public-participation-legislation.html> accessed 15 April 2019.
[279] *ibid.*

groups and other interested parties to comment on any such proposed project at its developmental stages, even before an application for a marine licence is submitted.[280] Hence, such activities will be subject to public pre-application consultation.

Furthermore, this study argues that a positive way of promoting such participation is by first making the environmental information available and accessible. One of the deficiencies identified in the Nigerian regime is the lack of public access to information on environmental enforcement. The UK on the other hand, has provided legislative instruments that stipulate the requirement of access to environmental information. Regulations 4-5 of the UK's Environmental Information Regulations (EIRs) and Section 1 of the Freedom of Information Act 2000 mandate public authorities to disseminate environmental information. This tallies with Section 5 of the UK's Regulators Code[281] which requires enforcement authorities to provide clear information, guidance and advice on standards to regulated persons. This will facilitate compliance on the part of the regulated persons. Indeed, this study observed that there is in fact no provision under Nigerian law criminalising a failure to make such disclosures which might have contributed to the inaccessibility of environmental information. Whereas, Regulation 19 of the UK's EIR criminalizes the act of a public authority trying to prevent such disclosure.

Indeed, the researcher noted the open publication of the Scottish Environment Protection Agency's (SEPA's) annual Performance Measurement Report (PMR) that reviews and measures its performance.[282] Based on the 2017-2018 PMR, the agency had achieved the following:[283]

a) Reduction of GHG emissions from 3,614 tonnes of CO_2 in 2006-2007 to 2,239 tonnes;

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[280] *ibid*.
[281] Department for Business Innovation and Skills, 'Regulators' Code' (Assets Publishing 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf>accessed 15 April 2019.
[282] Scottish Environment Protection Agency (SEPA), '2018-2019 Performance Measure Report' (SEPA 2019) <https://www.sepa.org.uk/media/443952/190528-sepa-performance-measure-report-2018-19.pdf> accessed 15 October 2019.
[283] SEPA, 'Greenhouse Gas Emissions' (SEPA 2019) <https://www.sepa.org.uk/media/361874/sepa_environmental_performance_infographics_2017_2018.pdf>accessed 15 October 2019.

b) In 2007, the agency set a target to reduce emissions by 42% by March 2019. The agency achieved 38% of the target; and
c) Reducing emissions by 7.5% since 2016.

The PMR is part of an Annual Operating Plan that measures its overall progress towards achieving the targets set by these performance measures.[284] Furthermore, under a Compliance Assessment Scheme, SEPA publishes a Compliance Assessment Report that shows the extent of compliance of companies.[285]

It is the view of this study that publishing these reports is in line with the principle requiring environmental awareness. It is also compliant with the standard stipulated under Regulations 4-5 of the Environmental Information Regulations and Section 1 of the UK's Freedom of Information Act. Moreover, the researcher could easily access most other information regarding information with which this study was formed (such as the Bureau of Safety and Environmental Enforcement reports utilised above). Publishing records on environmental enforcement enables the public to be aware of what the agencies established to protect their environment have achieved, hence participate in the process. Publishing the reports and making enforcement information easily accessible allow for public scrutiny on performance and focuses on areas that could be improved on if lacking.

Between May 27, 2016 and May 26, 2017, OPRED issued five enforcement notices (3 pursuant to the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005 and 2 pursuant to the Fluorinated Greenhouse Gases Regulations 2015) and 1 improvement notice pursuant to the Offshore Installations (Offshore Safety Directive) (Safety Case etc.) Regulations 2015. Such notices permit offshore installations to continue operating whilst improving their deficiencies.[286] OPRED also completed one prosecution during the period and referred 3 other cases for prosecution.[287] BEIS/OPRED openly publishes its

[284] SEPA, 'Annual Operating Plan 2019-2020' (SEPA 2019) <https://www.sepa.org.uk/media/427769/annual-operating-plan-2019-2020.pdf> accessed 15 October 2019.
[285] SEPA, 'Compliance Assessment Scheme - Assessment Reports' (SEPA 2019) <http://apps.sepa.org.uk/compliance/> accessed 15 October 2019.
[286] OPRED and BEIS (n.267).
[287] *ibid*.

enforcement policy which manifests the pillar of environmental awareness and guarantees that enforcement actions are consistent and transparent.[288] Inspectors from both agencies collaborate with the oil and gas industry to assist them to comply with the regulatory requirements.[289]

Another major enforcement agency to be considered in this section is the Scottish Environment Protection Agency (SEPA). This agency was established and its powers set out under Chapter II of the Environment Act 1995.[290] The SEPA is Scotland's principal environmental regulator.[291] Its duties include: protecting and improving the Scottish environment and public health, ensuring that Scottish natural resources are utilised in a sustainable manner and that the exploitation of such resources contribute to the devolved region's sustainable economic growth.[292] Among other mechanisms, two enforcement mechanisms that have been utilised by the agency to enforce compliance with environmental standards include: referrals to the Crown Office and Procurator Fiscal Services (COPFS) and the issuance of statutory notice.[293] In 2014-2015 alone, SEPA made:[294] 36 referrals on environmental offenders for prosecution by the COPFS[295] against the 27 it made in 2013-2014, 116 statutory notices against 93 in 2013-2014, and issued 141 warning letters against 137 in 2013-2014. Furthermore, in 2016–2017, SEPA made:[296] 12 referrals to COPFS as against 36 in 2014-2015; issued 120 statutory notices as against 116 in 2014-2015; and issued 113 warning letters as against 141 in 2014-2015.

[288] *ibid*.
[289] *ibid*.
[290] The establishment of SEPA is stipulated in Section 20 of the Environment Act.
[291] This is stipulated in Sections 32 and 33 of the Environment Act.
[292] *ibid*.
[293] Environmental Law Association, 'Criminal Prosecution in Scotland' (*Environmentlaw.org.uk*, 2017) <http://www.environmentlaw.org.uk/rte.asp?id=312> accessed 18 February 2020.SEPA works with the Crown Office and Procurator Fiscal Service to improve the prosecution of environmental crime in Scotland. Generally, enforcement mechanisms that have been utilised by SEPA include: referrals to COPFS, warning letters, statutory notices, guidance plans, compliance initiatives, and control rules.
[294] SEPA, 'SEPA Enforcement Report 2014-2015' (SEPA 2016) <https://www.sepa.org.uk/media/219699/2014-15-enforcement-report.pdf> accessed 30 August 2019.
[295] The Crown Office and Procurator Fiscal Services (COPFS) is responsible for criminal prosecution in Scotland.
[296] SEPA, 'SEPA Enforcement Report 2016-2017' (SEPA 2019) <https://www.sepa.org.uk/media/219699/2016-17-enforcement-report.pdf> accessed 30 August 2019.

From the examination of the UK regime (Scotland), it is evident that there are various mechanisms (such as to referrals to the COPFS, warning letters, issuance of statutory notices, guidance plans, compliance initiatives, and control rules) utilised by the regime for its enforcement. This study particularly noted the high rate at which the regime has utilised referrals to the COPFS and the issuance of statutory notices. The study therefore believes that the enforcement regime is equipped with measures to make regulated persons and companies comply. This study is of the view that if a variety of enforcement options were provided in the Nigerian statutes other than just investigation and detection, there will be greater options through which the regulated persons in the oil and gas industry could be made to comply. While it must not be exactly these standards, this study is of the view that the UK model analysed above serve as a model for the proposed inclusion in the Nigerian regime giving the evidence of its success mentioned above.

This study has earlier mentioned that regulators and enforcement authorities in this study refer to one and same thing. The UK government published the Regulators Code 2014[297] (pursuant to Section 23 of the Legislative and Regulatory Reform Act 2006) as guidance for authorities while carrying out their enforcement activities. Pursuant to Section 3 of the Code, enforcement authorities are advised to prioritise risk. If applied by Nigeria, this will help address the deficiency of lack of resources that has limited enforcement in the oil and gas sector. For example, greater resources can be allocated to the areas of oil spill detection, remediation and improper abandonment/lack of proper decommissioning that have been discovered to be major violations requiring adequate enforcement. It is also notable considering that the study has already established lack of resources as limiting enforcement in such areas, particularly remediation. In Section 3.3 of the Regulators Code, the enforcement authorities are guided to design a risk assessment framework which will enable them to allocate resources to effectively address priority risks. This study believes that this mechanism can be utilised by the Nigerian regime to make the resource allocation effective.

[297] Department for Business Innovation and Skills (n.283).

Section 6 of the Code stipulates that enforcement authorities should ensure that their enforcement duties are carried out transparently. In line with this, the Code is concluded with the assertion that the UK government wants "*businesses, regulated bodies and citizens to challenge regulators who they believe are not acting in accordance with their published policies and standards*."[298] Similar to the Code, Section 2 (a) of the Regulatory Enforcement and Sanctions Act 2008 requires that enforcement/regulatory activities must be carried out in a transparent, accountable, proportionate and consistent manner. This stipulation implies that where such enforcement is short of any of these, regulated persons or any other person or institution is within their right to question the enforcement process.

This study notes the non-existence of any guidance of this form in most Nigerian enforcement agencies. Moreover, none of the existing Nigerian environmental statutes make any reference to the need for transparency of the enforcement authorities. This study therefore, believes that if guidance codes of the UK form discussed here were generally existing in the Nigerian regime or even enacted statutes put reasonable emphasis on transparency, it would greatly minimise the lack of transparency in the Nigerian regime evidenced by the incidents of corruption mentioned in chapter 4. This is because there will be a clear statutory mandate against the lack of transparency going beyond corruption (in the form of money donations to impede enforcement). Such mandate will encompass all other forms of enforcement actions deemed to be non-transparent.

This study has earlier noted the failure of statutory provisions in the Nigerian regime concerning the inability of enforcement agencies to perform. However, Regulation 2 of the Regulatory Reform (Scotland) Act 2014 stipulates that a Scottish Minister can include provisions compelling a regulator (also an enforcement agency) to enforce an existing regulatory requirement. Moreover, Regulation 3 (1) (a) of the Regulatory Reform (Scotland) Act stipulates that the regulator must comply with carrying out the regulatory duties required of it unless it lacks the capacity to do so or there is conflicting statutory requirement regarding the duties of the regulator. Pursuant to Regulation 3 (2), where the regulator fails

[298] *ibid.*

to comply, the Minister can declare that the regulator has failed to comply with its duty and/or instruct the regulator to take steps to remedy the failure. Moreover, in a situation whereby the regulator fails to abide by the direction, Regulation 3 (3) (c) provides that the Minister could apply to the Court of Session for an order requiring the regulator to comply. In effect, while the above provisions under the Regulatory Reform (Scotland) Act do not directly entail criminal sanctions on the agencies for failing to perform, this shows evidence that enforcement agencies are not exempted from being compelled to regulate. This study welcomes this mechanism as a check and balance mechanism that might have contributed to the effective enforcement noted in the UK regime.

It is therefore without doubt that the UK has applied a commendable model of enforcement. This study will also examine the USA regime to determine ways in which it has enforced environmental standards in the oil and gas industry and mechanisms it has utilised to carry this out.

B) USA Application of Sufficient Enforcement

The development of conventional oil and gas reserves on USA federal lands is mainly governed by the Mineral Leasing Act 1920 (as amended in 1947). This development occur through leasing schemes mainly regulated by the Bureau of Land Management (BLM) under the Department of Interior (DOI).[299] Similarly, Section 301 of the USA's Federal Land Policy and Management Act (FLPMA) 1976 also establish the BLM. Pursuant to Section 302 of the FLPMA, the lands utilised for oil and gas purpose must be managed in accordance with existing statutory instruments (including those relating to environmental protection). Section 303 of the FLPMA further stipulates that a failure to comply with this standard will result to the licence of the operator being suspended or terminated as the case may be.

The only other agency that provides environmental enforcement in the USA onshore industry is the EPA. It has been asserted that a core priority of the EPA is the prevention, preparation for and response to crude oil spills that occur in and

[299] This is pursuant to Sections 13 and 26 of the Mineral Leasing Act.

around the inland waters of the USA.[300] Scholars have argued that EPA is the typical example of an agency utilising the 'Rule Strategy'.[301] The rationale for this strategy has been clearly documented in open web information published by the agency which warns that it will utilise tough enforcement mechanisms to ensure that individuals and companies comply with environmental standards.[302] The 'Rule Strategy' is mainly reliant on enforcement rules utilised to implement environmental protection standards.[303] Practical enforcement rules that the EPA has initiated to enable effective performance of their duties include: Spill Prevention, Control, and Countermeasure (SPCC)[304] and the Facility Response Plan (FRP) Rules.[305]

Through the FRP rule, the EPA compels risk laden oil and gas operators to submit their response plan and prepare to respond to significant oil discharges or even the threat of a discharge.[306] Through the SPCC Rules, the EPA assists the facilities of oil and gas corporations to prevent a discharge of crude oil into the navigable waters of the USA or its adjoining shorelines. The EPA has also created guidelines to enable a practicable implementation of its enforcement roles. For instance, in August 2013, the EPA revised the *SPCC Guidance for Regional Inspectors.*[307] With this guidance, regional inspectors of the EPA can easily review the extent to which a facility has implemented the SPCC Rules. This guidance is intended to assist regional inspectors in reviewing a facility's implementation of the Spill Prevention, Control, and the EPA has also made the guidance available to operators of facilities that may be required to comply with the SPCC Rules as well as the general public.[308] The EPA has also implemented an Underground Injection Control programme, which compels most USA states to regulate wells that have the

[300] EPA, 'Oil Spills Prevention and Preparedness Regulations' (EPA 2018) <https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations> accessed 15 April 2019.

[301] Neil Gunningham, 'Enforcing Environmental Regulation' (2011) 23 Journal of Environmental Law 175.

[302] EPA, 'Basic Information on Enforcement | US EPA' (*EPA*, 2019) <https://www.epa.gov/enforcement/basic-information-enforcement> accessed 28 October 2019.

[303] Malcom K Sparrow, *Imposing Duties: Government's Changing Approach to Compliance* (Praeger Publishers 1994) p. ix.

[304] Facility Response Plan (FRP) Rules 40 CFR part 112. <https://www.govinfo.gov/content/pkg/CFR-2015-title40-vol22/pdf/CFR-2015-title40-vol22-part112.pdf> accessed 10 December 2018.

[305] Malcom K Sparrow (n.307).

[306] This is provided in the Oil Pollution Prevention Regulation 40 CFR 112.

[307] EPA, 'SPCC Guidance for Regional Inspectors' (EPA 2018) <https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/spcc-guidance-regional-inspectors> accessed 15 April 2019.

[308] *ibid*.

potential of discharging oil waste.[309] In the same vein, the USA Coast Guard is the main enforcement agency required to respond to spills in coastal waters and deep water ports.[310]

The EPA has also implemented the National Compliance Initiative (NCI) towards ensuring that operations involved during energy extraction comply with environmental obligations.[311] The NCI advances the strategic plan of the EPA concerning significant public health and environmental problems caused by exposure to hazardous compounds and a reduction of the non-attainment of environmental standards.[312] The plan also concerns the improvement of air quality, provision of clean and safe water, and improvement in compliance with the USA's environmental laws.[313]

To facilitate compliance with environmental standards, the EPA recently released a new compliance assistance resource for operators.[314] This resource provides easily accessible information to assist oil and gas operators in complying with federal and state environmental standards.[315] According to Bodine (EPA Assistant Administrator for Enforcement and Compliance Assurance), "*many small and medium-sized oil and natural gas owners and operators want to comply with environmental requirements but don't have the expertise to fully understand*

[309] EPA, 'Distribution of Final Work Product from the National Underground Injection Control (UIC) Technical Workgroup- Minimizing and Managing Potential/Impacts of Injection Induced Seismicity from Class II Dis at Veils: Practical Approaches' (EPA 2015) <https://www.epa.gov/sites/production/files/2015-08/documents/induced-seismicity-201502.pdf> accessed 15 April 2019; Edith Allison and Ben Mandler, 'US Regulation of Oil and Gas Operations' (American Geosciences Institute 2018) <https://www.americangeosciences.org/critical-issues/factsheet/pe/regulation-oil-gas-operations> accessed 15 April 2019.
[310] EPA (n.313).
[311] EPA, 'National Compliance Initiative: Ensuring Energy Extraction Activities Comply with Environmental Laws' (EPA 2019) <https://www.epa.gov/enforcement/national-compliance-initiative-ensuring-energy-extraction-activities-comply> accessed 15 October 2019.
[312] *ibid*.
[313] EPA, 'EPA Announces FY 2020-2023 Priorities for Enforcement and Compliance Assurance' (EPA 2019) <https://www.epa.gov/newsreleases/epa-announces-fy-2020-2023-priorities-enforcement-and-compliance-assurance> accessed 15 October 2019.
[314] EPA, 'EPA Announces Environmental Compliance Website for the Crude Oil and Natural Gas Sector' (EPA 2019) <https://www.epa.gov/newsreleases/epa-announces-environmental-compliance-website-crude-oil-and-natural-gas-sector> accessed 7 October 2019.
[315] *ibid*.

them. The portal has put much of the information they need in one place to help them comply."[316]

It has also been asserted that "*a ruthless and efficient investigation and enforcement capability will produce compliance through the mechanism of deterrence*".[317] In other words, the EPA has continually sought to monitor compliance, identify violations of existing standards under its statutory instruments and gather evidence on offenders which it submits to the ECS.[318] In line with this, EPA Special Agents constantly investigate environmental offenders in the oil and gas industry and report offenders for prosecution.[319] The special agents in charge of investigation are the EPA's Criminal Investigation Division (EPA CID) Special Agents.[320] It is asserted that the agents receive eight weeks of basic federal law enforcement and Criminal Investigator training at a Federal Law Enforcement Training Centre.[321] Such agents are highly trained at investigations related to air, water, and land resources.[322] They are made up of scientists, technicians and even lawyers, hence the agency possess diverse backgrounds and rich work experience.[323]

The EPA has further asserted that it carries out 'environmental forensic analyses' and 'technical evaluations' to facilitate criminal enforcement.[324] The EPA has also carried out environmental forensics for its programmes through the National Enforcement Investigation Centre (NEIC).[325] This role of the NEIC supports

[316] *ibid*.
[317] Neil Gunningham (n.305).
[318] Clifford Rechtschaffen and David Markell, 'Reinventing Environmental Enforcement and the State/ Federal Relationship' in D Zaelke, D Kaniaru and E Kruzikova (eds), *Making Law Work: Environmental Compliance and Sustainable Development* (Vol 1, Cameron May 2005) 158.
[319] EPA, 'Criminal Investigations' (*EPA*, 2019) <https://www.epa.gov/enforcement/criminal-investigations> accessed 15 October 2019.
[320] EPA, 'Criminal Enforcement: Special Agents | USA EPA' (*USA EPA*, 2019) <https://www.epa.gov/enforcement/criminal-enforcement-special-agents> accessed 29 October 2019.
[321] *ibid*.
[322] *ibid*.
[323] EPA, 'Criminal Enforcement Overview | USA EPA' (*EPA*, 2019) <https://www.epa.gov/enforcement/criminal-enforcement-overview> accessed 29 October 2019.
[324] EPA (n.324).
[325] EPA, 'National Enforcement Investigations Centre (NEIC)' (EPA 2019) <https://www.epa.gov/enforcement/national-enforcement-investigations-center-neic> accessed 15 October 2019.

complex criminal and civil enforcement investigation and programmes.[326] The NEIC also serves the EPA's fully accredited ISO 17025 forensics laboratory and provides multi-disciplinary expert teams to conduct field investigations, gather and evaluate evidence to determine non-compliance.[327] The agency also gathers, retrieves and evaluates computer evidence of offences for prosecution.[328] The EPA often times, provides expert technical advice to the ECS and other US Attorneys who prosecute under the DOJ on environmental matters.[329] Based on past records of investigations,[330] writers have observed that EPA Agents are distinctively adversarial and confrontational when the agency detects violation of environmental standards.[331]

Some such investigations that have yielded positive results in the USA regime include: the investigation into Wood Group PSN Inc. which resulted in the corporation being ordered to pay $9.5 million on February 23, 2017, for their involvement in the Deep Water Horizon spill on the Gulf of Mexico;[332]the investigation into the International Petroleum Corporation of Delaware (IPC) which led to the company being ordered on February 2, 2017, to pay a criminal fine of $1,300,000 fine and $2,200,000 as restitution to the City of Wilmington for environmental crimes, including a conspiracy to violate the Clean Water Act;[333] and the investigation into KMTEX, KTX, Crosby and Ramsey which led to the companies being ordered on October 12, 2017, to pay $3.5 million dollars for criminal violations of the Clean Air Act by negligently releasing

[326] *ibid*.
[327] *ibid*.
[328] EPA (n.329).
[329] *ibid*.
[330] Records of Investigations by the EPA can be found in the following web links:
https://www.epa.gov/enforcement/2017-major-criminal-cases
https://www.epa.gov/enforcement/2016-major-criminal-cases
https://www.epa.gov/enforcement/2015-major-criminal-cases
https://www.epa.gov/enforcement/2014-major-criminal-cases
https://www.epa.gov/enforcement/2013-major-criminal-cases
These links showing records of successful investigations between the years 2013 and 2017 can be found in Environmental Protection Agency (n.324).
[331] Neil Gunningham (n.305).
[332] EPA, '2017 Major Criminal Cases | USA EPA' (*EPA*, 2019) <https://www.epa.gov/enforcement/2017-major-criminal-cases>accessed 29 October 2019.
[333] *ibid*.

hazardous air pollutants after a tank explosion at their chemical and petroleum processing facility in Port Arthur, Texas, on March 31, 2011.[334]

Indeed, utilising only the BLM and EPA for discussion on environmental enforcement in the USA regime provides very limited example of environmental enforcement in the USA. This is significant considering that the USA is used as a model regime in this study. The study will therefore, also explore environmental enforcement in the USA offshore industry (comprising of the Outer Continental Shelf [OCS]). In line with this, the Bureau of Safety and Environmental Enforcement (BSEE) which is also part of the DOI serves as a major environmental compliance enforcement division in the OCS.[335] In this capacity, their roles include the monitoring, verification, improvement and enforcement of compliance standards for environmental matters in the OCS.[336] The standards include, but are not limited to, provisions of environmental laws and regulations as well as conditions imposed on OCS licences and permits.[337] It has been reported that the agency has mainly enforced compliance of industry participants with the National Environmental Protection Act by monitoring the activities of such corporations to ensure they were in line with the provisions of the Act.[338] The BSEE has also established mechanisms to enable them carry out their enforcement task effectively. For instance, in 2016, the BSEE assembled an Environmental Stewardship Core Working Group to clarify its environmental stewardship ambition and mission and build its current programme objectives and responsibilities towards enhancing its environmental stewardship.[339]

Just like the EPA, the BSEE has gone beyond a paper obligation to enforcing environmental standards in the USA regime. For instance, the BSEE has implemented Well Control Rules to serve as pollution control standards during

[334] *ibid*.
[335] Bureau of Safety and Environmental Enforcement (BSEE), 'Environmental Focuses' (Department of Interior: BSEE 2019) <https://www.bsee.gov/what-we-do/environmental-focuses> accessed 16 April 2019.
[336] *ibid*.
[337] *ibid*.
[338] *ibid*.
[339] BSEE, 'Environmental Stewardship Collaboration Core Group (Final Report)' (USA Department of Interior: BSEE 2016) <https://www.bsee.gov/sites/bsee.gov/files/bsee-environmental-stewardship-core-group-final-report.pdf> accessed 16 April 2019.

drilling operations on the OCS.[340] They have also implemented the Oil and Gas Production Safety Systems Rules to serve as pollution control standards during oil and gas production.[341] Subject to executive[342] and secretarial[343] orders for the minimisation of avoidable regulatory strain on industry participants, the agency has revised the Well Control Rules[344] and the Oil and Gas Production Safety Systems Rules[345] towards ensuring that while the regulatory burden does not strain the participants, it compels them to carry out their operations in an environmentally friendly manner.[346] The agency has gone beyond investigation to issue recommendations on best practice mechanisms that can enhance environmental safety during oil and gas operations.[347]

The Deepwater Horizon pollution has served as a lesson that safety and environmental protection required during workflow processes cannot be ignored.[348] This led to the formulation of the Safety and Environmental Management Systems (SEMS) rules (otherwise referred to as the Workplace Safety Rules which was issued in October 2010).[349] This original SEMS concerned all offshore oil and gas operations in federal waters and mandated the previously voluntary practices in the API Recommended Practice 75 which establishes environmental and safety standard issues.[350] This has been enhanced by the SEMS II final rule which has provided greater protection by additionally providing employee training, and strengthening auditing procedures by requiring it to be

[340] BSEE, 'Regulatory Reform' (USA Department of Interior: BSEE 2019) <https://www.bsee.gov/guidance-and-regulations/regulations/regulatory-reform> accessed 16 April 2019.
[341] *ibid*.
[342] United States White House, 'Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs' (USA White House 2017) <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/>accessed 16 April 2019.
[343] United States Secretary of the Interior, 'America-First Offshore Energy Strategy' (USA Secretary of the Interior 2017) <https://www.doi.gov/sites/doi.gov/files/press-release/secretarial-order-3350.pdf> accessed 16 April 2019.
[344] BSEE, 'Revised Well Control Rule' (USA Department of Interior: BSEE 2018) <https://www.bsee.gov/guidance-and-regulations/regulations/revised-well-control-rule-summary-page> accessed 16 April 2019.
[345] BSEE, 'Oil and Gas Production Safety Systems Rule 2018' (USA Department of Interior: BSEE 2018) <https://www.bsee.gov/guidance-and-regulations/regulations/oil-and-gas-production-safety-systems-rule> accessed 16 April 2019.
[346] *ibid*.
[347] United States Secretary of the Interior, 'Review of Panel Report for Walker Ridge 469' (USA Secretary of the Interior 2019) <https://www.bsee.gov/sites/bsee.gov/files/memos//director-response-memo-wr469s.pdf> accessed 16 April 2019.
[348] Control Global, 'SEMS after Deepwater Horizon' (Control Global 2004) <https://www.controlglobal.com/articles/2011/sems-after-deepwater-horizon/> accessed 19 September 2019.
[349] BSEE, 'Safety and Environmental Management Systems (SEMS) Fact Sheet' (USA Department of Interior: BSEE 2019)<https://www.bsee.gov/site-page/fact-sheet>accessed 16 April 2019.
[350] *ibid*.

completed by independent third parties.[351] It will also enhance the environmental protection of offshore oil and gas drilling operations.[352] The SEMS II Final Rules has revised and added several new requirements to the existing regulations for the original SEMS.[353] Operators were required to integrate these new requirements into all SEMS programme existing before September 14, 2011.[354] One such important requirement is the establishment of guidelines for reporting possible violations of safety and environmental regulations directly to BSEE and mandating the BSEE to act on such reports.[355] Other such requirements include: enhanced well design, improved blowout preventer design, testing and maintenance, and an increased number of trained inspectors.[356]

Moreover, this research observed that due to the robust mechanism of enforcement in the regime, there is cooperation between the agency and other offshore operation regulators. This was evident in the acceptance and implementation of the recommendations made by the BSEE regarding environmental safety during operations, by the offshore operation regulators.[357] It is therefore not in doubt that enforcement agencies in the USA have been active in implementing environmental standards in the USA oil and gas industry.

5.1.5 Applying Criminal Sanctions through Criminal Prosecution

As earlier observed, there is an obvious lack of prosecution and sentencing of environmental offenders in Nigeria. This is interesting, considering the significant environmental offences that has been committed in the Nigerian oil and gas industry. The study also identified factors that have contributed to the deficient prosecution of environmental offenders in the Nigerian regime. This section will therefore, determine (through and examination of the UK and USA regimes) that

[351] *ibid.*
[352] *ibid.*
[353] *ibid.*
[354] *ibid.*
[355] *ibid.*
[356] BSEE, 'Regulations' (USA Department of Interior: BSEE 2019) <https://www.bsee.gov/guidance-and-regulations/regulations> accessed 13 October 2019.
[357] BSEE, 'Fatality Related to Restricted Access Zones, Moving Equipment and Fatigue' (USA Department of Interior: BSEE 2019) <https://www.bsee.gov/sites/bsee.gov/files/safety-bulletin-015-fatality-related-to-restricted-access-zones.pdf> accessed 16 April 2019.

can be adapted to the Nigerian regime to facilitate improved criminal prosecution of environmental offences.

5.1.5.1 Availability of Multiple Expert Prosecutors

As has been observed, in Nigeria all criminal prosecutions at the Federal level (including environmental offences in the oil and gas industry) are carried out by the Attorney-General of the Federation or other statutorily designated members of his department. This study has particularly argued that they often lacked the required skill and expertise to prosecute environmental offences.

A) UK Utilisation of Multiple Expert Prosecutors

On the other hand, some environmental enforcement agencies are permitted to prosecute in the UK. This is with the exception of Scotland in which the agencies cannot start prosecutions themselves but must go through COPFS (as had been mentioned above). For example, Section 54 of the UK's Environment Act 1995 stipulates that the Environment Agency through its designates can prosecute environmental offences. This solves the deficiency of specialisation since the agency itself is the relevant regulatory body that enforces the standards and by such detects the offenders. The study will explore into the role of environmental prosecutors in Scotland to emphasise the availability, commitment and timeliness of environmental crime prosecution in Scotland.

As has been earlier mentioned in this chapter, SEPA works with the COPFS to improve the prosecution of environmental crime in Scotland.[358] To achieve the best outcome on reports of environmental crime by SEPA, the Crown Office and COPFS and SEPA ensure effective liaison between the organs.[359] One such framework that has facilitated the liaison is the Environmental Crime Protocol which has been developed to ensure transparency in the relationship between COPFS and SEPA and that environmental cases are being dealt with in the most

[358] Environmental Law Association (n.297).
[359] SEPA, 'Environmental Crime Protocol | Scottish Environment Protection Agency (SEPA)' (*Sepa.org.uk*, 2020) <https://www.sepa.org.uk/regulations/how-we-regulate/policies/environmental-crime-protocol/> accessed 18 February 2020.

effective and consistent way.[360] In addition, the protocol covers liaison arrangements at national and local level and joint training as well as disclosure and publicity.[361]

COPFS is divided into 11 regions; each region has nominated at least one Procurator Fiscal Depute to specialise in SEPA cases (Area Specialist).[362] To ensure transparency in the reporting of cases and subsequent attention to the case by COPFS, it has been asserted that where the Reporting Solicitor has any concerns about a case they are usually entitled to discuss the concerns as early as possible with the Area Specialist (or allocated Procurator Fiscal Depute), often through a case conference.[363] SEPA's target is to report 90% of cases within six (or four) months of the date of the incident towards preventing undue delays in investigations and reporting.[364] It is however noteworthy that technically complex investigations, especially those requiring specialist evidence, may take longer (being six months or more).[365] For significant cases, or at the request of either party, a post-disposal assessment meeting may be called to learn lessons for the future. Any learning can be reported back to the SEPA/COPFS national or local liaison meetings.[366]

B) USA Utilisation of Multiple Expert Prosecutors

Likewise, the solution to the deficiency of specialisation and availability of prosecutors is inspired in the USA regime. In the USA, criminal prosecutions are generally carried out by the Department of Justice (DOJ).[367] Under the DOJ, the duty of prosecution against environmental offenders (including environmental offenders in the oil and gas industry) is coordinated by the Environmental Crimes

[360] *ibid.*
[361] *ibid.*
[362] *ibid.*
[363] *ibid.*
[364] *ibid.*
[365] *ibid.*
[366] *ibid.*
[367] Department of Justice (DOJ), 'About DOJ' (*Justice.gov*, 2019) <https://www.justice.gov/about> accessed 28 August 2019.

Section (ECS).[368] It is asserted that there are forty three prosecutors and twelve support staff to carry out the prosecution on behalf of the department against environmental offenders.[369] ECS attorneys prosecute environmental criminal cases throughout ninety-four federal judicial districts in coordination with the Environment and Natural Resources Division (ENRD) and the USA Attorneys' Offices (with a select number of Assistant USA Attorneys vastly trained by the ECS in environmental criminal prosecution).[370] The prosecution process will often involve an ECS prosecutor participating in the investigation of an environmental crime and subsequently arraigning the environmental offender before the grand jury for indictment.[371] After indictment, the ECS prosecutor then prepares the charge for trial.[372]

Furthermore, special agents within EPA's Criminal Investigation Division coordinate with the ECS and the other prosecutor agencies listed above to investigate environmental offences. To achieve this efficiently, they jointly constitute a body referred to as the Environmental Crime Task Force Teams for most such environmental criminal offences they deal with.[373] Through this team, the various agencies seating on the team collaborate on strategies and share information to improve the detection and prosecution of environmental crime and to deter such crime before it happens.[374]

Indeed, the above discussion presents a solution to the deficiency of the limited number of persons to prosecute clearly obvious in the Nigerian regime and that has limited the proportion of environmental criminal prosecution in the Nigerian oil and gas industry to the barest minimum. In chapter 4, this study has observed that the Attorney General of the Federation of Nigeria is sometimes unable to prosecute probably as a result of unwillingness to prosecute on account of corrupt

[368] DOJ, 'Prosecution of Federal Pollution Crimes: ECS'(*Justice.gov*, 2019)<https://www.justice.gov/enrd/prosecution-federal-pollution-crimes> accessed 28 August 2019.
[369] DOJ, 'Environmental Crime Section' (*Justice.gov*, 2019) <https://www.justice.gov/enrd/environmental-crimes-section> accessed 28 August 2019.
[370] *ibid*.
[371] *ibid*.
[372] *ibid*.
[373] EPA, 'Criminal Environmental Crime Task Force Partners' (EPA 2019) <https://www.epa.gov/enforcement/criminal-environmental-crime-task-force-partners> accessed 15 October 2019.
[374] *ibid*.

motives or as a result of burden of prosecuting several criminal offences (other than just environmental offence relating to the oil and gas sector). On the other hand, this study observes several agencies charged with prosecution of environmental offences in the USA regime, which eases the burden of prosecution. This provides several avenues to prosecution other than just concentration on one single office.

Furthermore, this study argues that by utilising specialised agencies like the ENRD and ECS, the USA regime has incorporated specialisation which will enhance the effective prosecution of environmental criminal matters. This study views this as more efficient than the Nigerian system considering that the Attorney General of the Nigerian Federation or members of his department might possibly lack the environmental expertise required to prosecute environmental criminal matters. It is on record that between October 1, 1998 and September 30, 2014, the ECS alone has prosecuted over 1,083 individuals and 404 corporate defendants, resulting in 774 years of incarceration and $825 million in criminal fines and restitution.[375] Their cases have set the modern standards for natural resources damages (NRD) and funding for ecological restoration.[376] This is not surprising considering some of the prosecutions resulting in tough sentences in the oil and gas industry alone discussed above.

The analysis shows evidence of a reasonable willingness to prosecute environmental offences in the industry under the USA regime (that is clearly lacking in the Nigerian regime). The case law also shows evidence of the practical implementation of the criminal sanctions embedded within the USA regime through prosecutions. Similarly, based on the case law examples observe in the USA regime as seen above, this study argues that the message would have been driven home that responsible corporate officers must tirelessly work towards preventing any form of environmental crime, or else they could be prosecuted and sanctioned for their actions or omission to act.

[375] *ibid.*
[376] George W Pring and Catherine Pring, 'Environmental Courts & Tribunals' (United Nations Environment Programme 2016) p.41.

5.1.5.2 Availability of Environmental Courts

This study also pointed out the clogging of the Federal High Courts (FHC) and the possible inexperience of the FHC to properly decide on environmental criminal matters to be a contributory factor to the delay in prosecution of environmental offences in the Nigerian regime. There have been calls for a unified establishment of environmental courts or tribunals in the USA.[377] It is believed that there are over 1,200 Environmental Courts and Tribunals (ECTs) in 44 countries at their national or state/provincial level with 20 more countries planning to establish theirs.[378] It is argued that this continuing increase in ECTs has been facilitated by the development of new national laws and policies, the acknowledgement of the relationship between human rights and environmental protection, the challenge of climate change, and dissatisfaction with the existing judicial system for the adjudicating environmental offences.[379]

Environmental matters and the legal and policy responses to them demand some degree of specialist knowledge.[380] It has been observed that ECTs are often specialised in the area of environmental matters.[381] In effect, judges and other ECT members need to be educated and acclimatised to environmental matters and the legal and public response to such matters. The environmental education ought to have been done even before the judges and ECT members are appointed.[382]

Scholars have argued in favour of ECTs. To some, environmental courts provide a solid binding forum for resolving environmental disputes[383] and would enable efficient environmental adjudication and judicial expertise in trying complex

[377] Catherine McCabe, 'Should the US Have Specialized Environmental Courts?' [2012] American College of Environmental Lawyers <http://www.acoel.org/post/2012/11/26/Should-the-USHave-Specialized-Environmental-Courts.aspx> accessed 16 April 2019.
[378] George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative 2009) p.1.
[379] *ibid.*
[380] Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 Journal of Environmental Law 377.
[381] Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study ' (2012) 29 Pace Envtl L Rev 425-426.
[382] George Pring and Catherine Pring (n.382) pp.73-75.
[383] Scottish Environment Link, 'Environmental Courts: A Better Way to Resolve Disputes' [2016] Scottish Environment Link <http://www.scotlink.org/link-thinks/environmental-courts-a-better-way-to-resolve-disputes/> accessed 15 October 2019.

environmental offences.[384] In addition, it has been asserted that in some jurisdictions like Australia, ECTs provide a devolved and more accessible forum to hear and learn the environmental challenges of rural inhabitants who otherwise would not want to come to regular courts.[385] In effect, such specialised courts provide full access rights for persons who have suffered environmental harm. Indeed, this fits part of the purpose of environmental justice as stipulated in the Aarhus Convention (which has been discussed in chapter 2 above).

Firstly, this study will not be utilising the UK as a case study for its exploration of well-developed environmental court systems. This is because the two regions of the UK jurisdiction used as case study for the UK in this study (being England and Scotland)[386] are still developing their environmental court models. In England, the First-Tier Tribunal (Environment) was established under Section 3 of the Tribunals, Courts and Enforcement Act 2007. It was established to receive appeals against civil sanctions issued by the Environment Agency, Natural England or any other regulator.[387] Subsequently in 2011, the UK government started the process of transferring a broad range of administrative appeals under environmental legislation scattered amongst several bodies, to the tribunal based on a report titled "*consistency and effectiveness–strengthening the new environment tribunal*" commissioned by Professor Macroy.[388] While this transfer has long since been completed, there is still a broad range of environmental issues the tribunal fails to cover such as environmental criminal offences.[389]

[384] Catherine McCabe (n.381).
[385] Sheila De Zavala and others, 'An Institute for Enhancing Effective Environmental Adjudication' (2010) 3 Journal of Court Innovation 9.
[386] This study has generally not included Northern Ireland and Wales in its comparison of the UK jurisdiction. Hence, it has limited its scope to England and Scotland.
[387] Her Majesty's Courts and Tribunal Service, 'First-Tier Tribunal (General Regulatory Chamber)' (*GOV.UK*, 2019) <https://www.gov.uk/courts-tribunals/first-tier-tribunal-general-regulatory-chamber> accessed 22 October 2019.
[388] Centre for Law and Environment, 'Environmental Tribunal in England and Wales Gaining New Powers ' (Centre for Law and Environment 2013) <https://ucl.ac.uk/law-environment/category/environmental-courts-tribunals/> accessed 22 October 2019.
[389] Richard Macroy, 'Environmental Courts and Tribunals in England and Wales – A Tentative New Dawn' (2010) 3 Journal of Court Innovation 68-69.

In the same vein, Scotland's sheriff courts adjudicate on certain civil[390] and criminal[391] environmental matters.[392] Furthermore, the sheriff court can adjudicate on certain statutory appeals relating to the environment.[393] However, it has been argued that the adjudication of environmental matters in the Sheriff court is usually not comprehensive and coherent.[394] Cowan argued that Scotland needs an environmental court with simplified procedures and a broad jurisdiction covering civil cases, criminal cases and administrative appeals.[395]

The above factors therefore will inspire this study to explore other jurisdictions that have possibly developed a better system of ECTs. To adequately analyse possible factors that will contribute to the success of ECT in Nigeria, this study will expand its scope of comparative study (regarding this subject) to other models of ECTs including: New South Wales in Australia, New Zealand and the states in the USA that have developed such specialised courts. The study believes that the characteristics of the models of ECTs utilised in this section cover most of the advantages of a modern ECT. The study has however, utilised the USA model to show the trial system for ECT that can be applied by Nigeria. This determination will be utilised by the study in its recommendation to the Nigerian regime regarding the adoption of an environmental court. The recommendations for the Nigerian regime will however be made in the recommendation section of this study.

A) State of New South Wales, Australia

This jurisdiction has set up the New South Wales Land and Environment Court (NSWLEC) universally regarded as one of the best and most independent ECTs as it has comprehensive and exclusive jurisdiction over both civil and criminal environmental, land use planning and development matters.[396] In the same vein,

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[390] Scottish Government, 'Developments in Environmental Justice in Scotland - Scottish Government - Citizen Space': Responses 803967012 (*Consult.gov.scot*, 2016) <https://consult.gov.scot/courts-judicial-appointments-policy-unit/environmental-justice/> accessed 22 October 2019.
[391] Environmental Law Association (n.297). For environmental offences, the maximum fine and prison sentence that may be imposed are specified in the relevant legislation.
[392] *ibid.*
[393] Scottish Government (n.394).
[394] Scottish Government, 'Developments in Environmental Justice in Scotland - Scottish Government - Citizen Space': Response 138634173 (*Consult.gov.scot*, 2016) <https://consult.gov.scot/courts-judicial-appointments-policy-unit/environmental-justice/consultation/view_respondent?uuId=138634173> accessed 22 October 2019.
[395] *ibid.*
[396] George W Pring and Catherine Pring, (n.382) p.21.

the NSWLEC of Australia has been recognized as one of the most innovative ECTs and it advises other ECTs around the world.[397] Some such innovations include:[398]

i) Provision for court evaluation of environmental disputes;
ii) Provision of an Online Sentencing Data Base for environmental criminal offences that enables environmental judges easily access statistics and commentary on sentences;
iii) Utilisation of expert commissioners who continually train judges and other judicial staff on environmental matters;
iv) Evaluation of an ECT on the extent of development and make recommendations to the Chief Judge for improvement initiatives;
v) Adoption of a 'multi-door courthouse' that provides complainants with access to other alternative dispute resolution (ADR) mechanisms other than litigation;
vi) Facilitation of response to restorative justice that compel perpetrators of environmental crime to remediate the environment.

It has been noted that a contributor to inadequate prosecution of environmental offences in Nigeria is the possible lack of judges with specialist knowledge and expertise. On the other hand, Section 12(2) of the Land and Environment Court Act 1979 of New South Wales mandates that judges and commissioners must possess among others, relevant environmental qualifications, and knowledge of the subject of environmental protection and assessment. In effect, the judges and commissioners are well trained in these subjects even before being appointed to their positions.

It has also been asserted that the NSWLEC's innovation has contributed to the facilitation of easy access to environmental justice in Australia by delimiting the challenges to environmental public interest litigation.[399] It has achieved this by attempting to be liberal with construing requirements on the *locus standi* of private persons to prosecute environmental criminal matters[400] and not necessarily requiring a public interest litigant to lodge security for the costs of such

[397] *ibid.*
[398] *ibid.*
[399] Brian J Preston (n.385) p.383.
[400] *Haughton* v *Minister for Planning and Macquarie Generation* (2011) 185 LGERA 373, 392–401; *Building Owners & Managers Association of Australia Ltd* v *Sydney City Council* (1984) 53 LGRA 54, 72–73.

environmental litigation.[401] Indeed, regarding public interest litigation, the Supreme Court of the Philippines has also encouraged the easy litigation of environmental criminal matters by private persons.[402]

Furthermore, it has been argued that the prime purpose of every ECT should be a just, quick and cheap adjudication of environmental litigations.[403] This is a challenge that has been pointed out by this study as being possibly present under the current adjudication of environmental matters relating to the oil and gas industry in the Nigerian FHC. On the other hand, the NSWLEC has reduced delay in environmental adjudication by applying efficient case management.[404] Case management relates to a series of policies, processes and technologies designed to achieve the just, quick and cheap adjudication of litigation.[405] Such policies might include court rules and practice notes on dispute resolution processes from filing to finalization.[406] The NSWLEC has applied a separate case management process for each peculiar environmental dispute.[407]

Processes that have been applied by the NSWLEC in the past include but are not limited to:[408] direction hearings before judges and commissioners to set a timeline regarding the particular litigation for the filing of applications, documents and evidence; facilitating document and information exchange between the parties through interlocutory applications; adopting case management conferences; and facilitating case evaluations by the court to assure that the cases are being adjudicated in a timely manner and that the deadlines for the adjudication process are adhered to. To achieve this, the court has utilised case management technologies such as a comprehensive and current court website providing all necessary information for parties; electronic filing and processing; teleconferencing and videoconferencing for hearings and taking evidence; and

[401] This is provided in Regulation 4.2 (2) of the Land and Environment Court Rules 2007 (NSW).
[402] Christine M Abraham, *Environmental Jurisprudence in India* (Kluwer Law International 1999); Jahid H Bhuiyan, 'Access to Justice for the Impoverished and Downtrodden Segments of the People Through Public Interest Litigation: A Bangladesh, India and Pakistan Perspective' [2010] LAWASIAJ 1; Bharat Desai and Balraj Sidhu, 'On the Quest for Green Courts in India' (2010) 3 Journal of Court Innovation 79, 91–98.
[403] Brian J Preston (n.385) p.385.
[404] *ibid.*
[405] *ibid.*
[406] *ibid.*
[407] *ibid.* p.420.
[408] *ibid.* pp.419-421.

computer data management systems to track the status, progress and deadlines for each case.[409]

It has also been observed that the NSWLEC has been at the forefront of developing environmental jurisprudence as a result of the large number of cases it deliberates on relating to matters of substantive, procedural, distributive and restorative justice.[410] Even more, the NSWLEC has shown willingness to incorporate the developed aspects of other jurisdictions such as the USA, New Zealand, the UK, and the International Court of Justice in developing its own model. An example of this is seen in the Australian case of *Telstra Corporation Ltd* v *Hornsby Shire Council*,[411] whereby the NSWLEC referred to the judicial decisions relating to the interpretation of the precautionary principle in other jurisdictions such as: the European Court of Justice, the courts of New Zealand, India, the United Kingdom, USA, and Pakistan, as well as the International Court of Justice (It is however notable that this principle was not a basis of the facts of the case).[412] Moreover, decisions of the NSWLEC have, in turn, been cited by several overseas environmental scholars towards developing their environmental law and policy.[413] In other words, this can be utilised by other jurisdictions seeking to improve theirs.[414] This has particularly informed the comparative analysis of this model by this study.

[409] George Pring and Catherine Pring (n.382) pp.76-78.
[410] Brian J Preston (n.385) p.388.
[411] *Telstra Corporation Ltd* v *Hornsby Shire Council* (2006) 146 LGERA 10 (Telstra).
[412] *Monsanto Agricoltura Italia* v *Presidenza del Consiglio dei Ministri* [2003] ECR I-8105; *National Farmers' Union* v *Secretary Central of the French Government* [2002] ECR I-9079; *Hungary* v *Slovakia, Re Gabcikovo-Nagymaros Project (Danube Dam case)* [1997] ICJ Rep 7; *Pfizer Animal Health SA* v *Council of the European Union* [2002] ECR II–3305; *Mahon* v *Air New Zealand Ltd* [1984] 1 AC 808; *A P Pollution Control Board* v *Bayadu AIR* 1999 SC 812 (India); *R* v *Secretary of State for Trade and Industry (Ex parte) Duddridge* [1995] Env LR 151; Zia v WAPDA (1994) PLD SC 693; *Industrial Union Department AFL-C10* v *American Petroleum Institute* 448 US 607 (1980).
[413] Rosemary Lyster, 'Chasing Down the Climate Change Footprint of the Private and Public Sectors: Forces Converge' (2007) 24 EPLJ 281; Jacqueline Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming' (2007) 24 EPLJ 90; Jacqueline Peel, 'When (Scientific) Rationality Rules: (Mis)Application of the Precautionary Principle in Australian Mobile Phone Tower Cases' (2007) 19 JEL 103; Arla M Kerr, 'Untapped Potential: Administrative Law and International Environmental Obligations' (2008) 6 NZ J Pub Intl L 81; Jacqueline Peel, 'Climate Change Law: The Emergence of a New Legal Discipline' (2008) 32 MULR 922; Jennifer Scott, Louise Hayward and Andrew Joyce, 'Climate Change Adaptation: Socialising the Science' (2008) 14 LGLJ 52; Chris Tollefson and Jamie Thornback, 'Litigating the Precautionary Principle in Domestic Courts' (2008) 19 JELP 33; Mike Dolan and Jack Rowley, 'The Precautionary Principle in the Context of Mobile Phone and Base Station Radiofrequency Exposures' (2009) 117 Environ Health Persp 1329.
[414] Ben Boer, 'The Rise of Environmental Law in the Asian Region' (1999) 32 U Rich L Rev 1503, 1510.

B) New Zealand

This jurisdiction has set up what is regarded as one of the best ECTs globally.[415] The ECT comprises 9 law-trained environment judges and 15 environment commissioners. These judges and commissioners are vastly trained in environmental matters.[416] The ECT serves the entire country with three registries in different parts which allows the ECT to consistently provide environmental justice to all its citizens.[417]

The ECT is permitted to regulate its litigation proceedings as it deems appropriate without any recourse to general court rules or procedure of tendering evidence.[418] Furthermore, the ECT judges and their staff are known to make use of information technology mechanisms such as the use of iPads to track case materials, an interactive website communicating updated case decisions regularly, and exploring the possibilities of an e-filing process in starting environmental case proceedings.[419]

C) States in the USA

Pursuant to USA environmental law, Congress directed the President of the USA through the Attorney-General to consider the possibility of establishing a Federal environmental court.[420] Section 9 of the CWA stipulates that "*the President, acting through the Attorney General, shall make a full and complete investigation and study of the feasibility of establishing a separate court or court system, having jurisdiction over environmental matters and shall report the results of such investigation and study together with his recommendations to Congress not later than one year after the date of enactment of this Act*." By virtue of this provision, subsequent environmental courts and tribunals that have been established in the USA include: the Vermont Superior Court Environmental Division, local courts such

[415] Environmental Court of New Zealand, 'Environment Court | Environment Court of New Zealand' (*Environmentcourt.govt.nz*, 2019) <https://www.environmentcourt.govt.nz/> accessed 30 August 2019.
[416] George Pring and Catherine Pring (n.382) p.22.
[417] *ibid.*
[418] *ibid.*
[419] *ibid.*
[420] Scott Whitney, 'The Case for Creating a Special Environmental Court System' (1973) 14 William and Mary Law Review 473.

as the Tennessee Environmental Courts, and administrative tribunals such as the US EPA's Environmental Appeals Board.[421] In particular, the Hawaii environmental courts were set up, pursuant to Act 218, Session Laws of Hawaii 2014.[422] The court which started operations on July 1, 2015 tries both civil and criminal matters relating to the environment.[423]

Although the ECTs in both Vermont and Hawaii have both civil and criminal jurisdiction, this is still limited as efforts to incorporate law and policy on land use as part of their scope was rejected in Congress.[424] In any case, appeals from the ECTs still head to the general courts of appeal and the Supreme Court of the USA, thus limiting the enforceability of its environmental decisions.[425] While this view has not been expressed elsewhere, this study has discussed the USA ECTs in these individual states (rather than a national ECT) to show evidence that as a first step, countries with significant barriers to ECTs or even without any ECT (such as Nigeria) might consider establishing it in sample states in the country with significant environmental challenges and utilise the experiences to apply it nationally.

5.1.6 Presence of Environmental Watchdog on Agencies

This study also observed the lack of environmental watchdog in the Nigerian regime. This lack is made notable by the apparent non-performance of the environmental enforcement agencies in the regime. In contrast, the UK regime have not only allocated duties and functions to enforcement agencies but have also established watchdog organisations to monitor the commitment and performance of the agencies. The regime has utilised the European Commission and European Environment Agency (ECEEA) as watchdog organisations to monitor the extent to which enforcement agencies comply with their duties.[426] Hence, they

[421] Catherine McCabe (n.381).
[422] Hawaii State Judiciary, 'Environmental Court' (Hawaii State Judiciary 2019) <https://www.courts.state.hi.us/special_projects/environmental_court> accessed 16 April 2019.
[423] *ibid.*
[424] George W Pring and Catherine Pring (n.382) p.30.
[425] *ibid.*
[426] Environmental Audit Committee 'The Government's 25 Year Plan for the Environment, Eight Report of Session 2017-2019' HC 1672 (House of Commons: The Stationery Office Limited 18th July 2018) <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/803.pdf> accessed 10 December 2018.

provide strategic oversight over the agencies and make periodic reports on the commitment to Parliament.[427]

Subsequent to Brexit, the Environmental Audit Committee has recommended the creation of an Environmental Enforcement and Audit Office (EEAO)-modelled on the National Audit Office (NAO) as an independent oversight body that will take over the monitoring role.[428] The EEAO is meant to ensure that ensure that the governance, enforcement, oversight and policy functions are not lost upon leaving the European Union.[429] It was recommended that the government fund the environmental role of the organisation from several sources such as EU funds, urban funds, private investment, net gain and nature capital.[430] Also, the Environmental Audit Committee recommended that the Office for Environmental Protection (OEP) should be created to hold the government accountable for environmental protection and ensure that the targets of the regime on environmental preservation were met.[431]

In 2018, Andrew Goddard responded to the government's consultation on environmental principles and accountability for the environment by asserting that: "*For the government to deliver a green Brexit, it is imperative that oversight and enforcement are maintained upon the UK's exit from the EU.*"[432] Relating this to the Nigerian regime, it is important that a body be established to carry out oversight over the enforcement role of its environmental enforcement agencies especially considering the apparent current failure of the agencies to enforce properly. In addition, Goddard observed that the new environmental watchdog should be independent and accountable to parliament only.[433] He also suggested that the watchdog should be supported by the necessary expertise and funds to

[427] *ibid.*
[428] *ibid.*
[429] *ibid.*
[430] *ibid.*
[431] *ibid.*
[432] Andrew Goddard, 'Welcoming an Independent 'Green Watchdog': Environmental Accountability Post-Brexit' (*RCP London*, 2018) <https://www.rcplondon.ac.uk/news/welcoming-independent-green-watchdog-environmental-accountability-post-brexit> accessed 19 February 2020.
[433] *ibid.*

carry out its duties.[434] In line with this suggestion, this study will subsequently recommend the establishment of similar environmental watchdog to the Nigerian regime considering the possibility that some of the existing enforcement agencies in the regime might be fully controlled by the Nigerian government. This study will further recommend that sufficient funds be provided for any future watchdog established in the Nigerian regime, and indeed all other environmental agencies in the regime in line with enforcement objectives.

Regarding the provision of sufficient of funds, this study will explore the USA application of funding for its agencies. The USA regime has shown commitment to the effective funding of environmental agencies in the industry. For instance, the total FY budget for the BSEE in 2017 was an estimated $205 million.[435] Out of this budget, a total of $189,968,000 was allocated to operations, safety and environmental enforcement.[436] The FY 2014 -2018 DOI Strategic Plan, in compliance with the principles of the Government Performance and Results (GPRA) Modernization Act of 2010, stipulates mission objectives, goals, strategies, and corresponding metrics that collectively make up an integrated and focused approach for accessing performance of agencies under the DOI across the wide range of DOI programmes.[437] Indeed, this strategic plan is the foundational structure for planning the FY 2017 Budget for the BSEE (that is part of the DOI).[438] The budgetary allocation stated above is in line with the strategic plan of the agency and has been tailored to achieve the environmental enforcement aims and objectives of the BSEE.

Similarly, an enacted budget of $8,849,488,000 was provided for the EPA in 2019 as against $8,824,488,000 in 2018 and $8,058,488,000 in 2017.[439] It is notable that these budgetary funds are tied to the enforcement target objectives of the agency and the USA regime has also provided an accessible platform to measure the attainment of such objectives in line with the budgetary allocation that has

[434] *ibid*.
[435] BSEE, 'Budget Justifications' (USA Department of Interior: BSEE 2018) p.33.
[436] *ibid*.
[437] *ibid*. p.29.
[438] *ibid*.
[439] *ibid*.

been provided each year.[440] For instance, in line with the budget, the EPA met its 2018 target to accelerate the pace of clean-ups and return sites to beneficial use in their communities.[441] The EPA returned 51 Superfund sites to become ready for anticipated use (RAU) in line with the FY 2018 target, and exceeded the brownfield target of 684 by making 861 brownfields sites RAU.[442] In line with the FY-2019 Budget, the agency further seeks to make an additional 102 Superfund sites and 1,368 brownfield sites RAU by September 30, 2019.[443] Furthermore, although there is incomplete data regarding the extent to which the EPA increased environmental law compliance rate in line with the FY-2018 Budget, the agency (in line with the FY-2019 Budget) seeks to increase compliance with the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) by reducing the percentage of permittees who are presently not complying from a baseline of 24% to 21% by September 30, 2019.[444] From the above analysis, it is evident that the USA environmental enforcement agencies are adequately provided with funds to carry out their roles unlike the Nigeria regime.

5.1.7 Harmonized Environmental Provisions

Previously, oil spills in the USA were regulated under different environmental statutes. Some of these statutes include: The Limitation of Liability Act 1851 which made vessel owners liable for all costs related to pollution from their vessels up to the post incident value of the vessel.[445] However, the position of the Limitation of Liability Act on financial liability for oil spill changed after the Torrey Canyon incident in the English Channel in 1967.[446] Out of the $8 million clean-up cost, the Torrey Canyon was only held liable for $50 under the Limitation of Liability Act,

[440] EPA, 'Fiscal Year 2020: Justification of Appropriation Estimates for the Committee on Appropriations SPCC Guidance for Regional Inspectors' (EPA 2019) <https://www.epa.gov/sites/production/files/2019-04/documents/fy20-cj-14-program-performance.pdf>accessed 15 October 2019.
[441] *ibid.*
[442] *ibid.*
[443] *ibid.*
[444] *ibid.*
[445] Christopher S Morin, 'The 1851 Ship owners' Limitation of Liability Act: A Recent State Court Trend to Exercise Jurisdiction over Limitation Rights' (1998) XXVIII Stetson Law Review 422.
[446] Laura Moss, 'The 13 Largest Oil Spills in History' (*Mother Nature Network*, 2010) <https://www.mnn.com/earth-matters/wilderness-resources/stories/the-13-largest-oil-spills-in-history> accessed 10 December 2018.

simply because that was the value of the only surviving lifeboat after the incident.[447]

Barely two years after the Torrey Canyon spill, there was another spill in the Santa Barbara Channel.[448] These successive spills compelled the US Congress to enact environmental statutes on different aspects of oil spill liability.[449] Some of these statutes included the Trans-Alaska Pipeline Authorization Act 1973,[450] the Deepwater Port Act 1974,[451] the Outer Continental Shelf Land Act 1978,[452] Port and the Waterways Safety Act 1972.[453] However, the most significant oil spill statute at the time was the Federal Water Pollution Act 1965[454] (now the CWA 1972) which imposed a penalty of up to $250, 000 on vessels that spill crude oil into US waters.

After the Exxon Valdez spill of 1989 in which approximately 11 million gallons of crude oil were discharged, the Alaska Oil Spill Commission in 1989 was formed to examine the causes of the spill and issue recommendations on potential policy changes.[455] The Commission issued 52 recommendations for legislative improvements,[456] fifty of which were eventually worked into the Oil Pollution Act 1990. This Act regulates all aspects of oil spills and the attendant liabilities.[457] Section 1002 (a) of the Oil Pollution Act defines who a responsible party is, provides for the enforcement of the clean-up of affected sites, and assigns cost liability for such clean-up to the offender who had been found liable. Section 1004 sets a compensation liability for tanker vessels larger than 3,000 gross tons at $10 million. Similarly, under this provision, responsible parties who have caused pollution in onshore facilities are liable for up to $350 million clean-up cost per spill; while holders of leases or permits for offshore facilities, except deep water

[447] Jeffrey D Morgan, 'The Oil Pollution Act of 1990: A Look at Its Impact on The Oil Industry' (1994) 6(1) Fordham Environmental Law Review 46.
[448] The spill occurred in 1969 on the Dos Candra's Offshore Oil Field. Within ten days of the incident, 80 000-100 000 barrels of crude oil was spilled into the Channel and onto the beaches of Santa Barbra.
[449] Gayle Baker, *Santa Barbara* (Harbour Town Histories 2003) p.89.
[450] 30 U.S.C. ch. 3a § 185.
[451] 33 U.S.C. 1501 *et seq.*
[452] 43 U.S.C. §§ 1331 *et seq.*
[453] 33 U.S.C. §§ 1221-1236.
[454] 33 U.S.C. §§ 1251–1387.
[455] Zygmunt JB Plater, 'The Exxon Valdez Resurfaces in the Gulf of Mexico ... and the Hazards of 'Megasystem Centripetal Dipolarity'' (2011) 38 Boston College Environmental Affairs Law Review 2.
[456] *ibid.*
[457] 101 H.R.1465, P.L. 101-380.

ports, are liable for up to $75 million per spill. These unified provisions on all aspects of clean-up of pollution spill in the USA is codified in the USA's Oil Pollution Act. On the contrary, the study has established in section 4.2.2 that there seem to be different provisions and frameworks regarding enforcement of clean-up from the NOSDRA Act, the Minerals and Mining Act and the EGASPIN. Moreover, there seem to be duplicity in the roles of the NOSDRA and the DPR regarding the enforcement of clean-up.

This study argues that this confusion could be easily resolved if all aspects of enforcement regarding environmental standards such as clean-up were codified in respective single documents or the provisions in separate documents were harmonised to complement each other. Regarding the seeming disorganisation of the Nigerian agency NOSDRA certifying sites wrongly alleged by companies to have been completed without verifying from the DPR that it has been done up to standard, this study recommend the enactment of a statutory provision such as Section 4 of the UK's Regulators Code[458] which stipulates that the authorities secure mechanisms to share information with each other concerning their regulatory/enforcement activities which will invariably help target their resources and activities and reduce the confusion that can arise from duplicated enforcement. This will encourage internal distribution of tasks and sharing of data between the agencies.

The study has studied the UK and USA regimes and identified exemplary aspects of the regimes (concerning sanctioning and administrative enforcement) that can be adapted by the Nigerian regime. This study will utilise the identified examples as models with which it will recommend solutions to the failing Nigerian regime.

[458] Department for Business Innovation and Skills (n.283).

Chapter Six

6.0 Conclusion

This study has identified deficiencies contributing to the poor regulation of environmental standards in the Nigerian oil and gas industry. Some such deficiencies include:

i) weak environmental criminal sanctions which fail to adequately punish offenders and deter future commission of the environmental criminal act.

ii) penalties that fail to rehabilitate offenders and are not proportionate with the environmental crime committed.

iii) absence of criminal prosecutions for environmental offences. This has been identified to be caused by

a) the corruption of the police force limiting detection of environmental crime;
b) lack of will of the Attorney-General of the Federation to prosecute environmental offences relating to the oil and gas industry;
c) inadequacy of the Federal High Court in trying Environmental offences;
d) absence of public interest litigation in the regime, heavy Standard of Proof required for the prosecution to prove their case against environmental offenders;

iv) inadequate enforcement of environmental standards caused by failure of establishment statutes to provide other enforcement mechanisms, conflicting provisions on the enforcement of clean-up obligation, negligence of the agencies to perform, lack of technological and scientific resources, manpower and funding to enforcement agencies, absence of an environmental watchdog and penal sanctions for agencies for failing to perform, and lack of political will to regulate the environment and the

confusion of the NESREA (Establishment) Act regarding environmental enforcement in the oil and gas industry.

From the analysis above, it is obvious that the UK and USA regimes have aspects of criminal sanctioning and enforcement that are better developed than the Nigerian regime. Based on this analysis, such aspects can be applied to some of the deficient areas of the Nigerian regime to correct the defectiveness of the Nigerian regime as it concerns the oil and gas industry. This study will suggest the application of such developed aspects through the means of recommendations. In addition, the study will recommend other possible mechanisms (in the form of rules or systems) that might not have been discovered from the comparator regimes, but will present a solution to the deficiencies of the Nigerian regime.

6.1 Recommendations

This study will make recommendations towards the development of the Nigerian regime (mostly based on the argument drawn out of the study carried out of the UK and the USA regimes). Indeed, most of the recommendations address aspects of Nigerian environmental criminal laws and enforcement systems that need to be improved. To this effect, it could necessitate the repeal of existing laws and enactment of new laws covering the environmental subject or the amendment of the provisions in the existing laws regarding the subject. Moreover, this study understands that correction does not happen in one day. This is because in some circumstances, the process of correction might be rigid, gradual and could linger. Nevertheless, if commenced and sustained, it will eventually be actualised. It is a gradual process that takes time, if sustained. The list of recommendations that can be adapted to the Nigerian regime (in light of the comparative study) to present a solution to its existing deficiencies include:

6.1.1. Strengthening the Enforcement of Environmental Standards

This study argues that a strong, committed and proper enforcement of environmental standards will contribute to environmental protection in the

Nigerian regime. However, certain factors have to be set in place for this to occur. Considering such factors, this study recommends that:

i) There should be a proactive approach and willingness on the part of enforcement agencies to carry out their duties. This study has examined approaches of enforcement utilised by the USA and UK and discovered the active involvement of the agencies in carrying out their roles. From the UK and USA analysis above, there is a clear commitment to enforce on the part of the agencies. This is evidenced in the transparency with which the enforcement records and compliance rates have been published. This recommendation therefore appeals to the consciousness of duty on the part of the enforcement agencies.

ii) The regime should give adequate attention to tackling corruption among enforcement agencies. Indeed, this study had earlier observed that Section 19 (a) (11) of the Independent Corrupt Practices Act 2000 stipulates a penalty of 5 years' imprisonment without option to a fine for any public officer that uses his/her position for personal undue advantage. The enforcement agencies as set up by federal law are also public officers, hence should be subject to this rule. If therefore it is discovered that an enforcement agent has refused to perform in exchange for such corrupt gratifications, such agent should be penalized in accordance with the sanction.

iii) Adequate financial provisions should be made to the agencies to facilitate performance. In line with the USA model to budgeting for their agencies, this study recommends that such financial budgets to be enacted in the Nigerian regime should be tied to strategic performance goals. Tying the financial resources of the agencies to the overall strategic plan on enforcement compels the agencies to be more effective and productive in their enforcement, as failure to do so apparently means a non-justification of the extent of financial provision tied to the enforcement plan.

Further to allocating annual budgets for the enforcement agencies, this study observes that the duties of the agencies are crucial in the light of the significant pollution occurring in the Nigerian oil and gas industry. To this effect, this study has sought other sources of funds for the agencies that would facilitate effectiveness in carrying out their duties. The study therefore recommends easy access of the enforcement agencies to funds provided in the Consolidation Revenue Funds (CRF). Section 123 of the Constitution (as amended) stipulates that the Nigerian government (or its component) can make withdrawal from the funds if there is evidence of an urgent need. Moreover, pursuant to Section 81 of the Constitution (as amended), the judiciary has some entitlement to the funds by virtue of the urgency of the nature of their judicial role. The study recommends that providing some entitlement to the agencies for the funds would reduce the hurdle of the agencies waiting till the end of each allocation year before they can access funds. This becomes limiting where there might be an immediate need to carry out an enforcement duty requiring funds.

iv) Other environmental monitoring bodies should be established by legislation to monitor the performance of the enforcement agencies (until the laws establishing the agencies can be amended in the long term to include sanctions for the failure of the agencies to carry out their enforcement duties). The monitoring bodies should be statutorily empowered to conduct reviews into the agencies to make them more accountable in their actions and more responsive to their duties. There should be a sufficient measure of independence for the monitoring body and if possible, it should only be answerable only to the National Assembly (as the Nigerian National Assembly can inquire into the operation and propriety of all agencies and government parastatal in the country). The monitoring bodies must also be specialised on environmental matters to effectively perform the checks and balance role.

v) Furthermore, this study observed a clear demarcation of roles between the enforcement agencies and the operators they regulate in the UK and

USA regimes. This study believes that this would have contributed to their ability to enforce environmental standards effectively and impartially in the industry. To this effect, this study recommends that the DPR (which is a major environmental enforcement agency in Nigeria) should be separated from the NNPC (which is the main Nigerian indigenous oil and gas corporation and in operations with the other multinational oil and gas companies alleged to have committed environmental crime) to enable them perform their enforcement role effectively without the bias of control from the NNPC. Moreover, the finance of the NOSDRA should not be tied to the Ministry of Petroleum but should be directly included in the National budget since NOSDRA is a statutorily established agency.

vi) The Nigerian regime should adopt explicit mechanisms that facilitate the enforcement of environmental standards. The regime can adapt the mechanisms observed in the UK regime in the form of warning letters, statutory notices, guidance plans, compliance initiatives, and control rules. This study is of the view that where such enforcement mechanisms are applied, the processes of sanctioning such as prosecution will become more efficient. To this effect, the study recommends that enforcement agencies in the Nigerian regime be given liberty to do the same. This study does not believe that establishing such mechanisms will undermine the supremacy of existing laws stipulating the functions of the agencies but will only rather complement it.

vii) As has been utilised in the UK and USA model regimes, enforcement agencies in the Nigerian regime should provide public access to enforcement regulations by setting out reports on how they have handled enforcement issues, their performance in implementing environmental standards and the extent to which individuals and corporations have complied with environmental standards by virtue of their enforcement actions. Such reports should be available on platforms that can easily be accessed by members of the public. This will facilitate public scrutiny and contribution on such relevant environmental subjects, invariably achieving public participation in environmental

matters. It will also facilitate environmental awareness of environmental enforcement thus reflecting the agencies as being transparent and accountable for their actions.

viii) There should be internal distribution of tasks and sharing of data between enforcement agencies.

ix) Novel sanctions should be established in Nigerian law to punish enforcement agencies and their agents that unreasonably fail to carry out their environmental enforcement functions. Regulations can be enacted compelling the agencies to carry out their role and providing a mechanism with which the agencies can be prosecuted for a failure to do so.

x) Furthermore, Regulations should emphasise the need for transparency by enforcement authorities. Such Regulations should expand the scope of actions viewed by the regime as not being transparent to include all other actions that can incite the authority to be complicit in aiding and abetting environmental violations.

6.1.2 Increasing the Prosecution of Environmental Offences

This study has included this recommendation as short term considering that there are existing laws that have criminalised the environmental offences in the oil and gas industry. Moreover, the study has established the occurrences of the offences. Indeed, even if tough criminal sanctions were included in the laws and they were not implemented through prosecution of offenders, the sanctioning of offenders will still be incomplete. The study identified deficiencies that have limited the prosecution of environmental offences in the Nigerian regime. Based on these deficiencies and the comparative study of the UK and USA models, this study recommends the following factors that can be adopted to improve the current state of the prosecution of environmental offenders in the Nigerian regime:

i) Utilisation of multiple expert prosecutors to facilitate easier and broader prosecution of environmental offences. This ensures that it is not only the Attorney-General and members of his team that carry out the prosecution of environmental offences. There will be multiple entities capable of performing this function. Moreover, such entities should be specialised in environmental and criminal matters to effectively carry out this role (as can be adapted from the model of the USA regime discussed above). For this purpose, this study recommends that instead of creating new agencies empowered with this role, the role of existing enforcement agencies could be extended to include this important function of prosecution to ensure sustained enforcement on environmental criminal matters beginning from the investigation and detection of such environmental offences.

ii) Adoption of environmental courts that will specifically handle environmental matters (including environmental criminal matters). First, as has been suggested in chapter 5, the Nigerian regime can adapt the USA approach of establishing the courts in respective states to test their applicability in the states and synergy with each other before implementing it in the country as a whole. In establishing environmental courts in Nigeria, consideration should be given to ensure that:

1) The administration of the environmental courts is willing to incorporate the developed aspects of other model jurisdictions that will improve the court process as has been done by the NSWLEC (discussed in section 5.3.2.2 above);
2) Judges and environmental commissioners of the courts are adequately trained on environmental matters and environmental aspects of oil and gas exploitation;
3) Just like the NSWLEC, the environmental courts should be independent, comprehensive and exclusive over environmental matters;
4) There should be periodic evaluation of the adequate settlement of environmental disputes in line with the NSWLEC model;
5) There should be provision of an accessible online database containing statistics on all environmental criminal matters that have been

decided for reference in the deliberation of future environmental cases;

6) There should be periodic review of the extent of development of the environmental courts and recommendations to the chief judge for initiatives to improve the courts;
7) In addition to sentences of fines and imprisonment for environmental pollution crimes, the courts should order perpetrators of environmental crime to remediate the environment;
8) There should be an adaptation of Public-interest litigation system from the NSWLEC regime into the Nigerian criminal legal system. This does not negate the role of the Attorney General and his team to perform their normal prosecutor duties even in this environmental court. Rather, the study suggests a coordinated joint effort between the general public and the statutory persons empowered with this function;
9) The courts should utilise case management technologies just like the NSWLEC such as a comprehensive and current court website providing all necessary information for parties through electronic filing and processing; teleconferencing and videoconferencing for hearings and taking evidence; and computer data management systems to track the status, progress and deadlines for each case.

iii) The study noted that some police officers have received financial donations in exchange for failing to detect third party oil sabotage perpetrators. In line with Section 19 of the Independent Corrupt Practices Act, this study recommends that police officers found to have failed to perform the function as a result of their corrupt practices should be sentenced to prison which will serve as general deterrence to other officers. The provision of Section 19 should be extended to other corrupt staff of the environmental enforcement agencies that are found guilty of receiving financial donations in place of performing their enforcement duties.

iv) It is recommended that the enforcement agencies be permitted to prosecute environmental offences considering that they possess the

required environmental expertise. Hence, this study recommends an adaptation of the system utilised in USA regime permitting agencies to easily prosecute environmental crimes and on time. Based on this, the study recommends that the Nigerian government can appoint lawyers and experienced prosecutors into the agencies to provide the required expertise in litigation. The researcher believes that a combined team of environmentalists and experienced lawyers will make a qualified and formidable environmental criminal prosecution team. On these grounds, the law should extend the powers of prosecuting environmental offences to the enforcement agencies (as it is currently lacking under Nigerian law).

v) This study further recommends the practical application of the existing mechanism under some of the statutes permitting any given Minister to withdraw the licence of oil and gas corporations that fail to observe the obligations listed on their licence as well as the statutory obligations that serve as standards for their operations. Although this sanction mechanism has been provided under relevant environmental laws in the regime, it has not been effectively utilised with regard to oil and gas pollution. To this effect, the study argues that if it is utilised to sanction some offending operators, the fear of losing their licence will deter other operators in the region from polluting.

6.1.3 Providing Adequate Criminal Sanctions for Environmental Offenders

Considering that this study has identified that environmental criminal sanctions in the Nigerian regime are either too weak to punish offenders or guarantee deterrence to the environmental offence or are too severe to fit the offence committed and guarantee rehabilitation of the environmental offender, this study recommends the following:

a) Enacting environmental criminal sanctions that fit the nature of the offence committed and are severe enough to impact on the financial resources of the environmental offender so that it will deter any future commission of

the offence. Hence, the sanction will be severe on offenders that have committed major environmental offences such as the oil and gas spills identified in Nigeria. On the other hand, the sanction should not be so severe that it fails to rehabilitate the environmental offender-for example the long imprisonment terms and death penalty that have been utilised in the Nigerian regime discussed below.

The nature of prison terms utilised in the USA regime as examined in the USA cases above can also be adapted during sentencing in Nigerian courts. This does not mean that the specific terms utilised in the USA regime must be adopted. This is because the terms applied in those USA cases are only right fits for the specific offences in those cases. Hence, the study recommends an adaptation of the UK and USA systems that scale statutory criminal sanctions and sentencing for environmental criminals according to their culpability, the extent of the offence and significance of the environmental offence committed. In particular, this study recommends a drastic increase in the nature of the fines prescribed as criminal sanctions in Nigeria. The adaptation of adequate sanctions into the existing statutory regime can be carried out by amending existing provisions to include tough sanctions.

b) To achieve the consistent sentencing recommended above, this study recommends the adaptation of a Sentencing Guideline such as those utilised by both the UK and USA regimes. Notwithstanding the lack of prosecution for environmental offences in the oil and gas industry, the study insists that establishing such guidelines will potentially facilitate proportionality in the Nigerian criminal sentencing system. The study recommends that while formulating the guideline, the Nigerian regime should adapt characteristics identified in the UK and USA Guidelines such as: matching the sentence to the income of the offender, matching the sentence to the severity of the offence, matching the sentence to the culpability of the offender and considering the repeated nature of the offence. Considering the contradictions observed in some of the statutory provisions discussed in the Nigeria regime, this study recommends that such guidelines should be made in correlation to the provision of existing statutes to avoid confusion.

6.1.4 Harmonising Complementary Laws on Environmental Subjects

This study has established the conflict of existing laws regarding relevant environmental subjects in the regime such as remediation and the scope of powers of enforcement agencies. There should be explicit provision on what liability directly applies to an offender and what sanctions are specifically imposed for the offences. There should be clear wording as to whether intention is required to determine fault or not. Similarly, while this study notes the scattered provisions in different legislation on enforcement of the remediation standard, this study observed that the USA regime has rather moved towards harmonising its provisions into single documents providing for the sanctioning and enforcement of specific standards. In this light, this study recommends that the scattered provisions on oversight of enforcement on remediation should be gathered into one single document specifying which agency has an oversight. If, however, as a result of the diverse aspects of enforcement regarding the subject, there is need to split the enforcement roles on remediation, then the respective statutes should explicitly distinguish the role and extent of power of the agencies in the regards of their specific enforcement roles. Moreover, a singular plan/policy on remediation should be adopted to facilitate the process.

6.1.5 Clarifying the Confusion of the NESREA (Establishment) Act

This study has argued that the NESREA Act provides arguably the best enforcement mechanisms under the Nigerian regime at present. This study also noted the obvious confusion as to whether the NESREA Act deals with oil and gas matters or not. For this reason, the study recommends that the scope of the NESREA Act should be amended to explicitly cover the oil and gas industry. Moreover, just like most other sanctions in the regime, the criminal sanction provisions of the Act should be strengthened to deter environmental offenders.

6.1.6 Amending the PIB or Enacting New Legislation

Indeed, the arguments in this study have pointed towards the need for new law or the amendment of existing law. There have been several views regarding the impact of the PIB on the Nigerian environmental regime. Truly, if enacted as law, the PIB is expected to repeal existing oil and gas laws. However, the study has also noted that the PIB in its current state does not proffer any solution to the deficiencies identified in the environmental components of such laws. Moreover, there is no certainty that the full contents of the PIB would eventually be passed into law, let alone the environmental criminal components. The study therefore, reiterates the need for the PIB to be disregarded as an instrument that will add any change in the respect of the environmental defect discussed in this study. The researcher recommends that the legislature should either amend the existing environmental laws in the regime in the light of the discussion that has been made in this study or enact new laws that would implement the recommendations in this study. The study believes that if these recommendations are incorporated into existing laws and systems, the regime will be more effective at ensuring environmental protection in the oil and gas industry.

6.1.7 Commitment by the Nigerian Government

This study has established the fact that the Nigerian government has not actively supported environmental regulation in their oil and gas sector. The researcher also argues that most of the recommendations in this study can only be effective if they are adopted and utilised by the Nigerian government. Hence, the study recommends that the government should show proof of their commitment to environmental issues by adopting and ensuring the implementation of the recommendations set out in this section. Furthermore, relevant provisions for revocation of oil and gas licences (such as seen in the EGASPIN) should be utilised in the Nigerian regime. The Minister of Petroleum should consider this as a robust deterrence measure, especially for repeated offenders. This study argues that when a licence is withdrawn from one company, other companies will think twice before repeating the same violations, for fear of risking their own licence.

Indeed, most of the recommendations above have been derived from adopted aspects of the UK and USA regime combined. If the recommendations are implemented, they will correct most of the deficiencies associated with the Nigerian regime. This will not only contribute to making oil and gas industry participants more compliant with environmental standards, but will undoubtedly also contribute to environmental protection in the industry as a whole.

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