

**Oil Exploration, Environmental Degradation,  
and Future Generations in the Niger Delta:  
Options for Enforcement of Intergenerational  
Rights and Sustainable Development Through  
Legal and Judicial Activism**

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\* Ph.D., Senior Lecturer, Faculty of Law, Ebonyi State University, Abakaliki, Ebonyi State, Nigeria, email: hemenfaga@gmail.com.

† LL.M., Senior Lecturer, Faculty of Law, Ebonyi State University, Abakaliki, Ebonyi State, Nigeria, email: uguruche@yahoo.com.

### ABSTRACT

*The Niger Delta region of Nigeria has been inundated with oil pollution since the beginning of oil exploitation in the 1960s. The pollution has led to environmental degradation, which has adversely affected the lives of the inhabitants and ruined the local economy of the region. This Article discusses the condition of the Niger Delta environment and its inhabitants from the perspective of intergenerational rights, equity, and justice. It analyzes the role of domestic and foreign legal norms—both statutory and case law—in the quest to balance economic development with environmental sustainability, equity, and justice in Nigeria’s petroleum sector. This Article argues that while Nigeria has enacted much legislation to protect the Niger Delta environment and its inhabitants from the impact of petroleum exploitation, the legislation remained largely unenforced until the recent decisions of courts at the domestic, foreign, and subregional levels that moved to enforce the laws. It concludes that these judicial decisions and more recent legislation have unlocked new ways of enforcing intergenerational rights and ensuring environmental justice and equity in the Niger Delta.*

### INTRODUCTION

Although governments contest the scientific data on the progression of global warming and climate change, experts largely agree that the earth has gradually warmed in the last 200 years due to anthropogenic human activities.<sup>1</sup> This period is characterized by the use of dirty energy sources, particularly fossil fuel, to drive the wheels of economic prosperity, especially in the northern hemisphere.<sup>2</sup> The use of fossil fuel leads to the emission of vast amounts of carbon dioxide and other greenhouse gases into the atmosphere through various activities involving burning and flaring.<sup>3</sup> These gases are implicated in the progressive warming of the earth’s

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<sup>1</sup> For detailed analysis of the debate on global warming and climate change arising from human activities, see generally Murray Goot, *Anthropogenic Climate Change: Expert Credibility and the Scientific Consensus*, GARNAUT CLIMATE CHANGE REV. (May 2011), <http://www.garnautreview.org.au/update-2011/commissioned-work/anthropogenic-climate-change-expert-credibility.pdf>. See also William R.L. Anderegg, *Diagnosis Earth: The Climate Change Debate*, THE NEA HIGHER EDUC. J. (Fall 2010), <http://www.nea.org/assets/img/PubThoughtAndAction/TA10AndereggR.pdf>.

<sup>2</sup> See Chigbo A. Mgbemene et al., *Industrialization and Its Backlash: Focus on Climate Change and Its Consequences*, 9 J. ENVTL. SCI. & TECH. 301, 307–08 (2016).

<sup>3</sup> *Id.* at 305.

surface and atmosphere, resulting in the current changes in the earth's climate system and the possibility of even more dramatic changes in the future.<sup>4</sup>

Already the consequences of global warming are daunting.<sup>5</sup> Global warming has led to the gradual disappearance of areas of lowland habitation and islands,<sup>6</sup> desertification,<sup>7</sup> the destruction of habitat,<sup>8</sup> and the extinction of species.<sup>9</sup> These consequences are estimated to become even worse in the future, with cataclysmic effect on the earth's climate and its inhabitants unless emission of greenhouse gases is considerably reduced.<sup>10</sup> Future generations will be worse off in the event of any catastrophe, which imposes the moral responsibility on the present generation to bequeath the earth to them in at least the same state as we received it from our predecessors.<sup>11</sup>

As the foremost source of greenhouse emission, the exploitation and use of fossil fuel has not only had deleterious effects on the earth's climate but has also left indelible imprints on the lives of inhabitants of the areas where it is exploited.<sup>12</sup> The Niger Delta is one

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<sup>4</sup> See Michael E. Mann, *Do Global Warming and Climate Change Represent a Serious Threat to Our Welfare and Environment?*, 26 SOC. PHIL. & POL'Y 193, 200–07 (2009).

<sup>5</sup> See GLOBAL HUMANITARIAN FORUM, HUMAN IMPACT REPORT: CLIMATE CHANGE – THE ANATOMY OF A SILENT CRISIS (2009), <http://www.ghf-ge.org/human-impact-report.pdf>.

<sup>6</sup> See Duncan M. FitzGerald et al., *Coastal Impacts Due to Sea-Level Rise*, 36 ANN. REV. EARTH & PLANETARY SCI. 601 (2008).

<sup>7</sup> See Lindsay C. Stringer et al., *Adaptations to Climate Change, Drought and Desertification: Local Insights to Enhance Policy in Southern Africa*, 12 ENVTL. SCI. & POL'Y 748, 752–59 (2009).

<sup>8</sup> S. Taylor & L. Kumar, *Global Climate Change Impacts on Pacific Islands Terrestrial Biodiversity: A Review*, 9 TROPICAL CONSERVATION SCI. 203, 203 (2016).

<sup>9</sup> Fitria Rinawati et al., *Climate Change Impacts on Biodiversity—The Setting of a Lingering Global Crisis*, 5 DIVERSITY 114, 118–19 (2013).

<sup>10</sup> Intergovernmental Panel on Climate Change, *Summary for Policymakers*, in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 17–27 (2013), [https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5\\_all\\_final.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_all_final.pdf).

<sup>11</sup> See Janna Thompson, *What Is Intergenerational Justice?*, FUTURE JUST., 5–10 (2010), [http://www.futureleaders.com.au/book\\_chapters/pdf/Future\\_Justice/Janna\\_Thompson.pdf](http://www.futureleaders.com.au/book_chapters/pdf/Future_Justice/Janna_Thompson.pdf).

<sup>12</sup> See generally Dara O'Rourke & Sarah Connolly, *Just Oil? The Distribution of Environmental and Social Impacts of Oil Production and Consumption*, 28 ANN. REV. ENVTL. RESOURCES 587, 593–98, 603–08, (2003) (discussing the impact of oil production



aspect of intergenerational justice and equity from the perspective of judicial activism, noting the impact of judicial decisions not only on the rights of the present inhabitants to a livelihood and clean environment, but also on the rights of future generations to these benefits through remediation of the environment. Part III considers the many recent innovations in the statutory provisions of Nigerian legislations to address the problem of environmental degradation arising from the oil industry and the common law remedies available.

## I

### CONCEPTUAL CLARIFICATIONS

#### *A. Environmental Degradation*

Environmental degradation is the process that compromises the natural environment by reduction of biological diversity and the general health of the environment.<sup>16</sup> It involves the progressive contamination, over-exploitation, or destruction of environmental elements like air, water, and land.<sup>17</sup> Depletion of resources may arise from natural causes, such as disasters or pressure of the ecosystem, or human exploitation, such as overuse and pollution.<sup>18</sup> Human activities accelerate the process of environmental degradation. This phenomenon is a major threat to the continuous existence of the human race on this planet.<sup>19</sup>

#### *B. Intergenerational Rights and Future Generations*

The phrase “intergenerational right,” used interchangeably with intergenerational justice, refers to the obligation of the present

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<sup>16</sup> See D.L. Johnson et al., *Meanings of Environmental Terms*, 26 J. ENVTL. QUALITY 581 (1997); see also *What Is Environmental Degradation?*, WISEGEEK, <https://www.wisegeek.com/what-is-environmental-degradation.htm> (last visited Mar. 26, 2019).

<sup>17</sup> See NATIONAL INSTITUTE OF OPEN SCHOOLING, *Environmental Degradation and Disaster Management Module-4 Contemporary India: Issues and Goals* 245, 250–51, <https://www.slideshare.net/indianeducation/disaster-managment-in-india> (last viewed Mar. 26, 2019).

<sup>18</sup> Kusam Rani, *Environment Degradation and Its Effects*, 1 INT’L J. ADVANCED EDUC. & RES. 92 (2016); see also Ighodalo Akhakpe, *Oil-Environmental Degradation and Human Security in the Niger-Delta Region of Nigeria: Challenges and Possibilities*, 8 EUR. SCI. J. 77, 84–85 (2012).

<sup>19</sup> John Harte, *Human Population as a Dynamic Factor in Environmental Degradation*, 28 POPULATION & ENV’T 223, 224 (2007).

generation of human beings to bequeath to future generations an environment that is better or at least no worse than the environment we live in today.<sup>20</sup> To achieve this purpose, the present generation must use the earth's resources in a way that the environment can sustain life in the future.

The concept of "intergenerational ecological justice" is derived from the preamble of the Stockholm Declaration on the Human Environment,<sup>21</sup> which proclaimed the goal of defending and improving the human environment for present and future generations.<sup>22</sup> This objective has been replicated in several other international instruments.<sup>23</sup> However, the concept achieved its first concrete meaning in the Brundtland Commission Report of 1987.<sup>24</sup> These instruments laid the foundation for the 1992 Earth Summit. The Earth summit produced the Rio Declaration on Environment and Development and Agenda 21, which made the well-being of "present and future generations" a high priority.<sup>25</sup> The Vienna Declaration and Programme of Action, adopted by the United Nations (U.N.) World Conference on Human Rights in June 1993, and the U.N. General Assembly resolutions relating to protection of our global climate gave future generations high priority.<sup>26</sup> "Future generations" are defined as

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<sup>20</sup> Thompson, *supra* note 11, at 6.

<sup>21</sup> See UNITED NATIONS, *Report of the United Nations Conference on the Human Environment*, 3, 62–66, U.N. <https://undocs.org/A/CONF.48/14/Rev.1> (June 5–16, 1972).

<sup>22</sup> *Id.* at ch. II, princ. 2.

<sup>23</sup> See generally UNESCO Convention Concerning the Protection of the World Cultural Natural Heritage, Nov. 21, 1972, 11(6) I.L.M. 1358; Convention on International Trade in Endangered Species of Wild Fauna and Flora, pmbl., Mar. 3, 1973, 27 U.S.T. 1087; G.A. Res. 29/3281, Charter of Economic Rights and Duties of States, ch. 3, art. 30 (Dec. 12, 1974); UNESCO Declaration on Responsibilities of the Present Generations Towards Future Generations, ch. 4, Nov. 12, 1997; Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, 1102 U.N.T.S. 1698, 15 I.L.M. 290, 1976; see also Dr. Jona Razzaque, *Human Rights and the Environment: The National Experience in South Asia and Africa*, UWE BRISTOL <http://eprints.uwe.ac.uk/18403/> (last visited Mar. 26, 2019).

<sup>24</sup> UN World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, ch. 12, § 5.1, U.N. Doc. A/42/427 (Mar. 20, 1987).

<sup>25</sup> U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (June 14, 1992); see U.N. Commission on Sustainable Development, *Framing Sustainable Development: The Brundtland Report—20 Years On*, BACKGROUNDER, <https://www.scribd.com/document/46270162/Backgrounder-UN-Brundtland-Report-Sustainable-Development> (Apr. 2007).

<sup>26</sup> See The World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 11, U.N. Doc. A/CONF.157/23 (June 25, 1993); see also G.A. Res. 46/169,

ranging from today's children to unborn persons distant in the future without limitation—the “remote future persons” described as “those that will come into existence after all those now living have ceased to exist.”<sup>27</sup> Boulding described the time frame of this unique generation as comprising a “two-hundred year present” —which began one hundred years ago today, on the day of the birth of centenarians who are still living among us, and “the hundredth birthday of the babies being born today.”<sup>28</sup>

There are several rationales for the concept of intergenerational rights and justice. Ethically, human beings have an obligation to ensure the preservation of the human race, which requires that we avoid any activity that has the potential to deplete the population of human beings on earth.<sup>29</sup> This is more so that the natural and cultural heritage of humans is a common enterprise, which belongs to the past, present, and future generations precisely because it imposes a duty on the present generation to bequeath a safe planet to future generations at all times.<sup>30</sup> Other reasons include the fact that the present generation has a moral duty not to inflict harm on defenseless future generations<sup>31</sup> simply because they are underrepresented in today's

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Protection of Global Climate for Present and Future Generations of Mankind (Dec. 19, 1991); G.A. Res. 45/212 (Dec. 21, 1990); G.A. Res.44/207 (Dec. 22, 1989).

<sup>27</sup> See LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF UNBORN AND FUTURE GENERATIONS: LAW, ENVIRONMENTAL HARM AND THE RIGHT TO HEALTH xv–xvii, 1, 383 (2006) (referring to presently living children—denominated as “the first generation” and children that would come in the future as an “overlapping generation”).

<sup>28</sup> ELISE BOULDING, THE DYNAMICS OF IMAGING FUTURES 7 (J. Russell ed. 1978); Burns H. Weston, *Climate Change and Intergenerational Justice: Foundational Reflections*, 9 VT. J. ENVTL. L. 372, 386–89 (2008); see also Nuclear Energy Inst., Inc. v. Env'tl. Prot. Agency, 373 F.3d 1251, 1267, 1284–85 (D.C. Cir. 2004) (defining of “future generations” in relation to the disposal of nuclear waste at Yucca Mountain, Nevada. The time-frame contested ranged from between ten thousand to hundreds of thousands of years after disposal, or even further into the future).

<sup>29</sup> JOEL FEINBERG, *The Rights of Animals and Unborn Generations*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 180–82 (1980).

<sup>30</sup> Joerg Chet Tremmel, *Generational Justice—A Leading Concept for the New Century*, 3 INTERGENERATIONAL JUST. REV. 4, 4 (2002).

<sup>31</sup> See Henry Shue, *Climate Justice: Vulnerability and Protection*, 91 INT'L AFF. 422 (2015); see also *ARC and the Faiths*, ARC: ALLIANCE OF RELIGIONS AND CONSERVATION, [http://www.arcworld.org/arc\\_and\\_the\\_faiths.asp](http://www.arcworld.org/arc_and_the_faiths.asp) (last visited Mar. 10, 2019).

political institutions<sup>32</sup>—especially given that technological advancement has placed the present generation at a vantage position to offset future dangers and risks.<sup>33</sup>

Even apart from ethical reasons, environmental philosophers identify three principles of intergenerational ecological equity that conserve the rights of future generations relative to the power of the present generation—conservations of options, quality, and access.<sup>34</sup> Thus, intergenerational equity (justice) is achieved, when each living generation:

- (a) “does not unduly restrict the *options* available to future generations in solving their problems and satisfying their own values,”<sup>35</sup> which recognizes for instance, that future generations are entitled to diversity (of natural and cultural resources) “comparable to that enjoyed by previous generations”;<sup>36</sup>
- (b) “maintains the *quality* of the earth, so that it is passed on in no worse condition” than the present generation received it, which recognizes that future generations are entitled to a quality of the planet comparable to the one enjoyed by previous generations;<sup>37</sup> and
- (c) “provides its members with equitable rights of *access* to the legacy of past generations and should conserve this access for future generations.”<sup>38</sup>

With these principles in mind, Tremmel<sup>39</sup> argues that intergenerational justice exists “when the accumulated capital, which the next adjacent generation inherits, is at least as high as what the present generation inherited.”<sup>40</sup> These include (i) natural capital (environmental assets for supporting human life); (ii) human-made capital (machinery, infrastructure, and institutions as well as financial assets); (iii) cultural capital (democracy and market economy, and

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<sup>32</sup> Wilfred Beckerman, *Intergenerational Justice*, 2 INTERGENERATIONAL JUST. REV. 1, 3–5 (2004).

<sup>33</sup> See Dieter Birnbacher, *Responsibility for Future Generations – Scope and Limits*, in HANDBOOK OF INTERGENERATIONAL JUSTICE 23, 34–36 (Joerg Chet Tremmel ed., 2006).

<sup>34</sup> Edith Brown Weiss, *Intergenerational Fairness and Rights of Future Generations*, 3 GENERATIONAL JUST. 1, 5 (2002).

<sup>35</sup> *Id.* at 1 (emphasis added).

<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> *Id.*

<sup>39</sup> See Tremmel, *supra* note 30; see also JOERG CHET TREMMEL, A THEORY OF INTERGENERATIONAL JUSTICE 10–11 (Joerg Chet Tremmel ed., 2009).

<sup>40</sup> See Joerg Chet Tremmel, *Is a Theory of Intergenerational Justice Possible? A Response to Beckerman*, 4 INTERGENERATIONAL JUST. REV. 1, 6–7 (2004).



constitutions and legal codes); (iv) social capital (solidarity within society, stable relationships between individuals and groups, and values); and (v) human capital (health, education, skills, and knowledge).<sup>41</sup>

### ***C. Sustainable Development***

Sustainable development is the maintenance of a balance between the present human need for development on the one hand and the preservation of natural resources and the ecosystem upon which the present and future generations depend for sustenance on the other.<sup>42</sup> The World Commission on Environment and Development defines sustainable development as “development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.”<sup>43</sup> The essence of this form of development is to achieve a stable relationship between human activities and the natural world, which does not diminish the prospects of future generations to enjoy a quality of life at least as good as the present generation. This requires the protection of environmental quality while meeting the need for economic growth and development.

Several international agreements constitute the basis of the concept of sustainable development including the Convention on Biological Diversity,<sup>44</sup> the United Nations Conference on Sustainable Development (Rio+20),<sup>45</sup> the International Conference on Financing for Development,<sup>46</sup> the World Summit on Sustainable Development,<sup>47</sup>

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<sup>41</sup> *Id.* at 6.

<sup>42</sup> See generally Oluf Langhelle, *Sustainable Development and Social Justice: Expanding the Rawlsian Framework of Global Justice*, 9 ENVTL. VALUES 296, 298–99 (2000).

<sup>43</sup> The World Commission on Environment and Report Development, *Report of the World Commission on Environment and Development: Our Common Future*, ch. 2, U.N. Doc./A/42/427 (Mar. 20, 1987).

<sup>44</sup> Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 30619 (ratified by 190 states and supplemented by the Cartagena Protocol on Biosafety to the Convention on Biological Diversity Jan. 29, 2000, which entered into force on Sept. 11, 2003) (translated by author).

<sup>45</sup> Rep. of the United Nations Conference on Sustainable Development, *Rio de Janeiro, Brazil*, A/CONF.216/16 (June 22, 2012).

<sup>46</sup> Rep. of the International Conference on Financing for Development, *Monterrey, Mexico*, ch. I, resolution 1, annex, A/CONF.227/20 (Mar. 22, 2002).

the United Nations Convention to Combat Desertification,<sup>48</sup> and the United Nations Framework Convention on Climate Change.<sup>49</sup> These conventions mainly deal with the conservation and sustainable use of biological resources, the fair and equitable sharing of benefits arising from the use of genetic resources, and bio-diversity.

## II

### ENVIRONMENTAL DEGRADATION AND INTERGENERATIONAL JUSTICE IN THE NIGER DELTA

The growth of the oil industry, combined with population explosion and the lack of inadequate implementation of environmental regulation, has led to substantial damage to Nigeria's environment, especially in the Niger Delta region.<sup>50</sup> Various activities in the oil industry account for the deleterious condition of the environment, including oil spillages, gas flaring, and seismic movements causing tremors.<sup>51</sup> Exploration of oil affects different elements of the environment leading to varied consequences.

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<sup>47</sup> Rep. of the World Summit on Sustainable Development, *Johannesburg, South Africa* A/CONF.199/20 (Sept. 4, 2002), [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf). (concluding the Summit with the Johannesburg Declaration and Plan of Implementation of the World Summit.)

<sup>48</sup> See U.N. Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Senate Treaty Doc. 104-29 (June 17, 1994).

<sup>49</sup> See U.N. Framework Convention on Climate Change, GE.05-62220(E) 200705 (1992), [http://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf).

<sup>50</sup> 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*, FRIENDS OF THE EARTH NETHERLANDS 11 (Nov. 2010), <http://oasis-earth.com/Resources/Milieudefensie%20rapport%20Shell%20Double%20Standard%20%2010-50-4435%20LR.pdf>.

<sup>51</sup> See *Seismograph Servs. (Nig.) Ltd. v. Ogbeni* [1976] 4 S.C. 18, 26 (Nigeria); *Seismograph Servs. Ltd., v. Esiso Akporovo* [1974] NSCC 308, 309 (Nigeria); *Seismograph Servs. (Nig.) Ltd. v. Eyuafe* [1976] NSCC 434, 441 (Nigeria); *Compagnie Genrralede Geophysique (Nig.) Ltd. v. Asaagbara* [2001] 1 NWLR (Pt. 693) 155, 156 (Nigeria); *Compagnie Genrralede Geophysique (Nig.) Ltd. v. Amaewhule* [2006] 3 NWLR (Pt. 967) 282, 284 (Nigeria); *Compagnie Genrralede Geophysique (Nig.) Ltd. v. Ogu* [2005] 8 NWLR (Pt. 927) 366, 386 (Nigeria); *Seismograph Servs. v. Mark* [1993] 7 NWLR (304) 203, 204 (Nigeria).

### **A. Air Pollution**

Gas flaring constitutes a major source of air pollution in the Niger Delta.<sup>52</sup> Gas flaring is the natural process associated with drilling crude oil from the ground, which results from the burning-off of extra gases producing “sulfur dioxide, nitrogen dioxides, benzapryene, toluene, xylene, and hydrogen sulfide.”<sup>53</sup> Wide-spread gas flaring has inflicted untold hardship or damage to human, plant, and animal life in the Niger Delta.<sup>54</sup> Consequently, agricultural production is drastically reduced as increased atmospheric temperatures scorch plants and animals in the vicinity of the flares.<sup>55</sup> Gas flaring also causes the corrosive effect of acid rain in the Niger Delta, which results in deadly diseases affecting the respiratory tract, central nervous system, and blood stream.<sup>56</sup> In fact, gas flaring in the Niger Delta has reached an alarming proportion, yet the government has consistently reneged on deadlines given to oil companies to end the practice.<sup>57</sup> Existing laws meant to encourage oil companies to eliminate gas flaring are hardly enforced,<sup>58</sup> and sanctions for default are too low to deter oil companies from flaring gas in the Niger Delta.<sup>59</sup>

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<sup>52</sup> Aniefiok E. Ite & Udo John Ibok, *Gas Flaring and Venting Associated with Petroleum Exploration and Production in the Nigeria's Niger Delta*, 1 AM. J. ENVTL. PROTECTION 70, 72 (2013).

<sup>53</sup> Eferiekose Ukala, *Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices*, 2 J. ENERGY, CLIMATE, & ENV'T 97, 101 (2010).

<sup>54</sup> Uwem E. Udok, *Environmental Degradation in the Niger Delta: A Critique of Existing Laws for Curbing the Degradation*, 4 NIGERIAN ENVTL. L. REV. 68 (2008).

<sup>55</sup> A.M. Adeyemo, *The Oil Industry Extra-Ministerial Institutions and Sustainable Agricultural Development: A Case Study of Okrika L.G.A. of Rivers State, in Nigeria*, 2 J. OIL & POLITICS 1, 32 (2002).

<sup>56</sup> Greg Campbell, *No Amount of Crying Extinguishes a Single Flare in the Niger Delta*, URHOBO HIST. SOC'Y (June 8, 2001), [http://www.waado.org/NigerDelta/Essays/Pollution/Flares\\_Campbell.html](http://www.waado.org/NigerDelta/Essays/Pollution/Flares_Campbell.html).

<sup>57</sup> Udok, *supra* note 54, at 68. *See also Nigeria: Enforcing the Gas Flaring Deadline*, ALL AFR. (Aug. 9, 2010), <http://allafrica.com/stories/201008091226.html>.

<sup>58</sup> *See infra* notes 128–30.

<sup>59</sup> Ukala, *supra* note 53, at 105.

### ***B. Marine Pollution***

Oil spillage is the most prevalent form of marine pollution in the Niger Delta.<sup>60</sup> Oil spills are a regular occurrence arising from negligence of oil companies and sabotage by criminal elements in the Niger Delta.<sup>61</sup> The data on oil spills and pollution in the Niger Delta is conflicting but very intimidating. For instance, the Department of Petroleum Resources (DPR) estimated that between 1976 and 1996 about 2,369,470 barrels of oil had spilled into the swamps and rivers of the Niger Delta in more than 4647 incidents.<sup>62</sup> This figure is small compared to the recent report of Amnesty International on the extent of oil spills in the region.<sup>63</sup> The resultant degradation of the surrounding environment has caused significant tension between the people and the multinational oil companies (MNOCs) because of the extensive pollution of waterways and fishponds leading to the death of fishes and other aquatic life, which affect the livelihood of the communities.<sup>64</sup>

One of the most visible consequences of the numerous oil spills has been the loss of the mangrove vegetation. The Niger Delta mangrove is decimated due to oil toxicity.<sup>65</sup> A good example of this is the Ubeji Community of Warri in Delta state, which is home to the Warri Refining and Petrol Chemicals Company. Waste disposal and pollution from the refinery have not only ruined fishing in the surrounding creeks and ponds and caused a number of deaths from poisoning of the waters but have also significantly depleted the biodiversity habitation of the mangrove terrain surrounding the

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<sup>60</sup> See Osondu Chimezie Nworu, *Ogoniland Clean-Up, Remediation and Satisfactory Environment Favorable to Its Development: Obligations of the Nigeria State*, 7 WORLD ENV'T 31, 36 (2017); see also S.O. Aghalino & B. Eyinla, *Oil Exploitation and Marine Pollution: Evidence from the Niger Delta, Nigeria*, 28 J. HUM. ECOLOGY 177 (2009).

<sup>61</sup> See Oteh Chukwuemeka Okpo & Eze R.C., *Vandalization of Oil Pipelines in the Niger Delta Region of Nigeria and Poverty: An Overview*, 3 STUD. SOC. SCI. 13 (2012).

<sup>62</sup> Peter C. Nwilo & Olusegun T. Badejo, *Impacts and Management of Oil Spill Pollution Along the Nigerian Coastal Areas*, [https://www.fig.net/resources/publications/figpub/pub36/chapters/chapter\\_8.pdf](https://www.fig.net/resources/publications/figpub/pub36/chapters/chapter_8.pdf) (last visited Mar. 21, 2019).

<sup>63</sup> AMNESTY INT'L, *BAD INFORMATION: OIL SPILL INVESTIGATIONS IN THE NIGER DELTA* 10 (2013), <https://www.amnestyusa.org/reports/bad-information-oil-spill-investigations-in-the-niger-delta/>.

<sup>64</sup> See U.N. ENV'T PROGRAMME, *ENVIRONMENTAL ASSESSMENT OF Ogoniland* 152–200 (2011), [http://postconflict.unep.ch/publications/OEA/UNEP\\_OEA.pdf](http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf) [hereinafter UNEP Report].

<sup>65</sup> 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*, 3 INT'L J. DEV. & SUSTAINABILITY 1878, 1885–86 (2014).

community.<sup>66</sup> Water samples taken in the vicinity of the refinery found the presence of benzo[a]pyrene, an alternate polynuclear hydrocarbon, which causes skin, lung, breast, and abdominal cancer.<sup>67</sup> This is true of many other communities that accommodate petroleum production and processing plants in the Niger Delta.<sup>68</sup>

### **C. Land Pollution**

Most activities that affect marine life also cause land pollution. For instance, it is common to find abandoned oil wells in different localities in the Niger Delta, which is a source of pollution to arable land in the region.<sup>69</sup> Various pollutants are found at the sites of these wells including drilling wastes, drill cuttings, oily sludge, and other hazardous chemicals.<sup>70</sup> Oil pollution on the land mainly affects plant/crop production and animals (flora and fauna), which includes human beings.<sup>71</sup> Crops and drinking water sources are contaminated with heavy metals such as lead, zinc, and mercury.<sup>72</sup>

The totality of this pollution not only results in environmental degradation and despoliation of the livelihood of the people but also has future consequences on subsequent generations in the Niger Delta. First, pollution in the Niger Delta is seldom cleaned or remediated.<sup>73</sup> Pollution sites are left unattended for years, a situation

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<sup>66</sup> Udok, *supra* note 54, at 69.

<sup>67</sup> See Muhammed Tahir Abdulmumini, *An Assessment of Liabilities of Oil Producing Companies for Oil Spillage in Nigeria* 32 (Aug. 2014) (unpublished M.A. dissertation, Ahmadu Bello University).

<sup>68</sup> See generally Ibibia Lucky Worika, *Deprivation, Despoilation and Destitution: Whither Environment and Human Rights in Nigeria's Niger Delta?* 8 *ILSA J. INT'L & COMP. L.* 1, 7–12 (2001); see also T.V. Otokunefor & C. Obiukwu, *Impact of Refinery Effluent on the Physicochemical Properties of a Water Body in the Niger Delta*, 3 *APPLIED ECOLOGY & ENVTL. RES.* 61 (2005).

<sup>69</sup> See Steiner, *supra* note 50, at 11.

<sup>70</sup> *Id.* at 11–12.

<sup>71</sup> See A. Emuedo Oke & O. Emuedo Crosdel, *Biodiversity and Oil Activities in the Niger Delta Region of Nigeria*, 14 *J. GEOGRAPHY ENV'T & EARTH SCI. INT'L* 1, 2 (2018).

<sup>72</sup> See generally P. B. Eregha & I. R. Irughe, *Oil Induced Environmental Degradation in the Nigeria's Niger-Delta: The Multiplier Effects*, 11 *J. SUSTAINABLE DEV. AFR.* 160, 164–66 (2009).

<sup>73</sup> See AMNESTY INT'L, *THE TRUE "TRAGEDY": DELAYS AND FAILURES IN TACKLING OIL SPILLS IN THE NIGER DELTA* 26–36 (2011), <https://www.amnestyusa.org/wp-content/uploads/2017/04/afr440182011en.pdf>.

that has significant implications.<sup>74</sup> An unrehabilitated environment may neither support the rich biodiversity in the Niger Delta nor the agricultural produce necessary for the survival of the people. Second, the health care infrastructure in the Niger Delta lacks the ability to ameliorate the long-term effects of pollution, such as disease, child mortality, and decreased life expectancy.<sup>75</sup> Pollution also destroys other sources of revenue, like coastal tourism, which is naturally abundant in the Niger Delta.<sup>76</sup> The combined effect of these factors has impoverished the people and, if unattended, will most certainly deprive future generations of enjoying a quality of life similar to, or better than, that of their ancestors.

For the purposes of environmental and intergenerational equity and justice, the situation in the Niger Delta appears contrary to the obligations of the Nigerian state and the MNOCs operating in the region. Apart from the 1999 Constitution of the Federal Republic of Nigeria (CFRN), which sets out environmental objectives and principles of developments for the entire country,<sup>77</sup> Nigeria is party to numerous international conventions on the sanctity of the environment and human rights.<sup>78</sup> For instance, Nigeria is a party to the African Charter on Human and Peoples' Rights, an international convention that provides for equitable exploitation of natural resources.<sup>79</sup> Sections 16, 17, and 20 of the Constitution make elaborate provisions on socioeconomic and cultural obligations of the Nigerian state regarding certain basic needs of life, equitable distribution of resources, and a healthy environment.<sup>80</sup> Although the

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<sup>74</sup> See UNEP Report, *supra* note 64.

<sup>75</sup> See Barisere Rachel Konne, *Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland*, 47 CORNELL INT'L L.J. 181, 188 (2014).

<sup>76</sup> See C.N.P. Okonkwo et al., *The Niger Delta Wetland Ecosystem: What Threatens It and Why Should We Protect It?*, 9 AFR. J. ENVTL. SCI. & TECH., 451, 456–57 (2015).

<sup>77</sup> See CONSTITUTION OF NIGERIA (1999), ch. 2.

<sup>78</sup> See generally *Ratification of International Human Rights Treaties – Nigeria*, UNIV. OF MINN. HUM. RTS. LIBR., <http://www1.umn.edu/humanrts/research/ratification-nigeria.html> (last visited Mar. 21, 2019).

<sup>79</sup> See African (Banjul) Charter on Human and Peoples' Rights, Organization of African Unity, art. 20–24, June 27, 1981, 21 I.L.M. 58.

<sup>80</sup> CONSTITUTION OF NIGERIA (1999), ch. 2 § 16(2) (promoting a planned and balanced economic development); *id.* § 17(2)(d) (exploitation of human or natural resources must be for the good of the community); *id.* § 17(3) (provide means of livelihood, employment, medical and health facilities and promote family life); *id.* § 20 (protecting and improving the environment).

Constitution renders these provisions nonjusticiable,<sup>81</sup> the environmental objectives set out in § 20 have been guaranteed in separate legislations enacted by the Nigerian Legislature,<sup>82</sup> including an act specifically adopting the African Charter into Nigerian domestic law.<sup>83</sup> The emerging jurisprudence of this instrument in Nigeria on environmental rights and equitable distribution of natural resources in the Niger Delta has huge implications for both environmental justice and intergenerational rights and equity. For instance, in the Nigerian case of *Oronto Douglas v. Shell Petroleum Development Co.*,<sup>84</sup> the Court of Appeal held that Article 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, which is equivalent to § 20 of the 1999 Constitution of Nigeria, is enforceable notwithstanding § 6(6)(c) of the Constitution.<sup>85</sup> On the other hand, in *A.G. Federation v. A.G. Abia State*,<sup>86</sup> a case bordering on claims by oil producing littoral states (federating units) in Nigeria to 13% derivation from revenues accrued from offshore oil production (as required by § 162(2) of CFRN),<sup>87</sup> the

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<sup>81</sup> See *id.* § 6(6)(c) (rendering the entire Chapter Two of the constitution non-justiciable or unenforceable); see also Bishop Okogie (Trustee of Roman Catholic Schools) v. Attorney-General of Lagos State, [1980] FNR 445 (Nigeria).

<sup>82</sup> See *Attorney-General of Ondo State v. Attorney-General of the Fed'n* [2002] 9 NWLR (Pt. 772) 222 at 382, 383–85 (dictum of Uwaifo JSC to the effect that the National Assembly has the legislative competence to expand on any provision in Chapter II of the constitution by a separate enactment, and that the courts are bound to enforce the provisions of such a law notwithstanding the limitation contained in § 6(6)(c)).

<sup>83</sup> See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (2010) Cap. (A9) (Nigeria). The other legislation that activates and justifies the environmental objective contained in § 20 of the 1999 constitution is the National Environmental Standards and Regulation Enforcement Agency (Establishment) Act (2010) Cap. (N164) [hereinafter NESREA Act].

<sup>84</sup> *Oronto Douglas v. Shell Petrol. Dev. Co.* [1999] 2 NWLR (Pt. 591) 466 (Nigeria).

<sup>85</sup> See Solomon T. Ebobrah, *The Future of Economic, Social and Cultural Rights Litigation in Nigeria*, 1 REV. NIGERIA L. PRAC. 108, 121 (2007).

<sup>86</sup> *Attorney-General of the Fed'n v. Attorney-General of Abia State* [2002] 6 NWLR (Pt. 764) 542 (Nigeria).

<sup>87</sup> CONSTITUTION OF NIGERIA (1999), § 162(2) (providing that “[t]he President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density; Provided that the principle of derivation shall be constantly reflected in any approved formula as being not

court refused to interpret the Nigerian territorial waters and continental shelf as falling into the territorial limits of littoral states.<sup>88</sup> The case pushed the frontiers of intergenerational equity in the Niger Delta through the subsequent enactment of an Act<sup>89</sup> by the federal legislature to contrive a political solution to the impasse.<sup>90</sup>

In the case of *Gbemre v. Shell Petroleum Development Co.*,<sup>91</sup> the Federal High Court, in a rare show of judicial activism, interpreted the fundamental right to life under § 33 of the 1999 Constitution to include the right to a clean and healthy environment.<sup>92</sup> The court reasoned that Article 24 of the African Charter (Ratification and Enforcement) Act, a subsisting legislation in Nigeria guaranteeing the right to a “healthy environment,” is applicable outside the provision of § 6(6)(c) of the Constitution.<sup>93</sup> The applicant in this case sued in a

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less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.”).

<sup>88</sup> The Court held that the seaward boundary of the territories of each of the littoral states ends at the low water mark because international waters could only fall within the purview of the jurisdiction and power of sovereign nations under international law. Therefore, natural resources located within the continental shelf are property of the Nigerian State and revenues therefrom accrue to the Federation Account and do not derive from the territory of the littoral states; consequently, constituent units could not claim a right to property in resources of the sea under international law. *See Attorney-General of the Fed'n v. Attorney-General of Abia State* [2002] 6 NWLR (Pt. 764) 542 (Nigeria); *see also* Olawale Ajai, *Law, Water and Sustainable Development: Framework of Nigerian Law*, 8 L. ENV'T & DEV. J. 91 (2012).

<sup>89</sup> Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act (2004) Cap. (A89) (Nigeria). The Act extended the seaward boundary of a littoral state of the federal Republic of Nigeria to two-hundred-meter water-depth isobath contiguous to that state for the purpose of the application of the principle of derivation.

<sup>90</sup> *See* Edwin Egede, *Who Owns the Nigerian Offshore Seabed: Federal or States? An Examination of the Attorney General of the Federation v. Attorney General of Abia State & 35 Ors Case*, 49 J. AFR. L. 73, 91–93 (2005).

<sup>91</sup> *Gbemre v. Shell Petroleum Dev. Co. of Nigeria Ltd.*, No. FHC/B/CS/53/05 [2005] (Nigeria), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/non-us-case-documents/2005/20051130\\_FHCBCS5305\\_judgment-1.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/non-us-case-documents/2005/20051130_FHCBCS5305_judgment-1.pdf).

<sup>92</sup> This inference is similar to that made by the Indian Supreme Court in *Subhash Kumar v. Bihar*, A.I.R., 1991 S.C. 420, 424 (India) (ruling that the right to life included the right to the enjoyment of pollution-free water and air).

<sup>93</sup> *See* Abdulkadir Bolaji Abdulkadir, *The Right to a Healthful Environment in Nigeria: A Review of Alternative Pathways to Environmental Justice in Nigeria*, 3 AFE BABALOLA UNIV. J. SUS. DEV. L. & POL'Y, 118, 130 (2014); *see also* Rufus A. Mmadu, *The Search for Environmental Justice in the Niger Delta and Corporate Accountability for Torts: How Kiobel Added Salt to Injury*, 1 AFE BABALOLA UNIV. J. SUS. DEV. L. & POL'Y 73, 81–83 (2013); Rufus A. Mmadu, *Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel*, 2 AFE BABALOLA UNIV. J. SUS. DEV. L. & POL'Y 149, 162–63 (2013).



representative capacity alleging that the respondents' (Shell Petroleum Development Company of Nigeria and the Nigerian National Petroleum Corporation) oil production activities, specifically gas flaring, violated his constitutional rights to life and dignity of the human person to the extent that his health and immediate natural environment were jeopardized.<sup>94</sup> The court agreed with him and consequently ordered the immediate cessation of gas flaring in the applicant's community.<sup>95</sup>

At the supranational level, both the regional African Commission<sup>96</sup> and the sub regional Economic Community of West African State (ECOWAS) Court<sup>97</sup> have made decisions against Nigeria and the MNOCs for violating Article 24 of the African Charter concerning the activities of oil companies in the Niger Delta. In *Social and Economic Rights Action Center (SERAC) v. Nigeria*,<sup>98</sup> the applicant, a nongovernmental organization (NGO), filed a complaint against Nigeria for violating the rights to health, a clean environment, and free disposal of the wealth and natural resources of the Ogoni people through the activities of the state oil company, the Nigerian National Petroleum Corporation, and its partner MNOCs. The African Commission in its decision found that the Federal Republic of Nigeria violated Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter.<sup>99</sup> It requested that the government ensure protection of the

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<sup>94</sup> Sections 33(1) and 34(1) of the 1999 Constitution guarantee every Nigerian fundamental rights to life and human dignity, respectively. CONSTITUTION OF NIGERIA (1999), §§ 33(1), 34(1).

<sup>95</sup> *Gbemre*, No. FHC/B/CS/53/05 at 29–31.

<sup>96</sup> See Ngozi Stewart, Constitutionalizing an *Eco-Anthropocentric* Ethic in Nigeria: Its Implications for Sustainable Development in the Niger Delta Region (2013) (unpublished Ph.D. dissertation, University of Leicester), <https://lra.le.ac.uk/bitstream/2381/28038/1/2013stewartnfpd.pdf>.

<sup>97</sup> See ECOWAS Community Court of Justice, Supplementary Protocol, Jan. 19, 2005, A/SP.1/01/05 (amending the Protocol, which established the court). Articles 1, 2, 9, 22, and 30 of Protocol A/P.1/7/91 and Article 4(1) of the Supplementary Protocol empowers the court to entertain actions for the enforcement of rights guaranteed in the African Charter. See Ebobrah, *supra* note 85, at 124.

<sup>98</sup> Soc. & Econ. Rights Action Ctr. (SERAC) & Ctr. for Econ. & Soc. Rights v. Nigeria [2001] No. ACHPR/COMM/A044/1 (Nigeria).

<sup>99</sup> These provisions all border on economic, social, and cultural rights, and the decision was the first to find violation of the right of all peoples to freely dispose of their wealth and natural resources (Art. 21), and the right of all peoples to a general satisfactory environment favorable to their development (Art. 24). See Morné van der Linde & Lirette

environment, health, and livelihood of the people of Ogoni and set out recommendations to achieve these goals.<sup>100</sup> The ECOWAS Court of Justice in the case of *Socio-Economic Rights and Accountability Project v. Nigeria*<sup>101</sup> also reached a similar decision. In this case, the plaintiff, an NGO, alleged that Nigeria violated the right to health, adequate standard of living, and rights to economic and social development of the people of the Niger Delta under the International Covenant on Economic, Social and Cultural Rights and the African Charter by failing to enforce existing environmental laws and regulations to protect the environment.<sup>102</sup> After dismissing Nigeria's objection on the nonjusticiability of these rights, the court reaffirmed the African Commission's holding in *SERAC* and held that Nigeria's failure to monitor and enforce environmental laws violated the rights to health and a healthy environment under Articles 1 and 24 of the African Charter.<sup>103</sup> The court also recognized that the breach of the right to health and a healthy environment had subsequently led to the breach of other rights, including the rights to an adequate standard of living and economic and social development.<sup>104</sup>

In addition to the above cases, recent developments in certain countries, such as the United States, Canada, Australia, and the United Kingdom (UK), have made it possible to enforce international human rights norms against multinational companies in foreign jurisdictions.<sup>105</sup> Thus, the case of *Wiwa v. Royal Dutch Petroleum Co.*<sup>106</sup> is quite instructive. The case was brought before the United States Southern District Court of New York by the son of Ken Saro-Wiwa (an environmentalist killed by the Nigerian military

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Louw, *Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in the Light of the SERAC Communication*, 3 AFR. HUM. RTS. L.J. 167 (2003).

<sup>100</sup> See Fons Coomans, *The Ogoni Case Before the African Commission on Human and Peoples' Rights*, 52 INT'L & COMP. L.Q. 749, 756 (2003).

<sup>101</sup> Socio-Econ. Rights & Accountability Project (SERAP) v. Nigeria, No. ECW/CCJ/JUD/18/12, ECOWAS Court of Justice (2012), [http://www.courtecowas.org/site2012/pdf\\_files/decisions/judgements/2012/SERAP\\_V\\_FEDERAL\\_REPUBLIC\\_OF\\_NIGERIA.pdf](http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf).

<sup>102</sup> *Id.* at 6.

<sup>103</sup> *Id.* at 26.

<sup>104</sup> *Id.* at 25–26.

<sup>105</sup> See Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 407 (2002).

<sup>106</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); see generally Aaron Xavier Fellmeth, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?*, 5 YALE HUM. RTS. & DEV. L.J. 241 (2002).

government in 1995) under the United States Alien Tort Claims Act.<sup>107</sup> The Act gives United States district courts “original jurisdiction over any civil action brought by an alien for a tort” committed outside the United States “in violation of the law of nations or a treaty of the United States.”<sup>108</sup> In *Wiwa*, the plaintiff claimed damages against the defendant for crimes against humanity; torture; cruel, inhuman, or degrading treatment; arbitrary arrest and detention; and violating the rights to life, liberty, and security of person relating to the activities of the oil giant in the Niger Delta, which led to the death of Ken Saro-Wiwa.<sup>109</sup> In deciding preliminary issues, the court approved the “joint action” test, under which private actors are considered state actors if they are willful participants in joint action with the state or its agents.<sup>110</sup> Unfortunately, the opportunity to decide the case on the merits was lost when the defendant, Shell, offered an out-of-court settlement in the sum of £55 million to the families of the victims but denied any wrongdoing or liability.<sup>111</sup>

In the United Kingdom, Shell formally admitted liability for oil spills in the Bodo, Ogoni region of the Niger Delta in the case of *Bodo Community v. Shell Petroleum Development Co.*<sup>112</sup> This case involved a double rupture of the Bodo-Bonny trans-Niger pipeline in 2008 that gushed crude oil, went unchecked for several weeks, and devastated about a twenty-square-kilometer network of creeks and

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<sup>107</sup> *Wiwa*, 226 F.3d at 91–92.

<sup>108</sup> 28 U.S.C.A. § 1350 (West 2018).

<sup>109</sup> Fellmeth, *supra* note 106, at 245.

<sup>110</sup> *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887 at \*13 (S.D.N.Y. Feb. 28, 2002) (quoting *Doe v. Unocal Corp.*, 963 F. Supp. 880, 891 (1997)). See also Francisco Rivera, *A Response to the Corporate Campaign Against the Alien Tort Claims Act*, 14 IND. INT’L & COMP. L. REV. 251, 272–73 (2003).

<sup>111</sup> *Shell Lawsuit (Re Oil Spills & Bodo Community in Nigeria)*, BUS. & HUM. RTS. RESOURCE CTR., <http://business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria> (last visited Mar. 27, 2019) [hereinafter *Bodo Community*].

<sup>112</sup> *Id.* (explaining that the court concluded a preliminary hearing of the case in May 2014 to consider Shell’s duty to take reasonable steps to prevent spillage from their pipelines. The judge ruled on June 20, 2014 that Shell could be held responsible for spills from their pipelines if the company fails to take reasonable measures to protect them from malfunction or from oil theft (known as “bunkering”)); see generally AMNESTY INT’L, *Briefing For Investors, Shell’s Growing Liabilities In The Niger Delta: Lessons from the Bodo Court Case*, [https://www.amnesty.org.uk/files/amnesty\\_international\\_briefing\\_on\\_shell\\_for\\_investors.pdf](https://www.amnesty.org.uk/files/amnesty_international_briefing_on_shell_for_investors.pdf) (last visited Mar. 27, 2019).

inlets, which Bodo and as many as thirty other smaller settlements depend upon for food, water, and fuel.<sup>113</sup>

Although it is still too early to assess the impact of the above decisions on the behavior of MNOCs and the Nigerian State in regards to the protection of the environment, it can be inferred from the increase of judicial activism that a new dawn of environmental and intergenerational justice and equity has arrived in the Niger Delta. This is highly necessary to protect the environment, especially against the backdrop of agitations by the Niger Delta people for environmental justice.<sup>114</sup> The implication is that the injustice, which has continued unabated since the discovery and production of crude oil in the Niger Delta, is just now beginning to receive the desired attention at both domestic and international levels. Indeed, similar judicial attention in other jurisdictions has shaped the behavior of MNOCs, resulting in more respect for human rights, sustainable development, and intergenerational equity.<sup>115</sup> Thus, in terms of environmental justice and intergenerational equity, judicial decisions that compensate victims directly for injuries suffered and make funds available for environmental remediation indirectly touch the lives of future generations while providing justice for those still living. The awards of damages also effectively perform the same function as regulations by deterring not only the present polluter but also other would-be polluters.

### III

#### LEGAL MEASURES TO PREVENT POLLUTION IN THE NIGER DELTA AND ENFORCEMENT MECHANISMS

Despite the deplorable state of the Niger Delta environment arising from activities of MNOCs, the Nigerian government has adopted several legislative measures to prevent the despoliation of the

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<sup>113</sup> *Bodo Community*, *supra* note 111.

<sup>114</sup> See Cyril I. Obi, *Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria's Oil-Rich Niger Delta*, 30 CANADIAN J. OF DEV. STUD. 219, 227–33 (2010) (discussing the agitations of the Niger Delta people for resource control, remediation of polluted sites and land reforms, which have often turned violent in the form of militancy and terrorism); see also Augustine Ikelegbe, *Beyond the Threshold of Civil Struggle: Youth Militancy and the Militia-ization of the Resource Conflicts in the Niger Delta Region of Nigeria*, 27 AFRICAN STUDY MONOGRAPHS 87, 104–19 (2006), [https://repository.kulib.kyoto-u.ac.jp/dspace/bitstream/2433/68251/1/ASM\\_27\\_87.pdf](https://repository.kulib.kyoto-u.ac.jp/dspace/bitstream/2433/68251/1/ASM_27_87.pdf).

<sup>115</sup> See Jędrzej George Frynas, *Social and Environmental Litigation Against Transnational Firms in Africa*, 42 J. MOD. AFRICAN STUD. 363, 366 (2004); see also Ukala, *supra* note 53, at 112–13; Anderson, *supra* note 105, at 403–06.

environment due to oil production.<sup>116</sup> These measures range from guidelines and standards for environmental sanity in the oil industry to prescription of penalties for violation of these standards. Other remedies are derived from civil common law principles that award damages for abuse of environmental rights.<sup>117</sup>

### ***A. Guidelines, Standards, and Regulations***

The petroleum industry is a complex combination of interdependent operations, which come with different dangers for pollution arising from leakages, spillages, and discharges of gaseous, liquid, and solid waste materials.<sup>118</sup> Environmental guidelines in the industry, therefore, cover various activities, including exploration, production, terminal operations, hydrocarbon processing plants, oil and gas transportation, and marketing.<sup>119</sup> The Department of Petroleum Resources (DPR) has the authority in Nigeria to regulate and enforce environmental laws and standards in the petroleum industry.<sup>120</sup> This explains why the DPR's Environmental Guidelines and Standards for the Petroleum Industry (EGASPIN) is the most extensive quasi-legal guide for the regulation and control of

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<sup>116</sup> See Aniefiok E. Ite et al., *Petroleum Industry in Nigeria: Environmental Issues, National Environmental Legislation and Implementation of International Environmental Law*, 4 AM. J. ENVTL. PROTECTION 21, 25–26 (2016).

<sup>117</sup> See INT'L COMM'N OF JURISTS, ACCESS TO JUSTICE: HUMAN RIGHTS ABUSES INVOLVING CORPORATIONS NIGERIA 24–29 (2012), <https://www.icj.org/wp-content/uploads/2012/06/Nigeria-rights-abuses-corporation-thematic-report-2012.pdf>.

<sup>118</sup> Dara O'Rourke & Sarah Connolly, *Just Oil? The Distribution of Environmental and Social Impacts of Oil Production and Consumption*, 28 ANN. REV. ENV'T & RESOURCES 587, 593–98 (2003), <http://nature.berkeley.edu/orourke/PDF/JustOil-final.pdf>; see also AMNESTY INT'L, *Petroleum, Pollution and Poverty in the Niger Delta* 14–20, AI Index AFR 44/017/2009, [https://www.es.amnesty.org/uploads/media/Vertidos\\_de\\_petroleo\\_de\\_la\\_empresa\\_Shell\\_en\\_el\\_Delta\\_del\\_Niger.pdf](https://www.es.amnesty.org/uploads/media/Vertidos_de_petroleo_de_la_empresa_Shell_en_el_Delta_del_Niger.pdf) [hereinafter AMNESTY INT'L 2009].

<sup>119</sup> See generally NESREA Act (2007) (including guidelines and regulations for effluent limitation, environmental protection (pollution abatement in industries and facilities producing waste), and solid and hazardous waste management under §§ 8 and 27); see also Adebola Ogunba, *An Appraisal of the Evolution of Environmental Legislation in Nigeria*, 40 VT. L. REV. 673 (2016); Anwuli Irene Ofuani, *Environmental Regulation of Offshore (E&P) Waste Management in Nigeria: How Effective?* 7 LAW, ENV'T & DEV. J. 79 (2011).

<sup>120</sup> See Petroleum (Drilling and Production) Regulations (1969) L.N. (69) Reg. 25 and 26 (Nigeria); Petroleum Regulations (1974) PU(A) 432, Reg. 43(3) (Nigeria); Oil Pipeline Ordinance (1956) Cap. (45), Reg. 17(3) (Nigeria) (now Oil Pipelines Act).

exploration, production, and processing activities in the oil industry in Nigeria.<sup>121</sup> The guidelines establish an effective monitoring and control program for any discharge arising from oil exploration and development and require compliance with sound and efficient environmental management by all operators.<sup>122</sup> License holders in the industry are required to adopt precautions and take practicable steps to prevent pollution, cause as little damage as possible to the surface of relevant areas of operation, and avoid interference with works of public utility.<sup>123</sup> EGASPIN requires cleanup operations of oil spills to commence within twenty-four hours of the occurrence.<sup>124</sup> However, the guidelines suffer from certain legal constraints and a lack of adequate implementation.<sup>125</sup> For instance, it is not clear if the guidelines are mere directives or are legally enforceable because the DPR lacks capacity to adopt subsidiary legislation under the Petroleum Act.<sup>126</sup> The DPR's power to monitor, control, and enforce environmental standards in the petroleum industry is also highly suspect because the DPR is an integral part of the petroleum ministry, which is tasked with the overall function of developing Nigeria's energy resources, including production activities.<sup>127</sup> Such authority to act as a watchdog may therefore be meaningless as it exposes the petroleum ministry to self-regulation and conflict of interest, which would affect implementation of laws and standards.<sup>128</sup>

Other regulations on pollution control in the oil industry are passed as subsidiary legislations under the Petroleum Act of 1969 and other legislation.<sup>129</sup> The Petroleum Act empowers the Minister of Petroleum

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<sup>121</sup> DEPT. OF PETROLEUM RESOURCES LAGOS, ENVIRONMENTAL GUIDELINES AND STANDARDS FOR THE PETROLEUM INDUSTRY IN NIGERIA (EGASPIN) (1991), <http://www.ngfcp.gov.ng/media/1066/dprs-egaspin-2002-revised-edition.pdf> (last visited Mar. 27, 2019) [hereinafter EGASPIN]; see also Ofuani, *supra* note 119, at 81.

<sup>122</sup> See Okhumode H. Yakubu, *Addressing Environmental Health Problems in Ogoniland Through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies*, 4 ENV'TS 28, 37 (2017).

<sup>123</sup> EGASPIN, *supra* note 121, ¶¶ 5.6.9.1, 3.4.4.

<sup>124</sup> See Konne, *supra* note 75, at 193.

<sup>125</sup> See Ayoade Morakinyo Adedayo, *Environmental Risk and Decommissioning of Offshore Oil Platforms in Nigeria*, 1 NIALS J. ENVTL. L. 1, 24 (2011).

<sup>126</sup> See Chris Cragg et al., *Environmental Regulation Pollution Control in the Global Oil Industry in Relation to Reform in Nigeria*, STAKEHOLDER DEMOCRACY NETWORK 1, 56, [http://www.stakeholderdemocracy.org/stockholm/wp-content/uploads/2015/04/SDN\\_ENVIRONMENTAL-REPORT\\_PDF.pdf](http://www.stakeholderdemocracy.org/stockholm/wp-content/uploads/2015/04/SDN_ENVIRONMENTAL-REPORT_PDF.pdf) (last visited Mar. 15, 2019).

<sup>127</sup> See AMNESTY INT'L 2009, *supra* note 118, at 41.

<sup>128</sup> *Id.* at 42.

<sup>129</sup> Petroleum Act (1990) Cap. (P10), § 9 (Nigeria).

Resources to make regulations that prevent the pollution of watercourses and the atmosphere arising from activities in the petroleum industry.<sup>130</sup> Some of the specific regulations include the Petroleum (Drilling and Production) Regulation 1969,<sup>131</sup> the Petroleum Regulations 1967,<sup>132</sup> the Petroleum (Drilling and Refining) Regulations of 1973,<sup>133</sup> the Petroleum Refining Regulations 1974,<sup>134</sup> the Mineral Oils (Safety) Regulations 1963,<sup>135</sup> the Crude Oil (Transportation and Shipment) Regulation 1984,<sup>136</sup> the Oil in Navigable Waters Regulations 1968,<sup>137</sup> and the Oil and Gas Pipeline Regulations 1995.<sup>138</sup>

The head of the petroleum inspectorate has the power to issue directives on pollution matters and revoke licenses from operators in the oil industry if they fail to comply.<sup>139</sup> The directives are subject to work obligations relating to the prevention of oil pollution, safety standards, and confinement of petroleum in the prescribed receptacles or containers.<sup>140</sup> The Petroleum (Drilling and Production) Regulations also oblige operators of oil licenses to prevent the crude oil pollution of all waterways in Nigeria and the territorial waters and ensure that their activities “cause as little damage as possible” to surface rights.<sup>141</sup> Operators are liable for the cleanup of the environment and must pay compensation to deserving parties where it is established that pollution was caused by their negligence.<sup>142</sup> Regulation 15 of the Mineral Oils (Safety) Regulations 1962 also requires that all installations meet the American Society of Mechanical Engineers’

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<sup>130</sup> *Id.* § 9(1)(b)(iii).

<sup>131</sup> L.N. 69 of 1969 (Nigeria).

<sup>132</sup> L.N. 71 of 1967 (Nigeria).

<sup>133</sup> L.N. 26 of 1973 (Nigeria).

<sup>134</sup> L.N. 45 of 1974 (Nigeria).

<sup>135</sup> L.N. 45 of 1963 (Nigeria).

<sup>136</sup> S.I. 44 of 1984 (Nigeria).

<sup>137</sup> L.N. 101 of 1968 (Nigeria).

<sup>138</sup> S.I. 14 of 1995 (Nigeria).

<sup>139</sup> *See* Petroleum Act § 9.

<sup>140</sup> *Id.* §§ 94–95.

<sup>141</sup> L.N. 69 of 1969 §§ 25, 37(e).

<sup>142</sup> Abimbola O. Salu, *Securing Environmental Protection in the Nigerian Oil Industry*, 3 MOD. PRAC. J. FIN. & INV. L. 348, 355 (1999); *see also* Petroleum Act § 9.

Code and comply with the appropriate current American Institute of Petroleum Safety Codes.<sup>143</sup>

### ***B. Preventing Oil Pollution Under Statutory Laws in Nigeria***

A number of laws stipulate stringent measures to prevent pollution in the oil industry in Nigeria. For instance, the Oil in Navigable Waters Act, which implements in Nigeria the International Convention for the Prevention of Pollution of the Sea by Oil 1962, provides for the prevention and control of oil pollution in navigable waters of Nigeria.<sup>144</sup> The Act prohibits the discharge of certain oils into sea areas.<sup>145</sup> This includes all sea areas within fifty miles from and outside the waters of Nigeria.<sup>146</sup> Other designated areas are those specifically listed under the schedule and areas outside the territorial waters of Nigeria.<sup>147</sup>

Persons affected by oil pollution may be awarded damages under the Oil in Navigable Waters Act.<sup>148</sup> However, there are certain special defenses under the Act for instances where oil was discharged to secure the safety of any vessel or cargo or to save a life.<sup>149</sup> Defenses also are available if oil escaped because of damage to a vessel or leak.<sup>150</sup> The Minister has the power to make regulations that require Nigerian ships to be fitted with equipment to prevent or reduce discharges of oil into the sea.<sup>151</sup> Surveyors are also given power to carry out tests to ascertain whether such fittings comply with the regulations.<sup>152</sup> The Minister may make regulations that require all masters of Nigerian ships to keep records of matters relating to oil and require that facilities be placed in harbors for disposal of oil residues.<sup>153</sup>

Under the Associated Gas Re-Injection Act, every company producing oil and gas in Nigeria is compelled to submit preliminary programs and other detailed plans for implementation of gas

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<sup>143</sup> Steiner, *supra* note 50, at 16.

<sup>144</sup> Oil in Navigable Waters Act (1968) Cap. (06), §§ 10, 11 (Nigeria).

<sup>145</sup> See Oil in Navigable Waters Act § 1.

<sup>146</sup> *Id.* § 2(2).

<sup>147</sup> *Id.* § 2(3).

<sup>148</sup> *Id.* § 13(2).

<sup>149</sup> *Id.* § 4(1).

<sup>150</sup> *Id.* § 4(2)(a)-(b).

<sup>151</sup> *Id.* § 5(1).

<sup>152</sup> *Id.* § 5(4).

<sup>153</sup> *Id.* § 7(1).



reinjection.<sup>154</sup> The Act was enacted to provide the framework to end gas flaring in the oil industry.<sup>155</sup> Deadlines for cessation of gas flaring were fixed at different times in the Act and its Regulations<sup>156</sup> but were never met by oil companies who preferred to pay penalties for breach.<sup>157</sup> Section 3 of the Act makes it an offense to flare gas without the consent of the Minister of Petroleum who may issue a certificate if satisfied that it is not feasible to use or reinject the associated gas.<sup>158</sup> The Act does not, however, address the issue of the environmental and human impact of gas flaring or the issue of compensation for damage caused by the flaring. Apart from the fact that the Act did not specify how the fine or penalty for gas flaring would be spent (whether to remediate the environment or not), the nature and purpose of the fine itself is suspect as it is grossly inadequate to deter oil companies from flaring gas and damning the environmental consequences.<sup>159</sup>

The Oil Pipelines Act, on the other hand, contains provisions that impose a duty on licensees and operators of oil pipelines in Nigeria to prevent damage to surface rights (including “buildings, crops or profitable trees”) arising from the exercise of the rights granted to them under the Act.<sup>160</sup> Nigeria has an impressive network of oil pipelines ranging over seven thousand kilometers, which are mostly

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<sup>154</sup> Associated Gas Re-injection Act (2004) Cap. (A25), § 2(1) (Nigeria).

<sup>155</sup> A.O.Y. Raji & T.S. Abejide, *Compliance with Oil & Gas Regulations in the Niger Delta Region, Nigeria c. 1960s-2000: An Assessment*, 3 ARABIAN J. BUS. & MGMT. REV. 35, 39 (2014).

<sup>156</sup> Associated Gas Re-injection Act § 2(1). *See generally* KENNETH OMEJE, HIGH STAKES AND STAKEHOLDERS: OIL CONFLICT AND SECURITY IN NIGERIA 45 (2006).

<sup>157</sup> *See* Nii Nelson, *National Energy Policy and Gas Flaring in Nigeria*, 5 J. ENV'T & EARTH SCI. 58, 59 (2015). The initial 1984 deadline was extended to 1990 and then to 1998, 2007, 2008, 2010, and 2012 respectively. Fees for non-compliance have also increased several times over the years. Fees began at \$0.003 (0.3 cents) per million cubic feet of gas flared, which increased to \$0.07 per million cubic feet in 1988, and to US \$3.50 per thousand cubic feet in January 2008. These fees have consistently failed to deter oil companies from flaring gas, since they can easily afford to pay such fines. *See Gas Flaring in Nigeria: An Overview*, JUSTICE IN NIGERIA NOW (Apr. 2010), <http://justiceinnigeria.org/jinn/wp-content/uploads/2010/04/JINN-2010-Gas-Flaring-an-overview.pdf>.

<sup>158</sup> Associated Gas Re-injection Act § 3(2).

<sup>159</sup> *See* F.O. Ayodele-Akaakar, *Appraising the Oil & Gas Laws: A Search for Enduring Legislation for the Niger Delta Region*, 3 J. SUSTAINABLE DEV. AFR. 1, 23 (2001).

<sup>160</sup> Oil Pipelines Act (2004) Cap. (O7), §§ 6(3), 20(2)(a)–(e) (Nigeria).

domiciled in the Niger Delta.<sup>161</sup> These pipelines of crude oil and its derivatives have remained a source of oil pollution due to spillages caused by equipment failure, operation mishaps, human error, and other deliberate acts of sabotage.<sup>162</sup> The Act obliges holders of pipeline licenses to pay compensation to any person whose land or interest in land is injuriously affected by the exercise of the right conferred by the license, except where the damage arises from sabotage or the malicious acts of third parties.<sup>163</sup> The amount of compensation is expected to be agreed upon between the licensee and landholders.<sup>164</sup> However, the Act provides, in § 20, the grounds for award of compensation or damages for claims made against licensees under the Act.<sup>165</sup> The quantum of damages is to be assessed based on the market value of the interest injuriously affected (whether crops, buildings, economic trees, or fishponds), which includes damages for disturbances and loss of value of the land.<sup>166</sup> For instance, in *Phnye v. Shell Petroleum Development Co.*, the court awarded damages under § 20(2)(d) and (e) of the Oil Pipelines Act for damage caused to a fish pond, traps, and other palms and trees.<sup>167</sup> Similarly, in *Shell Petroleum Development Co. v. Tiebo VII*, the respondents sued the appellant for damages under the Act that arose from oil spillage from pipelines operated by the appellant under different heads, including special and general damages (damage to fishponds, nets, palm trees, and drinking water, disturbance to juju shrines, and loss of fishing rights).<sup>168</sup> The Supreme Court dismissed the appeal, upholding the decisions of the lower courts and granted all of the respondents' claims under §§ 11 and 20 of the Oil Pipelines Act.<sup>169</sup>

Apart from the above legislation, which deals mainly with civil liability of defaulters under the respective Acts, certain legislations particularly dwells on the criminal responsibility of environmental

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<sup>161</sup> Steiner, *supra* note 50, at 11.

<sup>162</sup> Amalachukwu Okafor & Ayobami Olaniyan, *Legal and Institutional Framework for Promoting Oil Pipeline Security in Nigeria*, 8 J. SUST. DEV. L. & POL'Y 210, 214–18 (2017); *see generally* Takon, *supra* note 65, at 1883–84.

<sup>163</sup> Oil Pipelines Act § 11(5)(a)–(c).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* § 20(2).

<sup>166</sup> *See id.* § 20(3).

<sup>167</sup> *Phnye v. Shell Petroleum Dev. Co.* (Unreported 2 August 2006, FHC/PH/376/97), 25–26.

<sup>168</sup> *Shell Petroleum Dev. Co. v. Tiebo VII* [2005] 9 NWLR (Pt. 931) 439, 442 (Nigeria).

<sup>169</sup> *Id.* at 485.

polluters in Nigeria. The Oil in Navigable Waters Act is one such legislation. It establishes several anti-pollution offenses.<sup>170</sup> The Act makes it an offense for a Nigerian ship to discharge oil into prohibited sea areas created under the International Convention for the Prevention of Pollution of the Sea by Oil of 1954, as amended in 1971.<sup>171</sup> The section affects only Nigerian ships traversing international seas.<sup>172</sup> Section 3 of the Act creates an offense in circumstances where the owner or master of a ship, the occupier of land adjoining Nigerian waters, or the operator of an apparatus for transferring oil discharges oil into Nigerian waters from his vessel, a place on land, or his apparatus respectively.<sup>173</sup> Nigerian waters include “the whole of the sea within the seaward limits of Nigerian territorial waters” and all other navigable inland waters.<sup>174</sup> The obligation covers foreign ships and their alien masters who, under the Territorial Waters Act, may be arrested and prosecuted under any law.<sup>175</sup> It is also an offense under the Oil in Navigable Waters Act to fail to install pollution prevention equipment on ships.<sup>176</sup> Failure to keep records of oil transfers is criminalized under §§ 7(1) and 7(5) of the Act, as is failure of harbor authorities to provide oil reception facilities.<sup>177</sup> The latter is the only offense specifically directed at a government agency, which elevates the need to provide oil receptacles in the harbor to a high-risk factor for purposes of pollution control and management at the ports.<sup>178</sup> Failure to report the presence of oil in harbor waters is also an offense in the Oil in Navigable Waters Act.<sup>179</sup>

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<sup>170</sup> *E.g.*, Oil in Navigable Waters Act §§ 1, 3, 5–8, 10.

<sup>171</sup> *Id.* § 1(1). International Convention for the Prevention of Pollution of the Sea by Oil art. 3, May 12, 1954, 327 U.N.T.S. 4714; *see also* Ronald B. Mitchell, *Regime Design Matters: International Oil Pollution and Treaty Compliance*, 48 INT’L ORG. 425, 431–32 (1994).

<sup>172</sup> *See* Oil in Navigable Waters Act § 1(2).

<sup>173</sup> *Id.* § 3(1).

<sup>174</sup> *Id.* § 3(2)(a)–(b).

<sup>175</sup> Territorial Waters Act, (1961) Cap. (428), §§ 2–3 (Nigeria).

<sup>176</sup> Oil in Navigable Waters Act § 5(5).

<sup>177</sup> *Id.* §§ 7(1), 7(5), 8(8).

<sup>178</sup> *See generally* D. E. Onwuegbuchunam et al., *An Analysis of Ship-Source Marine Pollution in Nigeria Seaports*, 5 J. MARINE SCI. & ENGINEERING 39, 40 (2017).

<sup>179</sup> Oil in Navigable Waters Act § 10(1).

A person found guilty of the offense of discharging oil into prohibited seas of Nigerian territorial waters or failing to equip a ship with approved pollution prevention or reduction equipment is liable for a fine not exceeding two thousand Nigerian Naira.<sup>180</sup> On the other hand, a person who fails to keep record of spills or escape of oil caused by a desire to save life, vessel, or cargo, or resulting from ship damage or leakage, is penalized with a fine not exceeding four hundred Nigerian Naira.<sup>181</sup> Note that these fines are totally out of touch with reality, given the cost of cleaning up oil spills and the consequent damage to the ecosystem.<sup>182</sup> Section 13 of the Oil in Navigable Waters Act, which instructs that fines may be directed to be paid to any person who has incurred or is likely to incur expenses in any pollution-cleaning exercise resulting from spillage by offenders under the Act, is commendable.<sup>183</sup> However, against the background of the quantum of these fines, this provision is grossly inadequate.<sup>184</sup>

Under the Harmful Wastes (Special Criminal Provisions, etc.) Act, certain activities in the oil industry that may result in pollution are also criminalized.<sup>185</sup> These activities include carrying, dumping, or depositing; or causing to be carried, deposited, or dumped; or being in possession of any harmful waste.<sup>186</sup> Penalty for contravention of the offense is life imprisonment, forfeiture of vessel, and forfeiture of the land on which harmful waste is dumped respectively.<sup>187</sup> Oil pollutants are included in the definition of “harmful wastes” under the Act because of their hazardous, harmful, and toxic properties.<sup>188</sup> However, the application of the provisions of the Act to pollution arising from the oil industry is limited because the Act is evoked only where there

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<sup>180</sup> *Id.* § 6.

<sup>181</sup> *Id.* § 10(2).

<sup>182</sup> See Michael I. Igbokwe, *Assessment of Existing National Legislation and Regulations Related to Pollution Prevention* 14–15, <http://www.mikeigbokwe.com/new1/Assessment%20of%20existing.pdf> (last visited Mar. 15, 2019).

<sup>183</sup> Oil in Navigable Waters Act § 13(2).

<sup>184</sup> See Konne, *supra* note 75, at 196.

<sup>185</sup> See Harmful Wastes (Special Criminal Provisions, etc.) Act, (1989) Cap. (C49), § 15 (Nigeria) (defining “harmful waste” as “any injurious, poisonous, toxic or noxious substance . . .”). For further discussion of the relationship between Nigeria’s petroleum industry and generation of harmful waste substances, see I. O. Asia et al., *Characterization and Treatment of Sludge from the Petroleum Industry*, 5 AFR. J. BIOTECHNOLOGY 461, 462 (2006). See also Edward-Ekpu Douglas Uwagbale, *Hazardous Waste Management and Challenges in Nigeria*, 1 PUB. HEALTH INT’L 1, 2 (2016).

<sup>186</sup> Harmful Wastes (Special Criminal Provisions, etc.) Act § 1(2)(a)–(b).

<sup>187</sup> *Id.* § 6.

<sup>188</sup> See Stewart, *supra* note 96, at 84.

has been “transit” or “transportation” of the said hazardous waste (the environmental pollutants).<sup>189</sup> Thus, any action dealing with pollution during oil exploration activities (spillage, for instance) cannot be punished by the Act. This reduces the effectiveness of the Act to the extent that one of the major causes of environmental degradation in the Niger Delta region is oil spillage.<sup>190</sup>

Criminal liability for pollution in the oil industry may also arise from the criminal code applicable in the northern regions of Nigeria.<sup>191</sup> The Code contains several offenses that may be used to punish environmental polluters, such as the offense of “common nuisance” under § 234 of the Code,<sup>192</sup> “fouling” (corruption) of waters (“springs, streams, wells, tanks, or reservoirs”),<sup>193</sup> and violation of the atmosphere with “noxious” substances under § 247 of the Code.<sup>194</sup> This latter provision is particularly appropriate to punish those who cause gas flaring, which occurs during oil drilling.

### ***C. Liability for Oil Pollution Under the Common Law***

Liability for oil pollution may also arise under the common law in Nigeria, assuming the polluter is not found liable under the provisions of the above legislation. Several common law principles are relevant in determining liability of oil companies and other persons for pollution in the petroleum industry in Nigeria, including the tortious principles enunciated in the case of *Ryland v. Fletcher*, such as negligence and nuisance.<sup>195</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> See S.O. Adelana et al., *Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas*, 2 AM. J. SCI. & INDUS. RES. 834, 835 (2011).

<sup>191</sup> See, e.g., Criminal Code Act (2004) Cap. (C38), § 234 (Nigeria).

<sup>192</sup> *Id.*; see generally Amaka G. Eze, *Relevance of the Tort of Nuisance in Redressing Damage from Oil and Gas Pollution in Nigeria*, 6 NNAMDI AZIKIWE UNIV. J. INT’L L. & JURIS. 147, 152 (2015); Robert E. Lutz & Stephen E. McCaffrey, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOLOGY L.Q. 561, 577–79 (1971).

<sup>193</sup> Criminal Code Act § 245.

<sup>194</sup> *Id.* § 247(a)–(b); see also S.D. Kamga and O.O. Ajoku, *Reflections on How to Address the Violations of Human Rights by Extractive Industries in Africa: A Comparative Analysis of Nigeria and South Africa*, 17 POTCHEFSTROOM L.J. 452, 491 (2014).

<sup>195</sup> *Rylands v. Fletcher* [1868] UKHL 1, 3 LR (HL) 330 (appeal taken from Eng.).

Under the tort of negligence, the operation of the neighbor's principle imposes a duty of care on every owner of land or other property to ensure that no foreseeable damage occurs against his neighbor in the use of such land or property.<sup>196</sup> This is the same principle enunciated in *Donoghue v. Stevenson*, to take "reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."<sup>197</sup> Any person who fails to take proper (reasonable) care in performing an activity or omitting to do so and as a result causes injury to his neighbor is liable in negligence.<sup>198</sup> This principle is widely applied in cases arising from the activities of oil companies and other operators in the oil industry in Nigeria.<sup>199</sup> Thus, in the case of *Ifeagwu v. Tabansi Motors Ltd.*, the court found the defendants liable in negligence when petrol spilled and burst into flames from a tanker driven by the first defendant and caused damage to the plaintiff by way of burns.<sup>200</sup> Similarly, in *Shell Petroleum Development Co. Nigeria Ltd. v. Chief Otoko*, the court held that if a man brings "dangerous things" upon his premises, which are likely to escape and do damage, he should be held liable in negligence for any damage resulting from such escape.<sup>201</sup> On the other hand, in *Shell Petroleum Development Co. v. Tiebo VII*, the plaintiff claimed special and general damages for crude oil spills on their lands, creeks, lakes, and shrines arising from the negligence of the defendant's oil mining activities.<sup>202</sup> Even though the court of first instance and Court of Appeal found in the plaintiffs favor for negligence and granted their prayers, the Supreme Court found no

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<sup>196</sup> See *Caparo Indus. v. Dickman* [1990] UKHL 2, [1990] 2 AC 605 (appeal taken from Eng.) (discussing the criteria for assessing foreseeability, and when a duty of care exists in tort cases).

<sup>197</sup> *Donoghue v. Stevenson* [1932] AC 562 (HL) 564 (appeal taken from Scot.); see also *Smith v. Littlewoods Org. Ltd.* [1987] UKHL 18, [1987] AC 241 (discussing special circumstances invoking a duty of care through an assumption of proximity between persons).

<sup>198</sup> *Odinaka v. Moghalu* [1992] 4 NWLR (Pt. 233) 1, 15 (Nigeria).

<sup>199</sup> See generally Amaka G. Eze, *The Limits of the Tort of Negligence in Redressing Oil Spill Damage in Nigeria*, 5 NNAMDI AZIKIWE U. J. INT'L L. & JURIS. 50, 58-60 (2014).

<sup>200</sup> *Ifeagwu v. Tabansi Motors Ltd.* [1972] 2 ECSR 790, 795 (Nigeria).

<sup>201</sup> *Shell Petroleum Dev. Co. Nigeria Ltd. v. Chief Otoko* [1990] 6 NWLR (Pt. 159) 693, 721. (Nigeria).

<sup>202</sup> *Shell Petroleum Dev. Co. v. Tiebo VII* [2005] 9 NWLR (Pt. 931) 439, 452 (Nigeria).

evidence to support the award of special damages and, consequently, the appeal succeeded only on this technical point.<sup>203</sup>

Pollution arising from certain activities in the oil industry may equally constitute the tort of nuisance in Nigeria. A person who employs his premises, or anything on it, in such a manner as to cause inconvenience to his neighbor or the public, is liable to pay damages if he causes injury to another.<sup>204</sup> Certain activities in the oil industry, like blasting of rocks, movement of earth and heavy equipment, drilling, and gas flaring naturally pollute the environment with noise, smoke, gas, or dirt, and may give rise to a cause of action in public or private nuisance.<sup>205</sup> In *Airobuyi v. Nigerian Pipeline Ltd.*, the defendant engaged in sand blasting and a pipe coating operation about three hundred feet from the plaintiff's house.<sup>206</sup> The operation caused dust and smoke to escape, which damaged the plaintiff's house and endangered his health.<sup>207</sup> Upon complaint by the plaintiff, the defendant justified its actions as providing employment but promised to cease the activity in three months; the plaintiff sued in nuisance.<sup>208</sup> The court found the defendant liable in private nuisance.<sup>209</sup>

Similar circumstances involving use of land for mining crude oil and resulting in damage from the escape of crude oil, may invoke the rule in the case of *Ryland v. Fletcher*.<sup>210</sup> Under this rule, a person is liable if he brings anything of substance on his land that he knows to be mischievous to cause damage if it escapes onto his neighbor's land.<sup>211</sup> The substance must be accumulated on the defendant's land

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<sup>203</sup> *Id.* at 481.

<sup>204</sup> Eze, *supra* note 192, at 153.

<sup>205</sup> See T.C. Eze, *Redress for Pollution Damage Under the Common Law in Nigeria: An Appraisal*, 3 J.L. & GLOBAL POL'Y 1, 2–3 (2018).

<sup>206</sup> *Airobuyi v. Nigerian Pipeline Ltd.* [1976] 6 ECLSR 53, 54 (Nigeria).

<sup>207</sup> *Id.* at 55.

<sup>208</sup> *Id.*

<sup>209</sup> See *Oladehin v. Continental Textile Mills Ltd.* [1978] All NLR 31, 32 (Nigeria); *Ejowhomu v. Edok-Eter Mandilas Ltd.* [1986] 5 NWLR 1, 106–07 (Nigeria); *Shell Petroleum Dev. Co. v. Adamkue* [2003] 11 NWLR (Pt. 832) 533, 541, 597–98 (Nigeria).

<sup>210</sup> *Rylands v. Fletcher* [1868] UKHL 1, 3 LR (HL) 330 (appeal taken from Eng.) (holding that if the occupier of a piece of land brings and keeps something on it, which is likely to cause damage if it escapes, he is bound at his own peril to prevent that thing's escape; if it does escape, he is liable for all the direct consequences of the escape, even if he has not been guilty of any negligence).

<sup>211</sup> See *Shell Petroleum Dev. Co. v. Anaro* [2015] 12 NWLR (Pt. 1472) 122 (Nigeria).

either directly, by taking it there, or by the process of springing it out of the ground as long as it is not a usual or natural use of land.<sup>212</sup> Thus, in the case of *Umudge v. Shell-BP*, the court held that the defendant was liable for the escape of crude oil waste it had accumulated on its land.<sup>213</sup> In *Shell Petroleum Development Co. Nigeria Ltd. v. Chief Otoko*, an oil spillage from the defendant's manifold caused oil to enter and pollute the plaintiff's premises.<sup>214</sup> The High Court found for the plaintiff, but in considering the defense of a malicious act of a third party under the principle, the Supreme Court entered a contrary judgment.<sup>215</sup> The Court made it clear that there is no need to prove or even consider negligence under the rule of *Ryland v. Fletcher* once it is determined that a dangerous thing, the presence of which constitutes a nonnatural use of land, escaped out of the defendant's land onto another's.<sup>216</sup> The advantage of the rule is that it dispenses with the need to prove either negligence or special damages suffered by the plaintiff.

The utility of this rule to sustain claims in Nigeria is limited because most crude oil spillage and pollution in Nigeria results from acts of sabotage and vandalism rather than mismanagement by operators.<sup>217</sup> Thus, in the case of *Atubin et al. v. Shell Petroleum Development Co. Nigeria Ltd.*, Judge Ovie-Whiskey dismissed the plaintiff's claim for eight million Nigerian Naira when he found that the spill resulted from a hole of about one-eighth-to-one-sixth of an inch in diameter, which was expertly drilled into the pipeline by an unknown mischievous person, over whom the defendant had no control.<sup>218</sup> Notwithstanding, the preliminary holdings of the U.K. court in *Bodo* rejected an absolute application of the sabotage theory in refusing liability against MNOCs in Nigeria.<sup>219</sup> The court held that sabotage of oil pipelines or other oil facilities will not avail oil

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<sup>212</sup> *Umudge v. Shell Petroleum Dev. Co.* [1975] 9-11 SC 95, 115 (Nigeria); see also R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 325-31 (16th ed. 1973).

<sup>213</sup> *Umudge*, at 174.

<sup>214</sup> *Shell Petroleum Dev. Co. v. Chief Otoko* [1990] 6 NWLR (Pt. 159) 693, 695, 718-25.

<sup>215</sup> *Id.* at 735.

<sup>216</sup> *Id.* at 731.

<sup>217</sup> See Steiner, *supra* note 50, at 47-50.

<sup>218</sup> *Atunbin v. Shell Petroleum Dev. Co.* [1974 Unreported] Suit No. UHC/43/73 decided on 21/11/74, at 22 (Nigeria).

<sup>219</sup> *Bodo Cmty. v. Shell Petroleum Dev. Co.* [2014] EWHC 1973 (TCC).



companies in avoiding liability if they did not take reasonable care to foresee and prevent sabotage by third parties.<sup>220</sup>

### CONCLUSION

The problem of oil pollution in the Niger Delta has become an issue of national and international concern, especially because of the environmental consequences it has caused to the inhabitants of the region and their children yet to be born. We noted in this Article that the enabling legal framework exists to stem the menace of pollution in the Nigerian petroleum sector; however, the problem of enforcement remains the major hindrance to achieve a healthier environment in the Niger Delta. The Nigerian government is the main culprit in the continuous state of affairs that allows a free reign of the dominance of MNOCs.<sup>221</sup> The government lacks the political will to demand compliance with the available laws on environmental probity and control from MNOCs; perhaps because, on one hand, the commodity is the major driver of the Nigerian economy and, on the other hand, Nigeria lacks the technical knowhow to exploit the commodity, leaving it with less bargaining power against MNOCs.<sup>222</sup> The issue of intergenerational rights—in terms of bequeathing a sustainable environment and robust resource base to future generations in the Niger Delta—has been driven far behind the need to sustain a viable economy in Nigeria. This is characterized by the continuous flare of gas; the refusal of oil companies to rehabilitate, repair, and clean numerous polluted sites in the Niger Delta; and the unfortunate dissipation of the common wealth of Nigeria by a small cabal of politicians through monumental corruption.<sup>223</sup>

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<sup>220</sup> *Id.*

<sup>221</sup> Ukala, *supra* note 53, at 114 (describing Nigeria's adoption of a "rule by corporation" approach rather than a "rule of law" approach).

<sup>222</sup> See Adati Ayuba Kadafa et al., *Oil Spillage and Pollution in Nigeria: Organizational Management and Institutional Framework*, 2 J. ENV'T & EARTH SCI. 22, 23 (2012); see also Z. Adangor, *Petroleum Industry Bill 2012 and the Principle of Vicarious Liability of Oil Producing States and Local Government Councils for Sabotage of Petroleum Facilities: Resurrecting an Old Colonial Policy in the Niger Delta Region of Nigeria*, 8 J.L. & CONFLICT RESOL. 1, 3 (2016).

<sup>223</sup> See Ebiede, *supra* note 15, at 143–44; see also Ajibade E. Jegede et al., *Local Elite and Corruption: Revisiting Marginalization of Niger-Delta*, 4 INT'L J. RES. SOC. SCI. & HUM. DEV. 64, 67 (2012).

Notwithstanding, there is a ray of hope for future generations in the Niger Delta owing to the intervention of the judiciary not only to protect the environment and compensate the people for environmental damage arising from the activities of MNOCs but also to develop a more equitable formula for distribution of oil wealth in the federal system of Nigeria.