UNIVERSITY OF Hull

Achieving Environmental Sustainability in Nigeria's Extractive Industry: How viable is a Human Rights Approach to Environmental Protection?

Being a Thesis submitted for the Degree of

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By

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ABSTRACT

The Nigerian extractive industry illustrates the tension between economic development on the one hand and environmental sustainability on the other. As of 2017, the Central Bank of Nigeria Annual Report indicates that oil revenue constituted 56.2% of federal funds compared with 43.8% from non-oil receipts. Despite this immense contribution to economic development, the activities of the Nigerian extractive industry entities have led to the non-maintenance of the environmental sink, drastically compromising its ability to absorb future waste emissions. The 2011 United Nations Environment Programme (UNEP) report states that remediation might take 25-30 years. This incessant environmental degradation and pollution has resulted in the loss of life, livelihood, destruction of flora and fauna, and is identified as one of the causes of the Niger Delta conflict.

This research investigates whether the approach of using human rights to protect the environment provides a viable mechanism to ensure environmental sustainability in the Nigerian extractive industry. HRAEP concept within the Nigerian context is defined as the Nigerian citizens' right to a clean, safe and secure, healthy environment. The study finds that the enforcement of this right might provide an adequate mechanism to maintain or restore the qualities of the abiotic components by preventing the emission of pollution or reducing the presence of polluting substances in the environmental media. Thus, this enforcement might influence the maintenance of the environmental sink by the Nigerian extractive industry entities, thereby, improving the sink's ability to absorb future waste emissions. Consequently, engineering an environmentally sustainable Nigerian extractive industry.

Keywords: *extractive industry, environmental protection, human rights, artisanal and small-scale mining, environmental sustainability, host community, sustainable development, petroleum, sustainability, solid minerals*.

DEDICATION

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LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
ACJHPR	African Court of Justice and Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AfCHPR	African Court on Human and Peoples' Rights
AfCHPR Practice Directions	African Court on Human and Peoples' Rights Practice Directions
AHREIs	African Union Human Rights Enforcement Institutions
ANHRIs	African National Human Rights Institutions
ASM	Artisanal and Small-scale Mining
ATCA	Aliens Torts Claim Act
AU	African Union
CBN	Central Bank of Nigeria
CCJ, ECOWAS Practice Directions	Community Court of Justice, ECOWAS Instructions to the Chief Registrar and Practice Directions
CCPR	Committee on Civil and Political Rights
CDC	Constitution Draft Committee
CEESP- IUCN	Commission on Environmental, Economic, and Social Policy – International Union for Conservation of Nature
CESCR	Committee on Economic, Social and Cultural Rights

CESR	Center for Economic and Social Rights
CIESIN	Columbia University Center for International Earth Science Information Network
CSOs	Civil Society Organisations
ECCJ	Economic Community of West African States Community Court of Justice
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
EHREI	Economic Community of West African States Human Rights Enforcement Institutions
EIA	Environmental Impact Assessment
EPI	Environmental Performance Index
ES	Environmental Sustainability
ESI	Environmental Sustainability Index
FAO	Food and Agriculture Organisation of the United Nations
FCT HC	High Court of the Federal Capital Territory
FEPA	Federal Environmental Protection Agency
FG	Federal Government
FHC	Federal High Court
FODPSP	Fundamental Objectives and Directives Principles of State Policy
GEF	Global Environment Facility
GLT	Global Leaders for Tomorrow Environment Task Force

HRA	Human Rights Approach
HRAEP	Human Rights Approach to Environmental Protection
ICCPR	International Covenant on Civil and Political Rights
ICECSR	International Covenant on Economic, Social and Cultural Rights
J	Judge
JCA	Justice of the Court of Appeal
JSC	Justice of the Supreme Court
LFN	Laws of the Federation of Nigeria
MDG	Millennium Development Goals
MSF	Médecins Sans Frontiers
NBA	Nigerian Bar Association
NEEI	Nigerian Energy Extractive Industry
NEIHCs	Nigerian Extractive Industry Host Communities
NESREA	National Environmental Standards and Regulation Enforcement Agency
NGN	Nigeria Naira
NGOs	Non-governmental Organisations
NHRC	Nigerian Human Rights Commission
NIALS	Nigerian Institute of Advanced Legal Studies
NJI	National Judicial Institute
NNEI	Nigerian Non-energy Extractive Industry
NNPC	Nigerian National Petroleum Corporation

NOA	National Orientation Agency
NOSDRA	National Oil Spill Detection and Response Agency
NULAI	Network of University Legal Aid Institutions
OAU	Organisation of African Unity
PAPSACJHR	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights
Protocol on the CCJ	Protocol A/P.l/7/91 on the Community Court of Justice
Protocol on the Statute of ACJHR	Protocol on the Statute of the African Court on Justice and Human Rights
Protocol to the AfCHPR	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
PTDF	Petroleum Technology Development Fund
RPACHPR	The Rules of Procedure of the African Commission on Human and Peoples' Rights
RPACHPR	Rules of Procedure of the African Commission on Human and Peoples' Rights
Rules of the AfCHPR	Rules of Court African Court on Human and Peoples' Rights
Rules of the AfCHPR	Rules of Court African Court on Human and Peoples' Rights
Rules of the CCJ, ECOWAS	Rules of the Community Court of Justice of the Economic Community of West African States (ECOWAS)
SD	Sustainable Development
SERAC	Social and Economic Rights Action Center

SHC	State High Court
SPDC	Shell Petroleum Development Company Nigeria Ltd.
Statute of ACJHR	Statute of the African Court of Justice and Human Rights
Statute of the ACJHPR	Statute of the African Court of Justice and Human and Peoples' Rights
Supplementary Protocol on the CCJ	Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9, and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
USA	United States of America
WCED	World Commission on Environment and Development
WCS	World Conservation Strategy
WHO	World Health Organisation
WWF	World Wide Fund for Nature
YCELP	Yale Center for Environmental Law and Policy

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CHAPTER ONE

CONTEXT SETTING

1 INTRODUCTION

In the quest to make the earth a comfortable living space, human activities have led to:

> [D]angerous levels of pollution in water, air, earth and living beings; significant and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies, harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment.[1]

According to Festus and Ogoegbunam, anthropogenic-induced environmental degradation and pollution are a result of the varied unsustainable human activities on the environment.[2] These activities include (a) transportation, (b) construction, (c) knowledge transfer – that is, the use of information communication technology, teaching and learning, and satellite launch, (d) agriculture, (e) consumerism, and (f) industrial operations, such as oil and gas exploration and production, manufacturing, and solid minerals mining.[3]

Like other nation-states, Nigeria is seeking ways to address her environmental degradation and pollution challenges. In the 2012 Report to the Rio+20 Summit, the Federal Government of Nigeria specifies the nation's key environmental issues as land degradation, water, and air pollution.[4] According to the report, the extractive industry significantly contributes to the environmental pollution and degradation challenge in Nigeria.[5] In this research, the extractive industry refers to entities whose core operations involve

1 United Nations, 'Report of the United Nations Conference on the Environment: Declaration of the United Nations Conference on the Human Environment' (A/CONF.48/14/Rev.1, UNP 1972) 3-5, para 3 <www.un-documents.net/aconf48-14r1.pdf> accessed 28 September 2018.

2 MO Festus and OB Ogoegbunam, 'Energy Crisis and its effects on national development: the need for environmental education in Nigeria' (2015) 3 BJE 21, 22. See also CG Gonzalez, 'Environmental Justice, Human Rights, and the Global South' (2015) 13 SCJIL 151, 154.

3 Festus and Ogoegbunam (n 2).

4 Federal Government of Nigeria, 'Nigeria's Path to Sustainable Development through Green Economy' (Country Report to the Rio+20 Summit, June 2012) 48 <https://sustainabledevelopment.un.org/content/documents/1023nigerianationalreport.pdf> accessed 28 September 2018.

5 Federal Government of Nigeria (n 4) 48, 50, and 54. See also OU Ndukwe, *Elements of Nigerian Environmental Laws* (UCP 2000) 113.

exploring, extracting, and processing, of crude oil, natural gas, and solid minerals.[6] Also, the Nigerian extractive industry host communities (NEIHCs) refers to the communities where extractive industry activities occur.

Extant research suggests that the activities of the Nigerian extractive industry have resulted in the degradation of the environmental sink, significantly compromising the sink's ability to absorb waste emissions in the future.[7] In 2011, the United Nations Environment Programme (UNEP) [8] undertook extensive research on the Ogoni area of the Niger Delta with the objective of investigating the extent to which anthropogenic-induced environmental degradation and pollution from Nigerian extractive industry operations have affected this area. According to the UNEP report, the impact of the environmentally unsustainable operations is such that remediation might likely take 25 - 30 years.[9]

In addition to compromising the capacity of the environmental sink to absorb future waste emissions, the environmentally unsustainable activities in the Nigerian extractive industry have often resulted in the loss of life. A prominent example is what is termed the Zamfara Saga.[10] In 2010, a research conducted by *Médecins Sans Frontiers* (MSF) exposed an unparalleled epidemic of lead

6 C Sigam and L Garcia, 'Extractive Industries: Optimizing Value Retention in Host Countries' (UNCTAD/SUC/2012/1, UNCTAD 2012) 3 <http://unctadxiii.org/en/SessionDocument/suc2012d1_en.pdf> accessed 28 September 2018; Financial Times, 'Definition of extractive industry' <http://lexicon.ft.com/Term?term=extractive-industry> accessed 28 September 2018.

7 See United Nations Environment Programme (UNEP), *Environmental Assessment of Ogoniland* (UNEP 2011). Other studies include but not limited to: CO Ikporukpo, 'Environmental deterioration and public policy in Nigeria' (1983) 3 AG 303, 307-309; O Odeyemi and OA Ogunseitan, 'Petroleum Industry and its Pollution Potential in Nigeria' (1985) 2 OPP 223, 225-227; O Oyewo, 'Problem of Environmental Regulation in the Nigerian Federation' in JA Omotola(ed), *Environmental Law in Nigeria Including Compensation* (UL 1990) 108; PC Onianwa, 'Petroleum Hydrocarbon Pollution of Urban Topsoil in Ibadan City, Nigeria' (1995) 21 EI 341, 341; Federal Ministry of Environment and others, 'Niger Delta Natural Resource Damage Assessment and Restoration Project: Phase 1 – Scoping Report' (31 May 2006) <https://cmsdata.iucn.org/downloads/niger_delta_natural_resource_damage_assessment_and_restoration_project_recommendation.doc> accessed 28 September 2018; United Nations Development Programme (UNDP), 'Niger Delta Human Development Report' (UNDP 2006) 73 <http://hdr.undp.org/en/content/human-development-report> accessed 28 September 2018; United Nations Development Programme (UNDP) and Global Environment Facility (GEF), 'UNDP Project Document: Niger Delta Biodiversity Project' [2012] <www.undp.org/content/dam/undp/documents/projects/NGA/Niger%20Delta%20Biodiversity_Prodoc.pdf> accessed 28 September 2018; The Technical Committee on the Niger Delta, 'Report of the Technical Committee on the Niger Delta: Volume 1' [2008] 14-55 <www.waado.org/NigerDelta/niger_delta_technical_com/NigerDeltaTechnicalReport.pdf> accessed 28 September 2018; The Special Security Committee on Oil Producing Areas, 'Report of the Special Security Committee on Oil Producing Areas (Ogomudia Report)' (2007) 7 TC 120.

8 United Nations Environment Programme (n 7).

9 Ibid, 12 and 224.

10 Médecins Sans Frontier, 'Lead Poisoning Crisis in Zamfara State northern Nigeria' (MSF Briefing Paper 2012) <www.msf.org/lead-poisoning-crisis-zamfara-state-northern-nigeria> accessed 28 September 2018.

poisoning in several villages located in Zamfara state where members of the community engaged in artisanal gold mining.[11]

Given that the Nigerian extractive industry has an existing problem of ensuring that the operations of its entities are conducted in an environmentally sustainable manner, this research investigates whether the use of human rights mechanism to protect the environment provides a viable approach to achieve environmental sustainability in the Nigerian extractive industry.

This chapter aims to define the ambits of this research. In addition to the introduction section, the chapter is further divided into five sections. Section two, three, and four, respectively discuss the purpose, significance, questions, and objectives of the research. Section five examines the research methodology. Section six presents the research structure.

2 PURPOSE OF THE RESEARCH

In the introduction section, this chapter indicates that the Nigerian extractive industry has a recurrent problem of ensuring that the operations of its entities do not degrade the environmental sink and compromise the sink's future ability to absorb wastes. Nigeria has adopted several approaches to address her anthropogenic-induced environmental degradation and pollution challenges. They include (i) ratification of more than fifteen international agreements.[12] (ii) Enacting environmental legislation both at the federal and state level.[13] (iii) Establishing a Federal Ministry of Environment with the mandate to ensure the protection of the Nigerian environment.[14] (iv) Creating the National Environmental Standards and Regulation Enforcement Agency (NESREA)[15]

11 Joint UNEP/OCHA Environment Unit, 'Lead Pollution and Poisoning Crisis: Environmental Emergency Response Mission Zamfara State, Nigeria [2010] 11 <www.unocha.org/sites/unocha/files/Lead%20Pollution%20and%20Poisoning%20Crisis%20Environmental%20Emergency%20Response%20Mission%20Zamfara%20State%20Nigeria%202010.pdf> accessed 28 September 2018.

12 M Okorodudu-Fubara, 'Development and Codification of International Environmental Law: Whither Nigeria' in S Simpson and O Fagbohun (eds), *Environmental Law and Policy* (LASU 1998) 291.

13 Environmental Law Research Institute, 'A Synopsis of Laws and Regulations on the Environment in Nigeria' <http://elri-ng.org/newsandrelease2.html> accessed 28 September 2018; Ndukwe (n 5) 98-102.

14 Federal Ministry of Environment, 'Nigeria's Path to Sustainable Development' (n 4) 70.

15 National Environmental Standards & Regulations Enforcement Agency (NESREA), 'About NESREA' [2016] <http://www.nesrea.gov.ng/about/index.php> accessed 28 September 2018.

and the National Oil Spill Detection and Response Agency (NOSDRA)[16] as parastatals under the Federal Ministry of Environment to carry out the Ministry's mandate. In fulfilling its mandate, NESREA has developed several regulations aimed at protecting the environment, including the national policy on the environment and a draft document which details Nigeria's objective and strategies to achieve Agenda 21 (Nigeria's Agenda 21).[17]

According to Okorodudu-Fubara, the ratification of over fifteen international agreements and the several environmental legislation enacted at the federal and state level reflects a workable legal framework through which the environment can be protected.[18] Notwithstanding, it is evident that despite the existing regulatory bodies and the various environmental legislation, the activities of the Nigerian extractive industry remains environmentally unsustainable, leading to incessant environmental pollution and degradation.

Fagbohun identifies the following as factors responsible for the inability of the several environmental legislation to resolve Nigeria's environmental degradation and pollution challenges. These factors range from "corruption and lack of transparency to lack of access to information, lack of public participation in the enforcement process, and lack of access to justice in environmental matters."[19]

Identifying the crux of the matter, the Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ) in *SERAP* case[20] stated that:

> [T]he adoption of the legislation, no matter how advanced it may be, or the creation of agencies inspired by the world's best models, as well as the allocation of financial resources in equitable amounts, may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on

16 National Oil Spill Detection and Response Agency (NOSDRA), 'NOSDRA' <www.nosdra.gov.ng/index.html> accessed 28 September 2018.

17 Environmental Law Research Institute, 'Compilation of Institutions and Waste Management Regulations in Nigeria' <http://elri-ng.org/newsandrelease2_waste.html> accessed 28 September 2018; National Environmental Standards and Regulation Enforcement Agency (NESREA), 'Policies and Guidelines' <www.nesrea.gov.ng/publications-downloads/policies-guidelines/> accessed 28 September 2018.

18 MT Okorodudu-Fubara, 'Statutory Scheme for Environmental Protection in the Nigerian Context: Some Reflections of Legal Significance for the Energy Sector' in IA Ayua, DA Guobadia and Bolaji Owasanoye (eds), *Nigerian Current Law Review 1996* (NIALS 1999) 39.

19 O Fagbohun, 'Jurisdiction of Nigerian Courts in Environmental Matters: a Note on Shell v Abel Isiah' (2006) 24 JENRL 209,210.

20 ECW/CCJ/JUD/18/12 SERAP v Federal Republic of Nigeria (2012) ECOWAS.

> paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered…the core of the problem in tackling the environmental degradation in the Region of Niger Delta resides in lack of enforcement of the legislation and regulation in force, by the Regulatory Authorities of the Federal Republic of Nigeria in charge of supervision of the oil industry.[21]

Hence, it can be deduced that the existence of environmental legislation and regulatory bodies are not sufficient to address the challenge of environmental degradation and pollution. Therefore, it is suggested that the provision of effective enforcement mechanisms might be the solution to the environmentally unsustainable operations of the Nigerian extractive industry.

The challenge of anthropogenic-induced environmental pollution and degradation is not specific to Nigeria alone. The early 1960s and 1970s witnessed an increase in global consciousness on the disastrous effect anthropogenic-induced environmental degradation and pollution has on the human being.[22] This awareness led to public demand for the protection of the environment.[23] Knox states that human rights approach often provides the avenue through which the demand for environmental protection is canvassed.[24]

Nigerian academics advocate the adoption of a human rights approach as a means to resolve environmental degradation and pollution challenges in the Nigerian extractive industry.[25] It is suggested that the approach might provide

21 Ibid, paras 105 and 108.

22 See D Shelton and A Kiss, *Judicial Handbook on Environmental Law* (UNEP 2005) 19; P Wilson and others, 'Emerging Trends in National Environmental Legislation in Developing Countries' in S Lin and L Kurukulasuriya (eds), *UNEP's New Way Forward: Environmental Law and Sustainable Development* (UNEP 1995) 189; DK Anton and DL Shelton, *Environmental Protection and Human Rights* (CUP 2011) 1; RR Churchill, 'Environmental Rights in Existing Human Rights Treaties' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Reprinted, OUP 2003) 90.

23 UNGA 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, JH Knox' (24 December 2012) UN Doc A/HRC/22/43, para 10.

24 Ibid.

25 The authors include but not limited to: N Stewart, 'Constitutionalising an Eco-Anthropocentric Ethic in Nigeria: Its implications for Sustainable Development in the Niger Delta Region' (PhD Thesis, University of Leicester 2013); PD Okonmah, 'The Right to a Clean Environment: A story of Oil Pollution in the Nigerian Delta' (PhD Thesis, Aberystwyth University 2012); NUC Maduekwe, 'The Extractive Industries and Their Environmental Impacts on Host Communities: A Case for Environmental Human Rights' (LLM Dissertation, University of Dundee 2011); E Emeseh, 'Human rights dimension of contemporary environmental protection' in M Odello and S Cavandoli (eds), *Emerging Areas of Human Rights in the 21st Century: The Role of the Universal Declaration of Human Rights* (Routledge 2012); AB Abdulkadir, 'The right to a healthful environment in Nigeria: A review of alternative pathways to environmental justice in Nigeria' (2014) 3 JSDLP

"swifter, less burdensome and extensive remedies. Also, removes the difficult burden of proof which the victim bears under common law."[26]

Nigerian scholars[27] identify section 20 of the 1999 Constitution[28] and article 24 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983[29] as legislative provisions that might ensure the human right mechanism necessary to curtail the environmental pollution and degradation challenge. According to section 20 of the 1999 Constitution, "the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria."[30] Article 24 ACHPR Act 1983 provides that "all peoples shall have the right to a general satisfactory environment favourable to their development."[31]

118; RT Ako, 'The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India' (2010) 3 NUJSLR 423; N Ikpeze, 'Safe disposal of municipal wastes in Nigeria: Perspectives on a rights based approach' (2014) 3 JSDLP 72; E Egede, 'Human Rights and the Environment: Is there a Legally Enforceable Right to a Clean and Healthy Environment for the "Peoples" of the Niger Delta under the Framework of the 1999 Constitution of Nigeria?' (2007) 19 SLJIL 51; R Ako, N Stewart, and EO Ekhator, 'Overcoming the (non)justiciable Conundrum: The Doctrine of Harmonious Construction and Interpretation of the Right to a Healthy Environment in Nigeria' in A Diver and J Miller (eds), *Justiciability of Human Rights Law in Domestic Jurisdictions* (SIP 2016); UJ Orji, 'Right to a Clean Environment: Some Reflections' (2012) 42 EPL 285; AO Enabulele, 'The Right To Life or The Right to Compensation Upon Death: Perspectives on an Inclusive Understanding of the Constitutional Right to Life in Nigeria' (2014) 3 TJSDLP 99; O Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Intersentia 2014).

26 PD Okonmah, 'Right to a Clean Environment: The Case for the People of the Oil-Producing Communities in the Nigerian Delta' (1997) 41 JAL 43, 67.

27 See Ikpeze (n 25) 76; Enabulele (n 25) 100; Egede (n 25) 66; Ako, Stewart, and Ekhator (n 25) 123-141; Adedeji and Ako (n 25) 423; Ako (n 25) 433; Okonmah, 'The Right to a Clean Environment: A story of Oil Pollution in the Nigerian Delta' (n 25) 184; Orji (n 25) 286; Abdulkadir, 'The right to a healthful environment in Nigeria' (n 25) 125; MT Okorodudu-Fubara, *Law of Environmental Protection* (1998) 71 as cited in AM Tamuno, 'The Legal Roadmap for Environmental Sustainability in Africa: Expansive Participatory Rights and International Environmental Justice' (SJD Dissertation, Pace University School of Law 2012) 33; Federal Republic of Nigeria, 'National Action Plan for the Promotion & Protection of Human Rights in Nigeria' [2006] 60 <http://www.ohchr.org/Documents/Issues/NHRA/nigeria.pdf> accessed 28 September 2018; EP Amechi, 'Environmental Pollution and Human Rights in Nigeria: Some Reflections on the Linkages and the Need for Effective Enforcement of Environmental Regulations' (2012) 18 TNJCL 93, 45; AE Ite and others, 'Petroleum Industry in Nigeria: Environmental Issues, National Environmental Legislation and Implementation of International Environmental Law' (2016) 4 AJEP 21,25; AA Adedeji and RT Ako, 'Hindrances to Effective Legal Response to the Problem of Environmental Degradation in the Niger Delta' (2005) 5 ULJ 415, 423; KSA Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection: Gbemre v Shell Revisited' (2007) 16 RECIEL 312, 316; A Ambituuni, J Amezaga and E Emeseh, 'Analysis of safety and environmental regulations for downstream petroleum industry operations in Nigeria: Problems and prospects' (2014) 9 ED 43, 49.

28 Constitution of the Federal Republic of Nigeria 1999 (as amended). Hereafter referred to as the 1999 Constitution.

29 Art 24 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 CAP 10 LFN 1990. Hereafter referred to as ACHPR Act 1983.

30 1999 Constitution (n 28).

31 ACHPR Act 1983 (n 29).

However, the position in Nigerian case law[32] is that section 20 of the 1999 Constitution which forms part of Chapter II, entitled 'Fundamental Objectives and Directive Principles of State Policy', is non-justiciable based on the provisions of section 6(6)(c) of the said Constitution which states that:

> (6) The judicial powers vested in accordance with the foregoing provisions of this section –
>
> (c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.[33]

According to Courtis, for a right to be justiciable, it means that (i) its holder can access an independent and impartial body to claim remedy against its violation or likely violation; (ii) the duty-bearer can be enforced to fulfil the stated duty; and (iii) the right holder has access to mechanisms that guarantee the said rights.[34] In the case of *Ugwu v Ararume*, the Supreme Court held that:

> [A]n enactment is justifiable if only it can be properly pursued before a court of law or tribunal for a decision. But where a court or tribunal cannot enforce such enactment, then it becomes non-justifiable (i.e. non-enforceable). This means that the Executive does not have to comply with the enactment unless and until the Legislature enacts specific laws for its enforcement.[35]

The non-justiciability of section 20 has prompted Nigerian scholars to suggest avenues through which a justiciable human rights approach to protect the environment can be provided in Nigeria. Enabulele argues that the sections of the Constitution which are not justiciable should be assimilated with the right to life as provided for in section 33(1) of the 1999 Constitution, thereby, making them justiciable.[36] Enabulele's argument forms one of the main suggestions most Nigerian scholars propose – that is, using Chapter IV as the vehicle to

32 See *Archbishop Anthony Olubunmi Okogie & ors v The Attorney-General of Lagos State* 1980 FNLR, Suit No FCA/L/74/80; *Attorney-General of Ondo State v the Attorney-General of the Federation &Ors* (2002) LPELR-623 (SC); *Attorney-General of Lagos State v The Attorney-General of the Federation & Ors* (2003) LPELR-620(SC), (2003) 838 -1010 NSCQR Vol 14.

33 6(6)(c) 1999 Constitution (n 28).

34 C Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* (ICJ 2008) 6.

35 Engr Charles Ugwu & Anor v Senator Ifeanyi Ararume & Anor (2007) LPELR-3329(SC).

36 Enabulele (n 25) 99; AB Abdulkadir, 'Gas flaring in the Niger Delta of Nigeria: A Violation of the right to life and comment on the case of Johnah Gbemre v Shell Petroleum Development Company of Nigeria Limited' (2014) 22 IIUMLJ 75, 91.

read justiciable rights in the provisions of Chapter II.[37] In addition to this method, Abdulkadir argues that domesticated international instruments such as the African (Banjul) Charter on Human and Peoples' Rights[38] provide the means of securing the right to a healthful environment.[39] Supporting Abdulkadir's position, Okonmah states that by domesticating the Banjul Charter, "the right to a clean environment is now a part of Nigerian law."[40]

Stewart opines that incorporating an eco-anthropocentric right into the Nigerian Constitution will provide an avenue to protect the environment.[41] She defines eco-anthropocentric right as a right to a healthful and ecologically balanced environment. Stewart further recommends the creation of an environmental court which would provide the necessary effective enforcement mechanism.[42]

According to the National Conference Draft Report 2014, the Nigerian Constitution should be amended such that section 20 is removed from Chapter II and transferred to Chapter IV, to make the provision justiciable.[43] The report further recommends that in amending the Constitution, the sentence 'right to life in a healthy environment' should be added to Chapter II and this constitutional right should be made justiciable.[44]

In examining Nigeria's anthropogenic-induced environmental degradation and pollution challenges, three salient issues emerge: (1) the Nigerian extractive industry has an existing problem as it relates to environmentally unsustainable operations. (2) there is no dearth of legislation or regulatory authorities aimed at protecting the environment; and (3) although Nigerian scholars suggest that a human rights approach might provide the adequate platform through which this challenge is addressed, however, there is a consensus that such mechanism might not exist.

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37 Others include but not limited to Ako (n 25); Abdulkadir, 'The right to a healthful environment in Nigeria' (n 25); Abdulkadir, 'Gas flaring in the Niger Delta of Nigeria' (n 36); Okonmah, 'The Right to a Clean Environment: A story of Oil Pollution in the Nigerian Delta' (n 25) 231.

38 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58. Hereafter referred to as Banjul Charter.

39 Abdulkadir, 'The right to a healthful environment in Nigeria' (n 25) 128; Egede (n 25) 82-83.

40 Okonmah, 'Right to a Clean Environment: The Case for the People of the Oil-Producing Communities in the Nigerian Delta' (n 25) 66; Oluduro (n 25) 407.

41 Stewart (n 25) 210.

42 Ibid, 203-206.

43 The National Conference 2014, 'National Conference 2014: Final Draft of Conference Report 2014' [2014] 200 <www.premiumtimesng.com/national-conference/wp-content/uploads/National-Conference-2014-Report-August-2014-Table-of-Contents-Chapters-1-7.pdf> accessed 28 September 2018.

44 Ibid, 201-202.

Based on the suggestion by Nigerian scholars that the adoption of a human rights approach to protecting the environment might provide the necessary solution to the environmental degradation and pollution challenge Nigeria is confronted with, this research examines the validity of this proposition. It is important to note that this study is not canvassing for the adoption of a human rights approach to environmental protection (HRAEP) in Nigeria. The principal objective of this research is to investigate whether the HRAEP provides a viable mechanism through which the operations of the Nigerian extractive industry entities can be made environmentally sustainable. The emphasis is on the extractive industry based on its relevance to the Nigerian economy. Also, this industry is indicated to be a primary source of environmental degradation and pollution in Nigeria.[45]

3 SIGNIFICANCE OF THE RESEARCH

Although the extractive industry is generally known to significantly contribute to the economic growth of states with mineral resources,[46] however, according to the United Nations Development Programme (UNDP), states that finance their development through resource extraction are confronted with the risk of environmental degradation and pollution.[47] Currently, Nigeria is one of the nation-states that relies on her extractive industry for foreign revenue and economic growth.[48] Since the oil boom of the 1970s, where crude oil displaced other revenue-generating sectors in Nigeria,[49] the petroleum sector has provided Nigeria with almost 90% of her foreign revenue.[50]

45 Federal Government of Nigeria (n 4) 48, 50, and 54.

46 Sigam and Garcia (n 6) 9; H Wise and S Shtylla, 'The Role of the Extractive Sector in Expanding Economic Opportunity' (Economic Opportunity Series, HU 2007) 6 <https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/report_18_EO%20Extractives%20Final.pdf> accessed 28 September 2018; A Liebenthal, R Michelitsch and E Tarazona, Extractive Industries and Sustainable Development: An Evaluation of World Bank Group Experience (WB 2003) 1.

47 United Nations Development Programme, 'Extractive Industries' <www.undp.org/content/undp/en/home/ourwork/sustainable-development/natural-capital-and-the-environment/extractive-industries-.html> accessed 28 September 2018.

48 A Gillies, M Guéniat and L Kummer, 'Big Spenders: Swiss Trading Companies, African Oil and the Risks of Opacity' (July 2014) 3, fn3 <https://resourcegovernance.org/sites/default/files/documents/bigspenders_20141014.pdf> accessed 28 September 2018; UM Ogbonnaya, 'Environmental Law and Underdevelopment in the Niger Delta Region of Nigeria' (2011) 5 ARR 68, 69.

49 EJ Igbokwe 'The effect of oil production on the agricultural economy of Nigeria, 1970-1980' (Master Thesis, Iowa State University 1983) 5; CA Okezie and HB Amir, 'Economic crossroads: The experiences of Nigeria and lessons from Malaysia' (2011) 3 JDAE 368,369; KE Orji, 'National Security and Sustainable Development in Nigeria: Challenges from the Niger Delta' (2012) 6 ARR 198, 202; EK Agbaeze, SN Udeh and IO Onwuka,

The Central Bank of Nigeria (CBN) 2017 draft annual report indicates that revenue from the petroleum sector amounted to 56.2% of the generated income, compared with 43.8% from non-oil receipts.[51] In view of this, it can be deduced that Nigeria is extensively dependent on revenue from the petroleum sector to finance the development of her economy.[52] As indicated by UNDP[53] and evidenced by the 2011 UNEP report,[54] Nigeria's dependence on natural resource extracted-revenue has led to the experience of severe environmental degradation and pollution in the host communities.

Although the CBN 2015 annual report indicates that the mining sector contributes 0.7% to the Nigerian government revenue,[55] however, the 2017 draft annual report which is the latest report, is silent on the percentage contributed.[56] Notwithstanding, it is evident that in comparison with the petroleum sector, the mining sector provides a relatively small percentage of revenue.

Nevertheless, it is necessary to note that both the petroleum sector and the solid mineral sector, adversely impact on the environment and have consistently compromised the environmental sink. The environmental degradation and pollution in the mining sector have even led to the loss of life. The Zamfara saga is a clear example.

According to the Blacksmith report, the Zamfara saga represents "one of the worst lead poisoning epidemics to date."[57] Several villages engaged in artisanal and small-scale gold mining experienced exposure to high levels of lead poisoning.[58] Children below the age of five years were identified as the

'Resolving Nigeria's dependency on oil – The derivation model' (2015) 7 JASD 1, 4; OJ Eze, 'Analysis of Oil Export and Corruption in Nigeria Economy' (2015) 3 IJECM 112,112-113.

50 Corporate Guides International Ltd, *Corporate Nigeria: The Business, Trade and Investment Guide* (CGIL 2008) 175.

51 Central Bank of Nigeria, *Draft 2017 Annual Report* (CBN 2017) 161-162.

52 MC Thurber, IM Emelife and PRP Heller, 'NNPC and Nigeria's oil patronage ecosytem' in DG Victor, DR Hults and MC Thurber (eds), *Oil and Governance: State-Owned Enterprises and the World Energy Supply* (CUP 2014) 707.

53 United Nations Development Programme (n 47).

54 United Nations Environment Programme (n 7).

55 Central Bank of Nigeria, *2015 Annual Report* (CBN 2015) 164.

56 Central Bank of Nigeria, Draft 2017 Annual Report (n 51).

57 Blacksmith Institute, '2011 Annual Report' <www.pureearth.org/wp-content/uploads/2014/12/AnnualReport-2011-Final-5.pdf> accessed 28 September 2018.

58 Ibid.

immediate casualty.[59] In 2010, approximately 400 children had been confirmed dead due to the lead and mercury poisoning.[60] The statistics increased to more than 700 deaths in 2013.[61] Even though remediation of the environment has commenced, MSF finds that patients who have previously been treated are being re-exposed to lead, causing an increase in lead levels in their blood.[62] One of the identified factors responsible for this re-exposure is the contaminated soil used by the villagers to build their mud homes.[63] Almost 100% of the homes in these villages are mud houses, thus, posing a barrier to successful remediation.

Lead is identified as being highly toxic, causing "damage to the brain, kidney, bone marrow, and other body systems in humans."[64] Children are most susceptible to the damaging effects of lead, and when exposed, suffer "development problems including impaired cognitive function, reduced intelligence, impaired hearing, and reduced stature."[65]

Therefore, it is evident that both the petroleum and solid mineral sectors – which both constitute the Nigerian extractive industry – have led to environmental degradation and pollution, and in certain instances the loss of lives. Consequently, because Nigeria relies extensively on revenue from this industry, it underscores the urgent need for an adequate mechanism which might ensure that the industry entities engage in an environmentally sustainable manner.

As stated above, this study examines the HRAEP concept to determine whether it provides that useful tool through which the persistent environmental pollution and degradation challenge in the Nigerian extractive industry can be resolved. Also, as defined above, the extractive industry comprises of the

59 Blacksmith Institute, '2010 Annual Report' <www.pureearth.org/wp-content/uploads/2014/12/2010Annual-Report-Final-small-file.pdf> accessed 28 September 2018.

60 Médecins Sans Frontier (n 10) 3.

61 JD Pringle, 'The Unprecedented Lead-Poisoning Outbreak: Ethical Issues in a Troubling Broader Context' (2014) 7 PHE 301, 301; News Agency of Nigeria (NAN), 'Mining: 300 children die of lead poisoning in Zamfara' The Guardian (Nigeria, 3 March 2017) <https://guardian.ng/news/300-children-die-of-lead-poisoning-in-zamfara/> accessed 28 September 2018.

62 Médecins Sans Frontier (n 10) 3.

63 Blacksmith Institute, '2011 Annual Report' (n 57).

64 YC Lo and others, 'Childhood Lead Poisoning Associated with Gold Ore Processing: a Village-Level Investigation—Zamfara State, Nigeria, October–November 2010' (2012) 120 EHP 1450, 1450.

65 YC Lo and others (n 65). See also C Bartrem and others, 'Unknown risk: co-exposure to lead and other heavy metals among children living in small-scale mining communities in Zamfara State, Nigeria' (2014) 24 IJEHR 304, 306.

petroleum and mining sector. Thus, the HRAEP mechanism might provide a broad framework that applies to both sectors.

4 RESEARCH QUESTIONS AND OBJECTIVES

The principal question which this research investigates is whether HRAEP provides a viable mechanism through which environmental sustainability can be achieved in the Nigerian extractive industry. Within the context of this research, environmental sustainability refers to the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative capacity of the environment in which they operate, without degrading its future waste absorptive capacity.

From the primary research question, two hypotheses are identified, namely, (i) that the HRAEP within the Nigerian context is a viable mechanism, and (ii) that the Nigerian extractive industry operations are environmentally unsustainable. In addressing these assumptions, the research shall:

I. Aim to comprehend and analyse the HRAEP concept. This is because, to be able to investigate whether the HRAEP is a viable mechanism, it is necessary to understand what the concept connotes. This includes its definition, its nature, scope, and content. Although authors use the phrase ‘human rights approach’ and ‘human rights approach to environmental protection’, there is the absence of literature which aptly defines what the concept means and its essential characteristics.[66] By engaging in the discussion as to the definition and essential characteristics of the HRAEP concept, the research can proffer an operational definition of the concept and identify its basic features. The findings from this discussion provide a useful tool in defining the HRAEP within the Nigerian context and identifying its essential features.

II. Examine whether the identified statutory provisions which provide a human rights approach to protect the environment are justiciable and their existing enforcement mechanism. The justiciability of the

66 This is discussed in Chapter Two.

indicated human rights would aid in answering the question as to whether HRAEP provides that viable framework through which environmental sustainability is achieved in the Nigerian extractive industry.

III. Seek to formulate an operational definition of HRAEP and environmental sustainability that is applicable within the context of this research. The need for operational definitions in research cannot be overstated. Operational definitions aid clarity in research and might be useful in study replication – that is, in determining the research's validity and reliability. Matthews and Ross, describe operational definition as the definition(s) the researcher uses and adapts "to help focus the research questions and to decide what data to gather to address those questions."[67] For a definition to be regarded as an operational definition, it must:

> [B]e valid for and specific to the research – it must be able to be used to gather data to help address the research questions; it is context-specific; designed for each research project and may be of no use in other research projects.[68]

Thus, by formulating an operational definition of the concepts of HRAEP and environmental sustainability, the research can collect and analyse materials relevant to examining the identified hypotheses and subsequently, answering the principal question.

IV. In addressing the second hypothesis, namely, that the Nigerian extractive industry operations are environmentally unsustainable; the environmental sustainability index (ESI) five core components developed by Samuel-Johnson, Esty and Levy, [69] provides a framework through which the research examines the extent to which the Nigerian extractive industry operations can be categorised as being environmentally unsustainable.

67 B Matthews and L Ross, *Research Methods: A Practical Guide for the Social Sciences* (PEL 2010) 61.
68 Ibid.
69 K Samuel-Johnson, DC Esty and MA Levy, '2001 Environmental Sustainability Index: An Initiative of the Global Leaders of Tomorrow Environment Task Force and World Economic Forum' [2001] 9 <http://sedac.ciesin.columbia.edu/es/esi/ESI_01a.pdf> accessed 28 September 2018.

V. Investigate whether the existing African Union (AU) and Economic Community of West African States (ECOWAS) human rights enforcement institutions provide adequate mechanisms for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment. As such, providing an African solution to the Nigerian challenge of the environmentally unsustainable extractive industry.

It is fundamental to reiterate that discussion on whether the HRAEP should be adopted or not in Nigeria or recommending the HRAEP as an alternative option that should be adopted in Nigeria, is outside the remit of this research. By examining what precisely connotes HRAEP within the Nigerian context, the research can investigate whether the use of human rights mechanism to protect the environment essentially provides a viable approach which can remedy the continuous environmentally unsustainable operations of the Nigerian extractive industry entities.

5 METHODOLOGY OF THE RESEARCH

This section discusses the research methodology. Clark and Ivankova describe methodology as the entire research process, [70] primarily, from formulating the questions, the research design, data collection and analysis, to the conclusions of the research.[71] Coomans, Grünfeld and Kamminga define methodology as the "detailed description of the steps taken by the researcher to travel from the problem statement to the conclusion."[72] According to Vibhute and Aynalem, the methodology is the systematic process through which a researcher solves the research problem, and this includes an examination of the diverse methods and steps the researcher adopted in the research.[73]

Thus, it is suggested that methodology refers to the explicit discussion of the processes utilised in undertaking the research,[74] the methods engaged with,

70 Fisher and others, use the phrase 'systematic procedure' – see E Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 JEL 213, 226.

71 VLP Clark and NV Ivankova, *Mixed Methods Research: A Guide to the Field* (SPI 2016) 57.

72 F Coomans, F Grünfeld, and MT Kamminga, 'Methods of Human Rights Research: A Primer' (2010) 32 HRQ 179, 184.

73 K Vibhute and F Aynalem, 'Legal Research Methods' [2011] 19 <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> accessed 28 September 2018.

74 see Section 5.1: Reflexivity of the Researcher; Section 5.2: Research Methods.

the alternative methods considered and reasons for not using them.[75] In addressing this research's methodology, the subsections shall discuss the reflexivity of the research and the research methods used.

5.1 REFLEXIVITY OF THE RESEARCHER

Reflexivity is identified as an essential tool a qualitative researcher can use to ensure the precision and credibility of their research findings.[76] Reflexivity should not be confused with 'reflectivity,' which refers to the process where one becomes aware and thoughtful of one's emotions, reactions, and thoughts.[77] Reflexivity is defined as the process of:

> [S]elf-scrutinising the self, attending to the implications of what we are doing, not only as it might affect ourselves but also how our thoughts, assumptions, emotions, and so on, might shape how we are doing what we do and how what we do may affect others in our social world.[78]

Reflexivity refers to the "active acknowledgement by the researcher that his/her actions and decisions will inevitably influence the meaning and context of the experience under investigation."[79] Probst describes reflexivity as the "awareness of the influence the researcher has on the people or topic being studied, while simultaneously recognising how the research experience is affecting the researcher."[80] Thus, the researcher's influence in the research determines "what to research, how to frame the research question, what questions to ask in interviews, how to probe the answers, and so on."[81] Based on this, Shaw posits that reflexivity constitutes a vital part of every stage of the research process,[82] a continuous process that takes place not just at the beginning of the research but throughout the timeframe of the research.[83]

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75 See Section 5.2: Research Methods.

76 See C Seale, 'Quality in Qualitative Research' (1999) 5 QI 465, 465; R Berger, 'Now I see it, now I don't: researcher's position and reflexivity in qualitative research' (2015) 15 QR 219, 221; C Lambert, J Jomeen and W McSherry, 'Reflexivity: a review of the literature in the context of midwifery research' (2010) 18 BJM 321, 322.

77 J Veroff and A Distefano, 'Introduction' (2002) 45 ABS 1188, 1193.

78 Ibid.

79 D Horsburgh, 'Evaluation of qualitative research' (2003) 12 JCN 307, 308.

80 B Probst, 'The Eye Regards Itself: Benefits and Challenges of Reflexivity in Qualitative Social Work Research' (2015) 39 SWR 37, 37.

81 CA Barry and others, 'Using Reflexivity to Optimize Teamwork in Qualitative Research' (1999) 9 QHR 26, 30.

82 RL Shaw, 'Embedding reflexivity within experiential qualitative psychology' (2010) 7 QRP 233, 239.

83 Lambert, Jomeen and McSherry (n 76).

Furthermore, the researcher uses reflexivity as a tool to produce valid, reliable, unbiased, and ethical research.[84] By engaging in reflexivity, the researcher (i) leaves a visible trail that can be followed and challenged.[85] (ii) Identifies and controls his/her bias,[86] (iii) can "understand the role of the self in the creation of knowledge," [87] and (iv) adopt "a major strategy for quality control in qualitative research."[88]

In deciding what research approach might best be suited to conducting this present study, this researcher found it essential first to challenge her bias. By engaging in reflexivity, the researcher is provided with the necessary tool to confront, identify, and control her bias. The researcher's background is essential in addressing this.

The researcher is an indigene of one of the oil producing states in Nigeria. Also, as a child, the researcher experienced first-hand the disastrous effect environmental pollution can have on the health and life of humans. Although it might seem unrelated to environmental pollution and degradation in the Nigerian extractive industry, as a child, the researcher's home was situated close to a soap making factory. The black soot emission from the soap factory triggered corrosion on the zinc roof of her home. The corrosion caused holes in the zinc roofing, drastically reducing the estimated lifespan of the zinc roof. Also, because of the air pollution emanating from the factory, the researcher's sister developed breathing difficulties. Thus, when the researcher first came across the environmental degradation and pollution problem in the Niger Delta as a result of extractive industry operations, the issue called to mind the childhood experience of the researcher.

With the combination of being an indigene of one of the oil producing states and the researcher's childhood experience, it was necessary to identify the emotional connection to the research question.

84 VS Chau and BJ Witcher, 'The uses and usefulness of reflexive accounts in strategic performance management research: The case of UK regulated public utilities' (2009) 58 IJPPM 346, 349.
85 M Woods, R Macklin and GK Lewis, 'Researcher reflexivity: exploring the impacts of CAQDAS use' (2016) 19 IJSRM 385, 387.
86 JL McCabe and D Holmes, 'Reflexivity, critical qualitative research and emancipation: a Foucauldian perspective' (2009) 65 JAN 1518, 1520-1521.
87 Berger (n 76) 220.
88 Ibid, 219.

In addressing the subject on the environmental unsustainable extractive industry operations, the initial response was to examine and proffer an adequate regime where the multinational petroleum companies such as Shell Petroleum Development Company (SPDC), can be propelled to pay for the effect their activities have on the environment and the people. Needless to state that this approach might have produced a biased result as it did not take into cognisance the fact that members of the host communities also engage in activities which significantly impact on the environment, such as the bombing of oil pipelines, illegal crude oil refining, vandalising oil infrastructures, artisanal and small-scale mining.

In addition to the emotional bias, it was necessary to acknowledge the financial bias. The research is sponsored by the Petroleum Technology Development Fund (PTDF) which is an agency of the Nigerian government.[89] Thus, this research can adequately be described as a Nigerian government-sponsored study. Where the research examines an area, which might implicate the sponsor, as funded research, there is often the temptation to project one's sponsor in a positive light, regardless of contrary evidence.

By actively identifying and confronting her bias, the process influenced the researcher's decision to examine all the evidence to arrive at a balanced conclusion. Thus, affecting the methods, questions, and research analysing techniques used.

By identifying the researcher's bias, it became necessary to adopt an approach where earlier assumptions were discarded to produce objective research. To achieve this, the researcher undertook an empiricist process of systematic observation to gain knowledge, known as empiricism.[90] Empiricism is defined as the understanding that knowledge is derived from experience – what we touch, see, sense, and smell – and not *a priori* knowledge.[91] Fraassen

89 Petroleum Technology Development Fund, 'History of PTDF' <https://ptdf.gov.ng/about-ptdf/> accessed 3 October 2018.

90 D Jary and J Jary (eds), *Collins Dictionary: Sociology* (3rd edn, HCP 2000) 181.

91 See Jary and Jary (n 90); RD Leighninger, 'Letter from the Editor: Empiricism' (2015) XLII JSSW 3,3; C Hay, *The Theory of Knowledge* (LP 2008) 16-17,29; EA St Pierre, 'The Empirical and New Empiricism' (2016) 16 CSCM 111, 113; AM Graziano and ML Raulin, *Research Methods: A Process of Inquiry* (5th edn, PEGI 2005) 11; JC Mármol, 'Conceptual schemes and empiricism: what Davidson saw and McDowell missed' (2007) 22 TIJTHFS 153, 153; ML Patten, *Understanding Research Methods: An Overview of the Essential* (6th edn, PP 2007) 3; J Laird, 'Positivism, Empiricism, and Metaphysics' (1938-1939) 39 PAS 207, 209; J Dewey, 'The Postulate of Immediate Empiricism' in JM Capps and D Capps (eds), *James and Dewey on Belief and Experience* (UIP

states that the term 'empiricism' was first used to describe a school of physicians (Empirici) who drew their rules of practice entirely from observation and experience.[92] According to Leighninger, a researcher engages in empirical activity when "consulting experience, using senses, assembling evidence, and collecting data."[93]

Hay posits that:

> The assumption underlying empiricism is that all our knowledge can be accounted for on the basis of our experience of the world around us. The empiricists begin by seeing the mind as a blank sheet of paper that is written on experience…The empiricists make no presumption of innate knowledge.[94]

Thus, by discarding past knowledge and adopting a systematic observation approach to understanding the literature, the researcher re-examined the literature with "the mind as a blank sheet of paper that is written on experience."[95] The re-examination process enabled the researcher to identify the paucity of literature where the definition and features of HRAEP form the subject of study; [96] more so, within the Nigerian context. [97] This also, influenced the systematic method used in examining the accuracy of the consensus that section 20 of the 1999 Constitution is not justiciable.[98]

Therefore, even though reflexivity might be viewed as unusual in legal research, reflexivity provided a valuable tool which enabled the researcher to ensure the validity and reliability of the study. The reflexivity process influenced the methods utilised in data collection and analysis. Consequently, enabling the researcher to – as humanly possible – objectively address the principal question posed by the research. In turn, aiding the researcher in identifying, challenging, and addressing gaps in the literature.

2005) 189; WT Stace, 'Misinterpretations of Empiricism' (1958) 67 Mind 465, 472; AC Benjamin, 'The Essential Problem of Empiricism' (1943) 10 PS 13, 13; K Nielsen, 'Is Empiricism an Ideology?' (1972) 3 Metaphilosophy 265, 266; G Longworth, 'Empiricism/Rationalism' in S Chapman and C Routledge (eds), *Key Ideas in Linguistics and the Philosophy of Language* (EUP 2009) 67; S Paeth, *Philosophy* (AFP 2015) 78.

92 BC van Fraassen, *The Empirical Stance* (YUP 2002) 32.

93 Leighninger (n 91) 4.

94 Hay (n 91) 32, 34, 37.

95 Ibid, 32.

96 This is discussed in detail in Chapter Two – see Section 3: Defining the HRAEP Concept and Section 4: Understanding the HRAEP Concept.

97 This is discussed in detail in Chapter Three – see Section 3: Understanding the HRAEP Concept within the Nigerian Context.

98 This is discussed in detail in Chapter Three – see Section 4: Is there a Justiciable HRAEP in Nigeria?

5.2 RESEARCH METHODS

Research method refers to the tools, techniques, or processes utilised in conducting data collection and analysis.[99] It is the research question(s) that determines the method that is best applicable to the research, and not the other way around.[100] As stated above, the principal question which this research seeks to investigate is whether HRAEP provides a viable mechanism through which environmental sustainability is achieved in the Nigerian extractive industry.

To adequately answer this primary question, it is necessary to first define within the context of the study the concepts of 'environmental sustainability' and 'human rights approach to environmental protection.' Hence, since these concepts do not have legal definitions, to understand and define these concepts within the context of this research, it is necessary to consult non-legal materials. The methods used in collecting and analysing the data are library-based and doctrinal analysis.

5.2.1 Library-based

Library-based is the method the research engages in collecting relevant data. Although the researcher had first considered conducting field research to collect primary data[101] that would enable her to gain insights into the topic being investigated. However, during the subsequent literature review, the researcher found that the information relating to the study is in the public domain and conducting field research may not provide further substantial information.

Hence, the research method used in collecting data can be described as library-based research. This includes resources garnered from both the

99 Clark and Ivankova (n 71) 57; A Bryman, *Social Science Research Methods* (3rd edn, OUP 2008) 31; NW Lawrence, S*ocial Research Methods: Qualitative and Quantitative Approaches* (6th edn, Pearson 2011) 2; SLT McGregor and JA Murnane, 'Paradigm, methodology and method: Intellectual integrity in consumer scholarship' (2010) 34 IJCS 419, 420; Vibhute and Aynalem (n 73) 19; Jary and Jary (n 90) 512.

100 GD Brewer, 'The challenges of interdisciplinarity' (1999) 32 PS 327, 329; W Schrama, 'How to carry out interdisciplinary legal research: Some experiences with an interdisciplinary research method' (2011) 7 ULR 147, 149; Coomans, Grünfeld, and Kamminga (n 72) 184; Matthews and Ross (n 67) 113.

101 While Primary data refers to data a researcher collects specifically to investigate the social phenomenon in issue, on the other hand, secondary data is where the researcher makes use of data produced by other sources, which is relevant for other purposes other than the researcher's investigation – see Matthews and Ross (n 67) 51-52.

physical and electronic library, case law database, and institutions' website. Through this method, the researcher obtained data from both primary and secondary sources. The primary sources include international, regional, and national legal instruments, also regional and national case law. The secondary sources comprise textbooks, journal articles, government policy documents, online newspapers, legal and non-legal dictionaries, and blogs.

5.2.2 Doctrinal analysis

The research tool utilised in analysing the information garnered through the library-based method is doctrinal analysis. This method is also known as the doctrinal research method.[102] The doctrinal research method is a two-prong process of first identifying the relevant primary authority and second, analysing and interpreting the text.[103] The doctrinal analysis is utilised in this research because primary sources constitute the bulk of the resources used in answering the research question. The doctrinal analysis is a combination of legal reasoning techniques, textual analysis, interpretation, and practical argumentation.[104] This method is used in doctrinal research.

Doctrinal research[105] refers to research which aims to answer the question 'what is the law'[106] and not what it should be.[107] To answer this question, the researcher assembles and critically analyses relevant legislation and case law with the aim to describe the law and its application to the problem under

102 AN Fourie, 'Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research: Experiences with Studying the Practice of Independent Accountability Mechanisms at Multilateral Development Banks' (2015) 8 ELR 95, 96; RA Posner, 'The Present Situation in Legal Scholarship' (1980) 90 YLJ 1113, 1113; T Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' [2015] ELR 130,131; DW Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 JLS 163,179; P Chynoweth, 'Legal research in the built environment: a methodological framework' [2008] 673 <http://usir.salford.ac.uk/12467/1/legal_research.pdf> accessed 28 September 2018; P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (JWS 2009) 31.

103 T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 DLR 83,110.

104 Fourie (n 102) 96; J Vranken, 'Exciting Times for Legal Scholarship' (2012) 2 Recht en Methode in onderzoek en onderwijs 42,44.

105 Also informally known as 'black-letter' law research – see M McConville and WH Chui, 'Introduction and Overview' in M McConville and WH Chui (eds), *Research Methods for Law* (EUP 2007)1; Chynoweth, 'Legal research in the built environment: a methodological framework' (n 102) 672; Chynoweth, 'Legal Research' (n 102) 30.

106 I Dobinson and F Johns, 'Qualitative Legal Research' in M McConville and WH Chui (eds), *Research Methods for Law* (EUP 2007) 19.

107 M Dixon, 'A Doctrinal Approach to Property Law Scholarship: Who Cares and Why?' (2014) 3 PLR 160, 162.

investigation.[108] According to McConville and Chui, the law itself is the focus of this research, and to understand and explain the law, the researcher extensively relies on statutes and case law.[109] Vick further states that the relative importance of these primary sources is dependent on the "legal tradition and system within which the legal researcher operates."[110] Therefore, even though secondary sources such as textbooks, articles, law dictionary, and non-legal resources were useful materials in this present research, the researcher relied extensively on primary sources, that is, legislation and case law. Thus, necessitating the use of doctrinal methods.

It is necessary to note that social science qualitative research analysing methods were also considered as possible tools. However, because the focus of the research is not to examine the why and how of the experiences of individuals to a social phenomenon, the doctrinal analysis presented the relevant method.

6 STRUCTURE OF THE RESEARCH

In addition to this chapter, the research is further divided into six chapters. As stated above, Chapter One seeks to delineate the ambit of this research. Each of the following chapters is designed to answer the enumerated research objectives specifically. Also, broadly examine the hypotheses ensuing from the primary research question; namely, (i) that HRAEP within the Nigerian context provides a viable mechanism, and (ii) that the operations of the Nigerian extractive industry entities are environmentally unsustainable. To conclusively ascertain the accuracy or otherwise of these hypotheses, it is necessary to understand and define the key concepts relevant to this research, and they are, HRAEP and environmental sustainability (ES). Given this study's national and industry-specific focus – that is, Nigeria and her extractive industry – the objective is to formulate operational definitions applicable to this investigation. While HRAEP is discussed in Chapters Two, Four, and Five, Chapters Three and Six examine the ES concept.

108 Dobinson and Johns (n 106); Hutchinson (n 102) 130-131.
109 McConville and Chui (n 105) 1, 3.
110 Vick (n 102) 178.

In summary, Chapters Two and Four examine the HRAEP concept, respectively, from an international perspective to a national perspective. Chapter Five investigates the AU human rights enforcement institutions (AHREIs) and the ECOWAS human rights enforcement institution (EHREI) to ascertain whether they provide an adequate mechanism for Nigerian citizens to enforce their HRAEP. Chapter Three examines the ES concept, its linkage with the HRAEP concept. Chapter investigates the extent to which the Nigerian extractive industry operations can be categorised as being environmentally unsustainable. Chapter Six presents the research findings, contribution to literature, recommendations, and future research.

Chapter Two: To investigate whether the HRAEP, within the Nigerian context, is a viable mechanism, an understanding of the concept is critical. This chapter seeks to understand, define, and identify the essential features of the concept. However, there is the absence of literature which defines and identifies the essential characteristics of HRAEP within the Nigerian context. To bridge this lacuna, issues scholars have highlighted when discussing HRAEP is relevant. The chapter indicates four salient issues which are (i) approaches through which HRAEP can be envisaged; (ii) whether the formulated right is anthropocentric or ecocentric in scope; (iii) defining the formulated right, and (iv) whether the formulated right is a third generation right.

Although scholars reference 'human rights to environmental protection' in literature, however, there is the absence of an explicit definition of the concept. The research finds that there is no consensus as to the approach HRAEP can be envisaged and whether the formulated human right refers to a right to the environment or a right for the environment.[111] The study also finds that the classification of the formulated right as a third generation right may not be accurate. The chapter formulates an operational definition of HRAEP as the use of human rights mechanism to maintain or restore the quality of the abiotic components of the natural environment with the objective to prevent the emission of pollutants or reduce the presence of polluting substances in the environmental media.

111 Hereafter expressed in this research as the right to (or for) the environment.

The definition illustrates that HRAEP has a specific function and purpose, which is, (i) to maintain or restore the quality of environmental media, and (ii) ensure the prevention of pollutant emissions or reduce the presence of these pollutants in the abiotic components. This purpose and function also indicate the essential characteristics of HRAEP.

Chapter Three: To effectively examine the validity or otherwise of the second hypothesis, which is that the operations of the Nigerian extractive industry entities are environmentally unsustainable, it is necessary to determine what environmental sustainability connotates, specifically, as it relates to the Nigerian extractive industry. The chapter formulates an operational definition of the ES concept as the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative capacity of the environment in which they operate, without degrading its future waste absorptive capacity. Also, given the intricate nexus between HRAEP and ES, the chapter finds that an enforcement of HRAEP produces ES, vice versa.

Chapter Four: The definition of HRAEP and the identified essential features in chapter two provide the foundation through which this chapter examines the HRAEP within the Nigerian context. The chapter defines HRAEP within the Nigerian context as the enforcement of the Nigerian citizens' right to a clean, safe and secure, healthy environment to maintain or restore the quality of the abiotic components of the natural environment through preventing the emission of pollutants or reducing the presence of polluting substances in environmental media. Also, HRAEP confers negative and positive rights on the right-holders and negative and positive duties on the duty-holders. The chapter examines whether the existing HRAEP enforcement mechanism in Nigeria provides an adequate platform for Nigerian citizens to enforce their citizens' right to a clean, safe and secure, healthy environment. Although the research finds that the HRAEP enforcement mechanism might provide a viable platform through which Nigerian citizens can ensure that the operations of the extractive industry entities are environmentally sustainable, however, there is the minimal utilisation of this mechanism.

Chapter Five: While examining the HRAEP enforcement mechanism in Nigeria, the study finds that there is the absence of court jurisprudence on article 24 of the ACHPR Act 1983.[112] Since the Act is domesticated from the Banjul Charter, [113] and the Banjul Charter is the primary human rights instrument enforced at both the AU and ECOWAS, it is necessary to examine how the AU and ECOWAS human rights enforcement institutions have interpreted article 24. Also investigate whether these institutions provide an adequate route for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment. From the analysis, the research suggests that compared to the AU and ECOWAS, the national HRAEP enforcement mechanism might provide an effective platform for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment.

Chapter Six: Having defined what ES connotes, this chapter uses the adapted the environmental sustainability index (ESI) five core components developed by Samuel-Johnson, Esty and Levy[114] as an analytical framework, the chapter investigates whether the Nigerian extractive industry entities have kept waste emissions within the assimilative capacity of the environmental sink. The research suggests that the utilisation of the HRAEP enforcement mechanism identified in chapter three might provide the viable framework through which environmental sustainability can be achieved in the Nigerian extractive industry.

Chapter Seven: This chapter presents a summary of the research findings. It also identifies the study's contribution to existing literature. The chapter suggests that the systematic approach through which the research investigates whether section 20 of the 1999 Constitution is justiciable, forms the contribution to existing literature. Another contribution is the adaptation of the ESI five components as a framework to examine the extent to which the operations of Nigerian extractive industry entities are environmentally unsustainable. The benefit of this framework is that it aids policymakers to explicitly identify areas which require urgent attention and can be addressed. Instead of vague statements that the environmental sustainability level of the

112 ACHPR Act 1983 (n 29).
113 Banjul Charter (n 38).
114 Samuel-Johnson, Esty and Levy (n 69).

Nigerian extractive industry will be improved. Additionally, citizens, non-governmental organisations (NGOs), and civil society organisations (CSOs) can use the identified areas to hold the government accountable to improve environmental sustainability levels. Also, the framework can be applied to other sectors of the Nigerian economy.

Taking cognisance of the indicated lack of utilisation of the HRAEP enforcement mechanism, the chapter identifies stakeholders whose input are critical to creating awareness and educating Nigerians citizens, judicial officers, and legal practitioners, on the justiciable right to a clean, safe and secure, healthy environment and its enforcement mechanism. These stakeholders are the Nigerian Human Rights Commission (NHRC), the Nigerian Legal Aid Council, Nigerian Bar Association (NBA), the Nigerian Judicial Institute (NJI), and the Nigerian Institute of Advanced Legal Studies (NIALS). The research also suggests that future research can investigate the basis for the seeming lack of awareness and the minimal utilisation the FREP Rules 2009 to protect the environment.

CHAPTER TWO

HUMAN RIGHTS APPROACH TO ENVIRONMENTAL PROTECTION (HRAEP)

1 INTRODUCTION

Human rights mechanism is identified as an approach that can be used to prevent and reduce anthropogenic-induced environmental degradation and pollution.[1] Given the continuous environmentally unsustainable operations of the Nigerian extractive industry entities, Nigerian scholars suggest that the human rights approach provides an avenue to resolve this challenge. This present research investigates the validity of the postulation that the use of human rights mechanism to protect the environment, within the Nigerian context, provides a viable tool to protect the Nigerian environment and in turn, achieve an extractive industry whose operations are environmentally sustainable.

Although there is abundant literature on the utilisation of human rights mechanism to protect the environment, there is the absence of scholarship which critically examines the concept – including precise definition - more so, within the Nigerian context. Therefore, to examine HRAEP from the Nigerian perspective, it is necessary first to study what scholars have discussed concerning the concept from a broader perspective. The purpose of engaging in this process is that a discussion of the concept at the broader level may provide insight as to how the HRAEP concept might be understood within the Nigerian context.

Thus, section 2 of this chapter shall discuss the development of HRAEP, section 3 shall formulate an operational definition relevant to this research, section 4 examines the issues scholars have raised concerning the concept, and section 5 presents the conclusion.

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1 Other approaches include market mechanism, public regulation, and private actions (such as nuisance, strict liability, negligence, and public trust doctrine) – see DK Anton and DL Shelton, *Environmental Protection and Human Rights* (CUP 2011) 16-56. See also UNGA, UNGA 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox' (24 December 2012) UN Doc A/HRC/22/43, para 10.

2 DEVELOPMENT OF THE HRAEP CONCEPT

Global awareness on the disastrous effect anthropogenic-induced environmental degradation and pollution have on public health witnessed an increase in the early 1960s and 1970s.[2] Factors that ignited this universal consciousness include: (i) the fear of limited resources ensuing from World War II.[3] (ii) ecological catastrophes, like the 1967 Torrey Canyon oil spill which caused black tides off England, France, and Belgium coast.[4] (iii) publications, such as Rachel Carson's 1962 *Silent Spring*.[5] (iv) the World Health Organisation (WHO) reports on environmental pollution and its control.[6] (v) the joint report by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the Food and Agriculture Organisation (FAO) on the conservation and rational use of the environment.[7]

The upsurge in public awareness influenced, respectively, the adoption of the United Nations Economic and Social Council (ECOSOC) resolution 1346 (XLV) of 30 July 1968,[8] and the United Nations General Assembly (UNGA) resolution 2398 (XXIII) of 3 December 1968.[9] Both ECOSOC and UNGA noted and expressed concern that the continuous and accelerated degradation of the environment adversely affected the enjoyment of basic human rights.[10]

2 D Shelton and A Kiss, *Judicial Handbook on Environmental Law* (UNEP 2005) 19; P Wilson and others, 'Emerging Trends in National Environmental Legislation in Developing Countries' in S Lin and L Kurukulasuriya (eds), *UNEP's New Way Forward: Environmental Law and Sustainable Development* (UNEP 1995) 189; Anton and Shelton (n 1) 1; RR Churchill, 'Environmental Rights in Existing Human Rights Treaties' in A Boyle and M Anderson (eds) *Human Rights Approaches to Environmental Protection* (Reprinted, OUP 2003) 90.

3 Shelton and Kiss (n 2) 1.

4 Ibíd.

5 DR Boyd, *The Environmental Rights Revolution: A global study of Constitutions, Human Rights, and the Environment* (UBCP 2012) 10; BW Cramer, 'The Human Right to Information, the Environment and Information about The Environment: From the Universal Declaration to the Aarhus Convention' (2009) 14 CLP 73, 81; JR Desjardins, *Environmental Ethics: An Introduction to Environmental Philosophy* (4th edn, WCL 2006) 3.

6 ECOSOC, 'Questions Relating to Science and Technology: Environmental Pollution and Its Control' (29 February 1968) E/4457/Add.1; ECOSOC 'Question of convening an international conference on the problems of human environment' Res 1346 (XLV) (30 July 1968) preamble para 8.

7 ECOSOC, 'Conservation and Rational Use of the Environment' (12 March 1968) E/4458; ECOSOC, Res 1346 (XLV) (n 6) preamble para 8.

8 ECOSOC, Res 1346 (XLV) (n 6).

9 UNGA, 'Problems of the Human Environment' Res 2398 (XXIII) (3 December 1968) preamble paras 4 and 5.

10 See ECOSOC, Res 1346 (XLV) (n 6) preamble praras 2 and 3; UNGA, Res 2398 (XXIII) (n 9) preamble paras 3 and 4.

Based on ECOSOC recommendation that a United Nations (UN) conference be convened to address the environmental pollution problem, [11] UNGA resolved to organise the UN Conference on the Human Environment in 1972.[12] The outcome of this conference is what is known as the *Declaration of the United Nations Conference on the Human Environment*.[13] The Declaration, amongst others, proclaims that the environment is essential for the enjoyment of human rights, especially the right to life.[14]

In addition to the events indicated above, the following can be highlighted as collectively creating the ambience leading to the emergence of the concept of a human rights approach in protecting the environment. They are:

(i) The adoption of the 1969 Declaration on Social Progress and Development under the auspices of UNGA, which called for national and international action that would include the "protection and improvement of the human environment" [15] as the basis for social development policies.[16]

(ii) Christopher Stone's 1972 article on '*Should Trees Have Standing – Toward Legal Rights for Natural Objects,*' where the author argued for recognition of the right of nature.[17]

(iii) In 1974, René Cassin in his Hague Academy lecture, campaigned for the extension of existing human rights protection to encompass "the right to a healthful and decent environment."[18]

(iv) In 1977, Karel Vasak in his UNESCO article, developed the three-generation human rights concept, categorising the "right to a healthy and ecologically balanced environment"[19] as a third generation right.

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11 ECOSOC, Res 1346 (XLV) (n 6) para 1.
12 UNGA, Res 2398 (XXIII) (n 9) para 1.
13 UNGA, 'United Nations Conference on the Human Environment' Res 2994 (XXVII) (15 December 1972) para 2.
14 United Nations, 'Report of the United Nations Conference on the Environment: Declaration of the United Nations Conference on the Human Environment' (A/CONF.48/14/Rev.1, UNP 1972) 3-5, para 1 <www.un-documents.net/aconf48-14r1.pdf> accessed 28 September 2018.
15 Declaration on the Social Progress and Development, UNGA Res 2542 (XXIV) (11 Dec 1969), art 13(c).
16 Ibid, preamble para 15.
17 CD Stone, 'Should Trees Have Standing – Toward Legal Rights for Natural Objects' (1972) 45 SCLR 450.
18 WP Gormley, *Human Rights and Environment: The Need for International Co-operation* (AWSIPC 1976) 1.

(v) The formulation of the *1994 draft Declaration of Principles on Human Rights and the Environment* by the Special Rapporteur, Fatma Zohra Ksentini, [20] in her report on human rights and the environment – prepared on behalf of the United Nations Sub-commission on the Prevention of Discrimination and Protection of the Minorities – to the ECOSOC.[21]

Hitherto, the concept of utilising human rights mechanism to protect the environment might have been perceived as a radical idea.[22] However, since the Ksentini report,[23] there has been a significant expansion of international concerns on this subject matter.[24] Knox describes environmental rights as "late arrivals to the body of human rights law"[25] because the international bill of rights had been adopted before the international community understood the significance of environment protection.[26] The international bill of human rights accentuates states' obligations towards individuals and provides a mechanism through which individuals can enforce their rights against their states. The international bill of human rights comprises of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICECSR).[27]

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19 K Vasak, 'A 30-year Struggle: the sustained efforts to give force of law to the Universal Declaration of Human Rights' in R Caloz and O Rödel (eds), *The UNESCO Courier* (UNESCO 1977) 29.

20 Currently referred to as Ms. Ouhachi-Vasely – see Earthjustice, 'Environmental Rights Report 2007: Human Rights and the Environment' 1 <http://earthjustice.org/sites/default/files/library/references/2007-environmental-rights-report.pdf> accessed 28 September 2018.

21 UNCHR (Sub-Commission), 'Review of Further Developments in Fields with which the Sub-commission has been Concerned: Human Rights and the Environment' (6 July 1994) UN Doc E/CN.4/Sub.2/1994/9.

22 DR Boyd, 'The Effectiveness of Constitutional Environmental Rights' (Yale/UNITAR Workshop on Rights in Environmental Governance, New Haven, 26 – 27 April 2013) 1 <https://environment.yale.edu/gem/events/yaleunitar-workshop-on-rights-in-environmental-governance/#gsc.tab=0> accessed 28 September 2018.

23 UN Doc E/CN.4/Sub.2/1994/9 (n 21).

24 D Shelton, 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice' [2002] Health and Human Rights Working Paper Series No 1, 3 <www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> accessed 28 September 2018.

25 UNGA, UN Doc A/HRC/22/43 (n 1) para 7.

26 D Shelton, 'Human Rights and the Environment: Substantive Rights' in M Fitzmaurice, DM Ong, and P Merkouris (eds) *Research Handbook on International Environmental Law* (EE 2011) 266.

27 P Hassan, 'The International Bill of Human Rights' (1973) XXVI PH 28, 28; BG Ramcharan, 'The Legal Status of the International Bill of Human Rights' (1986) 55 NJIL 366, 366; CNJ Roberts, *The Contentious History of the International Bill of Human Rights* (CUP 2015) 2-3.

According to Shelton, an examination of the development of human rights demonstrates that the formulation of rights reflects evolving social values.[28] An example of changing societal values is the different reaction the Holocaust and Colonisation events evoked. The Holocaust experience influenced the formulation of the UDHR.[29] According to the UDHR, the Holocaust is a barbarous act which outrages the conscience of humanity,[30] also, a "disregard and contempt for human rights."[31] Interestingly, the act of Colonisation occurred before the Holocaust experience. Although Colonisation might adequately be described as the disregard and contempt for human rights and more specifically a violation of the right to self-determination, nonetheless, the existing societal values did not regard Colonisation as such.

The UDHR did not put an end to Colonisation[32] until UNGA adopted the *Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960* – almost three decades after adopting the UDHR. In its preamble, the Declaration highlights UNGA's conviction that "all peoples have an alienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory."[33] Thus, the example between the Holocaust and Colonisation accentuates the fact that as emerging social values recognise the universality of human rights, new rights are formulated to reflect societal changes and challenges.

Presently, UNGA is yet to adopt any legal instrument which recognises and guarantees the right to the environment or environmental rights.[34] Nonetheless, Knox maintains that based on UN member states' obligations under the international bill of rights, states are obliged to adopt "legal and institutional frameworks that protect against, and respond to, the

28 D Shelton, 'Human rights, Environmental Rights, and the Right to Environment' (1991) 28 SJIL 103, 106. See also SP Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1981) 33 RLR 435, 439.

29 The Universal Declaration of Human Rights, UNGA Res 217 (III) (10 Dec 1948). Hereafter referred to as UDHR.

30 Ibid, preamble para 2.

31 Ibid.

32 K M'Baye and B Ndiaye, 'The Organization of African Unity (OAU)' in K Vasak (ed), *The International Dimensions of Human Rights* (Vol 1, English edition, P Alston (ed), UNESCO and GP 1982) 585.

33 Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960) preamble para 11.

34 United Nations Human Rights Office of the High Commissioner, 'UN expert calls for global recognition of the right to safe and healthy environment' (OHCHR, 5 March 2018) <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22755&LangID=E> accessed 28 September 2018.

environmental harm that may or does interfere with the enjoyment of human rights."[35]

According to Boyd, after the adoption of the 1972 Stockholm Declaration, an increasing number of nation-states[36] – as at 2013, 182 UN member states[37] – provide environmental protection in their constitutions; as either substantive rights, procedural rights, individual responsibility, or government duty.[38] Hence, with a membership of 193 nation-states,[39] the inclusion of environmental protection in the Constitution of 182 nation-states indicates that a majority of UN member states constitutionally recognise and provide for the right to (or for) the environment.

Highlighting the impact of this, Knox points out that the rise in state practice recognition of environmental rights in their national constitutions reflects a growing global consciousness of the significance of environmental values and

35 UNGA, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report' (30 December 2013) UN Doc A/HRC/25/53, para 47. See also JH Knox, 'Access Rights as Human Rights' (Third meeting of the focal points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on the Environment and Development in Latin America and the Caribbean, Peru, October 2013) 2 <www.ohchr.org/Documents/Issues/Environment/AccessRightsAsHumanRights.pdf> accessed 28 September 2018; UNGA, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (24 January 2018) UN Doc A/HRC/37/59, para 3.

36 As early as 1948, Italy was the first country to recognise environmental protection in her national constitution. Other countries are Madagascar, Kuwait, Malta, Guatemala, Switzerland, United Arab Emirates, Panama, Bahrain, Syrian Arab Republic, San Marino, Greece, Papua New Guinea, Cuba, India, Portugal, Tanzania, Micronesia, Spain, Sri Lanka, Thailand, Yemen, Iran, Peru, Chile, Guyana, Vanuatu, Vietnam, Belize, Palau, China, Equatorial Guinea, Honduras, Turkey, El Salvador, Netherlands, Austria, Ecuador, Nicaragua, Haiti, Philippines, South Korea, Suriname, Sweden, Brazil, Hungary, Benin, Croatia, Guinea, Mozambique, Namibia, São Tomé and Principe, Bulgaria, Burkina Faso, Colombia, Gabon, Laos, Macedonia, Mauritania, Slovenia, Zambia, Angola, Cape Verde, Czech Republic, Estonia, Ghana, Lithuania, Mali, Mexico, Mongolia, Norway, Paraguay, Saudi Arabia, Slovak Republic, Togo, Turkmenistan, Uzbekistan, Andorra, Cambodia, Kyrgyzstan, Lesotho, Russia, Seychelles, Argentina, Belarus, Belgium, Costa Rica, Germany, Malawi, Moldova, Tajikistan, Armenia, Azerbaijan, Ethiopia, Finland, Georgia, Kazakhstan, Uganda, Algeria, Cameroon, Chad, Gambia, Niger, Oman, South Africa, Ukraine, Uruguay, Eritrea, Poland, Albania, Latvia, North Korea, *Nigeria*, Venezuela, Cote d'Ivoire, Indonesia, Comoros, Senegal, Bolivia, Congo-Brazzaville, East Timor, Qatar, Romania, Rwanda, Afghanistan, Central African Republic, Somalia, Burundi, Democratic Republic of the Congo, France, Iraq, Sudan, Swaziland, Nepal, Serbia, Egypt, Luxembourg, Montenegro, Bhutan, Maldives, Myanmar, Dominican Republic, Kenya, Bangladesh, Jamaica, Morocco, and South Sudan - see Boyd, 'The Environmental Rights Revolution' (n 5) 50; DR Boyd, 'The Status of Constitutional Protection for the Environment in other Nations' <https://davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations-SUMMARY.pdf> accessed 28 September 2018.

37 Boyd, 'The Effectiveness of Constitutional Environmental Rights' (n 22) 3.

38 Boyd, 'The Environmental Rights Revolution' (n 5) 53 - 57.

39 United Nations, 'Member States' <http://www.un.org/en/member-states/> accessed 28 September 2018.

acceptance of the right to a healthy environment.[40] He further suggests that this practice may ultimately "set the stage for renewed debate on the status of the customary law on the right to a healthy environment."[41]

In addition to the increasing state practice of constitutionally recognising and providing for the right to (or for) the environment, some regional legal instruments explicitly recognise and guarantee the right to protect the environment. They are the African (Banjul) Charter on Human and Peoples' Rights;[42] the Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights;[43] the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa;[44] and the 2004 Arab Charter on Human Rights,[45] amongst others.[46]

Article 24 of Banjul Charter	"All peoples shall have the right to a general satisfactory environment favourable to their development."
Article 11(1)(2) of the Protocol of Salvador 1999	"(1) Everyone shall have the right to live in a healthy environment and to have access to basic public services. (2) The States Parties shall promote the protection, preservation, and improvement of the environment."
Article 18 (1) of the Maputo Protocol 2003	"Women shall have the right to live in a healthy and sustainable environment."

40 UNGA, 'Analytical study on the relationship between human rights and the environment: Report of the United Nations High Commissioner for Human Rights' (16 December 2011) UN Doc A/HRC/19/34, para 31.

41 UNGA, UN Doc A/HRC/19/34 (n 40). See also M Soveroski, 'Environment Rights versus Environmental Wrongs: Forum over Substance?' (2007) 16 RECIEL 261, 268.

42 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58. Hereafter referred to as Banjul Charter.

43 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992). Hereafter referred to as Protocol of San Salvador 1999.

44 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 7 November 2003, entered into force 25 November 2005). Hereafter referred to as Maputo Protocol 2003.

45 Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008). Hereafter referred to as Arab Charter on Human Rights 2004.

46 UNGA, UN Doc A/HRC/22/43 (n 1) para 13.

Article 38 of the Arab Charter on Human Rights 2004	"Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment…"

3 DEFINING THE HRAEP CONCEPT

From the discussion on the development of the HRAEP concept, it is evident that the concept developed primarily as an approach to protect the environment. Thus, having established the basis for the development of the concept, the pertinent question is what exactly connotes HRAEP concept? Although scholars often refer to the term 'HRAEP', however, there is minimal attempt to define it.[47] Nonetheless, some authors have sought to describe what the concept could mean.

According to Pathak, the process of linking human rights with the environment creates HRAEP, which places at its centre people who have been harmed by environmental degradation.[48] HRAEP expresses the fundamental rights of people to the environment and provides the opportunity for the people to protect these rights through human rights institutions.[49] Ebeku posits that HRAEP includes the constitutional provision of a right to a healthy, clean environment; or where the national courts expansively interpret constitutional rights as including the right to a healthy, clean environment – for example, the right to life.[50] Bansal describes HRAEP as the invoking of human rights laws, processes, and institutions "for asserting a right to clean environment."[51]

47 See D Shelton, 'Whiplash and Backlash – Reflections on a Human Rights Approach to Environmental Protection' (2015) 13 SCJIL 11; T Madebwe, 'A rights-based approach to environmental protection: The Zimbabwean experience' (2015) 15 AHRLJ 110; B Mia and KS Islam 'Human Rights Approach to Environment Protection: An Appraisal of Bangladesh' (2014) 22 JLPG 59; AE Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (CP 1998).

48 P Pathak, 'Human Rights Approach to Environmental Protection' (2014) 7 OIDAIJSD 17, 18.

49 Ibid.

50 KSA Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection: Gbemre v Shell Revisited' (2007) 16 RECIEL 312, 316. See also CM van der Bank and M van der Bank, 'Sustainable Development: The Human Rights Approach to Environmental Protection in South Africa' (2015) 9 ISSRI 672, 672.

51 A Bansal, 'Should There Be a Human Rights Approach to Environmental Protection?' (OxHRH Blog 22 January 2014) <http://ohrh.law.ox.ac.uk/should-there-be-a-human-rights-approach-for-environmental-protection/> accessed 28 September 2018.

From these definitions, it can be deduced that HRAEP refers to the use of human rights mechanism to protect the environment. Given that HRAEP developed as an approach to protect the environment, this research argues that although the above definitions highlight the 'human rights approach' aspect, they do not take into cognisance the 'environmental protection' aspect. The term HRAEP consists of two phrases, namely, 'human rights approach' and 'environmental protection'. This study posits that a comprehensive definition of the HRAEP concept should reflect the interaction of both phrases.

It is important to note that there is no universal understanding of the phrase 'environmental protection', as it holds different meaning to different people – that is, government, companies, policymakers, legislature, individual, and so on.[52] The phrase can be defined as "maintaining, or restoring natural resources such as plants, animals and fish, water, soil, and the air."[53]

The Oxford Dictionary of Environment and Conservation describes environmental protection as the "practices and procedures that are designed to avoid, minimise, eliminate, or reverse damage to the environment and environmental systems."[54] According to Ndukwe, environmental protection refers to:

> [T]he preservation and protection of the air, water, and soil from pollution and degradation and the preservation of the heritage of humanity for the benefit of the present and future generations…encompass the careful use of land, air, water, minerals, plants and animal resources and other natural resources so that they are not destroyed by the thoughtless or selfish actions, despite all the various demands made upon them by the growing world population.[55]

Hill defines environmental protection to mean:

> [R]educing pollution, making sustainable choices, seeking holistic solutions, and distributing the burdens and

52 P Hill, *Environmental Protection: What Everyone Needs to Know®* (OUP 2017) 2; C Stahn, J Iverson and JS Easterday, 'Introduction: Protection of the Environment and Jus Post Bellum: Some Preliminary Reflections' in C Stahn, J Iverson and JS Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (OUP 2017) 2.

53 National Audit Office, 'Environmental Protection' (Briefing for the House of Commons Environmental Audit Committee 2014) 7 <www.nao.org.uk/wp-content/uploads/2014/06/Environmental-Protection-briefing.pdf> accessed 28 September 2018.

54 C Park and M Allaby, *A Dictionary of Environment and Conservation* (3rd edn, OUP 2017) <www.oxfordreference.com/view/10.1093/acref/9780191826320.001.0001/acref-9780191826320-e-2617?rskey=hlWKcf&result=1> accessed 28 September 2018.

55 OU Ndukwe, *Elements of Nigerian Environmental Laws* (UCP 2000) 11.

> benefits of industrialisation fairly among all populations, considering their current situations, their contribution to the harms being addressed, and the resources available to them.[56]

Environmental protection is defined by the United Nations Department for Economic and Social Information and Policy Analysis as:

> Any activity to maintain or restore the quality of environmental media (that is, abiotic components of the natural environment, namely air, water, and land) [57] through preventing the emission of pollutants or reducing the presence of polluting substances in environmental media.[58]

From these definitions, it is apparent that (i) environmental protection involves processes; (ii) which can either be to reduce, maintain, prevent, reverse, or restore the quality of the environmental systems; (iii) the elements protected include land, water, air, animal resources, plant resources, and other natural resources. In view of this, it is suggested that a robust definition of HRAEP refers to the use of human rights mechanism to reduce, maintain, prevent, reverse, or restore the quality of land, water, air, animal resources, plant resources, and other natural resources; by preventing the emission of pollutants or reducing the presence of polluting substances in these elements.

The advantage of this detailed description is that it highlights the specific purpose and function HRAEP seeks to achieve which is maintaining or restoring the environmental media by preventing or reducing the emissions released into the abiotic components. Having proffered the operational definition for HRAEP that is relevant to this research, the next section shall examine the issues scholars have raised concerning the concept; further aiding understanding of the concept.

4 UNDERSTANDING THE HRAEP CONCEPT

In canvassing for the recognition and guarantee of human rights to protect the environment either at the international or national level, scholars have

56 Hill (n 52) 2-3.

57 United Nations Department for Economic and Social Information and Policy Analysis, 'Studies in Methods: Glossary of Environment Statistics' (ST/ESA/STAT/SER.F/67, United Nations 1997) 30 <http://unstats.un.org/unsd/publication/SeriesF/SeriesF_67E.pdf> accessed 28 September 2018.

58 Ibid.

identified specific issues. It is suggested that these indicated issues might provide additional understanding of what HRAEP connotes. The following four concerns shall be engaged with: (i) the avenues through which HRAEP can be envisaged, (ii) is the formulated right ecocentric or anthropocentric? (iii) Is it a right to the environment or a right for the environment? (iv) Is it a third-generation right?

4.1 HRAEP: Approaches through which it can be envisaged

Scholars have debated on the various avenues through which the human rights mechanism can be used to protect the environment. According to Knox in pursuing the recognition "of the importance of environmental protection to human well-being,"[59] two approaches have been embraced, specifically:

> (a) Adoption of an explicit new right to an environment characterised in terms such as healthy, safe, satisfactory or sustainable; and (b) heightened attention to the relationship to the environment of already recognised rights, such as rights to life and health.[60]

Adebowale and others, also agree that there are two approaches, namely, (a) using existing human rights, and (b) the formulation of a "human rights for a safe and clean environment."[61] Shelton[62] and Cullet,[63] respectively, adopt a different view. The authors suggest that three approaches can be applied: (i) using existing human rights to combat environmental problems, (ii) proposing a "set of environmental rights based on existing rights to information about and involving the political decision-making process,"[64] and (iii) formulating and adding to the existing human rights catalogue a right to environment.

Taking a slightly different route, Boyle situates his proposition within Vasak's human rights-three generation concept. Boyle argues that environmental rights can be envisaged from three perspectives, namely, (i) what he refers to as the 'greening' of rights, that is, using existing civil and political human rights to

59 UNGA, UN Doc A/HRC/22/43 (n 1).
60 Ibid, para 11.
61 M Adebowale and others, 'Environment and Human Rights: A New Approach to Sustainable Development' [2001] IIED 2. Woods supports this position – see K Woods, 'What does the language of human rights bring to campaigns for environmental justice?' (2006) 15 EP 572, 574.
62 Shelton, 'Human rights, Environmental Rights, and the Right to Environment' (n 28) 105.
63 P Cullet, 'Definition of an Environmental Right in A Human Rights Context' (1995) 13 NQHR 25, 25.
64 Shelton, 'Human rights, Environmental Rights, and the Right to Environment' (n 28) 105.

seek environmental protection and remedy.[65] (ii) "treat a decent, healthy or sound environment as an economic or social right."[66] (iii) environmental quality should be treated as what he terms 'collective or solidarity right', which is enforceable by communities and not individuals. Boyle argues that communities can use the right to manage and protect their natural resources and environment.

From the above, it is evident that scholars have identified two or more avenues through which HRAEP can be approached. Although the approaches proffered seemed different, however, authors seem to agree that existing rights – which Boyle refers to as 'greening' of rights – can be used to ensure the protection of the environment. The second approach which seems to follow the 'greening of rights' is the formulation of a right to the environment. According to Shelton, given that 182 nation-states include environmental protection in their Constitutions, and the right to environment is explicitly provided in certain regional instruments, the formulation of a right to the environment seems to be the approach which has gained dominance.[67]

Therefore, taking cognisance that (i) Nigeria is one of the nation-states with Constitutional provision for environmental protection.[68] (ii) She is a party to the Banjul Charter which explicitly recognises and guarantees the human right to environmental protection. (iii) Nigeria has in accordance with section 12 of the 1999 Constitution[69] domesticated the Banjul Charter.[70] Thus, the Charter has the force of law in Nigeria, and Nigerian citizens can seek redress for the violation of any of the rights recognised and guaranteed in the Charter before the Nigerian courts. It is evident that the avenue relevant to this research is the approach of a formulated right to environmental protection.

65 B Boer and A Boyle, 'Background paper: Human Rights and the Environment' (13th Informal ASEM Seminar on Human Rights, Asia-Europe Meeting 2013) 13 <www.asef.org/images/docs/Background%20Paper%20-%20FINAL.pdf> accessed 28 September 2018.

66 A Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2008) 18 FELR 471, 471.

67 Shelton, 'Human rights, Environmental Rights, and the Right to Environment' (n 28) 106. See also Boyd, 'The Environmental Rights Revolution' (n 5) 43-46.

68 See s20 Constitution of the Federal Republic of Nigeria 1999 (as amended). Hereafter referred to as the 1999 Constitution.

69 Ibid.

70 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 CAP 10 LFN 1990. Hereafter referred to as ACHPR Act 1983.

4.2 HRAEP: Ecocentric or Anthropocentric

Having indicated that the approach relevant to this research is that of formulating human rights to environmental protection, it is necessary to note that in discussing this formulated right one of the issues identified is the lack of universal definition of the term 'environment' as is reflected in the right.[71] There are two schools of thought on this, namely, the Ecocentric and Anthropocentric schools. It is suggested that the definition of 'environment' might influence the perspective of what is being protected, that is, anthropocentric or ecocentric.[72]

According to the Ecocentric School,

> [T]he world is an intrinsically dynamic, interconnected web of relations in which there are no absolutely discrete entities and no absolute dividing lines between the living and the non-living, the animate and the inanimate, or the human and the nonhuman.[73]

Therefore, man does not have the right to exploit nature limitlessly. Instead, man must respect and preserve nature because nature exists for its own sake and not its economic or aesthetic importance to man.[74] Also, everything in nature has equal value.[75] Thus, given that contemporary environmental degradation and pollution is a product of anthropogenic factors,[76] instead of naturogenic factors, it becomes imperative that the environment is protected from man's present and future destructiveness through the recognition and guarantee of the right of nature.[77]

It is necessary to note that in 1982, the UNGA adopted the *World Charter for Nature*. Although the Charter does not explicitly provide for the right of nature, however, it delineates "principles of conservation by which all human conduct affecting nature is to be guided and judged."[78] An example is principle 1 of the

71 B Apple, 'Commentary' in J Bauer and H Osofsky (eds), *Human Rights Dialogue Series 2 Number 11* (CCEIA 2004) 34.
72 Stahn, Iverson and Easterday (n 52) 4.
73 R Eckersley, *Environmentalism and Political Theory* (2nd impression, UCLP 1993) 49.
74 M Stenmark, *Environmental Ethics and Policy Making* (APL 2002) 57-58; SD Breen, 'Ecocentrism, Weighted Interests and Property Theory' (2001) 10 EP 36, 36.
75 Stenmark (n 74) 57-58; Breen (n 74) 36.
76 R Mushkat, 'Contextualizing Environmental Human Rights: A Relative Perspective' (2009) 26 PELR 119, 119.
77 Stone (n 17).
78 UNGA 'World Charter for Nature' (28 October 1982) UN Doc A/RES/37/7.

World Charter for Nature 1982 which stipulates that "nature shall be respected, and its essential processes shall not be impaired."[79]

Notably, some nation-states such as Ecuador and New Zealand accord rights to nature. In 2017, the Whanganui River in New Zealand was granted legal status.[80] Also, the Ecuador Constitution 2008 grants the ecosystem inalienable rights,[81] which is described as "the right to integral respect for its existence, maintenance, and regeneration; and the right to be restored." [82] The Constitution further mandates the state to give incentive to communities, natural persons, and legal entities to protect nature and promote respect for the ecosystem.[83]

The Anthropocentric school is divided into strong anthropocentric and weak anthropocentric.[84] The strong anthropocentric school hold the opinion that the environment should be protected because man is dependent on the ecosystem for survival and development.[85] Therefore, man protects nature not because it possesses any intrinsic value but due to its economic usefulness to humanity.[86] The weak anthropocentric school argue that even though the environment has economic use to man, it also possesses intrinsic value and as such, this value should be taken into consideration when protecting the environment.[87] The weak anthropocentric school further acknowledges that anthropogenic actions have negatively impacted on the environment, in turn, the resultant environmental degradation has adverse effects on humans.[88]

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79 Ibid.

80 See I Davison, 'Whanganui River given legal status of a person under unique Treaty of Waitangi settlement' *Wanganui Chronicle* (15 March 2017) <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11818858> accessed 28 September 2018; E Ainge, 'New Zealand river granted same legal rights as human being' *The Guardian* (Dunedin, 16 March 2017) <www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> accessed 28 September 2018.

81 Art 10 Ecuador Constitution 2008 Constitution of the Republic of Ecuador 2008. Hereafter referred to as Ecuador Constitution 2008.

82 Ibid, arts 71-72.

83 Ibid, arts 71-74.

84 See C Redgwell, 'Life, The Universe and Everything: A Critique of Anthropocentric Rights' in A Boyle and M Anderson (eds*) Human Rights Approaches to Environmental Protection* (Reprinted, OUP 2003) 73.

85 A Gillespie, *International Environmental Law, Policy and Ethics* (OUP 1997) 15 and 19; Mushkat (n 76) 122; JS Barkin, 'Discounting the Discount Rate: Ecocentrism and Environmental Economics' (2006) 6 GEP 56, 57.

86 Gillespie (n 86) 15 and 19; Mushkat (n 76) 122; Barkin (n 85) 57.

87 L Feris, 'Constitutional Environmental Rights: An Under-utilised resource' (2008) 24 SAJHR 29, 32.

88 Ibid, 33.

Taking cognisance of the divide between Ecocentric and Anthropocentric Schools, because contemporary human rights regime came into existence to protect human beings,[89] it is suggested that the use of human rights mechanism to protect the environment indicates a weak anthropocentric approach. In adopting the UDHR, the UNGA proclaimed the Declaration "as a common standard of achievement for all peoples and all nations."[90] Decleris supports this position when he states that the environment assumes a legal value akin to that already acquired by man's freedom and life when protected under law.[91] This legal value, however, is not mainly for man's sake or to effectively protect his other values.[92] Decleris emphasises that the protection of the environment as a legal value stem from the equal interest both man and the environment share.[93] Thus, man is unable to exist without the environment.[94] Decleris also states that the rights of nature cannot go "against man's rights, because the law is the province only of rational beings, and only man and his man-made systems can be subject to the law."[95]

To further elucidate the suggestion that the HRAEP reflects the weak anthropocentric school, it is necessary to note that although the Ecuador Constitution 2008 recognises and guarantees the rights of nature, the enforcement of the rights are dependent on "all persons, communities, peoples, and nations to call upon public entities to enforce the rights of nature."[96] The Constitution further identifies communities, individuals, groups of individuals, and nations, as the beneficiaries of the "environment and natural wealth enabling them to enjoy a good way of living."[97] The Constitution also mandates the state to apply "preventive measure on activities that might lead to the extinction of species, the destruction of the ecosystem, and the permanent alteration of natural cycles."[98]

89 Hassan (n 27) 28.
90 UNGA Res 217 (III) (10 Dec 1948) preamble para 8 (n 29).
91 M Decleris, *The Law of Sustainable Development: General Principles, A report Produced for the European Commission* (EC 2000) 51.
92 Ibid.
93 Ibid.
94 Ibid.
95 Ibid.
96 Art 71 Ecuador Constitution 2008 (n 81).
97 Ibid, art 74.This provision can be compared with art 24 of the ACHPR 1981, which recognises all peoples' right to a satisfactory environment that enhances their development.
98 Ibid, art 73.

Thus, it is apparent that even though nature might be granted rights, and the state has positive obligations to protect, promote, and fulfil those rights; nature cannot seek the enforcement of those rights *suo moto*. It is evident that man, therefore, remains instrumental in protecting the environment and ensuring that the rights are enforced, whether as individuals or legal persons.

It is suggested that the above reflects the position of the weak anthropocentric school that man and the environment are interdependent, and the environment should be protected not only because of its economic usefulness to man but also due to its inherent, intrinsic value. It is not a question of the environment first or humans first; but rather a coordinated approach to meeting the needs of both. Buttressing this argument, Knox states that HRAEP reveals the interrelatedness and interdependence of the environment and human rights. [99] HRAEP emphasises the fact that "a healthy environment is essential to the enjoyment of human rights, and the exercise of human rights required for a healthy environment."[100]

Furthermore, Cullet posits that the philosophy underlining HRAEP stems from the understanding that man is dependent on the environment; [101] and anthropogenic activities on the environment will adversely impact humankind leading to the human rights violation.[102] Consequently, in as much as human rights mechanisms are utilised in protecting the environment, this serves as a vital mechanism in protecting both human rights and the environment.[103]

4.3 HRAEP: Defining the formulated rights

In addition to the lack of consensus as to whether the proposed formulated right is ecocentric or anthropocentric in design, there is the absence of

99 See JH Knox, 'Keynote Speech; Human Rights and the Environment: Carrying the Conversation Forward' (13th Informal ASEM Seminar on Human Rights, Asia-Europe Meeting 2013) 2 and 4 <www.asef.org/images/docs/Keynote%20speech-John%20Knox_Human%20Rights%20and%20the%20Environment.pdf> accessed 28 September 2018.

100 Ibid.

101 See Cullet (n 63) 31.

102 See also OHCHR and UNEP, 'Human Rights and the Environment Rio+20: Joint Report OHCHR and UNEP' [2012] 6 <www.unep.org/delc/Portals/119/JointReportOHCHRandUNEPonHumanRightsandtheEnvironment.pdf> accessed 14 July 2018; T Hayward, *Constitutional Environmental Rights* (OUP 2005) 9; UNGA, UN Doc A/HRC/22/43 (n 1) para 17.

103 See Cullet (n 63) 33 and 37.

uniformity as to the definition and scope of the right. Through scholarly engagement varied phrases have emerged, such as: 'right to a healthful environment',[104]'environmental human right',[105] 'environmental rights',[106] 'right to environment',[107]'a right to a clean environment',[108]'a right to a satisfactory environment',[109] 'a pure, healthful, and decent environment',[110] 'right to a clean and healthy environment',[111] and so on.[112] Cullet describes these phrases as being ambiguous.[113] The effect has been formulations without defined scope and content, open to interpretation, and an unclear right.[114] This section shall discuss some of the phrases and the proffered definitions below.

According to Knox, environmental rights are rights related to environmental protection. [115] Churchill describes environmental rights as the right of individuals or group to a decent environment.[116] This specifically refers to the rights to be free from excessive noise, water, air, and land pollution; and to enjoy biological diversity and unspoilt nature.[117] Also, states have a positive duty to ensure that the right holder can enforce these rights.[118]

Shelton posits that environmental rights can be described as either the rights *of*[119] the environment or the right *to*[120] the environment. While the rights of the

104 AB Abdulkadir, 'The right to a healthful environment in Nigeria: A review of alternative pathways to environmental justice in Nigeria' (2014) 3 JSDLP 118.
105 J Glazewski, 'Environmental Rights and the New South African Constitution' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Reprinted, OUP 2003) 177.
106 N Ikpeze, 'Safe disposal of municipal wastes in Nigeria: Perspectives on a rights based approach' (2014) 3 JSDLP 72.
107 A Dias, 'Human Rights, Environment and Development: With Special Emphasis on Corporate Accountability' (Human Development Report 2000 Background Paper) <http://hdr.undp.org/sites/default/files/ayesha-dias.pdf> accessed 28 September 2018.
108 A Dube, 'Does SADC provide a remedy for environmental rights violations in weak legal regimes? A case study of iron ore mining in Swaziland' (2013) 3 SADCLJ 259, 260.
109 FZ Ksentini, 'Human Rights, Environment and Development' in S Lin and L Kurukulasuriya (eds), *UNEP's New Way Forward: Environmental Law and Sustainable Development* (UNEP 1995) 110.
110 Gormley (n 18) 1.
111 UJ Orji, 'Right to a Clean Environment: Some Reflections' (2012) 42 EPL 285.
112 B Lewis, 'Environmental Rights or A Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection' (2012) 8 MJICEL 36, 40.
113 Cullet (n 63) 30.
114 Lewis (n 112) 40; A Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in A Boyle and M Anderson (eds) *Human Rights Approaches to Environmental Protection* (Reprinted, OUP 2003) 50; J Blake and B Boer, 'Regional Affairs: Human Rights, the Environment and Tehran Declaration' (2009) 39 EPL 302, 303.
115 UNGA, UN Doc A/HRC/22/43 (n 1).
116 Churchill (n 2) 89.
117 Ibid.
118 Ibid.
119 Emphasis added.
120 Emphasis added.

environment refer to the rights of nature as espoused by Christopher Stone, on the other hand, the right to environment is strictly a human right.[121] Kidd agrees with Shelton's classification of environmental rights into two categories. He describes these rights as "the rights of humans to a safe and healthy environment and the rights of the environment itself not to be degraded."[122] Kidd further states that the right of the environment lacks "official favour anywhere in the world."[123]

It is imperative to note as at 1997 when Kidd published his book, perhaps the right of nature had not yet been recognised anywhere in the world, however, the Ecuador Constitution 2008 recognises and guarantees the right of nature.[124] Also, in 2017, the Whanganui River in New Zealand became the first river in the world to be granted legal personality.[125]

Expatiating on the distinction between 'environmental rights' and the 'right to environment', Shelton states that:

> [E]nvironmental rights refer to the reformation and expansion of existing human right and duties in the context of environmental protection; an intermediate step between simple application of existing human rights to the goal of environmental protection and recognition of a new full-fledged right to environment[126]

Shelton, however, did not elaborate on what the right to environment means. Instead, she indicates that both the Banjul Charter[127] and the Protocol of San Salvador, [128] recognise and guarantee the right to environment.[129] She further indicates areas the proposed international right to environment should reflect, for example, substantive environmental standards and the protection of future generations.[130]

Cobzaru, quoting the dictionary of environmental law, states that the right to a healthy environment is:

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121 Shelton, 'Human rights, Environmental Rights, and the Right to Environment' (n 28) 105.
122 M Kidd, *Environmental Law: A South African Guide* (JCL 1997) 34.
123 Ibid.
124 See arts 71- 74 Ecuador Constitution 2008 (n 81).
125 Davison (n 80); Ainge (n 80).
126 Shelton, 'Human rights, Environmental Rights, and the Right to Environment' (n 28) 117.
127 Banjul Charter (n 42).
128 Protocol of San Salvador 1999 (n 43).
129 Shelton, 'Human rights, Environmental Rights, and the Right to Environment' (n 28) 125-127.
130 Ibid, 134-135.

> A fundamental human right which expresses the requirement to ensure a quality environment and maintaining ecological balance as a prerequisite for human health protection and continuity of the human species on earth.[131]

Archibald defines the right to a healthy environment as "an environment that does not cause serious harm to human health."[132] Ruppel opines that the right to a healthy environment encompasses the non-interference of government with the enjoyment of the right; government obligation to prevent third parties non-interference with the enjoyment of the right; and lastly, the government is mandated to adopt necessary measures in ensuring the realisation of the right.[133]

Ksentini states that the right to a satisfactory environment is a right to prevention, and where preventive measures do not exist, victims are entitled to restitution, compensation, indemnification, and rehabilitation.[134] The right to a satisfactory environment is also a right to conserve nature on behalf of future generations.[135] Ksentini acknowledged that the content of the right to a satisfactory environment lacked clear focus and expressed hope that the practice being developed within regional and international bodies would resolve this issue.[136]

Adebowale and others describe environmental human rights as "the human right to a safe and healthy environment"[137] which must comprise of "the right to a clean and safe environment; the right to act to protect the environment; and the right to information."[138] In agreement with Adebowale and others, Ako states that environmental human rights consist of "substantive right to a clean environment, procedural rights to act to protect the environment, the right to information, and access to justice."[139] It is pertinent to note that Dias, opines

131 A Cobzaru, 'Famous Cases Which Confirmed the Right to a Healthy Environment on National and European Levels' (2013) 5 CRLSJ 400, 402.
132 CJ Archibald, 'What Kind of Life? Why the Canadian Charter's Guarantees of Life and Security of Person Should Include the Right to a Healthy Environment' (2013) 22 TJICL 1, 3.
133 OC Ruppel, 'Third-generation Human Rights and the Protection of the Environment in Namibia' in N Horn and A Bösl (ed), *Human Rights and the Rule of Law in Namibia* (2nd edn, MN 2009) 103.
134 UN Doc E/CN.4/Sub.2/1994/9 (n 21) paras 255-256.
135 Ibid.
136 Ibid, para 258.
137 Adebowale and others (n 61) 1.
138 Ibid, 3.
139 Ako, 'The Judicial Recognition and Enforcement of the Right to Environment' (n 25) 423.

that, scholars are divided as to whether the right to the environment should be substantive or procedural.[140] Hence, it might seem that in seeking to avoid this division, Adebowale and others,[141] and Ako,[142] adopt a definition that is both procedural and substantive. Ako further defines environmental human rights as "a rights-based approach to environmental protection through the combination of substantive and procedural rights."[143] Okonmah echoes this position when he states that "the right to a clean environment is a part of the evolving concept of environmental human rights which encompasses both substantive and procedural aspects."[144]

From the various phrases and definitions above, it is evident that scholars are unresolved as to (i) whether the formulated rights refer to plural 'rights' or a singular 'right', and (ii) whether the right(s) refers to the right to (or for) the environment. Notwithstanding this lack of unified stance, a review of the proffered definitions highlights key aspects of what the formulated right might embody, namely, (i) the right of future generations, (ii) negative and/or positive duties, (iii) substantive or procedural, and (iv) a human right to an environment which is not detrimental to life, health, and development. Therefore, when examining the HRAEP within the Nigerian context, it is necessary to ascertain whether the statutory provided rights reflect any of the aspects indicated above.

4.4 HRAEP: Third Generation Rights

In discussing the human rights mechanism through which the environment can be protected, scholars have often categorised the formulated right as a third generation right. This classification was first engaged in by Vasak, who in 1977 as the then Director of UNESCO division of human rights, introduced the concept of grouping human rights into three generations.[145] Civil and political

140 Dias (n 107) 11.
141 Adebowale and others (n 61).
142 Ako, 'The Judicial Recognition and Enforcement of the Right to Environment' (n 25) 423.
143 RT Ako, 'Resolving the Conflicts in Nigeria's Oil Industry – A Critical Analysis of the Role of Public Participation' (PhD Thesis, University of Kent 2008) 51.
144 PD Okonmah, 'The Right to a Clean Environment: A story of Oil Pollution in the Nigerian Delta' (PhD Thesis, Aberystwyth University 2012) 119.
145 PH Kooijmans, 'Human Rights – Universal Panacea? Some reflections on the so-called human rights of the third generation [1990] 37 NILR 315, 315.

rights are labelled as the first generation rights.[146] The economic, social, and cultural rights comprise of the second generation rights.[147] The third generation rights – which he also refers to as 'right to solidarity' – consist of the right to peace, development, "a healthy and ecologically balanced environment, and ownership of the common heritage of man." [148]

The significance of Vasak's concept is the intellectual prominence it has assumed. In addition to its recognition by the international community,[149] the concept has produced an immense following, influencing the human rights perception of numerous legal scholars, practitioners, judges, and students studying human rights.[150] Thus, given the different parameters assigned to the classifications, in seeking to understand the HRAEP concept, it is necessary to examine whether the formulated right is validly categorised as a third generation right.

A study of Vasak's 1977 article indicates that the author did not explain how he arrived at his three-generation rights concept. However, it can be deduced that while discussing the changing patterns of society which influenced the Director-General of UNESCO to formulate the phrase 'third generation of human rights;'[151] Vasak might have been obliged to further elaborate on what then constituted the first- and second-generation human rights. Macklem in quoting Kooijmans, states that in a subsequent 1984 publication, Vasak specifies that his human rights-generation concept "captures how human rights came into existence in different 'waves' throughout history."[152] The first being the French revolution which created the civil and political rights, the second is the Russian revolution ushering in economic, social, and cultural rights, and the third being the decolonisation movement struggle by the third world.[153]

On the other hand, Whelan[154] and Burns,[155] respectively, opine that Vasak's human rights-generation concept was inspired by the three normative themes

146 Vasak (n 19) 29.
147 Ibid.
148 Ibid.
149 DJ Whelan, *Indivisible Human Rights* (UPP 2010) 209.
150 P Macklem, *The Sovereignty of Human Rights* (OUP 2015) 51.
151 Vasak (n 19) 29.
152 Macklem (n 150) 53.
153 Macklem (n 150) 53; Kooijmans (n 145) 315.
154 Whelan (n 149) 209.

which emerged from the French revolution, and they are liberty (liberté), equality (égalité), and fraternity (fraternité). In that order, they represent the first, second, and third generation rights. Whelan divided the three generations into four dimensions: (i) principles reflected, (ii) types of rights, (iii) target of claims, and (iv) the group to whom the generation of rights is relevant. Whelan proposes that third generation rights reflect the fraternity principles; they are group or solidarity rights; the target of claims is anti-colonial and given priority by the third world (that is developing countries).[156]

Even though Vasak's human rights three-generation concept seems to have gained wholesale acceptance in the legal community, there have been criticisms. The criticisms include (1) the use of term 'generation'; (2) classifying Civil and Political Rights and Economic, Social, and Cultural Rights, as distinctively negative rights and positive actions; and (3) categorising right to a healthy environment as rights of solidarity.

4.4.1 Classifying Human Rights as 'Generation'

To understand the criticism on the use of the word 'generation,' the first place to start is to define it. According to the Oxford Dictionary of English, generation refers to:

> a) all the people born and living at about the same time, regarded collectively;
> (b) the average period, generally considered to be about thirty years, in which children grow up, become adults, and have children of their own;
> (c) a set of members of a family regarded as a single step or stage in descent.[157]

From this definition, it is evident that the word 'generation' refers to an era and what it constitutes. Also, there is the expectation that one period would produce another, signalling the end of the preceding period.[158] According to Kooijmans, by classifying human rights into three generations, it means that the first generation rights were succeeded by the second, which is succeeded

155 BH Weston, 'Human Rights' (1984) 6 HRQ 257, 264.
156 Whelan (n 149) 209.
157 A Stevenson (ed), *Oxford Dictionary of English* (3rd edn, OUP 2015) <www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m_en_gb0278730?rskey=7s6kOU&result=29976> accessed 28 September 2018.
158 RY Rich, 'The Right to Development as an Emerging Human Right' (1983) 23 VJIL 287, 323.

by the third.[159] Following this analogy, it would mean that civil and political, and economic, social, and cultural rights have outlived their era, ushering in the new generation of rights – third generation rights.[160] Therefore, it is likely that fourth generation rights might succeed the third after it has outlived its era.[161]

Although Boyle and Cullet, respectively, accept Vasak's three-generation human rights concept, however, the authors argue that the "right to a healthy and ecologically balanced environment" [162] should not be limited to a generation as it transcends the three generations.[163] In contrast, Macklem, argues that civil and political rights, economic, social, and cultural rights, and rights which are classified as third generation rights encompass "but one generation: a single population of entitlements."[164] It is necessary to note that the author contends this position in contradiction to his statement that a human rights generational concept is oblivious to the common purpose[165] that binds human rights.

From Macklem's proposition, it can be deduced that although the author accepts the classification of human rights using the generational concept. However, he is against dividing it into three generations. Macklem proposes that the development of human rights be approached as a single generation. Given the definition of generation stated above, as a period, a timeline, and an era, which is set to be succeeded by another generation, it can be argued that Macklem's proposition that the development of human rights be approached as a single generation may not be valid in as much as it entails labelling human rights into generations. On that basis, there is no difference between Vasak's concept and Macklem's argument.

Furthermore, Sepuldeva, Van Banning and van Genugten indicate that Vasak's three-generation rights concept has been criticised for "not being historically accurate and for establishing a sharp distinction between all human

159 Kooijmans (n 145) 316-317.
160 P Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) XXIX NILR 307, 316.
161 Ibid, 317.
162 Vasak (n 19) 29.
163 See Boyle, 'Human Rights or Environmental Rights?' (n 66) 471; Cullet (n 63) 27.
164 Macklem (n 150) 52.
165 Which Macklem identifies as mitigating injustice – see Macklem (n 150) 52.

rights."[166] The authors' argue that the concept contradicts the accepted norm that rights are interrelated, interdependent, and indivisible.[167] Supporting this position, Alston opines that:

> [T]he implication that the concept of human rights can be split up into different generations each with its own distinctive characteristics and each more evolved and sophisticated than its predecessor…is…directly at odds with the United Nations' insistence that all human rights are indivisible and interdependent.[168]

Based on the above, it can be argued that it might not be valid to classify human rights into generations as that fails to reflect the historical development and negates its nature of being indivisible, interrelated, and interdependent.

4.4.2 Civil and Political Rights and Economic, Social and Cultural Rights: negative rights and positive actions

Before examining Vasak's usage of the terms 'negative rights' and 'positive actions,' it is necessary to define what these terms connote. For clarity of analysis, 'positive action' shall hereinafter be referred to as 'positive duty.' Negative rights and positive duties can be traced to moral philosophy where instead of 'rights', the word 'rule' is used. Singer distinguished between the negative rule and positive rule.[169] Singer states that while a negative rule prohibits the doing of an action, and in doing so, imposes a negative duty, that is a duty not to do the action. On the other hand, a positive rule requires the doing of an action, creating a positive duty, that is a duty to carry out an action. Therefore, a positive duty "cannot be fulfilled by inaction."[170]

Belliotti, on the other hand, while agreeing that negative duties require refraining from doing an act, he extends that of a positive duty to mean requiring the rendering of assistance (to those in need, in distress).[171] Thus, according to Belliotti, positive duty is not just the requirement to do something

166 Sepuldeva M, Van Banning T and van Genugten WJ, *Human Rights Reference Handbook*(UP 2004) 13. See also Alston (n 160) 316; A Eide, 'Economic, Social and Cultural Rights as Human Rights' in A Eide, C Krause, and A Rosas (eds), *Economic, Social and Cultural Rights* (NP 1995) 24-29.

167 Sepuldeva, Van Banning and van Genugten (n 166).

168 Alston (n 160) 316.

169 MG Singer, 'Negative and Positive Duties' (1965) 15 TPQ 97, 98-99. See also H Breakey, 'Positive duties and human rights: Challenges, Opportunities and Conceptual Necessities' (2015) 63 PS 1198, 1198.

170 Singer (n 169) 99.

171 See RA Belliotti, 'Negative Duties, Positive Duties, and Rights' (1978) 16 ASJP 581, 581; RA Belliotti, 'Negative and Positive Duties' (1981) 47 Theoria 82, 82.

but more specifically, the requirement to render assistance. Furthermore, Belliotti opines that while negative duties produce a corresponding right to demand that it is fulfilled, positive duties do not create similar enforceable rights.[172]

It is necessary to note that while Singer and Belliotti are in consensus that negative duties proscribe the doing of an act; they both disagree as to the nature of obligation ensuing from positive duties. According to Singer, positive duties require the duty-holder to do an action, and the obligation remains pending until the action is carried out. For Belliotti, positive duty entails rendering assistance, and the duty-holder cannot be compelled to perform that act. Cruft sums this up as "the assistance/non-interference distinction and the act/refrain distinction."[173]

In human rights discourse, the general presumption is that human rights give rise to negative rights which create negative duties and nothing else.[174] According to Freedman, "where positive duties are acknowledged, they are usually associated with socio-economic rights."[175] Thus, legal scholars often label civil and political rights as negative rights, while referring to economic, social, and cultural rights as embodying positive duties. This distinction is also reflected when interpreting the perceived role of the state in meeting its obligation to fulfil, protect, and respect the citizens' rights.[176] While the state is expected to do nothing except ensure that it does not interfere with civil and political rights, on the other hand, economic, social, and cultural rights would necessitate that the state actively put in place measures – legislative and administrative measures.

Hence, while civil and political rights are presumed to cost the state little or no financial burden, are justiciable, and immediately effective. Conversely, economic, social, and cultural rights, require positive state action, are mostly

172 Belliotti, 'Negative Duties, Positive Duties, and Rights' (n 171) 581.

173 R Cruft, 'Response to World Poverty and Human Rights: Human Rights and Positive Duties' (2005) 19 EIA 29, 30.

174 T Pogge, 'Poverty and Human Rights' <www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf> accessed 28 September 2018; S Freedman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 1.

175 Freedman (n 174) 1.

176 A Eide and A Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in A Eide, C Krause, and A Rosas (eds), *Economic, Social and Cultural Rights* (NP 1995) 17.

non-justiciable, necessitate progressive implementation, and are often considered aspirational objectives to be achieved by the state when resources become available.[177] Courtis defines justiciability as:

> [T]he ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur; it implies access to mechanisms that guarantee recognised rights; and a justiciable right grants the right-holder a legal course of action to enforce that right whenever the duty-bearer fails to comply with his or her duties. [178]

Responding to the above presumption of the dichotomy between positive and negative rights, the Committee on Civil and Political Rights in *General Comment No 31* dealing with legal obligations of states parties to the ICCPR, interprets states' legal obligation under article 2 of the ICCPR[179] as creating both negative and positive duties. [180] The Committee further holds that the purposes of ICCPR would be defeated where measures – which may require changes in a states party's legislation – are not taken to prevent the recurrent violation.[181] Thus, states parties are mandated by article 2 of the ICCPR to "adopt legislative, judicial, administrative, educative, and other appropriate measures in order to fulfil their legal obligations."[182]

Likewise, concerning states parties' legal obligation under article 2 of the ICESCR,[183] the 1987 Limburg Principles provides that states parties' obligation towards implementing the rights guaranteed in the ICESCR, is immediate through the use of "all appropriate means, including legislative, administrative,

177 See A Conte and R Burchill, 'Introduction' in A Conte and R Burchill (eds), *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2nd edn, APL 2009) 2-3; Freedman (n 174) 66; TC van Boven, 'Distinguishing Criteria of Human Rights' in K Vasak (ed), *The International Dimensions of Human Rights* (Vol 1, English edition, P Alston (ed), UNESCO and GP 1982) 50; Sepuldeva, Van Banning and van Genugten (n 166) 9; M Scheinin, 'Economic and Social Rights as Legal Rights' in A Eide, C Krause, and A Rosas (eds), *Economic, Social and Cultural Rights* (NP 1995) 41; UNGA 'Annotations on the text of the draft International Covenants on Human Rights' UN Doc A/2929 (1955) <www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/A-2929.pdf> accessed 28 September; A Nolan, B Porter and M Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' [2007] <http://socialrightscura.ca/documents/publications/BP-justiciability-belfast.pdf> accessed 28 September 2018.

178 C Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* (ICJ 2008) 6 .

179 International Covenant on Civil and Political Rights, UNGA Res 2200 (XXI) (16 December 1966).

180 UNCHR, 'General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 6.

181 Ibid, para 17.

182 Ibid, para 7.

183 International Covenant on Economic, Social and Cultural Rights, UNGA Res 2200 (XXI) (16 December 1966).

judicial, economic, social, and educational measures."[184] Expatiating on the issue of 'progressive implementation', the Limburg Principles explains that 'progressive implementation' does not imply that states have the right to indefinitely defer the execution of the rights guaranteed by the ICESCR. Instead, because the obligation on the state requires the efficient use of available resources and not the existence of increased resources,[185] states parties are required to "move as expeditiously as possible towards the realisation of the rights." [186]

Expounding on the Limburg Principles, the Committee on Economic, Social, and Cultural Rights (CESCR) in its *General Comment No 3* provides that

> Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable.[187]

In a subsequent comment dealing with the domestic application of ICESCR, the Committee states that

> In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social, and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions…The adoption of a rigid classification of economic, social, and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[188]

Taking cognisance of the explanations given by both the Committee on Civil and Political Rights and the Committee on Economic, Social, and Cultural

184 UNCHR, 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' UN Doc E/CN.4/1987/17 <www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UN_Limburg_Principles_1987_En.pdf> accessed 28 September 2018, pt 1 cls 16 -17.

185 UNCHR, 'The Limburg Principles' (n 184) cl 23. See also UNCHR 'General Comment 3: The nature of States parties' obligations' (14 December 1990) E/1991/23 <www.refworld.org/docid/4538838e10.html> accessed 28 September 2018.

186 UNCHR, 'The Limburg Principles' (n 184) cl 21.

187 UNCHR, 'General Comment 3' (n 185) para 5.

188 UNCHR, 'General Comment 9: The domestic application of the covenant' (3 December 1998) E/C.12/1998/24 <www.refworld.org/docid/47a7079d6.html> accessed 29 September 2018.

Rights, and the Limburg Principles, it is evident that civil and political, and economic, social, and cultural rights entail negative rights and positive rights. Thus, Vasak's concept which demarcates negative rights as strictly civil and political rights, and positive duty as strictly that of economic, social, and cultural rights, is contrary to this. Kooijmans adequately sums it up when he states, "it is not true that civil and political rights imply only a duty to abstain on the part of the government, while social and economic rights suggest a duty to act."[189]

Other authors have echoed Kooijmans statement.[190] During the drafting process of the UDHR – which is the foundation for both the ICCPR and ICESCR – the representative from Brazil stated that "by making human rights international, the United Nations Charter had placed upon states positive legal obligations."[191] The statement confirms that human rights confers on states not only negative duties but more so, positive duties.[192] According to White, duty (or obligation) implies that the duty-holder has to do something for the right-holder.[193] This research concludes that all duties, whether negative or positive mandates action by the duty holder. Based on this conclusion, instead of referring to duty as either negative or positive, it is argued that duty should be regarded plainly as a duty.

4.4.3 Third generation rights (rights of solidarity)

According to Vasak, the "right to a healthy and ecologically balanced environment"[194] falls within the categorisation of third-generation rights. These third-generation rights

> [R]eflect a certain conception of community life, they can only be implemented by the combined efforts of everyone: individuals, States and other bodies, as well as public and private institutions.[195]

189 Kooijmans (n 145) 321.
190 See Freedman (n 174) 9; Cruft (n 173) 37; Macklem (n 150) 58-59; UNGA 'Consideration by the General Assembly at its Third Session' (1948-49) UNYB <www.unmultimedia.org/searchers/yearbook/page.jsp?volume=1948-49&bookpage=i> accessed 29 September 2018.
191 UNGA, 'Consideration by the General Assembly at its Third Session' (n 190).
192 Ibid.
193 A White, *Rights* (OUP 1984) 56.
194 Vasak (n 19) 29.
195 Ibid.

An examination of Vasak's description of first, second, and third generation rights, indicates that their execution methods demarcate these generation rights. Essentially, the first-generation rights entail the non-interference of state to individual freedom; the second-generation rights necessitate positive state action; and the third-generation rights would require the combined efforts of individuals, states, private and public institutions, and other bodies. Following Vasak's postulation, it can be deduced that third generation rights are neither implemented by state actions, nor by non-interference of state on individual freedom. Also, while the state is specified as the duty holder in the first- and second-generation rights, Vasak identifies 'everyone' as the duty holder in third generation rights.[196] The implication of this is that the "right to a healthy and ecologically balanced environment"[197] becomes a right with unidentified duty-holders and right-holders.

Kooijmans argues that for a right to exist, there has to be an identifiable right holder who can bring a claim against the duty holder who is obliged to fulfil that claim. [198] The right holder and duty holder ought to be distinct and recognisable.[199] Taking cognisance that the third generation rights do not have identifiable right holders and duty holders, it is necessary to question whether they should be recognised as existing rights.

In his 1977 article, Vasak referred to third generation rights as "rights of solidarity."[200] This research contends that an examination of what rights of solidarity connotes might aid understanding of the type of rights Vasak's third generation rights embody. It is necessary to note that Vasak did not explicitly expound on what the rights of solidarity mean. Notwithstanding, Alston alleges that Vasak in his 1979 inaugural lecture at the International Institute of Human Rights expatiated on what constitutes the rights of solidarity.

According to Alston, Vasak stated that rights of solidarity "may be both invoked against the state and demanded of it."[201] The author further indicates that

196 C Wellman, 'Solidarity, the Individual and Human Rights' (2000) 22 Human Rights Quarterly 639, 644.
197 Vasak (n 19) 29.
198 Kooijmans (n 145) 323.
199 Ibid.
200 Vasak (n 19) 29.
201 K Vasak, 'For the Third Generation of Human Rights: The Rights of Solidarity' (Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, Strasbourg, 2-27 July 1979) as cited in P Alston,

Vasak argued against the issue that the right of solidarity lacked a precise object.[202] In answer to that, Alston states that Vasak contended that earlier rights lacked duty holders when they were first formulated and "modern rights concept does not necessarily require the identification of any specific guarantor."[203]

Given the seeming absence of clarification on what constitutes rights of solidarity, there has been a scholarly engagement to decipher this. According to the 1978 UNESCO Expert meeting report, the rights of solidarity would entail that all accept their responsibilities or all would be unable to enjoy the right.[204] The report emphasised that the "appropriate analytical tools and machinery for implementing the rights of solidarity are yet to be elaborated."[205] The report further recommends that based on the various formulations and interpretations of the concept of solidarity, it is necessary to clarify the objects, content, and subjects of solidarity rights.[206]

In 1980, a working group of the standing committee of international non-governmental organisations (NGOs) organised a symposium under the auspices of UNESCO with the aim to examine the concept of 'solidarity rights.'[207] According to the NGO working group, the rights of solidarity "entail duties of solidarity."[208] The NGO working group defined solidarity as

> The recognition of our common destiny and the desire to enable each individual to exercise his rights and assume his share of responsibility for safeguarding and improving the future of mankind.[209]

The NGO working group further held that the ability of an individual to enjoy the rights of solidarity extensively depended on whether that person can

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'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) XXIX NILR 307, 311.

202 Ibid.

203 Ibid.

204 UNESCO, 'Final Report: Expert Meeting on Human Rights, Human Needs and the Establishment of a New International Economic Order' (29 December 1978) SS-78/CONF.630/COL.2 para 238 <http://unesdoc.unesco.org/images/0003/000326/032647eb.pdf> accessed 29 September 2018.

205 Ibid, para 2.

206 Ibid, para 240.

207 UNESCO, 'Symposium New Human Rights: the Rights of Solidarity; the Rights of Solidarity: an attempt at conceptual analysis' (9 July 1980) SS-80/CONF.806/6 para 11 <http://unesdoc.unesco.org/images/0004/000407/040770eo.pdf> accessed 29 September 2018.

208 Ibid.

209 Ibid, para 9.

legitimately claim these rights from the "local, regional, national, international, or private communities"[210] to which he or she belongs.

According to Marks[211] and Wellman,[212] rights of solidarity comprise both individual rights and group/collective rights. Also, unlike first and second generation rights, the rights of solidarity impose joint obligations on all states and obligations on all actors in the international fora.[213] Relating the individual and collective rights dimension of the rights of solidarity to the "right to a healthy and ecologically balanced environment,"[214] Marks described the individual rights as the "right of any victim or potential victim of an environmentally damaging activity to obtain the cessation of the activity and reparation for the damage suffered."[215] The collective dimension, on the other hand, referred to "the duty of the state to contribute through international cooperation in resolving environmental problems at a global level."[216]

Taking a different stance from Marks and Wellman's position that rights of solidarity constitute both individual and group/collective rights, Boyle adopts the view that solidarity rights are collective rights which communities, and not individuals, can enforce to manage and protect their environment and natural resources.[217] The question then is whether rights of solidarity encompasses both individual and collective/group; or merely collective rights?

The Oxford Dictionary of English defines solidarity as "unity or agreement of feeling or action, especially among individuals with a common interest; mutual support within a group."[218] From this definition given by the Oxford Dictionary of English, it is evident that the term 'solidarity' refers to something held by a group or community. Solidarity involves plural and not a singular action. The definition supports Boyle's position that rights of solidarity are collective rights and not, as suggested by Marks and Wellman, consisting of both individual

210 Ibid, para 11.
211 Marks (n 28) 444.
212 Wellman (n 196) 650.
213 Ibid.
214 Vasak (n 19) 29.
215 Marks (n 28) 444.
216 Ibid.
217 Boyle, 'Human Rights or Environmental Rights?' (n 66) 471.
218 Stevenson (n 158).

rights and group/collective rights. Thus, an individual can only enjoy these rights with his/her community but not as an individual.[219]

Levy is of the view that what constitutes a collective right is imprecise based on the uncertainty as to whether collective right refers to "a right to a collective good? A right which could only be exercised by members of a collective? A right which could only be exercised by a collectivity (sic) itself?"[220] Describing the nature of collective rights, Jones states that members of the collective group cannot enforce these rights against members of that group; the rights can only be enforced against externals.[221] This is because "right holders cannot hold rights against themselves."[222] Jones argues that like individual rights which are enforced against external persons, collective rights must be directed externally against other individuals or groups of individuals; and not internally against itself – the right holders.[223] Hence, "individuals who incur the duty entailed by a collective right cannot figure amongst the holders of that right."[224]

From the discussion, it is evident that scholars do not hold a common position as to what constitutes rights of solidarity. Although according to Alston, Vasak argues that rights of solidarity may be invoked and demanded from a state, it is still unclear as to who are the identified right holders and duty holders. Thus, the pertinent questions include whether the rights of solidarity are 'for all rights,'[225] or rights individuals have to claim from their community[226] or a combination of individual and group/collective rights,[227] or merely collective rights.

This lack of clarity underlines the recommendation by the 1978 UNESCO Expert Meeting that the subject, content and object of the rights of solidarity

219 See Boyle, 'Human Rights or Environmental Rights?' (n 66) 471; P Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21 HRQ 80, 94.

220 See JT Levy, 'Classifying Cultural Rights' (1997) 39 Nomos 22, 23; S Wall, 'Collective Rights and Individual Autonomy' (2007) 117 Ethics 234, 236; W Kymlicka, 'Cultural Rights and Social-Democratic Principles: Dialogue with Alfredo Gomez-Muller and Gabriel Rockhill' in A Gomez-Muller and G Rockhill (eds), *Politics of Culture and the Spirit of Critique: Dialogues* (CUP 2012) 148-149.

221 P Jones, 'Group Rights and Group Oppression' (1999) 7 TJPP 353, 373.

222 Jones, 'Human Rights, Group Rights, and Peoples' Rights' (n 219) 94.

223 Ibid, 94-95.

224 Jones, 'Group Rights and Group Oppression' (n 221) 373.

225 UNESCO, 'Final Report' (n 204) para 238.

226 UNESCO, 'Symposium New Human Rights' (n 207) para 11.

227 See Marks (n 28) 444; Wellman (n 196) 650.

needs clarification.[228] More so, should the definition of rights of solidarity as collective rights be adopted – that is, in relation to the "right to a healthy and ecologically balanced environment"[229] – it would mean that this right can only be enjoyed by communities and not individuals. Also, because the individuals or group of individuals collectively hold the position of right holders with the community and given that the community cannot enforce the collective right against itself. This means that where a member of the community engages in activities that cause environmental degradation and pollution; the community cannot enforce the collectively enjoyed right against these individuals or groups of individuals.

Furthermore, it is suggested that cataloguing the "right to a healthy and ecologically balanced environment"[230] as a third generation right would mean labelling it a non-existing right because it does not clarify who the right holders and duty holders are. It is impossible to hold 'everyone' responsible for 'everyone,' and for 'everyone' to claim rights from 'everyone. As stated by Kooijmans, a right must have precise right holders and duty holders to be identified as a right.[231]

4.4.4 Subsection Analysis

Having examined Vasak's three-generation human rights concept, it is suggested that Vasak's classification of generation rights is imprecise, invalid, and especially, fails to reflect the true nature of the international bill of human rights. According to Eide, although it is not clearly spelt out in the international bill of rights, "but are gradually clarified through additional more specific instruments and the practice of monitoring bodies,"[232] it is trite that rights create correlative duties. This factor is missing in Vasak's third generation rights classification (rights of solidarity), as Vasak did not state who precisely are the right holders and duty bearers of these rights.

228 UNESCO, 'Final Report' (n 204) para 240.
229 Vasak (n 19) 29.
230 Ibid.
231 Kooijmans (n 145) 323.
232 Eide (n 166) 35.

Furthermore, Shelton argues that Vasak's proposition that the third-generation rights are distinguished because the combined efforts of all parts of the society are required to implement the rights, "does not seem to be a distinctive feature in practice, as all human rights involve correlative duties for individuals, groups, and governments."[233]

With regards to Vasak's classification of civil and political rights as precisely negative rights; and economic, social, and cultural rights as positive rights, from the *General Comments* of both the CCPR and CESCR, it can be argued that this proposition might not be accurate. According to the *General Comments* of both the CCPR and CESCR, it is evident that in adopting the international bill of rights, states parties which make up the UNGA accepted an international bill of rights which creates both positive and negative obligations on the states parties. That is an indivisible,[234] interrelated,[235] inalienable,[236] universal,[237] and interdependent[238] body of human rights.[239] Thus, according to Whelan, "if we subscribe to the idea that (something about) human rights is truly indivisible, the generations approach confronts us with significant contradictions."[240]

According to the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights 1997, in the same manner, states parties who do not comply with the treaty obligations in ICCPR are said to be in violation. Likewise, states parties who fail to fulfil their obligations as agreed under ICESCR violate the

233 Shelton, 'Human rights, Environmental Rights, and the Right to Environment' (n 28) 124. This positon is confirmed in the UDHR – see UNGA Res 217 (III) (10 Dec 1948) preamble para 8 (n 29).

234 "All civil, cultural, economic, political, and social rights are equally important. Improving the enjoyment of any right cannot be at the expense of the realisation of any other right" – see OHCHR, 'Human Rights Indicators: A Guide to Measurement and implementation' [2012] 11 <www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf> accessed 29 September 2018.

235 "Improvement in the realisation of any one human right is a function of the realisation of the other human rights" – see ibid.

236 "Human rights are inherent in all persons and cannot be alienated from an individual or group except with due process and in specific situations" – see ibid.

237 "Human rights are universal, regardless of political, economic or cultural systems" – see ibid.

238 "Human rights are interdependent, as the level of enjoyment of any one right is dependent on the level of realisation of the other rights" – see ibid.

239 The UN has consistently reiterated this fact – see UNGA, 'Preparation of two Draft International Covenants on Human Rights' Res 543 (VI) (5 February 1952) preamble, para 2; UNGA, 'Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights' A/RES/63/117 (10 December 2008) preamble, paras 4-5; UNCHR, 'The Limburg Principles' (n 184) pt1 cl3. See also art 5 Vienna Declaration and Programme of Action 1993; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (1 December 2011) (2017) 29 NQHR 578, 580, para 5 <https://doi.org/10.1177%2F016934411102900411> accessed 29 September 2018.

240 Whelan (n 149) 211.

Treaty.[241] It is suggested that this further reflects the indivisible, interrelated, interdependent, universal, and *of-equal-importance*[242] characteristic of the international bill of rights. The Maastricht Guidelines further provides that the ICCPR and ICESCR impose on states the obligations[243] to respect,[244] protect,[245] and fulfil.[246] Thus, failure to do so creates a violation of the rights guaranteed therein.

Bridging the seeming gap between ICCPR and ICESCR,[247] on the 10th of December 2008, UNGA adopted the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights;[248] with the objective to equip the CESCR to achieve the purposes of the ICESCR and implement its provisions.[249] Similar to the regime obtainable for violation of rights guaranteed in the ICCPR,[250] the Optional Protocol makes it possible for the CESCR to receive communications brought by or on behalf of individuals or groups who have been victims of a violation of any rights guaranteed by the ICESCR.[251]

Therefore, it is evident that the obligations created by the international bill of rights are obligations to act and not obligations to render assistance. These obligations create correlative right to demand that the right is fulfilled, as failure to do so results in a violation of the treaty. Therefore, unlike Belliotti's moral philosophy positive duties, which do not create a correlative right to demand enforcement, positive duty obligations arising from human rights give

241 Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights (22-26 January 1997), para 4-5 <http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html> accessed 29 September 2018.
242 Expression that of thesis.
243 See also Maastricht Principles 2011 (n 239) para 3.
244 This requires the state to refrain from interfering with the enjoyment of civil, political, economic, social, and cultural right – see Maastricht Guidelines 1997 (n 241) para 6.
245 This requires the state to prevent violations of civil, political, economic, social, and cultural rights by third parties – see ibid.
246 This requires the state "to take appropriate legislative, judicial, budgetary, administrative, and other measures towards the full realisation of" civil, political, economic, social, and cultural rights – see ibid.
247 Whelan (n 149) 206.
248 Which came into force on the 5th of May 2013 – see United Nations, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3-a.en.pdf> accessed 29 September 2018.
249 UNGA, A/RES/63/117 (n 239) preamble, para 6.
250 UNGA, 'Optional Protocol to the International Covenant on Civil and Political Rights' (16 December 1966) art 2 <https://treaties.un.org/doc/Treaties/1976/03/19760323%2007-37%20AM/Ch_IV_5p.pdf> accessed 29 September 2018.
251 UNGA, A/RES/63/117 (n 239) art 2.

individuals and groups the correlative right to demand that the right is fulfilled.[252] Freedman refers to this right as the right to state action.[253]

In conclusion, although Horn argues that the right to the environment can be categorised as either first, second, or third generation rights,[254] based on the analysis above, it can be argued that it might not be valid to adopt Vasak's three-generation human rights classification in understanding the HRAEP concept.

5 CHAPTER CONCLUSION: WHAT IS THE HREAP CONCEPT?

The crux of this chapter has been to understand and define the HRAEP concept to provide materials through which it is further examined within the Nigerian context.

From the formulated operational definition, it is evident that the HRAEP serves a specific function and purpose. The principal focus of HRAEP is to maintain or restore the quality of environmental media and ensure the prevention of pollutant emissions or reduce the presence of these pollutants in the abiotic components. Thus, HRAEP within the Nigerian context would fulfil this function and purpose.

In addition to defining the concept, this chapter examined salient issues emanating from scholarly discourse on the concept, namely, (i) the avenues through which HRAEP can be envisaged, (ii) is the right ecocentric or anthropocentric, (iii) is it a right to the environment or a right for the environment, (iv) is it a third generation right?

Due to the absence of a UN legal instrument which recognises and guarantees a human right to protect the environment, scholars have sought avenues through which the human rights mechanism can be used to protect the environment. Hence the varied suggested approaches. However, because rights to environmental protection are statutorily recognised and guaranteed in

252 Freedman (n 174) 88.
253 Ibid.
254 L Horn, 'Reframing Human Rights in Sustainable Development' (2013) 6 JALTA 1, 7.

Nigeria, this resolves the lack of consensus on approaches. Therefore, an examination of HRAEP from the Nigerian perspective has the certainty of the avenue through which HRAEP is realised.[255]

Another issue indicated is the lack of agreement as to whether the term 'environment' as used in the formulated rights should be ecocentric or anthropocentric in scope. It is suggested that the statutory definition of 'environment' in Nigeria might resolve this ambiguity in the discussion of HRAEP within the Nigerian context. [256] It is also argued that because the use of a human rights mechanism to protect the environment in itself underscores the need for a human person or legal person to ensure its enforcement; HRAEP might reflect the view of the weak anthropocentric school of thought instead of ecocentric or strong anthropocentric.

Concerning the different phrases used to describe the formulated right, the analysis indicates that scholars are not unanimous in deciding whether the formulated right should be a right to the environment or a right for the environment, whether it should be a singular right or plural rights, and whether it should be a procedural or substantive right. It can be argued that the lack of a universal definition of the term 'environment' might have influenced this situation. However, when examining HRAEP within the Nigerian context, in addition to the courts' interpretation of their intendment, the provided human rights to protect the environment are precise. Therefore, cannot be described as an unclear right, lacking in defined scope and content.

With regards to cataloguing the human rights to protect the environment as third generation rights, this chapter has examined Vasak's concept critically and concludes that such classification might not be valid, because (i) the three-generation human rights concept is not a reflection of the true nature of the international bill of human rights. (ii) According to the CCPR and CESCR, human rights cannot be distinctively divided as being either positive or negative. Every human right connote both positive and negative duties to fulfil, respect, promote, and protect. (iii) Given Kooijmans definition of rights as

255 See Chapter Three for discussion.
256 Ibid

having specific right-holders and duty-holders,[257] accepting that human right to environmental protection is a third generation right would be inadvertently agreeing that such right does not exist. Also, such rights can only be enforced against persons who are not part of the community, and this does not reflect the universal, inalienable, indivisible, interdependent, and interrelated nature of human rights.

Having stated these, in answer to the question as to what the HRAEP concept connotes, it is suggested that the concept refers to the use of human rights mechanism to reduce, maintain, prevent, reverse, or restore the quality of land, water, air, animal resources, plant resources, or other natural resources; through preventing the emission of pollutants or reducing the presence of polluting substances in these elements. Within the Nigerian context, the approach through which the concept is envisaged is the formulated human rights to protect the environment, and this 'formulated right' is recognised and guaranteed by statute. Also, the formulated right is precise and cannot be categorised as a third generation right. Furthermore, the concept recognises the symbiotic relationship the human being has with the environment and the environment with the human being. The next chapter shall examine this concept from the Nigerian perspective.

257 Kooijmans (n 145) 323.

CHAPTER THREE
THE CONCEPT OF ENVIRONMENTAL SUSTAINABILITY (ES)

1 INTRODUCTION

As stated in Chapter One, the two key concepts in this research are, HRAEP and ES. Having defined the HRAEP concept in Chapter Two, this chapter examines the ES concept to formulate an operational definition relevant to this research.

This chpater is further divided into four sections. Section 2 seeks to understand what the concept of environmental sustainability (ES) connotes and formulates an operational definition of ES that is relevant to this research. Section 3 examines the ES concept and other similar concepts, such as sustainability and sustainable development, to determine which concept is most relevant in dealing with a human rights approach to environmental protection. Section 4 discusses the nexus between the HRAEP and ES concepts. Section 5 presents the chapter conclusion.

2 UNDERSTANDING THE CONCEPT OF ENVIRONMENTAL SUSTAINABILITY (ES)

According to Corrigan and others, the ES concept is a product of two ideas, namely, ecologism and environmentalism.[1] While ecologism refers to the "idea that the non-human world is worthy of moral consideration," [2] environmentalism, on the other hand, denotes a "broad-based movement concerned with protecting the environment, and in particular with the effects of environmental damage on the health and well-being of both humans and the environment."[3] Sutton posits that the ES concept emerged from the concern

1 G Corrigan and others, 'Assessing Progress toward Sustainable Competitiveness' in K Schwab (ed), *The Global Competitiveness Report 2014-2015 (*WEF 2014) 53.
2 Ibid.
3 Ibid.

that aspects of the environment – which people love, value, and depend on – is threatened by severe degradation and extinction.[4]

Before its current terminology, the ES concept has been couched differently at different periods. The term has metamorphosed from 'environmentally responsible development,' subsequently to 'environmentally sustainable development', and finally to its present terminology, 'environmental sustainability'.[5] Elliot highlights that the diversity of views on the concept of ES has led to confusion in terminology, cascading to the lack of a universal definition.[6] It is suggested that this challenge of a standard definition might be linked to the fact that the sustainability concept – which ES is a component of[7] – is perceived as an abstract term which defies precise definition[8] Gow argues that the sustainability concept has become extensively "all-encompassing as to be virtually toothless."[9]

Given that the first step to understanding a concept is to define the concept, taking cognisance that the ES concept lacks a universal definition, it is necessary to formulate an operational definition that is relevant to this research. This section discusses the varied ES concept definitions proffered by scholars to identify which of the definitions might be most suitable in the discussion of the Nigerian extractive industry within the context of this research.

According to Sutton, ES refers to the ability to maintain the qualities that are valued in the physical, natural, and biological environments.[10] Redwood,

4 P Sutton, 'A Perspective on Environmental Sustainability?' (Victorian Commissioner for Environmental Sustainability 2004) 10 <www.green-innovations.asn.au/A-Perspective-on-Environmental-Sustainability.pdf> accessed 1 October 2018.

5 B Moldan and S Janoušková and T Hák, 'How to understand and measure environmental sustainability: indicators and targets' (2012) 17 EI 4, 6.

6 S Elliot, 'Transdisciplinary Perspectives on Environmental Sustainability: A Resource Base and Framework for IT-Enabled Business Transformation (2011) 35 MISQ 197, 207. See also A Dobson, 'Environment sustainabilities: An analysis and a typology' (1996) 5 EP 401, 402.

7 Other components are economic sustainability and social sustainability – see R Goodland, 'The Concept of Environmental Sustainability' (1995) 26 ARES 1, 2. See also Sutton (n 4).

8 HE Daly, Ecological Economics and Sustainable Development, Selected Essays of Herman Daly (EEPL 2007) 36; J Pope, D Annandale and A Morrison-Saunders, 'Conceptualising sustainability assessment' (2004) 24 EIAR 595, 597; G Van de Kerk and AR Manuel, 'A comprehensive index for a sustainable society: The SSI – the Sustainable Society Index' (2008) 66 EE 228, 228; V Veleva and others, 'Indicators for measuring environmental sustainability: A case study of the pharmaceutical industry' (2003) 10 BAIJ 107, 107.

9 D Gow, 'Poverty and Natural Resources: Principles for Environmental Management and Sustainable Development' (1992) 12 EIAR 49, 51.

10 Sutton (n 4)1.

Eerikainen, and Tarazona define ES as the process of guaranteeing that the "overall productivity of accumulated human and physical capital resulting from development actions more than compensates for the direct or indirect loss or degradation of the environment."[11] Corrigan and others describe ES as "the institutions, policies, and factors that ensure efficient management of resources to enable prosperity for present and future generations."[12] The United Nations Development Programme (UNDP) defines ES as "the protection and sustainable management and use of ecosystem and natural resources, including ensuring the equitable access to, and governance of ecological goods and services."[13] Esty and others, describe ES as the "ability to maintain valued environmental assets over the next several decades and to manage problems that emerge from changing environmental conditions."[14] According to Ugochukwu, Ertel, and Schmidt, ES is the "long-term maintenance of valued environmental resources in an evolving human context."[15] Aniyie defines ES as the procedure of ensuring that existing "processes of interaction with the environment are pursued with the intention of keeping the environment as pristine as naturally possible."[16]

Notably, Goodland in his 1995 article entitled *The Concept of Environmental Sustainability* critically examined the ES concept.[17] Although other scholars briefly address the ES concept, however, to date, Goodland's article is the only research which extensively examines the ES concept. Goodland indicates that the ideas he analyses in his article are based on the work of Herman Daly, whom he acknowledges as "the leading sustainability theoretician."[18]

11 J Redwood and J Eerikainen and E Tarazona, Environmental Sustainability: An Evaluation of World Bank Group Support (WB 2008) iv.

12 Corrigan and others (n 1).

13 UNDP, 'Practitioner's Guide: Capacity Development for Environmental Sustainability' [2011] 3 <https://sustainabledevelopment.un.org/content/documents/954017_UNDP_Practitioner_Guide_CD%20for%20Sustainability.pdf> accessed 1 October 2018.

14 DC Esty and others, '2005 Environmental Sustainability Index: Benchmarking National Environmental Stewardship' (YCELP 2005) 11 and 401 <http://archive.epi.yale.edu/files/2005_esi_report.pdf> accessed 1 October 2018.

15 CNC Ugochukwu, J Ertel and M Schmidt, 'Environmental Sustainability and Sustainable Development Issues in the Niger Delta Region of Nigeria' (2008) 21 FF 151, 154.

16 IA Aniyie, 'What is the much ado about environmental law: Another Addition to the Rhetorics?' in E Azinge, B Owasanoye and FE Nlerum (eds), *Nigerian Current Law Review 2007-2010* (NIALS 2010) 176.

17 Goodland (n 7) 1-21.

18 Ibid, 21.

Using economic terminologies such as 'natural capital,' [19] 'utility,' [20] and 'throughput,'[21] according to Daly, the environment is affected by throughput and not utility.[22] Hence, ES

> [R]equires that the throughput is within the regenerative capacities of renewable natural resources, and within the assimilative capacities of natural sinks. For non-renewable resources, there is no regenerative capacity and strictly speaking no ecologically sustainable use rate. However, quasi-sustainability may sometimes be attained by depleting non-renewables at a rate equal to the development of renewable substitutes.[23]

Taking cognisance of Daly's definition, Goodland further describes ES as the "maintenance of natural capital."[24] Goodland indicates that through the output and input rule,[25] ES seeks to indefinitely maintain the life-support systems which refers to "those systems maintaining human life…environmental sink and source capacities." [26] A healthy life-support system refers to a life-support system with maintained environmental service capacity. [27] Environmental service is defined as:

> [Q]ualitative functions of natural non-produced assets of land, water, and air (including related ecosystem) and their biota. There are three basic types of environmental service: (a) disposal services which reflect the functions of the natural environment as an absorptive sink for residuals, (b) productive services which reflect the economic functions of providing natural resource inputs and space for production and consumption, and (c) consumer or consumption services which provide for

19 There are four kinds of capital: human-made, natural, social, and human. The natural capital – which can also be referred to as the natural environment – refers to the "stock of environmentally provided assets (such as soil, atmosphere, forests, water, wetlands), which provide a flow of useful goods or services; these can either be renewable, non-renewable, marketed, or nonmarketed (sic)" – see Goodland (n 7) 14.

20 Daly defines 'utility' as the "average per capita utility of members of a generation" – see Daly (n 8) 37.

21 Daly defines 'throughput' as the "total throughput flow for the community over some time period, for example, the product per capita throughput and population" – see Daly (n 8) 37.

22 Ibid, 254.

23 Ibid, 57.

24 See Goodland (n 7) 10.See also JM Harris, 'Sustainability and Sustainable Development' [2003] 1 <http://isecoeco.org/pdf/susdev.pdf> accessed 1 October 2018; P Ekins, 'Environmental Sustainability: From Environmental Valuation to the Sustainability Gap' (2011) 35 PPG 629, 637; Elliot (n 6) 207; R Goodland and H Daly, 'Environmental Sustainability: Universal and Non-Negotiable' (1996) 6 EA 1002, 1003; J Morelli, 'Environmental Sustainability: A Definition for Environmental Professionals' (2011) 1 JES 1, 1; Moldan and Janoušková and Hák (n 5) 6; AD Basiago, 'Economic, Social, and Environmental Sustainability in Development Theory and Urban Planning Practice' (1999) 19 TE 145, 150.

25 Goodland (n 7) 10.

26 Ibid, 2, 5-6.

27 See Goodland and Daly (n 27) 1003.

> physiological as well as recreational and related needs of human beings.[28]

According to Goodland, the output rule requires that waste emissions be confined within the assimilative ability of the environment where the project activities take place without infringing its ability to absorb waste in the future or other vital services.[29] The input rule, on the other hand, states that

> (a) Harvest rates of renewable resource inputs should be within the regenerative capacities of the natural system that generates them;
> (b) The depletion rates of non-renewable resource inputs should be set below the rate at which renewable substitutes are developed by human invention and investment.[30]

Goodland further emphasises that although environmental services have the immense capacity, however, this capacity is finite and when overused, this impairs the provision of its life-support services.[31] In addition, due to (i) the inability to substitute most of the environmental services, such as air; (ii) the slow processes associated with the self-regeneration of these properties which cannot be significantly hastened; Goodland cautions that if uninterrupted provision of these environmental services is to be ensured, ES should be taken as an urgent matter.[32]

Having discussed the varied definitions advanced, in formulating an operational definition of ES, taking cognisance of this research focus, which is the Nigerian extractive industry, it is suggested that the definition proffered by Goodland might be most relevant. From Goodland's examination of the ES concept it is evident that the ES concept aims to achieve two things, namely:

i. Indefinitely maintain the environmental source capacity such that renewable resources are procured within regenerative capacities, while

28 United Nations Department for Economic and Social Information and Policy Analysis, 'Studies in Methods: Glossary of Environment Statistics' (ST/ESA/STAT/SER.F/67, United Nations 1997) 30 <http://unstats.un.org/unsd/publication/SeriesF/SeriesF_67E.pdf> accessed 1 October 2018.
29 Goodland (n 7) 10.
30 Ibid.
31 Ibid, 6.
32 Ibid, 13.

for non-renewable resources, at the development rate for renewable substitutes.[33]

ii. Indefinitely support the environmental sink capacity such that emitted wastes are within the assimilative capacity of the natural sink, without impinging on its ability to assimilate future emissions or other services.[34]

In discussing the Nigerian extractive industry, this research is not concerned with the sustainable harvesting of the non-renewable resources. Instead, the focus is on the environmental degradation and pollution consequent of the operations of the Nigerian extractive industry entities. Therefore, the ES concept within the context of this research is defined as the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative capacity of the environment in which they operate, without degrading its future waste absorptive capacity.

3 DISTINGUISHING ENVIRONMENTAL SUSTAINABILITY FROM SIMILAR CONCEPTS

Having formulated an operational definition of the ES concept that is relevant to this research, given the existence of similar concepts such as sustainability and sustainable development (SD). It is necessary to examine these concepts to ascertain which – that is, ES, sustainability, or SD – adequately reflects the desired outcome the use of human rights mechanism to protect the environment might achieve. The sustainability and SD concepts are examined because scholars have often referred to these concepts in addition to the ES concept when discussing anthropogenic-induced environmental degradation and pollution.

3.1 Sustainability

The German engineer and forest scientist, Hans Carl von Carlowitz, is credited to have formulated the term 'sustainability' (*Nachhaltigkeit*).[35] Carlowitz used

33 See also Moldan and Janoušková and Hák (n 5) 11.
34 Ibid.

this term in his 1713 book entitled *Sylvicultura oeconomica oder Naturmassige Anweisung zur Wilden Baum-Zucht (Forest Economy or Guide to Tree Cultivation Conforming with Nature)*.[36] The background which led to Carlowitz postulation of 'sustainability' stems from the ecological crisis of deforestation experienced in that era.[37] In that period, wood was the primary resource and was used for fuel, mining, constructing ships, houses, and manufacturing. The extensive utilisation of wood was such that by 1650, wood became scarce.[38] This scarcity had a negative impact on the economies of countries such as England and France, who actively sought alternative means to improve the crippling of their economies due to this scarcity.[39]

Based on his 40 years' experience as an administrator at the silver mining industry in Saxony, Carlowitz developed the concept of 'sustainability.' He argued that the practice of short-term gain-oriented forestry, anchored on greed and ignorance, would ruin forestry and lead to irreparable damage.[40] Carlowitz proposed that sustainability – that is, the conservation and growing of timber in order to provide sustained, durable, and continued use - was an indispensable tool which would ensure the continued existence of the affected nation-states.[41]

Although the term 'sustainability' came into existence several hundred years ago, it did not gain wide currency until the 1980s. This was primarily as a result of the 1960s and 1970s environmental awakening "which propelled environmentalist to examine the nexus between environmental issues and mainstream questions of development."[42]

As indicated above,[43] 'sustainability' has been described as a vague term with the propensity of acquiring varied meanings for different people.[44] Goodland

35 See K Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (reprinted Ashgate 2009) 18.
36 Ibid, 18.
37 Ibid, 16.
38 Ibid, 16-17.
39 Ibid.
40 Ibid, 18.
41 Bosselmann (n 35) 18; SM LéLé, 'Sustainable Development" A Critical Review' (1991) 19 WD 607, 609.
42 See I Scoones, 'Sustainability' (2007) 17 DP 589, 590.
43 See Section 2: Understanding the Concept of Environmental Sustainability (ES).
44 See fn 11.

defines 'sustainability' as maintaining "environmental assets,[45] or at least not depleting them."[46] Ekins, states that "at its simplest, the sustainability of something is its capacity for continuance into the future."[47] Bosselmann refers to sustainability as "the preservation of the substance or integrity of ecological systems."[48] Sutton states that "sustainability issues arise wherever there is a risk of difficult or irreversible loss of the things or qualities of the environment that people value."[49] According to Daly,

> [S]ustainability does not mean forever but rather is a way of asserting the value of longevity and intergenerational justice while recognising mortality and finitude; sustainability means maintaining capital intact, avoiding the mistake of consuming capital and counting it as income.[50]

Although the above authors have given seeming different meanings to 'sustainability,' from these definitions, it can be surmised that the finite nature of the earth's resources influences the need for sustainability. Thus, illuminating the necessity to use available resources in such a manner that can be enjoyed by future generations.[51]

According to Daly[52] and LéLé,[53] to convert the abstract-undefinable-nature of 'sustainability to a precise-definable term, the following factors should be indicated; namely, (i) what is being sustained, (ii) what is doing the sustaining, (iii) for whom, and (iv) how long. This research adds a fifth factor, which is the motive for sustaining the identified subject. The basis for adding this fifth factor is that where the motive for sustaining the identified subject is clear, this motive might reinforce the focus of sustainability.

Having discussed the concept of sustainability, what is the difference between this concept and the ES concept? Although ES is a component of the sustainability concept, however, when comparing the objectives of the sustainability and ES concepts, it is apparent that ES goes beyond sustainable

45 Environmental assets refer to natural capital – see Goodland (n 7) 14.
46 Ibid.
47 P Ekins, ''Limits to growth' and 'sustainable development': grappling with ecological realities' (1993) 8 EE 269, 280.
48 Bosselmann (n 35) 28.
49 Sutton (n 4) i.
50 Daly (n 8) 38 and 57.
51 See S Beder, *Environmental Principles and Policies* (NSB 2006) ch 1.
52 Daly (n 8) 36.
53 LéLé (n 41) 614-615.

harvesting of renewable and non-renewable resources. It is suggested that even though ES and sustainability seek to maintain the natural resources, however, ES further seeks to maintain the environmental sink. Therefore, while the sustainability concept might serve as a useful concept when broadly discussing the need to preserve the earth's resources, on the other hand, where the focus is on environmental degradation and pollution, the ES concept might be most relevant.

3.2 Sustainable Development (SD)

According to Robinson, the concept of SD

> [E]merged as an attempt to bridge the gap between environmental concerns about the increasingly evident ecological consequences of human activities and socio-political concerns about human development issues.[54]

These environmental concerns refer to the argument by the environmentalists that there was the need to limit growth or stop growth in order to protect natural resources; resolve the threat of pollution, and respect the rights of future generations.[55] Opposing the limits to growth/no-more-growth position, were economists, especially from developing nations, who argued that development was necessary to alleviate poverty, which posed a substantial challenge in these developing states. Also, that development provided the necessary framework for these states to participate in international affairs.[56]

The term SD was first coined in the 1980 World Conservation Strategy (WCS) document produced by the International Union for Conservation of Nature and Natural Resources (IUCN), United Nations Environment Programme (UNEP), and World Wildlife Fund (WWF).[57] However, the WCS document does not

54 J Robinson, 'Squaring the circle? Some thoughts on the idea of sustainable development' (2004) 48 EE 369, 370.

55 Also known as the no-more-growth position – see C Mitcham, 'The Concept of Sustainable Development: its Origins and Ambivalence' (1995) 17 TS 311, 317.

56 Ibid.

57 International Union for Conservation of Nature and Natural Resources (IUCN), World Conservation Strategy: Living Resource Conservation for Sustainable Development (IUCN-UNEP-WWF 1980) <https://portals.iucn.org/library/efiles/documents/wcs-004.pdf> accessed 1 October 2018. See also HSK Nathan and BS Reddy, 'A conceptual framework for development of sustainable development indicators' (IGIDR 2008) 5-6 <www.igidr.ac.in/pdf/publication/WP-2008-003.pdf> accessed 1 October 2018; Moldan and Janoušková and Hák (n 5) 4; Bosselmann (n 35) 28; Basiago (n 24) 147; R Harding, 'Ecologically sustainable development: origins, implementation and challenges' (2006) 187 Desalination 229, 231.

define SD. Instead, the WCS document defines conservation and development. Conservation refers to:

> The management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations.[58]

The WCS document defines development as

> The modification of the biosphere and the application of human, financial, living and non-living resources to satisfy human needs and improve the quality of human life.[59]

According to the WCS document, conservation seeks to "ensure earth's capacity to sustain development and support all life, while development aims to provide for social and economic welfare."[60] Notwithstanding this difference in objectives, the WCS document identifies the human being as the principal beneficiary of both conservation and development. This is because

> [D]evelopment aims to achieve human goals largely through the use of the biosphere and conservation aims to achieve human goals by ensuring that such use of the biosphere can continue.[61]

Hence, in the quest for "economic development and enjoyment of the riches of nature,"[62] man must recognise both the reality that resources and the carrying capacities of the ecosystem are limited and the needs of future generations.[63] The objective of the WCS document is to help "advance the achievement of sustainable development through the conservation of living resources."[64]

Building on the tenets of WCS, in 1987 the World Commission on Environment and Development (WCED) combined WCS definition of conservation and development to define sustainable development (SD).[65] The WCED report defines SD as development that meets the needs of the present without

58 International Union for Conservation of Nature and Natural Resources (IUCN) (n 57).
59 Ibid.
60 Conservation seeks to "ensure earth's capacity to sustain development and support all life, while development aims to provide for social and economic welfare" – see ibid.
61 Ibid.
62 Ibid, I.
63 Ibid.
64 Ibid, IV.
65 Also known as the Brundtland Commission, in reference to GH Brundtland, who chaired the Commission – see World Commission on Environment and Development, *Our Common Future* (13th Impression 1991, OUP 1987); D Mebratu, 'Sustainability and Sustainable Development: Historical and Conceptual Review' (1998) 18 EIAR 493, 501.

obstructing the ability of the future generations to meet theirs.[66] By proposing neither simply limits nor simply development, but SD, it is suggested that the WCED proffered a merger between the stop/limit-growth and continue-development group.[67] The WCED is credited as having given SD global recognition.[68]

Egunjobi states that one of the fundamental premises of SD is its recognition that development and environment are not exclusive but complementary, interdependent, and mutually reinforcing in the long run.[69] Daly opines that the concept of SD "requires that natural capital is maintained intact."[70] However, scholars have highlighted that the WCED definition of SD focuses on development rather than sustainability,[71] placing "human beings and human welfare above concepts of environmental or ecological sustainability."[72] Also, the definition is described as being vague;[73] reduced to a cliché;[74] a "win-win strategy;"[75] resulting in "tremendous diversity of definition and interpretations"[76] – simply put, the lack of a universally accepted definition.[77]

Addressing the difference between the term ES and SD, it is suggested that unlike ES where the environment is the dominant focus, economic development is central to SD. Seeking to proffer a definition which would appeal to all sides, it is argued that the WCED inadvertently produced a vague term.[78] This research aligns itself with the argument that SD focuses on the

66 See World Commission on Environment and Development (n 65) 43.
67 See Mitcham (n 55).
68 Nathan and Reddy (n 57) 6. See also Harding (n 57) 232.
69 L Egunjobi, 'Issues in Environmental Management for Sustainable Development in Nigeria' (1993) 13 TE 33, 34.
70 HE Daly, 'Toward Some Operational Principles of Sustainable Development' (1990) 2 EE 1, 4.
71 M McCloskey, 'The Emperor has no Clothes: The Conundrum of Sustainable Development' (1998-1999) 9 DELPF 153, 154.
72 WM Lafferty, 'The politics of sustainable development: Global norms for national implementation' (1996) 5 EP 185, 188.
73 See Y Jabareen, 'A new conceptual framework for sustainable development' (2008) 10 EDS 179,179; JC Dembach and F Cheever, 'Sustainable Development and its Discontents' (2015) 4 TEL 247, 250.
74 Mebratu (n 65) 503.
75 S Cohen and others, 'Climate change and sustainable development: towards dialogue' (1998) 8 GEC 341, 352.
76 Lafferty (n 72) 185.
77 According to Gauvin, there are over thirty published definitions of SD– see T Gauvin, 'Economic Growth in the Context of Sustainable Development' 1 <www.comm-dev.org/images/attachments/118_Track%201%20Econ%20growth.pdf> accessed 1 October 2018. See also P McManus, 'Contested terrains: Politics, stories and discourses of sustainability' (1996) 5 EP 48, 49.
78 See Mitcham (n 55).

development and less on its sustainability element.[79] Furthermore, it is contended that unlike SD, ES seeks to indefinitely maintain sustainable harvesting of renewable and non-renewable resources and the environmental sink capacity. Therefore, in using the human rights mechanism to protect the environment, it is argued that ES and not SD, reflect the desired outcome.

4 HRAEP AND ES CONCEPTS: ANY NEXUS

In this research, HRAEP concept refers to the use of human rights mechanism to reduce, maintain, prevent, reverse, or restore the quality of land, water, air, animal resources, plant resources, or other natural resources; through preventing the emission of pollutants or reducing the presence of polluting substances in these elements. The objective is to maintain or restore the quality of land, water, air, animal resources, plant resources, or other natural resources; by preventing the emission of pollutants or reducing the presence of polluting substances in these elements. Also, the ES concept is defined as the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative ability of the environment in which they operate, without degrading its future waste absorptive capacity.

Given the above definitions, it is evident that both concepts seek to maintain the abiotic components/environmental sink and ensure the absence or negligible presence of waste emissions which do not affect the ability of the environmental sink to absorb future emissions. Therefore, by enforcing his/her right to a clean, safe and secure, healthy environment against any natural or legal person, or the government for extractive industry activities which have led to infringement of this right. Because the purpose is to prevent or reduce the emission of polluting substances or pollutants with the objective to maintain or restore the quality of land, water, air, animal resources, plant resources, or other natural resources. It is suggested that HRAEP simultaneously leads to the maintenance of the environmental sink and its capacity to absorb waste in the future. Similarly, when the operations of the Nigerian extractive industry entities are such that they actively maintain the environmental sink and its

79 McCloskey (n 71) 154.

future absorptive capacity, this process, in turn, ensures the prevention or reduction of polluting substances in the environmental media.

Taking cognisance of the ecocentric and anthropocentric arguments discussed in Chapter Two of this research, Goodland identifies humankind as the beneficiary of ES, as the concept:

> [S]eeks to improve human welfare by protecting the sources of raw materials used for human needs and ensuring that the sinks for human wastes are not exceeded, in order to prevent harm to humans; hence making it necessary to maintain natural capital both as a provider of inputs (sources) and as a sink for wastes (output).[80]

Hirsh supports this position when he states that "the long-term survival of human society requires that we adapt our behaviours and organisational policies to be more environmentally sustainable."[81] Thus, given the intricate nexus between HRAEP and ES – that is, the enforcement of HRAEP concurrently leads to the realisation of ES and the active maintenance of the environmental sink simultaneously ensures the prevention or reduction of polluting substances in the environmental media. It is suggested that the statements of Goodland and Hirsh further strengthens the argument made in Chapter Two of this research that the use of human rights mechanism to protect the environment reflects a weak anthropocentric approach instead of an ecocentric approach. The reason is that although the human being is the beneficiary of both HRAEP and ES, however, the purpose is to protect the environment, which would also benefit from this. Both the man and the environment are dependent on each other to survive.[82] None has a higher value than the other.

5 CHAPTER CONCLUSION

To effectively examine the validity or otherwise of the second hypothesis, which is that the operations of the Nigerian extractive industry entities are environmentally unsustainable, it was necessary to determine what

80 Goodland (n 7) 3.

81 JB Hirsh, 'Environmental Sustainability and National Personality' (2014) 38 JEP 233, 233.

82 M Decleris, *The Law of Sustainable Development: General Principles, A report Produced for the European Commission* (EC 2000) 51.

environmental sustainability connotates, specifically, as it relates to the Nigerian extractive industry. The chapter formulates an operational definition of the ES concept as the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative capacity of the environment in which they operate, without degrading its future waste absorptive capacity.

Given the use of similar terms such as sustainability and sustainable development, it is suggested that where the objective is to resolve environmental degradation and pollution, the ES concept might provide a more relevant approach than sustainability and SD. In addition, the chapter finds that the HRAEP and ES are intricately linked as both concepts seek to maintain the abiotic components/environmental sink and ensure the absence or negligible presence of waste emissions which do not affect the ability of the environmental sink to absorb future emission. Thus, when the operations of the Nigerian extractive industry entities are such that they actively maintain the environmental sink and its future absorptive capacity, this process, in turn, ensures the prevention or reduction of polluting substances in the abiotic components.

CHAPTER FOUR

HUMAN RIGHTS APPROACH TO ENVIRONMENTAL PROTECTION (HRAEP) IN NIGERIA

1 INTRODUCTION

As noted in Chapter Two, the foremost step to verifying the hypothesis that the HRAEP within the Nigerian context provides a viable mechanism is to understand and define the concept first in itself and second, from the Nigerian perspective. However, given the absence of literature which engages in this, Chapter Two broadly discussed the concept and proffered an operational definition relevant to this research. The discussion provides the necessary foundation through which the HREAP concept is understood and defined within the Nigerian context making it possible to adequately investigate the proposition that the use of human rights mechanism for environmental protection provides a possible tool through which the Nigerian environment can be protected.

This research defines HRAEP as the use of human rights mechanism to maintain or restore the quality of land, water, air, animal resources, plant resources, or other natural resources; by preventing the emission of pollutants or reducing the presence of polluting substances in these elements. In Chapter Two, it is stated that Nigeria recognises the right to protect the environment which is provided in both the 1999 Constitution[1] and the domesticated Banjul Charter – that is, the ACHPR Act 1983.[2] To adequately understand HRAEP from the Nigerian perspective, there is the need to examine these indicated rights and their enforcement mechanism.

This chapter seeks to achieve two main objectives, namely, (i) to understand and define the HRAEP concept within the Nigerian context, and (ii) to examine

1 Constitution of the Federal Republic of Nigeria 1999 (as amended). Hereafter referred to as the 1999 Constitution.

2 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 CAP 10 LFN 1990. Hereafter referred to as ACHPR Act 1983.

whether the existing human rights enforcement mechanism provides a viable platform to protect the environment. This chapter is further divided into five sections. Section 2 discusses the concept of environmental protection in Nigeria. Section 3 seeks to understand what the concept of HRAEP connotes from the Nigerian perspective. Section 4 examines whether the existing human rights to protect the environment are justiciable. Section 5 investigates whether the HRAEP enforcement mechanism in Nigeria provides the required avenue to protect the environment. Section 6 presents the chapter conclusion.

2 A DISCUSSION ON ENVIRONMENTAL PROTECTION IN NIGERIA

As indicated in Chapter Two, HRAEP is a combination of two phrases; namely, 'human rights approach' and 'environmental protection.' While this section discusses the aspect of 'environmental protection' in Nigeria, however, section 3 shall examine the 'human rights approach' aspect. The objective in broadly discussing the concept of environmental protection in Nigeria is to highlight that the need for environmental protection is recognised in Nigeria as reflected in the legislation and institutions established to ensure that the Nigerian environment is protected.

The concept of environmental protection is not new in Nigeria, according to Chokor, the pre-colonial communities which form the entity now known as Nigeria demonstrated a commitment to environmental protection embodied in their norms and values.[3] Each of these communities had specific codes of practice aimed at protecting the environment.[4] Disobedience to the codes of practice included spiritual, social, mystical, and moral sanctions such as "complex rituals to be fulfilled in appeasing the gods and the feeling of one's lineage being regarded as an outcast."[5] Consequently, ensuring that the community members complied with the conservation norms.[6]

3 BA Chokor, 'Government Policy and Environmental Protection in the Developing World: The Example of Nigeria' (1993) 17 EM 15, 17.
4 Ibid.
5 Ibid.
6 Ibid.

This concept of environmental protection continued into the colonial period, with emphasis on health protection and environmental sanitation.[7] Unlike the pre-colonial era where conservation norms were not written down and instead they were passed verbally from generation to generation, during the colonial era, statutes were enacted such as: (a) the Criminal Code Act of 1916[8] which criminalised activities that lead to the pollution of air, water, and land; and (b) the Public Health Act of 1917[9] which prohibited and regulated air, water, and land pollution.[10]

After Nigeria had gained independence, new challenges arose from the burgeoning industrialising economy. The activities of the oil and gas companies revealed the absence of adequate environmental legislation to address these challenges.[11] As a new nation, the focus was on increasing resource exploitation for economic development. Thus, enacted legislation concentrated primarily on the conservation and protection of the natural resource,[12] in addition to resolving the associated environmental problems.[13] Environmental protection constituted a secondary motive.[14] Consequently, in 1988, when an Italian company dumped toxic waste in Koko,[15] Nigeria lacked both specific legislation regulating the protection of her environment and an institution having the mandate to do so.[16]

Like the ecological catastrophes in Europe[17] which influenced global environmental pollution awareness, the Koko incident of 1988 – mainly due to hostile media reaction[18] – brought to the consciousness of Nigerians the

7 MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8 LEDJ 116, 118.
8 CAP C38 Laws of the Federation of Nigeria (LFN) 2004 as cited in Ladan (n 7).
9 CAP P38 LFN 2004 as cited in Ladan (n 7).
10 Ladan (n 7).
11 Ibid.
12 A Adegoroye, 'The Challenges of Environmental Enforcement in Africa: The Nigerian Experience' (The Third International Conference on Environmental Enforcement, Oaxaca, April 1994) 43, 43.
13 SG Ogbodo, 'Environmental Protection in Nigeria: Two Decades after the Koko Incident' (2009) 15 ASICL 1, 1.
14 E Emeseh, 'Mainstreaming Enforcement for the Victims of Environmental Pollution: Towards Effective Allocation for Legislative Competence under a Federal Constitution' (2012) 14 ELR 185; OU Ndukwe, *Elements of Nigerian Environmental Laws* (UCP 2000) 97.
15 A community situated in Warri North Local Government Area of Delta State – see E Amaize, '24 years after 'drums of death: A new air in Koko' *Vanguard* (31 July 2011) <www.vanguardngr.com/2011/07/24-years-after-%E2%80%98the-drums-of-death-a-new-air-in-koko/> accessed 29 September 2018.
16 Emeseh (n 14).
17 As discussed in Chapter Two – Section 2: Developemnt of the HRAEP Concept.
18 Chokor (n 3) 24.

disastrous effect environmental pollution has on human health.[19] Also, "the ensuing frantic search for the appropriate sanctions to deter and control activities hazardous to the environment," [20] highlighted the need for comprehensive legislation on environmental protection and the inadequacy of the then prevailing environmental protection regulation.[21]

In addition to the above, the massive public protest arising from the event propelled the enactment[22] of the Harmful Waste (Special Criminal Provisions) Decree of 1988[23] and the Federal Environmental Protection Agency (FEPA) Act 1988.[24] While the Harmful Waste Act 1988 dealt specifically with the dumping of illegal, harmful waste, on the other hand, the FEPA Act 1988 established FEPA with the mandate to protect and develop the environment, conserve biodiversity, and the sustainable development of Nigeria's natural resources.[25]

Before the creation of FEPA, although there were at least five federal ministries[26] which had the responsibility of managing Nigeria's environment, however, with the establishment of FEPA, Nigeria for the first time had a specific agency in charge of protecting her environment and enforcing environmental legislation.[27] Chokor states that FEPA was the highest authority on environmental matters.[28] Supporting this view, Uwaifo JSC while adopting the argument of one of the defendants in *AG Lagos State v AG Federation*,[29] described the FEPA Decree of 1988 as:

19 Ogbodo (n 13) 2; Adegoroye (n 1212) 44; Ndukwe (n 14) 98.

20 Y Osinbajo, 'Some Public Law Considerations in Environmental Protection' in JA Omotola (ed), *Environmental Laws in Nigeria Including Compensation* (UL 1990) 128-129.

21 Ibid.

22 Ogbodo (n 13) 2; IA Aniyie, 'What is the much ado about environmental law: Another Addition to the Rhetorics?' in E Azinge, B Owasanoye and FE Nlerum (eds), *Nigerian Current Law Review 2007-2010* (NIALS 2010) 176.

23 Harmful Waste (Special Criminal Provisions etc) Decree No 42 of 1988. Now Harmful Waste (Special Criminal Provisions etc) Act 1988 CAP H1 LFN 2004. Hereafter referred to as Harmful Waste Act 1988.

24 Federal Environmental Protection Agency Decree No 58 of 1988 and No 59 (amended) of 1992. Now Federal Environmental Protection Agency Act CAP F 10 LFN 2004. Hereafter referred to as FEPA Act 1988.

25 Ibid, ss1(1) and 5.

26 These Federal Ministries are: Federal Ministry of Industries, Budget and Planning; Agriculture and Water Resources; Health; Works and Housing; and Transport – see F Allen, 'Implementation of Oil-related Environmental Policy in Nigeria: Government Inertia and Conflict in the Niger Delta' (PhD thesis, University of KwaZulu-Natal 2010) fn 23, 16.

27 Ibid.

28 Chokor (n 3) 24.

29 *Attorney-General of Lagos State v The Attorney-General of the Federation & Ors* (2003) LPELR-620(SC), (2003) 838 -1010 NSCQR Vol 14. Hereafter referred to as *AG Lagos State v AG Federation*.

> The statutory threshold of environmental protection in the country…which provides the legal framework for the implementation of policies, goals, and objectives pertaining to environmental protection, natural resources conservation, and sustainable development; because it is concerned with the protection and improvement of the environment and safeguarding of the water, air and land, forest and wildlife of Nigeria.[30]

It is necessary to note that the establishment of FEPA also made Nigeria the first African state to create a "national institutional mechanism for environmental protection."[31] The importance of this observation is that it evidences Nigeria's proactive approach towards environmental protection. In accordance with its mandate, FEPA in 1989 launched the National Policy on the Environment[32] and formulated the National Guidelines and Procedures on Environmental Impact Assessment.[33] In 1991, FEPA initiated the enactment into law of two regulations – the National Effluent Limitation Regulation, and the Pollution Abatement in Industries and Facilities Generating Wastes Regulation.[34] In 1992, the formulated National Guidelines was enacted into law as the Environmental Impact Assessment Decree.[35]

According to Adegoroye, FEPA at inception was created as a parastatal under the Ministry of Works and Housing, until 1992 when it was transferred to the Presidency.[36] However, in 1999 at the creation of the Federal Ministry of Environment, FEPA became a department in the Ministry.[37] Making FEPA a department of the Federal Ministry of Environment, "created a vacuum in the effective enforcement of environmental laws, standards and regulations in the

30 Ibid, 935 NSCQR Vol 14.

31 See National Environmental Standards & Regulations Enforcement Agency (NESREA), 'About NESREA' [2016] <http://www.nesrea.gov.ng/about/index.php> accessed 29 September 2018.

32 Although Chokor and Adegoroye respectively indicate that the environmental policy was launched in 1989, however, the 2016 revised policy states that the Environmental policy was first formulated in 1991, revised in 1999, and presently 2016 – see Chokor (n 3) 24; Adegoroye (n 12) 44; Federal Ministry of Environment, 'National Policy on the Environment (Revised 2016)' <www.environment.gov.ng/media/attachments/2017/09/22/revised-national-policy-on-the-environment-final-draft.pdf > accessed 29 September 2018.

33 Chokor (n 3) 25.

34 Ibid.

35 Environmental Impact Assessment Decree No. 86 of 1992 <www.nigeria-law.org/Environmental%20Impact%20Assessment%20Decree%20No.%2086%201992.htm> accessed 29 September 2018. Now Environmental Impact Assessment Act 1992, CAP E12 LFN 2004. Hereafter referred to as EIA 1992.

36 Adegoroye (n 12); Ndukwe (n 14) 98.

37 Federal Government of Nigeria, 'Nigeria's Path to Sustainable Development through Green Economy' (Country Report to the Rio+20 Summit, June 2012) 70 <https://sustainabledevelopment.un.org/content/documents/1023nigerianationalreport.pdf> accessed 28 September 2018.

country."[38] This led to the establishment of National Environmental Standards and Regulations Enforcement Agency (NESREA), as a parastatal under the Federal Ministry of Environment.[39] The Act enabling the establishment of NESREA, repealed the FEPA Act 1988; thus, replacing FEPA with NESREA.[40]

As a parastatal under the Federal Ministry of Environment, NESREA is responsible "for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources."[41] According to a report by the Federal Ministry of Environment, Nigeria's environmental issues include: (i) "desertification due to unsustainable use of forest resources as fuel and housing, intensive grazing, over-cultivation, over-ploughing."[42] (ii) land degradation, air and water pollution resulting from "indiscriminate, inappropriate, and illegal mining of mineral resources in many parts of Nigeria."[43] (iii) air and water pollution due to increasing urbanisation, industrialisation, resulting from "highly polluted gaseous and dust emissions from industries, vehicles, and dangerous industrial wastes, that are incessantly discharged into the environment."[44] Given the several environmental challenges that confront Nigeria, the focus of this research is on the environmental pollution arising from the extractive industry operations.

In addition to creating the Federal Ministry of Environment and its parastatals,[45] as stated, the right to environmental protection is statutorily recognised and provided for in section 20 of the 1999 Constitution[46] and article 24 of the Schedule to the ACHPR Act 1983.[47]

Thus, from the discussion engaged in, it is evident that the concept of protecting her environment is not a foreign concept to Nigeria. Also, the concept has evolved and strengthened as Nigeria recognises the need to maintain or restore the quality of the environmental media; through preventing

38 NESREA (n 31).
39 Ibid.
40 S36 National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 CAP 164 LFN 2007. Hereafter referred to as NESREA Act 2007.
41 see s5 FEPA Act 1988 (n 24); s2 NESREA Act 2007 (n 40).
42 Federal Ministry of Environment, 'Nigeria's Path to Sustainable Development' (n 37) 26.
43 Ibid.
44 Ibid.
45 Ibid, 71.
46 1999 Constitution (n 1).
47 ACHPR Act 1983 (n 2).

the emission of pollutants or reducing the presence of polluting substances in these elements. This position is reflected in the numerous legislation enacted to protect her environment and the institutions established with the mandate to achieve this objective.[48]

Given that part of the research focus is to examine the HRAEP within the Nigerian context, and as indicated, the substantive rights are provided for in the 1999 Constitution[49] and the ACHPR Act 1983;[50] the examination of the various environmental legislation Nigeria has, and the identified institutions is beyond the remit of this study. The next section examines the connotation of HRAEP concept within the Nigerian context.

3 UNDERSTANDING THE HRAEP CONCEPT WITHIN THE NIGERIAN CONTEXT

Having examined the HRAEP concept from a broader perspective in Chapter Two, the conclusion is that HRAEP serves a specific purpose and function, and it seems more aligned towards the weak anthropocentric school definition of environment. However, where issues such as (i) lack of consensus as to the avenues through which HRAEP can be envisaged, (ii) the definition of the word 'environment' and (iii) scope of the formulated right, might shroud the concept in uncertainty, this is not the case when examining the concept from the Nigerian perspective.

As shown in section 2 of this chapter, Nigeria recognises and guarantees the right to protect the environment in her Constitution and the ACHPR Act 1983. Also, despite the fact the Nigerian Constitution does not define the word 'environment,' this is explicitly defined in only two Nigerian statutes, namely: the EIA 1992 and the NESREA Act 2007. It is necessary to note that

48 See M Okorodudu-Fubara, 'Development and Codification of International Environmental Law: Whither Nigeria' in S Simpson and O Fagbohun (eds), *Environmental Law and Policy* (LASU 1998) 291; Environmental Law Research Institute, 'A Synopsis of Laws and Regulations on the Environment in Nigeria' <http://elri-ng.org/newsandrelease2.html> accessed 29 September 2018; Environmental Law Research Institute, 'Compilation of Institutions and Waste Management Regulations in Nigeria' <http://elri-ng.org/newsandrelease2_waste.html> accessed 29 September 2018; National Environmental Standards and Regulation Enforcement Agency (NESREA), 'Policies and Guidelines' <www.nesrea.gov.ng/publications-downloads/policies-guidelines/> accessed 29 September 2018; Ndukwe (n 14) 98-102.

49 1999 Constitution (n 1).

50 ACHPR Act 1983 (n 2).

'environment' was first defined in the FEPA Act 1988 to include "water, air, land, and all plants and human beings or animals living therein, and the interrelationships which exist among these or any of them."[51]

The NESREA Act 2007, which replaces the defunct FEPA Act 1988, maintains this definition.[52] Furthermore, as stated above, in fulfilling its mandate to prepare "procedure for environmental impact assessment for all development projects,"[53] the FEPA formulated national guidelines which were then enacted into law as the EIA 1992. Section 61(1) EIA 1992 defines environment as:

> The components of the earth, and includes (a) land, water and air, including all layers of the atmosphere; (b) all organic and inorganic matter and living organisms; and (c) the interacting natural systems that include components referred to in paragraphs (a) and (b).[54]

An examination of section 42 of the FEPA Act 1988 and section 61(1) of the EIA 1992, indicates that the definition provided in the EIA 1992 is an extension of that in the FEPA Act 1988. Although both definitions share a certain level of similarities, however, they differ in certain aspects. Namely, (i) while the FEPA Act refers to 'human beings or animals', the EIA 1992 uses the phrase 'living organisms'. It is suggested that the phrase 'living organisms' also means human beings, animals, and plants, as reflected in the FEPA Act 1988 (NESREA 2007). (ii) While the EIA 1992 includes all layers of the atmosphere in its definition, the FEPA Act simply states 'air'. Again, it is argued that the extension of 'air' to include all layers of the atmosphere does not negate the fact that both legislation refers to 'air'. In a nutshell, it is suggested that section 61(1) of the EIA 1992 elaborates on the definition provided by section 42 of the FEPA Act 1988 (NESREA 2007). The definitions are similar in scope and content.

Furthermore, both definitions recognise the relationship between human beings, animals, plants, water, air, and land; none has more priority than the other. The protection of one is beneficial to the other. It is suggested that this reflects the proposition of the weak anthropocentric school that both human

51 S 42 FEPA Act 1988 (n 24).
52 See s 37 NESREA Act 2007 (n 40).
53 S 5 (a) FEPA Act 1988 (n 24).
54 EIA 1992 (n 35).

beings and the ecosystem within which they live are of the same value to each other. Consequently, a definition of HRAEP concept within the Nigerian context will have to take cognisance of the interaction between the physical, human, and animal components. Thereby, embracing a holistic rather than an individualistic approach. More so, it is necessary to note that the Supreme Court in *AG Lagos State v AG Federation*, commenting on the definition of 'environment' as provided in section 38 FEPA Act 1988, held it "to be *raison d'etre* behind section 20 of the 1999 Constitution."[55]

Another issue highlighted while discussing the HRAEP from the broader perspective is the lack of consensus in defining the formulated right. As stated, section 20 of the 1999 Constitution and article 24 of the Schedule to the ACHPR Act 1983 are the statutory provisions which recognise human rights approach to protecting the environment. Therefore, it can be argued that when reference is made to HRAEP within the Nigerian context, the 'human rights' in question refers to the rights provided in section 20 of the 1999 Constitution and article 24 of the Schedule to the ACHPR Act 1983. The next subsections shall systematically examine these provisions, to further elucidate what HRAEP concept connotes from the Nigerian perspective.

3.1 Section 20 of the 1999 Constitution

Section 20 of the 1999 Constitution provides that:

> The State shall protect and improve the environment and safeguard[56] the water, air and land, forest and wildlife of Nigeria.[57]

From the plain reading of this provision, it is evident that the 'state' has the responsibility to protect the Nigerian environment. The pertinent question, however, is who or what connotes 'state'? Another question is whether the indicated responsibility is discretionary or mandatory. It is important to examine this because although the Supreme Court interpreted the meaning of 'state' as

55 *AG Lagos State v AG Federation* (n 29) 939 NSCQR Vol 14.

56 Safeguard is another synonym for protect. Thus, it can be stated that section 20 mandates the state to protect and improve the Nigerian environment; which has been defined as including "water, air, land, and all plants and human beings or animals living therein, and the inter-relationships which exist among these or any of them" – s37 NESREA Act 2007 (n 40).

57 1999 Constitution (n 1).

provided in section 20 of the 1999 Constitution,[58] the issue of whether the obligation is mandatory or discretionary has never arisen before the court. Thus, taking cognisance of the discussion on negative rights and positive actions in Chapter Two,[59] it is essential to determine whether the responsibility ensuing from section 20 of the 1999 Constitution connotes a positive duty to carry out an action or mere requirement to render assistance. The difference is that while the former creates an enforceable right, the later does not and the duty-holder cannot be compelled to carry out the action.

The next subsections shall extensively rely on Nigerian case law to identify the meaning of the words 'shall' and 'state.' The basis for using Nigerian case law is mainly because the onus will lie on the court to interpret section 20 should the need arise. It is necessary to note that although the cases referenced have different facts and may not specifically interpret the meaning of 'shall' and 'state'[60] as provided in section 20 of the 1999 Constitution, however, they are relevant to this discussion because in determining the subject matters of these cases, the courts' had to interpret the words 'shall' and 'state.' The jurisprudence of the courts being examined is that of the Supreme Court and Court of Appeal because they constitute the highest courts of record in Nigeria – with the Supreme Court being the final court of appeal.[61]

3.1.1 The Meaning of 'Shall'

Although the Nigerian courts have held that when used in a statutory provision the meaning of the word 'shall' "makes it mandatory that the rule must be obeyed. In other words, the term 'shall' is a word of command and denotes obligation, and this gives no discretion, it imposes a duty."[62] Nevertheless, in

58 See discussion in subsection 3.1.2: The Meaning of 'State'.

59 See Chapter Two subsection 4.4.2: CPR and ESCR: Negative rights and Positive actions.

60 Except in AG Lagos State v AG Federation (n 29) – see subsection 3.1.2: The Meaning of 'State'.

61 S 235 1999 Constitution (n 1).

62 See *Kalamu v Gunrim* (2003) 16 NWLR (Pt 847) 517. See also *Chief Dominic Onuorah Ifezue v Livinus Mbadugha & Anor* (1984) LPELR-1437(SC); *Arthur Agwuncha Nwankwo & Ors v Alhaji Umaru Yar'adua & Ors* (2010) LPELR-2109(SC); *Offomah v Ajegbo* (2000) 1 NWLR (Pt 641) 505; *Amalgamated Trustees Ltd v Associated Discount House Ltd* (2007) LPELR-454(SC); *Amokeodo v Inspector-General of Police & 2 Ors* (1999) 6 NWLR (Pt 607) 467; *Diokpa Francis Onochie & Ors v Ferguson Odogwu & Ors* (2006) LPELR-2689(SC); *Fatai Alabi v Godwin Chibueze Umeugoji* (2010) LPELR-9048(CA); *Aladetan O v Ogunyemi Wole J & Ors* (2010) LPELR-3699(CA); *Opara & Anor v Amadi & Anor* (2013) LPELR-20747(SC); *The State v Okpala* (2012) LPELR-7845(SC); *Steve Torkuma Ugba & Ors v Gabriel Torwua Suswam & Ors* SC.191/2012 (CONSOLIDATED); *Tamti*

certain cases, the courts have held that the word ‘shall’ can be construed as ‘may’. Thus, giving ‘shall’ a discretionary interpretation instead of its mandatory interpretation. *Atungwu v Ochekwu*[63] is one of such cases. In this case, Alagoa JSC, interpreting the meaning of ‘shall’ as used in section 294(1) of the 1999 Nigerian Constitution, stated that:

> "Shall" may at times be construed as conveying a permissive or directory meaning of "May". Whether the word "Shall" is used in a mandatory or directory sense would depend on the circumstances of the case.[64]

Alagoa JSC cited *Amadi v NNPC* [65] and *Abdullahi v The Military Administrator*[66] as authorities which support his reasoning in arriving at that decision. These cases shall be critically examined to determine whether indeed the court held that where a statute explicitly uses the word ‘shall,’ that the circumstance of the case would determine whether ‘shall’ could be interpreted as ‘may.’ The basis for engaging in this analysis is that if the interpretation of ‘shall’ as either mandatory or discretionary is dependent on the circumstances of the case, it would mean that the circumstance of the case would determine whether the court would interpret ‘shall’ in section 20 as discretionary or mandatory. The significance is that if the court interpretes ‘shall’ in section 20 as ‘may,’ it means that the protection of the Nigerian environment is at the discretion of the state and it is not mandatory. Therefore, the state cannot be held liable for not performing its duty should it choose not to protect the environment. Also, a discretionary ‘shall’ would mean that section 20 does not provide an enforceable right.

In *Amadi v NNPC,* Uwais JSC, citing *Ifezue v Mbadugha,*[67] as authority stated that “it is settled that the word "shall" when used in an enactment is capable of bearing many meanings. It may be implying futurity or implying a mandate or direction or giving permission.”[68] Given that Uwais JSC based his decision on

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DU v Nigeria Customs Service Board & Anor (2008) LPELR-8490(CA); *Corporate Ideal Insurance Ltd v Ajaokuta Steel Company Ltd & Ors* (2014) LPELR-22255(SC); *Odusote v Odusote* (2011) LPELR-9056(CA).

63 See *Emmanuel Atungwu & Anor v Ada Ochekwu* (2013) LPELR-20935(SC). Hereafter referred to as *Atungwu v Ochekwu*.

64 Ibid, 48 para A-B.

65 *Captain ECC Amadi v Nigerian National Petroleum Corporation* (2000) 10 NWLR (Pt 674) 76, (2000) LPELR-445(SC).

66 *Alhaji Ibrahim Abdullahi v The Military Administrator & Ors* (2009) 15 NWLR (Pt 1165) 417, (2009) LPELR-27(SC).

67 (1984) 1 SCNLR 427 at 456 – 457.

68 *Amadi v NNPC* (n 65) 20 paras D-E.

Ifezue v Mbadugha, it is necessary to examine this case to ascertain whether the court held that 'shall' can be interpreted as 'may.'

The Supreme Court in *Ifezue v Mbadugha* was called upon to interpret whether 'shall' as used in section 258(1) of the 1979 Constitution was mandatory or discretionary. This provision is identical to section 294(1) in the 1999 Constitution, which is the same provision interpreted by Alagoa JSC in *Atungwu v Ochekwu*.

In *Ifezue v Mbadugha*, Aniagolu JSC held that:

> S.258 (1) contains the words 'shall deliver…in writing not later than 3 months.' These words appear to me to be commanding enough to be regarded as mandatory rather than directory…The words are clear, positive and unambiguous and dictate that literal interpretation be given to them.[69]

From the above, it can be deduced that Uwais JSC and Alagoa JSC, might have misinterpreted the decision of Aniagolu JSC. This is because, from Aniagolu JSC decision, it is apparent that the Honourable Justice interpreted 'shall' as being mandatory and not discretionary, as erroneously concluded by Uwais JSC and Alagoa JSC.

In examining the second authority indicated by Alagoa JSC – that is, *Abdullahi v The Military Administrator*,[70] this research finds that though Tobi JSC, made reference to the fact that 'shall' is sometimes construed as conveying a permissive or directory meaning of 'may',[71] the learned Justice unequivocally interpreted 'shall' in "its usual meaning of command or compulsion."[72] As his authorities for arriving at that conclusion, Tobi JSC cited the following cases[73] *Ifezue v Mbadugha;*[74] *Captain Amadi v NNPC;*[75] *General Bamaiyi v Attorney General of the Federation;*[76] *Ogidi v The State.*[77]

69 *Ifezue v Mbadugha* (n 62) 30 paras A-C.
70 *Abdullahi v The Military Administrator* (n 66).
71 Ibid.
72 Ibid.
73 Ibid.
74 (1984) 5 SC 19.
75 (2000) 10 NWLR (Pt 674) 76.
76 (2001) 12 NWLR (Pt 727) 468, (2001) LPELR-730(SC).
77 (2005) 5 NWLR (Pt 918) 268.

In *General Bamaiyi v Attorney General of the Federation,*[78] the Supreme Court was called to interpret section 295(2) of the 1999 Constitution, to determine whether it is mandatory for the Court of Appeal to answer any question referred to it by the High Court. Mohammed JSC held that it was "wrong to construe the words, 'shall give its decision upon the question' under S.295 (2), to mean 'shall answer the question'. The provision of the Constitution is clear and not ambiguous."[79]

From the above, evident that the court did not hold that 'shall' could be discretionary. Instead, the court explained that the words '*shall give its decision upon the question*'[80] as provided for in S.295 (2) of the Constitution, did not mean '*shall answer the question*'[81] as was averred by the Counsel in the case.

In *Ogidi v The State*,[82] the Supreme Court was called to decide whether the trial court had obeyed section 36(7) of the 1999 Constitution in that case. Interpreting section 36(7), Ejiwunmi JSC stated that:

> There can be no doubt that when the word 'shall' is used in the context of a statute or in ordinary parlance, it means that a command to do or not to do a particular act. There is no question of the exercise of discretion to do or not to do the envisaged act. In my humble view, when the word 'shall' is used in the context of section 36(7) of the Constitution, it seems to me, and having regard to the usage of the word referred to above, the clear intention of the makers of the Constitution is that the courts are commanded by the courts to record fully and faithfully the transactions including the presence of interpreters who interpret the evidence at the trial and in what language such evidence was taken throughout the course of the proceedings.[83]

Having reviewed the authorities cited by Alagoa JSC, it is suggested that the honourable Justice might have arrived at his decision in error. This is because the analysis conducted above demonstrates that the Supreme Court has consistently upheld the view that 'shall' connotes mandatory, command, obligation, and not permissive or directory. Flowing from this analysis, it is

78 *Lt General Ishaya Rizi Bamaiyi (rtd) v Attorney General of the Federation & Ors* (2001) LPELR-730 (SC).
79 Ibid, 10 paras F-G.
80 Emphasis added.
81 Emphasis added.
82 *Cyriacus Ogidi & Ors v The State* (2005) LPELR-2303(SC).
83 Ibid, 43-44 paras E-A.

evident that the 'shall' as provided in section 20 is a mandatory duty and not discretionary duty. Therefore, the state must protect the Nigerian environment.[84]

Recalling the discussion on positive and negative duties in Chapter Two,[85] it can be deduced that 'mandatory duty' imposed on the state by section 20 translates to a positive duty. Furthermore, from the analysis above, it is evident that this positive duty is not discretionary – that of rendering assistance which does not create an enforceable right – but connotes a mandatory duty to act which "cannot be fulfilled by inaction."[86]

Therefore, it is suggested that section 20 connotes both positive duty and positive right. The positive duty to act inherent in section 20 creates a positive right to action that can be demanded from the 'state'.[87] The right to state action means that the state is mandated to create a legal or administrative framework for the protection and improvement of the Nigerian environment.[88] Once the 'state' has established this framework, "the individual's right crystallises into an entitlement to the particular resources."[89]

Although section 20 identifies who the duty holder is, the right-holder is not explicitly stated. However, in *AG Lagos State v AG Federation*,[90] Kalgo JSC interpreted the intendment[91] and true meaning of section 20. It is necessary to note that, this is the only case where the court interpreted the intention of section 20.[92] According to the learned Justice, the intention of section 20 is "to protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other conveniences.[93]

84 See *Kalamu v Gunrim* (n 62).
85 See Chapter Two subsection 4.4.2: Civil and Political Rights and Economic, Social and Cultural Rights: negative rights and positive actions.
86 MG Singer, 'Negative and Positive Duties' (1965) 15 TPQ 97, 99.
87 S Freedman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 88.
88 Ibid.
89 Ibid.
90 *AG Lagos State v AG Federation* (n 29).
91 Intendment is defined as "the sense in which the law understands something; a decision-maker's inference about the true meaning or intention (the quality, state, or condition of being set to do something) of a legal instrument" – see BA Garner, *Black's Law Dictionary* (10th edn, TR 2014) 930 and 931.
92 As far as this researcher is aware of and this is through searching the electronic law reports provided by Funmi Quadri Law Companion database and Law Pavillion database.
93 *AG Lagos State v AG Federation* (n 29) 919 NSCQR Vol 14.

From this, it is evident that 'the people' constitute the right-holders. Although neither the 1999 Constitution[94] nor the Interpretation Act[95] provides the meaning of the word 'people,' it is suggested that an understanding of who 'the people' denotes is found in the preamble to the 1999 Constitution. The preamble starts with "we the people of the Federal Republic of Nigeria,"[96] and as provided in Chapter III of the 1999 Constitution, 'we the people' refers to Nigerian citizens.[97] Thus, it can be argued that section 20 connotes a positive right which entitles Nigerian citizens to the protection of their external surroundings and guarantee of a safe and secure atmosphere devoid of any threat to their health or conveniences.

Therefore, in realising this right, it is suggested that Nigerian citizens can demand that the state create legal or administrative frameworks for the protection and improvement of the Nigerian environment, which once established, crystallises the Nigerian citizen's right into an entitlement to the resources – which is, the protection of the environment. The next subsection shall examine the word 'state,' as it determines who has the duty to create the legal or administrative framework within the objective of section 20.

3.1.2 The Meaning of 'State'

The word 'state' is defined by section 318(1) of the 1999 Constitution to include the government and one of the component parts of the federation. Given that Nigeria operates a federal system, and is made up of the federal government, state governments,[98] and local governments, it is suggested that this definition might introduce confusion. Illuminating further on the definition given, section 318(1) defines 'federation' to mean "the Federal Republic of Nigeria," [99] and gives the description of 'government' as including "the

94 1999 Constitution (n 1).
95 Interpretation Act, CAP 192 LFN 1990.
96 1999 Constitution (n 1).
97 Ibid. See s 25(1) for description of a Nigerian citizen.
98 For States of the Federation and local government areas – see ibid, First sch pt 1, States of the Federation.
99 Ibid, s 318 (1).

Government of the Federation, or any State, or of a Local Government council or any person who exercises power or authority on its behalf."[100]

The Nigerian Supreme Court has sought to clarify what exactly is meant by 'State'. In *AG Ondo State v AG Federation*,[101] the Supreme Court was asked to interpret the meaning of 'state' as provided in section 15(5) of the 1999 Constitution.[102] The section provides thus: "The State shall abolish all corrupt practices and abuse of power."[103] Part of the argument adduced was that the word 'corruption' was absent in both the Exclusive and Concurrent Legislative Lists, thereby making 'corruption' a matter under the Residual List.[104]

According to Uwais JSC, who read the lead judgement, such argument overlooks section 4(4)(b) which empowers the National Assembly to enact legislation on any matter with respect to which it has the power as provided by the Constitution, and as such section 15(5) mandates the National Assembly to abolish all corrupt practice and abuse of power.[105] Furthermore, the only way through which the National Assembly can effectively exercise this power is the combined reading of section 4(2) and item 67 under the Exclusive Legislative List which evidences that the National Assembly "has the power to legislate against corruption and abuse of office even as it applies to persons not in authority under public or government office."[106] Therefore, it is clear that the 'corruption' is not under the Residual List.

However, Uwais JSC further held that the interpretation given to the word 'state' would determine whether both National Assembly, the State House of Assembly, and Local Government Council had concurrent powers over the subject matter of 'corruption'.[107] Thus, applying the definitions provided in section 318(1), Uwais JSC interpreted 'state' in section 15(5) to mean the

100 Ibid.
101 *Attorney-General of Ondo State v the Attorney-General of the Federation &Ors* (2002) LPELR-623 (SC), (2002) 1035 NSCQR Vol 10. Hereafter referred to as *AG Ondo State v AG Federation*.
102 Ibid, 1040 NSCQR Vol 10.
103 1999 Constitution (n 1).
104 *AG Ondo State v AG Federation* (n 101) 1079 NSCQR Vol 10.
105 Ibid.
106 Ibid.
107 Ibid.

"three tiers of government, namely, the Federal Government, State Government and Local Government."[108] Accordingly:

> In that case, the power to legislate in order to prohibit corrupt practices and abuse of power is concurrent and can be exercised by the Federal and State Governments by virtue of the provisions of section 4(2), (4)(b), and (7)(c) of the Constitution. It is doubtful however if the third tier, viz the Local Governments can legislate on the subject since there is no provision under section 7 and the Fourth Schedule to the Constitution that empowers them to do so. Although the power to legislate on the subject is given to the National Assembly and State House of Assembly, when both exercises the power, the legislation by the National Assembly will prevail by virtue of section 4(5), of the Constitution.[109]

Taking a different approach, Uwaifo JSC, although concurring entirely with the lead judgment,[110] did not agree with Uwais JSC definition of 'state'. Uwaifo JSC opined that any definition of 'state' to mean Federal, State, and Local governments, misses the point.[111] This is because section 14(1) which provides that "the Federal Republic of Nigeria shall be a State based on the principles of democracy and justice"[112] makes it clear that "it is the Federal Republic of Nigeria, as a State, that is looked upon under the Constitution."[113] According to Uwaifo JSC, the 'state' refers to the Federal Republic of Nigeria and not the Federal Government.[114] He further opined that:

> Matters concerning the Fundamental Objectives and Directive Principles of State Policy in Chapter II of the Constitution are placed under item 60(a) of the Exclusive Legislative List...[115] one cannot run away from the reality that the National Assembly has the sole power to legislate for the `establishment and regulation of authorities for the Federation or any part thereof so as to promote and enforce the observance of the national responsibility to abolish all corrupt practices and abuse of power (which falls under the Fundamental Objectives and Principles of State Policy in section 15(5). It is to all intents and purposes now a subject matter coming within 60(a) in the form of Abolition of all Corrupt Practices and Abuse of Power.[116]

108 *AG Ondo State v AG Federation* (n 101) 1080 NSCQR Vol 10. See also *Attorney General of Abia State v Phoenix Environmental Services Nigeria Ltd & Anor* (2015) LPELR-25702(CA).
109 *AG Ondo State v AG Federation* (n 101) 1080 NSCQR Vol 10.
110 Ibid, 1139 NSCQR Vol 10.
111 Ibid, 1165 NSCQR Vol 10.
112 S 14(1) 1999 Constitution (n 1).
113 *AG Ondo State v AG Federation* (n 101) 1165 NSCQR Vol 10.
114 Ibid, 1176 NSCQR Vol 10.
115 Ibid, 1165 NSCQR Vol 10.
116 Ibid, 1167 NSCQR Vol 10.

A year later, in *AG Lagos State v AG Federation*,[117] the Supreme Court was again tasked with interpreting the meaning of 'state', this time as provided in section 20 of the 1999 Nigerian Constitution. In the lead judgement, Uwais JSC maintained the interpretation of 'state' he gave in *AG Ondo State v AG Federation*.[118] He rejected Uwaifo JSC interpretation given in *AG Ondo State v AG Federation*. [119] Uwais JSC argued that the provision of section 13 of the 1999 Constitution does not differentiate between the Federal, States, or Local governments but rather applies to "all organs of government and all authorities and persons exercising Legislative, Executive or Judicial powers."[120] He further held that section 14(4) specifically applies to the "Governments of a State, a Local Government Council or any agencies of such Government or Council, and the conduct of the affairs of the Government or Council or such agencies."[121]

In his dissenting judgement, Uwaifo JSC also maintained his interpretation of 'state' given in *AG Ondo State v AG Federation*.[122] He argued that 'state' as used in section 20 of the 1999 Constitution means the Federal Republic of Nigeria and not the three tiers of government.[123]

From the above, it seems that the Supreme Court might be divided as to whether the interpretation of 'state' refers to the Federal Republic of Nigeria, or includes all three tiers of government, namely, the Federal, State, and Local governments. At this juncture, it is useful to note the significance of the lead judgment. Where a single judge presides over a matter, his judgement constitutes the judgement of the court. However, where three or five Justices – as is usually the case in Court of Appeal and Supreme Court – preside over a matter, the *rationes decidendi* in the lead judgment is the judgment of the court and the authority for which the case stands. The expressions in the concurring or dissenting judgments of the other Justices are *obiter dicta*. "Obiter dicta in

117 *AG Lagos State v AG Federation* (n 29) NSCQR Vol 14.
118 Ibid, 882 NSCQR Vol 14.
119 Ibid, 883 NSCQR Vol 14.
120 Ibid.
121 Ibid.
122 Ibid, 938 NSCQR Vol 14.
123 Ibid.

the leading judgement as well as in the concurring judgments may be of persuasive effect in other occasions."[124]

Thus, taking cognisance of Uwais JSC definition of 'state' in the lead judgements in *AG Ondo State v AG Federation* and *AG Lagos State v AG Federation*, it would seem that the word 'state' in section 20 refers to the three tiers of government and not the Federal Republic of Nigeria – that is, the Federal government. Uwais JSC argues that based on this definition, both the National Assembly and State Houses of Assembly have concurrent powers to enact legislation to protect and safeguard land.[125] Concurring with this argument, according to Ayoola JSC:

> Since 'the State' referred to in section 20 is not restricted to the Federal Republic but also its component units, environment becomes a concurrent subject over which the National Assembly, as well as a House of Assembly of a State, can legislate subject of course, to the territorial restriction of the legislation of a House of Assembly; the doctrine of covering the field; and due regard paid to the inherent attributes of a State in federation as an autonomous political unit.[126]

It is essential to note that like the word 'corruption', the specific mention of the subject matter 'environment' is absent in both the Exclusive and Concurrent Legislative list.[127] According to Osinbajo, this illuminates three options available in addressing this issue, namely, the subject matter of environment can either be dealt with as incidental or supplementary to matters listed on the Exclusive or Concurrent Legislative List or relegated to residual matters.[128] Oyewo states that a study of the items on the Exclusive Legislative list indicates issues that allude to environmental matters.[129] These items include mines and minerals, aviation, maritime, nuclear energy, meteorology, national parks, trans-state water sources, fishing and fisheries.[130] However, he further argues that environmental matters that are not listed in the legislative lists

124 *General Sani Abacha & ors v Chief Gani Fawehinm*i (2002) LPELR-14(SC) 115-117, paras C-A.
125 *AG Lagos State v AG Federation* (n 29) 887-888 NSCQR Vol 14. For powers to legislate on concurrent lists – see ss4 (4)(a) and (7)(b) 1999 Constitution (n 1).
126 Ibid, 980 NSCQR Vol 14.
127 Ibid. See also O Oyewo, 'Problem of Environmental Regulation in the Nigerian Federation' in JA Omotola (ed), *Environmental Laws in Nigeria Including Compensation* (UL 1990) 100; Osinbajo (n 2020) 130.
128 Osinbajo (n 20) 130.
129 Oyewo (n 127).
130 See items 3, 29, 36-41, 64 Second sch pt 1, Exclusive Legislative list, 1999 Constitution (n 1).

should be deemed residual matters which state governments have exclusive power to enact laws.[131]

It is necessary to note that the decision of the Supreme Court in *AG Ondo State v AG Federation*, might apply.[132] Here, Uwais JSC unequivocally held that the absence of the word 'corruption' in either the Exclusive or Legislative List does not make it a residual list subject matter.[133] Further indicating that the definition of 'state' determines whether both the National and State Houses of Assembly have concurrent powers over the matter.[134] Thus, by defining 'state' as consisting the three tiers of government, he concluded that 'corruption' is a matter which both the National Assembly and the State Houses of Assembly share concurrent legislative powers. [135] As stated above, Uwais JSC maintained this position with regards to section 20.[136]

Concerning the opinion that both the National Assembly and State Houses of Assembly have concurrent powers to legislate on section 20, Uwaifo JSC argues that this is not the case. He states that "[c]oncurrent powers are limited to the Concurrent Legislative List."[137] Therefore, given his definition that 'state' as mentioned in section 20 refers to the Federal Republic of Nigeria:

> It is only the National Assembly that is empowered to legislate on behalf of the entity known as the Federal Republic of Nigerian in regard to the any of the matters under Chapter II, through item 60 (a) in the Exclusive Legislative List by virtue of section 4(1), (2) and (3) of the Constitution. One of such matters is 'Environment' in section 20…[138] Section 20 of the Constitution empowers the National Assembly to enact any appropriate law on the matter of environment as a subject matter under the Exclusive Legislative List by virtue of the operation of item 60(a) of that List.[139]

Thus, Uwaifo JSC, argues that the subject matter of environment is explicitly provided in the Exclusive Legislative List in item 60(a), which states that "[t]he establishment and regulation of authorities for the Federation or any part

131 Oyewo (n 127). See also s 4(7) 1999 Constitution (n 1).
132 *AG Ondo State v AG Federation* (n 101) 1079 NSCQR Vol 10.
133 Ibid.
134 Ibid.
135 Ibid, 1080 NSCQR Vol 10.
136 *AG Lagos State v AG Federation* (n 29) 887-888 NSCQR Vol 14.
137 Ibid, 929 NSCQR Vol 14.
138 Ibid, 938-939 NSCQR Vol 14.
139 Ibid, 946 NSCQR Vol 14.

thereof - (a) To promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution."[140]

Although Uwaifo JSC opinion may not be recognised as the judgement of the court, however, as indicated above, *obiter dicta* in concurring judgements might have a persuasive effect on subsequent decisions. Hence, for the following reasons, this research aligns with Uwais JSC definition of 'state'.

First, while justifying his reason for maintaining his definition of 'state' to mean the three tiers of government in *AG Lagos State v AG Federation*, Uwais JSC cited section 14(4), which reads thus:

> 14 (1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.
> (2) It is hereby, accordingly, declared that:
> (a) Sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority;
> (b) The security and welfare of the people shall be the primary purpose of government: and
> (c) The participation by the people in their government shall be ensured in accordance with the provisions of this Constitution.
> (3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or any of its agencies.
> (4) The composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation.[141]

From the above, it is evident that section 14(4) cannot be read in isolation, it must be read in conjunction with subsections 1, 2, and 3. In doing so, it becomes obvious, as maintained by Uwaifo JSC that a combined reading of section 14(1) and section 381 (1) indicates that 'state' simply refers to the

140 Item 60(a) Second sch pt 1, Exclusive Legislative list, 1999 Constitution (n 1).
141 1999 Constitution (n 1).

Federal Republic of Nigeria, and nothing else.[142] Therefore, going back to Ayoola JSC explanation, it can be deduced that had Ayoola JSC defined 'state' to mean the Federal Republic of Nigeria, it is suggested that he would have concluded that 'environment' was under the exclusive legislative power of the National Assembly.

Second, section 4(3) provides that the Houses of Assembly of States can legislate on any matter included in the Exclusive Legislative List if so provided in the Constitution. Nevertheless, given the absence of such provision in the Constitution, it can be argued that the items in the Exclusive List are solely under the legislative power of the National Assembly. Ultimately, a combined reading of section 4(2) and item 60(a) of the Exclusive Legislative List explicitly provides that the National Assembly shall have powers to make laws for the "establishment and regulation of authorities for the Federation or any part thereof – (a) To promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution." [143] Therefore, the National Assembly has exclusive powers to make laws for the establishment and regulation of authorities to promote and enforce section 20.[144]

Third, in 2004 the Supreme Court had to define the word 'state' in relation to section 15 (5). This is the same section that was interpreted by the same court in *AG Ondo State v AG Federation* and which also influenced Uwais JSC interpretation of 'state' in section 20 to mean the three tiers of government. Rejecting Uwais JSC definition and agreeing with that of Uwaifo JSC, in the lead judgement, Tobi JSC held that:

> Referring to the definition of State in section 318 of the Constitution, learned Assistant Director submitted that the provision shows that the word "State" refers to both the federal and state governments and that the federal and state governments can legislate on corruption, but where both legislate on corruption, the legislation by the federal government will prevail by virtue of the provision of section 4(5) of the Constitution. I think this court dealt with

142 *AG Ondo State v AG Federation* (n 101) 1165 NSCQR Vol 10; *AG Lagos State v AG Federation* (n 29) 938 NSCQR Vol 14.

143 1999 Constitution (n 1).

144 *AG Lagos State v AG Federation* (n 29) 938-939 NSCQR Vol 14; *AG Ondo State v AG Federation* (n 101) 1167 NSCQR Vol 10.

> the issue in Attorney-General of Ondo State V. Attorney General of the Federation (supra).
>
> Uwaifo JSC, appropriately dealt with the issue when he said at page 392; 'That takes me straight to section 14(1) which provides that the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice. It is plain that it is the Federal Republic of Nigeria, as a State, that is looked upon under the Constitution to take steps, or perhaps to spearhead the policy, to abolish all corrupt practices and abuse of power.'
>
> I entirely agree with the above construction. It cannot be otherwise. I can move a bit further. Section 14(1) which defines a State regarding the Federal Republic of Nigeria, is a sub-section in Chapter II of the Constitution on Fundamental Objectives and Directive Principles of State Policy. The word "State" in section 15(5) immediately after section 14 in the same Chapter II cannot bear any other meaning.
>
> The Federal Republic of Nigeria as a State is wider in operational scope than the definition of government in section 318(1) of the Constitution, as it conveys the meaning in section 1 of the Constitution. After all, words used in proximate sections will be presumed to have the same meaning and will be so construed unless it is clear from the particular section that the word is used in a completely different sense and therefore conveys a completely different meaning, I think this is a correct canon of statutory interpretation. From whichever side one looks at the coin, the construction placed on section 15(5) by Uwaifo, JSC, is correct.[145]

Taking cognisance of the purpose of examining the meaning of the word 'state,' which is to determine who has the duty to create a legal or administrative framework within the objective of section 20. Thus, based on the reasons stated above, it is suggested that the Federal Republic of Nigeria is the identified duty-holder who is mandated to "protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other conveniences."[146]

Therefore, since the Federal Republic of Nigeria is the duty-holder having the positive duty to create legal or administrative frameworks for the protection and improvement of the Nigerian environment, it is suggested that section 20 likewise bestows on Nigerian citizens the positive right to demand that the

145 *Federal Republic of Nigeria v Alhaji Mika Anache & Ors* (2004) 206-207 NSCQR Vol 17. Hereafter referred to as *FRN v Anache*.

146 *AG Lagos State v AG Federation* (n 29) 919 NSCQR Vol 14.

Federal Republic of Nigeria fulfil its positive duty.[147] It is necessary to note that the executive powers of the federation are vested in the President of Nigeria who can exercise this power "either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation."[148]

Thus, in fulfilling its obligation to create administrative frameworks, it is suggested that the President of Nigeria on whom the executive powers of the Federal Republic of Nigeria are vested, established the Federal Ministry of Environment as the organ[149] through which its function of protecting and improving the Nigerian environment is realised. It is necessary to note that the National Oil Spill Detection and Response Agency (NOSDRA)[150] and NESREA,[151] which are parastatals under the Federal Ministry of Environment are designed to support the mandate of the Ministry. They form part of the organs created by the Executive to protect the external surroundings of Nigerian citizens and ensure that they live in a safe and secure environment free from any danger to their health or other conveniences.

The African Commission on Human and Peoples' Rights (ACHPR) in *SERAC* case[152] acknowledged that the Federal Ministry of Environment was created to "address environmental and environment-related issues prevalent in Nigeria,"[153] further requesting that the Federal Republic of Nigeria keep ACHPR informed on the work of the Federal Ministry of Environment in realising this mandate.[154]

The mandate of the Federal Ministry of Environment includes:

> [S]ecuring a quality environment conducive for good health and wellbeing of fauna and flora; promoting sustainable use of natural resources, restoring and maintaining the ecosystem, ecological processes,

147 See subsection 3.1.1: The Meaning of 'Shall' and subsection 3.3: What then is HRAEP concept within the Nigerian context.

148 S 5(1) (a) 1999 Constitution (n 1).

149 For discussion on what constitutes as agency of the federal government – see *Bank of Industry Limited v Dr GK Ajayi & Ors* (2017) LPELR-42815 (CA) 32.

150 National Oil Spill Detection and Response Agency (Establishment) Act 2006. Hereafter referred to as NOSDRA Act 2006.

151 NESREA Act 2007 (n 40).

152 *Communication 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria* (2001) ACHPR.

153 Ibid, para 69.

154 Ibid.

> preserve biodiversity, raising public awareness, and promoting understanding of linkages of the environment.[155]

Furthermore, the National Assembly is the body with the legislative powers of the federation.[156] The significance of this is that, in fulfilling its positive duty enshrined in section 20 of the 199 Constitution, the National Assembly is expected to make laws for the promotion and enforcement of section 20. It is suggested that it is in fulfilling this obligation[157] that the National Assembly has enacted legislation such as the FEPA Act 1988 (now NESREA Act 2007), Harmful Waste Act 1988, EIA 1992, National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations 1991, [158] Endangered Species Decree CAP 108 LFN 1990, NOSDRA Act 2006, Nigerian Minerals and Mining Act 2007, Freedom of Information Act 2011, and the ACHPR Act 1983. According to information on the NESREA website, section 20 formed the basis for establishing the agency.[159] The next section shall examine article 24 of the Schedule to the ACHPR Act 1983.

3.2 Article 24 of the Schedule to the ACHPR Act 1983

Article 24 of the Schedule to the ACHPR Act 1983 provides that

> All peoples shall have the right to a general satisfactory environment favourable to their development.[160]

Unlike section 20 of the 1999 Constitution whose intendment has been interpreted by the Nigerian courts, there is the absence of Nigerian court jurisprudence interpreting the intendment of article 24 of the Schedule to the ACHPR Act 1983. It is necessary to note that at the time of this research, there is no case whether at the Supreme Court or Court of Appeal, dealing specifically with the enforcement of article 24 of the Schedule to the ACHPR

155 Federal Ministry of Environment, 'Nigeria's Path to Sustainable Development' (n 37) 71.
156 S 4 (1)1999 Constitution (n 1).
157 Ikpeze supports this position as well – see NG Ikpeze, 'The Environment, Oil and Human Rights in Nigeria' (2011) 2 NAUJILJ 87, 91.
158 *AG Lagos State v AG Federation* (n 29) 938 NSCQR Vol 14.
159 NESREA (n 31).
160 ACHPR Act 1983 (n 2).

Act 1983.[161] However, Orji identifies two unreported Federal High Court (FHC) cases where the applicants sought for the enforcement of this provision,[162] and they are *Gbemre v SPDC*[163] and *Okpara v SPDC*.[164]

Although the applicants in the respective cases requested similar reliefs[165] and sought enforcement through the same procedure – that is, the Fundamental Rights (Enforcement Procedure) (FREP) Rules, the court gave different decisions. Concerning the FREP Rules, it is necessary to note that section 46 of the 1999 Constitution provides for the Chief Justice of Nigeria to "make rules with respect to the practice and procedure of a High Court"[166] through which any person who alleges that his or her fundamental rights "has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress."[167] It is in accordance with this provision that Fatai-Williams JSC in 1979, made the first FREP Rules.[168] In 2009, Kutigi JSC, made a new FREP Rules, repealing the 1979 FREP Rules.[169]

As stated above, both cases sought to enforce rights guaranteed in the Schedule to the ACHPR Act 1983 – article 24, amongst others – through the FREP Rules. While in *Gbemre v SPDC*, Nwokorie J held that article 24 of the Schedule to the ACHPR Act 1983 constituted a fundamental right to a healthy environment and that gas flaring violated that right.[170] On the other hand, in *Okpara v SPDC*, Nwodo J, refusing to be persuaded by the above decision of his brother Judge, held that:

> The 'African Charter' did not stipulate any special procedure to follow in the enforcement of the Rights contained therein unlike S.46 (1) of 1999 Constitution that

161 E Egede, 'Human Rights and the Environment: Is there a Legally Enforceable Right to a Clean and Healthy Environment for the "Peoples" of the Niger Delta under the Framework of the 1999 Constitution of Nigeria?' (2007) 19 SLJIL 51, 76.

162 UJ Orji, 'Right to a Clean Environment: Some Reflections' (2012) 42 EPL 285, 290.

163 *Mr Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation, Attorney General of the Federation* (2005) Unreported, suit no: FHC/B/CS/53/05 of 14 November 2005.

164 *Ikecukwu Okpara & others v Shell Petroleum Development Company of Nigeria Limited & others* (2006) Unreported, suit no: FHC/PHC/C5/518/2005 of 29 September 2006.

165 See *Gbemre v SPDC* (n 163) 2; *Okpara v SPDC* (n 164) 11-12.

166 S 46(3) 1999 Constitution (n 1).

167 Ibid, s 46(1).

168 The Constitution of the Federal Republic of Nigeria, Fundamental Rights (Enforcement Procedure) Rules 1979.

169 See Ord XV r 1 of the Constitution of the Federal Republic of Nigeria, Fundamental Rights (Enforcement Procedure) Rules 2009 under Chapter IV of the Constitution, B1365. Hereafter referred to as the FREP Rules 2009.

170 *Gbemre v SPDC* (n 163) final order 2 of the court, 30.

> provides under S.46 (3) that the Chief Judge makes special procedural rules to be followed. Furthermore, it is indisputable looking at Order 1 Rule 1(1) on the description of "fundamental right" that the Fundamental Rights Enforcement Procedure Rules 1979 applies only to fundamental rights provided for in Chapter IV of the Constitution. Furthermore, Order 1 Rule 2(1) provides that "any person who alleges that any of the fundamental Rights provided for in the Constitution…" Clearly, the Fundamental Rights Enforcement Procedure Rules is limited to the provisions in Chapter IV and does not extend to enforcement of rights stipulated in the African Charter. Therefore, to that extent Applicants reliance on African Charter by way of fundamental rights enforcement procedure is incompetent…the rights created by the African Charter on Human and Peoples Rights are not within definition ascribed to "fundamental rights" within the contemplation of section 46(1) of the Constitution of the Federal Republic of Nigeria.[171]

In view of the decision of the Supreme Court in *Abacha v Fawehinmi*,[172] this research argues that Nwodo J might have given that decision in error.[173] In *Abacha v Fawehinmi*, the Supreme Court, unequivocally held that the incorporation of the Banjul Charter[174] into the Nigerian municipal laws made its provisions justiciable in the Nigerian courts[175] and

> [I]t would follow that the procedural provisions set out in the Fundamental Rights (Enforcement Procedure) Rules under Chapter 4 of the 1979 constitution for enforcing fundamental rights enshrined in the Constitution, are applicable by extension, to the provisions of the African Charter.[176]

Taking cognisance that (i) the Supreme Court is the apex and final court of appeal in Nigeria,[177] (ii) based on the principle of precedent or stare decisis, the decision of superior courts are binding on courts when asked to determine the same issue,[178] and (iii) the decision of the Supreme Court remains good law until it is set aside by same;[179] one wonders why Nwodo J chose to ignore

171 *Okpara v SPDC* (n 164) 12-13.

172 *Abacha v Fawehinmi* (n 124). See also, *Ogugu & others v The State* (1994) 9 NWLR (Pt 366) 1, (1994) 10 Ilaw/sc.303/1990.

173 Orji supports this position as well – see Orji (n 162) 290.

174 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58. Hereafter referred to as Banjul Charter.

175 *Abacha v Fawehinmi* (n 124) 12-13.

176 Ibid, 109.

177 L Fagbohun, 'Introduction to Law: Nigerian Legal System' in DF Asaju (ed), *General Studies Book of Readings* Volume 2 (LSUP 2006) 302; *Isaac Obiuweubi v Central Bank of Nigeria* (2011) LPELR-2185 (SC)28-29, paras E-A, 86 NSCQR Vol 45.

178 *Hon Chris Azubuogu v Hon (Dr) Harry N Oranezi & ors* (2017) LPELR-42669 (SC) 13-13, paras F-A.

179 *Abacha v Fawehinmi* (n 124) 98.

the decision of the superior court. In addition, it is important to note that prior to the *Abacha v Fawehinmi* case which was decided in 2000, the Supreme Court in the case of *Ogugu v The State* – decided in 1994 – had held that the provisions of the Schedule to the ACHPR Act 1983 are enforceable through the FREP Rules in the same manner as those of Chapter IV.[180] This makes it apparent that Nwodo J decision failed to follow the good law made by the Supreme Court. Therefore, to the extent of its inconsistency with the decision of the Supreme Court on this matter, it is suggested that Nwodo J decision is null and void.

Having established that article 24 of the Schedule to the ACHPR Act 1983 is a fundamental right and is enforceable through the FREP Rules 2009, this further illuminates the need to interpret the intendment of the provision. Thus, being that there is the absence of Nigerian court jurisprudence on this, to bridge this lacuna, it might be necessary to examine the decisions of the ACHPR. This is because, by article 30 of the Banjul Charter – which has been enacted into law by the National Assembly as ACHPR Act 1983[181] – the ACHPR is endowed with the powers to interpret all the provisions of the Banjul Charter.[182]

Furthermore, since the domestication of the Banjul Charter by the Nigerian Legislature[183] makes the ACHPR Act 1983 an Act of the National Assembly, [184] it is suggested that the ACHPR might be considered as an establishment promoting and enforcing the observance of Chapter II of the Constitution, as provided for in item 60(a) of the Exclusive Legislative List. The ACHPR can also be deemed to fall within the definition of "such other courts as may be authorised by law to exercise jurisdiction on matters concerning which the National Assembly may make laws."[185]

Notwithstanding the above suggestion, in Abacha *v Fawehinmi*, the Supreme Court described the ACHPR as a "monitoring and research body rather than a

180 *Ogugu v The State* (n 172).
181 S12 1999 Constitution (n 1), inter alia, provides that except a treaty between Nigeria and any other country has been enacted into law by the National Assembly, such treaty fail to have force of law in Nigeria.
182 Art 45(3) Banjul Charter (n 175).
183 S12 (1) 1999 Constitution (n 1).
184 ACHPR Act 1983 (n 2).
185 S6 (5) (j) 1999 Constitution (n 1).

judicial body with enforcement powers."[186] Thus, taking cognisance of this, it is evident that the ACHPR may not categorically fall within the description of a court. Nonetheless, it is suggested that the ACHPR can be described as an establishment within the context of item 60(a) 1999 Constitution – that is, a monitoring and research body.

Even though the recommendations of the ACHPR are not binding on Nigerian courts, nevertheless, it can be argued that they might have a persuasive impact and guiding influence on the Nigerian courts' interpretation of article 24 of the Schedule to the ACHPR Act 1983. Nwokorie J in *Gbemre* case did not categorically highlight that his interpretation of article 24 of the Schedule to the ACHPR Act 1983 as constituting a fundamental right to a healthy environment was influenced by the ACHPR jurisprudence on the same provision in the Banjul Charter.[187] Notwithstanding, there is the probability that such occurred. The jurisprudence of the ACHPR on article 24 of the Banjul Charter is examined below.

In *SERAC*,[188] the ACHPR was called to interpret article 24 of the Banjul Charter. Amongst other things, the ACHPR held that article 24 of the Banjul Charter referred to the right to a healthy environment;[189] which imposes explicit obligations on the state to protect, fulfil, respect, and promote that right.[190] The obligation to protect, fulfil, respect, and promote, requires the state to

> (a) take reasonable and other measures to prevent pollution and ecological degradation; (b) promote conservation; (c) secure an ecologically sustainable development and use of natural resources; (d) not carry out, sponsor or tolerate any practice, policy or legal measure violating the integrity of the individual; (e) order or at least permit independent scientific monitoring of threatened environments; (f) require and publicise environmental and social impact studies prior to any major industrial development; (g) undertake appropriate monitoring and provide information to those communities exposed to hazardous materials and activities; (h) provide meaningful opportunities for those individuals to be heard and to participate in the development decisions affecting their communities.[191]

186 *Abacha v Fawehinmi* (n 124) 39.
187 *Gbemre v SPDC* (n 163) 30.
188 *SERAC* (n 152).
189 Ibid, para 52.
190 Ibid, paras 45-46.
191 Ibid, paras 52-53.

Prima facie, it is evident that 'people' in article 24 of the Banjul Charter/Schedule to the ACHPR Act 1983 are the identified right-holders. Also, from the ACHPR decision in *SERAC*, the state is an identified duty-holder, which as indicated while examining section 20 of the 1999 Constitution, refers to the Federal Republic of Nigeria. This research, however, argues that when seeking the enforcement of article 24 of the Schedule to the ACHPR Act 1983, the 'state' is not the only duty-holder. This is because the Nigerian Courts have consistently held that an application to seek remedy for infringement of fundamental rights can be brought against a natural person, artificial person, the federal government or its agency, and the state government or its agency.[192]

From this, it is apparent that article 24 of the Schedule to the ACHPR Act 1983 has explicit duty-holders, the challenge, however, is to identify who its right-holders are – that is, who exactly is meant by 'peoples'.[193] According to Rembe, "who are peoples? Is it a group of individuals; the State (or States); tribal or ethnic minority within the State?"[194] Again, there is the absence of Nigerian court jurisprudence on the definition of 'peoples' as stated in article 24 of the Schedule to the ACHPR Act 1983. This necessitates referring to the ACHPR jurisprudence on the matter.

It is essential to note that the Banjul Charter is silent on the definition of 'Peoples'.[195] The group of jurists who drafted the Charter adduced the reason for such "deliberate refusal…as not to end up in difficult discussions."[196] Nevertheless, the lack of definition of 'peoples' by the Banjul Charter, should not be interpreted to mean that peoples' rights as expressed in articles 19-24

192 *Alhaji Lawwani Zakari v Inspector-General of Police & anor* (2000) LPELR-6780 (CA) 25-26, paras G-G; *The Nigerian Navy & ors v Lionel Okon Garrick* (2005) LPELR-7555 (CA) 50-52, paras A-C; *Alhaji Ibrahim Abdulhamid v Talal Akar & Anor* (2006) 1449-1450 NSCQR Vol 26; *Economic and Financial Crimes Commission v Ibrahim Suleiman & anor* (2016) LPELR-40790 (CA) 56-58, paras D-A.

193 R Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 VJIL 667, 678.

194 NS Rembe, *The System of Protection of Human Rights under the African Charter on Human and Peoples' Rights: Problems and Prospects* (ISAS 1991)17.

195 *Communication 253/02 Antonie Bissangou / Congo* (2006) ACHPR para 80; Rembe (n 194); SB Keetharuth, 'Major African Legal Instruments' in A Bösl and J Diescho (eds), *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (MEN 2009) 171; RM D'Sa, 'The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action' (1981-1983) 10 AYBIL 101, 117; F Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (H Sutcliffe tr, KLI 2003) 41, 05; SA Dersso, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights' (2006) 6 AHRLJ 358, 360.

196 African Charter on Human and Peoples' Rights, Rapporteur's Report CAB/LEG/67/Draft Rapt Rpt (II) Rev 4, para13; Ouguergouz (n 195).

are of less significance than the individual rights.[197] D'Sa posits that the addition of peoples' in the Banjul Charter title reflects its central importance.[198] The inclusion of peoples' rights stemmed from the principle guiding the drafting of the Banjul Charter, which is that it should reflect the African conception of human rights.[199] Hence, the legal experts resolved to provide for both individual rights and peoples' rights[200] for the following reasons: (a) "the conception of an individual who is utterly free and utterly irresponsible and opposed to society"[201] is incompatible with the African philosophy. (b) In Africa, the individual is part of the group.[202] (c) "individual rights could be explained and justified only by the rights of the community."[203]

It is suggested that the above reasons might be influenced by Vasak's human rights three-generation concept where he categorises third generation rights as rights of solidarity or group rights.[204] This study is not in agreement with Vasak's concept; as such argues that that peoples' rights are rights held by individuals which can be enforced against individuals, states, or artificial persons.

Initially, the ACHPR hesitated to interpret the word 'peoples.'[205] Nevertheless, taking cognisance of its mandate to interpret the provisions of the Banjul Charter, the ACHPR has sought to define the term. According to the ACHPR, the word 'people' lacks a universal and unambiguous definition.[206] In *Congrès du peuple katangais*[207] the ACHPR noted that there might be controversy as to the definition of peoples.[208] Although the ACHPR did not attempt to define 'all peoples" as provided in article 20(1) Banjul Charter, it can be gleaned that by referring to 'the people of Katanga' and stating the lack of evidence indicating

197 *Communication 266/03 Kevin Mgwanga Gunme et al / Cameroon* (2009) ACHPR para 176; DC Turack, 'The African Charter on Human and Peoples' Rights Some Preliminary Thoughts' (1984) ALR 365, 373.
198 D'Sa (n 195) 116.
199 See the governing principle as stated in the preliminary draft of African Charter on Human and Peoples' Rights, CAB/LEG/67/3/Rev 1 (Dakar Draft) 1979.
200 Ibid.
201 Ibid.
202 Rapporteur's Report CAB/LEG/67/Draft Rapt Rpt (II) Rev 4 (n 196) para10.
203 Ibid.
204 K Vasak, 'A 30-year Struggle: the sustained efforts to give force of law to the Universal Declaration of Human Rights' in R Caloz and O Rödel (eds), *The UNESCO Courier* (UNESCO 1977) 29.
205 *Communication 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya* (2009) ACHPR para 147.
206 Ibid.
207 *Communication 75/92 Congrès du peuple katangais / DRC* (1995) ACHPR.
208 Ibid, para 3.

their denial to participate in the Zaire government,[209] the ACHPR indirectly accepted that 'people' could refer to distinct communities within a state.[210]

In *Constitutional Rights Project*[211] the ACHPR defined 'all peoples" in article 20(1) "as involving the right of Nigerians."[212] Here, it can be seen that the ACHPR interpreted 'peoples" as referring to "the population of a State as a whole."[213] In *Legal Resources Foundation,*[214] the ACHPR defined 'peoples" in article 19 of the Banjul Charter as referring to a group that is identified "because of their common ancestry, ethnic origin, language or cultural habits."[215]

In *Centre for Minority Rights Development*,[216] the ACHPR noted that the idea of peoples' share affinity to collective rights.[217] The Commission further indicated "features a collective of individuals should manifest to be considered as peoples."[218] Namely:

> [A] common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights.[219]

In *SERAC*, the ACHPR did not define 'peoples" as provided in article 24 Banjul Charter. However, it referred to rights of communities[220] and stated that collective rights constituted indispensable components of human rights in Africa.[221] Again, similar to the *Congrès du peuple katangais,*[222] it can be

209 Ibid, para 6.
210 Dersso (n 195) 362.
211 *Communication 102/93 Constitutional Rights Project / Nigeria* (1998) ACHPR.
212 Ibid, para 52.
213 Dersso (n 195) 361.
214 *Communication 211/98 Legal Resources Foundation / Zambia* (2001) ACHPR.
215 Ibid, para 73.
216 *Centre for Minority Rights Development* (n 205).
217 Ibid, para 149.
218 Ibid, para 151.
219 *Centre for Minority Rights Development* (n 205) para 151. For extensive discussion on the criteria to identify who constitutes 'peoples' – see United Nations Educational, Scientific and Cultural Organization, 'International Meeting of Experts on further study of the concept of the rights of peoples: Final Report and Recommendations' SHS-89/CONF.602/7 (Paris, 27-30 November 1989), para 22.
220 *SERAC* (n 152) para 69.
221 Ibid, para 68.
222 *Congrès du peuple katangais* (n 207).

surmised that 'peoples" might refer to communities within the state as opposed to the whole population of the state.

In *Sudan Human Rights Organisation*,[223] the ACHPR held that 'a people' referred to an identifiable group with characteristics such as "the language, religion, culture, the territory they occupy in a state, common history, and ethno-anthropological factors."[224] It further stated that race and ethnic identity could be used to determine who constituted groups of peoples.[225] Also, these characteristics possessed by these groups make them distinct from the whole population of the state.[226] In addition, the ACHPR emphasised that the

> African Charter was enacted by African States to protect human and peoples' rights of the African peoples…it protects the rights of every individual and peoples of every race, ethnicity, religion and other social origins.[227]

Recalling its description of the concept 'peoples' as stated in *Centre for Minority Rights Development*,[228] in *Gunme,*[229] the ACHPR held that

> Certain objective feature attributable to a collective of individuals may warrant them to be considered as "people". In the context of the African Charter, the notion of "people" is closely related to collective rights. Collective rights enumerated under articles 19-24 of the Charter can be exercised by a people, bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds.[230]

The ACHPR further echoed this position in *Front for the Liberation of the State of Cabinda*,[231] where it held that 'peoples" referred to "distinct and identifiable groups of "peoples' and communities (which) exist within the States parties to the African Charter."[232]

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223 *Communication 279/03-296/05 Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan* (2009) ACHPR.
224 Ibid, para 220.
225 Ibid.
226 Ibid.
227 Ibid, para 222-223.
228 *Centre for Minority Rights Development* (n 205).
229 *Gunme* (n 197).
230 Ibid, paras 169 and 171.
231 *Communication 328/06 Front for the Liberation of the State of Cabinda / Republic of Angola* (2013) ACHPR.
232 Ibid, para 114.

Having examined the effort by the ACHPR to define the intendment of the term 'peoples' as it relates to articles 19-24 of the Banjul Charter;[233] it is evident that the ACHPR has been inconsistent with its position.[234] This is further emphasised in it guidelines for submitting communications where it described peoples' rights as group or solidarity rights, which broadly refers to "the rights of a community (be it ethnic or national)."[235] Thus, although the ACHPR describes peoples' rights as rights enjoyed by a community, however, the ACHPR does not explicitly define that 'community' as strictly ethnic or strictly national.

It is necessary to note that the African Court on Human and Peoples' Rights (AfCHPR) in *App. No. 006/2012 –African Commission on Human and Peoples' Rights v. Republic of Kenya*, was asked to determine who connotes 'indigenous people'. The AfCHPR noted that the Banjul Charter did not define the term and that there is the absence of universally accepted definition. Notwithstanding, the AfCHPR drew inspiration from the criterias identified by the ACHPR Working Group on Indigenous Populations/Communities and the United Nations Special Rapporteur on Minorities. The AfCHPR held that:

> [F]or the identification and understanding of the concept of indigenous populations, the relevant factors to consider are the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.

According to Keetharuth, given its broad scope "the term *people* can lend itself to various interpretations"[236] and as such the ACHPR has an essential role in

233 *Gunme* (n 197) para 174.

234 Dersso (n 195) 358; FM Ndahinda, 'Peoples' Rights, Indigenous Rights and Interpretative Ambiguities in Decisions of the African Commission on Human and Peoples' Rights' (2016) 16 AHRLJ 29, 30.

235 African Commission on Human and Peoples' Rights, 'Information Sheet No. 2: Guidelines for the Submission of Communications' 4-5 <www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf> accessed 29 September 2018.

236 Keetharuth (n 195) 173; Ouguergouz (n 195) 205 and 211; Dersso (n 195) 359. Also confirmed by the AfCHPR in *App. No. 006/2012 –African Commission on Human and Peoples' Rights v. Republic of Kenya*.

"creating defining jurisprudence in this area." [237] Notwithstanding that the flexible position of the ACHPR as to who exactly are people provides it with the opportunity to apply either ethnic or national to the matter before it. However, it can be argued that this undefined position of the ACHPR might affect Nigerian Courts' jurisprudence on the matter.

Should the Nigerian courts' adopt the definition of 'peoples' by the ACHPR and AfCHPR, it would mean that the right-holders in article 24 of the Schedule to the ACHPR Act 1983, refers to a *distinct group of peoples or communities within Nigeria, identifiable by their culture, language, religion, common history, ethno-anthropological factors, ethnicity, the territory they occupy, economic identities and affinities*.[238] However, based on the fact that (i) Nigeria has over 250 ethnic groups with their diverse languages;[239] (ii) individuals within those ethnic groups practice either Islam, Christianity, or traditional religion;[240] also (iii) these ethnic groups share the common history of colonialism.[241] Therefore, it might be difficult to identify who can be categorised under this definition accurately.

Furthermore, it is argued that the ACHPR description of 'peoples' as a collective right[242] goes back to Vasak's three-generation human rights concept where he postulated the existence of third-generation rights.[243] Vasak referred to third generation rights as rights of solidarity, and the ACHPR also describes peoples' rights as group or solidarity rights.[244] As discussed in Chapter Two of this research, scholars are undecided as to whether rights of solidarity comprise of both individual and collective/group rights or are rights held by a community as a collective.[245] From the ACHPR description in its information sheet, it can be deduced that the ACHPR is favourable to the description of the rights of solidarity as collective rights, instead of a combination of individual

237 Keetharuth (n 195) 173; Dersso (n 195).
238 See *Legal Resources Foundation* (n 214); *Sudan Human Rights Organisation* (n 223); *Gunme* (n 197).
239 Federal Republic of Nigeria, 'People of Nigeria' <http://www.nigeria.gov.ng/index.php/2016-04-06-08-38-30/people-of-nigeria> accessed 29 September 2018; Ndahinda (n 234) 56.
240 Ibid.
241 Ibid.
242 *Gunme* (n 197) para 171; *Centre for Minority Rights Development* (n 205) para 149.
243 Vasak (n 204).
244 African Commission on Human and Peoples' Rights (n 235).
245 C Wellman, 'Solidarity, the Individual and Human Rights' (2000) 22 HRQ 639, 650; SP Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1981) 33 RLR 435, 444; A Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2008) 18 FELR 471, 471.

and collective rights. According to ACHPR, these are "the rights of a community (be it ethnic or national)."[246] Thus, the rights provided in articles 19-24 of the Banjul Charter/Schedule to the ACHPR Act 1983 constitute rights held by individuals jointly rather than severally,[247] which can only be enjoyed collectively,[248] and can only be enforced against outsiders;[249] because "right holders cannot hold rights against themselves."[250]

As argued in Chapter Two, this research rejects the idea that the right to the environment can be validly classified as third generation rights for three reasons (i) Vasak's classification of human rights into three generations is not an accurate reflection of the development of human rights. [251] (ii) Acknowledging that human rights are divided along the lines of 'generation' would mean that there should be a fourth, fifth, and so on.[252] Also, meaning that the first, second, and third human rights might be obsolete- basically, past their era. (iii) The rights as described by Vasak lack explicit right-holders and duty-holders. According to Kooijmans, a right with such features cannot be an existing right.[253] Given that a right should have identified right-holders and duty-holders, defining the right provided in article 24 of the Banjul Charter/ Schedule to the ACHPR Act 1983 as third generation rights might mean it cannot be recognised as a right.[254] Taking cognisance that article 24 of the Banjul Charter/Schedule to the ACHPR Act 1983 explicitly highlights who the right-holders are – that is peoples, it suggested that the provisions do not fall within Vasak's definition of third-generation rights.

Concerning the description as collective rights or rights of solidarity, this research also argues that an adoption of such definition might affect the potential of article 24 of the Banjul Charter/Schedule to the ACHPR Act 1983

246 African Commission on Human and Peoples' Rights (n 235).
247 P Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21 HRQ 80, 88.
248 *Gunme* (n 197) para 175 and 176.
249 P Jones, 'Group Rights and Group Oppression' (1999) 7 TJPP 353, 373.
250 Jones, 'Human Rights, Group Rights, and Peoples' Rights' (n 247) 94.
251 See Sepuldeva M, Van Banning T and van Genugten WJ, Human Rights Reference Handbook (UP 2004) 13. See also A Eide, 'Economic, Social and Cultural Rights as Human Rights' in A Eide, C Krause, and A Rosas (eds) *Economic, Social and Cultural Rights* (NP 1995) 24-29; P Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) XXIX NILR 307, 316.
252 Alston (n 251) 317.
253 PH Kooijmans, 'Human Rights – Universal Panacea? Some reflections on the so-called human rights of the third generation [1990] 37 NILR 315, 323.
254 Discussed in Chapter Two, subsection 4.4.3: Third generation rights (rights of solidarity).

as a viable tool for protecting the environment as it may lead to confusion instead of clarity when seeking its enforcement. This is because the right-holders who engage in activities that result in environmental degradation and pollution cannot be held responsible for such acts. Given the focus of this study, examples of such acts include illegal oil refining, bombing oil pipelines and infrastructures, indiscriminate and unregulated artisanal mining. The inability to hold the right-holders accountable is because collective rights cannot be enforced against the right-holders but other individuals or groups of individuals.[255]

It is suggested that the definition of people – that is the identified right holders – would determine how the Nigerian courts would interpret article 24 of the Schedule to the ACHPR Act 1983. This research had suggested above that as provided for in the preamble of the 1999 Constitution; people should be defined as the Nigerian citizen. The interpretation of 'peoples' given by the ACHPR in *Constitutional Rights Project*[256] as Nigerian citizens – that is the national definition – constitutes a suitable interpretation of the term 'peoples'. According to Howard, "the rights of peoples mentioned in articles 19-24 are clearly meant to be rights of national, not subnational, groups."[257] The benefit of this definition means that all Nigerian citizens have the right to a general satisfactory environment favourable to their development.[258] This provides a simple, concise, and explicit definition.

Pursuant to Order 1 Rule 2 of the FREP Rules 2009, article 24 of the Schedule to the ACHPR Act 1983 is defined as fundamental rights and per Nigerian jurisprudence, an applicant can seek redress for infringement of fundamental rights against a person (natural or artificial), the federal government or its agency, and the state governments and their agencies.[259] Therefore, it is suggested that defining peoples as Nigerian citizens provides the requisite platform for Nigerian citizens [this apparently includes Nigerian extractive industry host communities (NEIHCs)], to enforce article 24 of the Schedule to

255 Jones, 'Human Rights, Group Rights, and Peoples' Rights' (n 247) 94-95.
256 *Constitutional Rights Project* (n 211).
257 RE Howard, *Human Rights in Commonwealth Africa* (RL 1986) 92.
258 ACHPR Act 1983 (n 2).
259 *Zakari v IG Police* (n 192); *The Nigerian Navy v Garrick* (n 192) 50-52, paras A-C; *Abdulhamid v Akar* (n 192) 1449-1450; *Economic and Financial Crimes Commission v Ibrahim Suleiman & anor* (2016) LPELR-40790 (CA) 56-58, paras D-A.

the ACHPR Act 1983 against either individuals from the NEIHC engaged in activities resulting in environmental degradation and pollution, the government, or the extractive entities.

3.3 What then is HRAEP concept within the Nigerian context?

The objective of this section has been to understand what HRAEP connotes from the Nigerian perspective. From the examination so far, it can be deduced that the two statutory provisions which guarantee a human rights approach to protect the environment might be different and at the same time, interrelated. First, while section 20 of the 1999 Constitution creates a positive right to environmental protection[260] and requires positive state action; on the other hand, article 24 of the Schedule to the ACHPR Act 1983, can be said to create a negative right and requires the duty-holders' to refrain from any action which would infringe on the right-holders' "general satisfactory environment favourable to their development."[261] Nevertheless, as stated in Chapter Two of this research, human rights encompass both negative rights/duties and positive rights/duties. Hence, it is suggested that section 20 of the 1999 Constitution and article 24 of the Schedule to the ACHPR Act 1983, both require positive actions from the state and non-interference in fulfilling, respecting, and ensuring the protection of these provisions. For article 24, this includes natural and artificial persons, the state governments, and their agencies.

Second, 'people' are the identified right-holders for both provisions. This research maintains that the definition of people should be that provided in the preamble of the 1999 Constitution, which is, the Nigerian citizen. Thus, a combined reading of section 20 of the 1999 Constitution and article 24 ACHPR Act 1981, indicates the existence of citizens' right to a clean, safe and secure, healthy environment. It is argued that this right is an individual right which every Nigerian has, and which can be enforced against other Nigerian citizens. Classifying the right as a collective right would mean that citizens' right to a

260 Boyd refers to this positive right as "Government duty" – see DR Boyd, *The Environmental Rights Revolution: A global study of Constitutions, Human Rights, and the Environment* (UBCP 2012) 56.

261 ACHPR Act 1983 (n 2).

clean, safe and secure, healthy environment can only be enjoyed by a collective and more so, the right cannot be enforced against that collective.

Third, with regards to section 20 of the 1999 Constitution, the state is the identified duty-holder, on the other hand, the identified duty-holders for article 24 of the Schedule to the ACHPR Act 1983 comprise of both natural and artificial persons, the federal government and its agencies, the state governments and their agencies.

Fourth, it is suggested that the domestication of the Banjul Charter forms part of the Federal Republic of Nigeria – that is the state – fulfilment of its positive duty stipulated by section 20 of the 1999 Constitution. Therefore, the enforcement of article 24 of the Schedule to the ACHPR Act 1983 realises the objective of section 20 of the 1999 Constitution, which per Kalgo JSC is "to protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other conveniences."[262]

Having outlined the differences and interrelated points of section 20 of the 1999 Constitution and article 24 of the ACHPR Act as human rights provisions through which the environment can be protected, it is suggested that the HRAEP concept within the Nigerian context can be described as the enforcement of the citizens' right to a clean, safe and secure, healthy environment with the objective to maintain or restore the quality of land, water, air, animal resources, plant resources, or other natural resources; by preventing the emission of pollutants or reducing the presence of polluting substances in these elements.

Furthermore, given the definition of 'environment' provided in NESREA Act 2007 and EIA 1992, it can be argued that HRAEP from the Nigerian perspective is weak anthropocentric in scope. Therefore, by ensuring that the external surroundings and atmosphere of the Nigerian citizen is safe and secure, devoid of any threat to their health or other amenities, and favourable

262 *AG Lagos State v AG Federation* (n 29) 919 NSCQR Vol 14.

to their development, the environmental media is being maintained or restored, and pollution prevented or reduced.

4 IS THERE A JUSTICIABLE HRAEP IN NIGERIA?

Having understood what the concept of HRAEP from the Nigerian perspective connotes, it is necessary to examine whether the identified rights – that is, the rights provided by section 20 of the 1999 Constitution and article 24 of the Schedule to the ACHPR Act 1983 are justiciable. This is because the justiciability of the said rights will determine whether the HRAEP concept provides a viable mechanism through which environmental sustainability can be achieved in the Nigerian extractive industry.

In *Ugwu v Ararume*,[263] Mohammed JSC described the meaning and effect of a non-justiciable statute provision. He held that

> An enactment is justifiable if only it can be properly pursued before a court of law or tribunal for a decision. But where a court or tribunal cannot enforce such enactment, then it becomes non-justifiable (i.e. non-enforceable). This means that the Executive does not have to comply with the enactment unless and until the Legislature enacts specific laws for its enforcement.[264]

4.1 Section 20 of the 1999 Constitution

Existing Nigerian court jurisprudence holds that section 20 of the 1999 Constitution is non-justiciable based on section 6(6) (c) which ousts courts' judicial powers from entertaining any issue or question about Chapter II of the 1999 Constitution.

Section 6(6) (c) provides thus:

> The judicial powers vested in accordance with the foregoing provisions of this section –
> (c) Shall not *except as otherwise* provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive

263 *Engr Charles Ugwu & Anor v Senator Ifeanyi Ararume & Anor* (2007) LPELR-3329(SC). Hereafter referred to as *Ugwu v Ararume*.

264 *Ugwu v Ararume* (n 263).

> Principles of State Policy set out in Chapter II of this Constitution.[265]

Taking cognisance of Mohammed JSC definition of a justiciable provision, it means that the Executive does not have to comply with Chapter II "unless and until the Legislature enacts specific laws for its enforcement."[266] Through a critical examination of the 1999 Constitution and the Nigerian courts' jurisprudence, this research seeks to investigate whether section 20 is non-justiciable. In view of this, the main question is whether Chapter II is justiciable; if the answer is in the affirmative, then it means section 20 is justiciable (*vice versa*).

The Constitutional provision of Chapter II, dealing with *Fundamental Objectives and Directives Principles of State Policy* (FODPSP), was not added to the Nigerian Constitution until the 1979 Constitution.[267] Before its enactment by the National Assembly, the Daily Times of Nigeria organised series of debates, talks, and symposia aimed at providing a platform for the Nigerian public to give their opinions on the 1979 Draft Constitution.[268] The justiciability and non-justiciability of Chapter II formed an essential part of the debate due to the provisions of section 7. Although section 7 mandated the executive, legislature, and judiciary, to conform to, observe, and apply the provisions of Chapter II, it also ousted the judicial powers of the court

> [T]o determine any issue or question as to whether any action or omission by any person or authority or, as to whether any Law or any judicial decision is in conformity with this Chapter of this Constitution.[269]

In his contribution to the debate, Chief Obafemi Awolowo [270] succinctly argued that a non-justiciable provision in the Constitution was not in tune with the

265 6(6) (c) 1999 Constitution (n 1). Emphasis added.

266 *Ugwu v Ararume* (n 263).

267 See the Constitution of the Federation of Nigeria 1960 and the Constitution of the Federation 1963. See also *Archbishop Anthony Olubunmi Okogie & ors v The Attorney-General of Lagos State* (1980) FNLR 445, 18, Suit No FCA/L/74/80. Hereafter referred to as *Okogie v AG Lagos State*; BO Okere, 'Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution' (1983) 32 TICLQ 214, 214; OO Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 JAL 89, 104.

268 See WI Ofonagoro, A Ojo, and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976/1977* (DTN 1977).

269 See O Awolowo, 'My Thoughts' in WI Ofonagoro, A Ojo, and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976/1977* (DTN 1977) 43.

270 Chief Awolowo was one of the important figures in the struggle for Nigeria's independence. Till date, his ideals continue to influence Nigerian politics – see Encyclopædia Britannica, 'Obafemi Awolowo: Nigerian Statesman' [2016] <www.britannica.com/biography/Obafemi-Awolowo> accessed 29 September 2018.

voice of Nigerians.[271] Also, it was wrong for the Constitution Draft Committee (CDC) to make the duties of the citizens towards the state justiciable while that of the state towards the citizens, non-justiciable. He further stated that:

> Unless these objectives are clearly defined, and constitutional provisions are made for their legal enforcement if the need arises, the State will drift, and suffer instability and turmoil…It may be argued with some cogency that some sections in Chapter II are not drafted in a language that would lend them to court actions. If this is then such sections should be re-drafted. But I don't think that this is so…I have read chapter II again and again, and I am of the considered opinion that a breach of any of the sections in the Chapter can be tenably challenged in our Courts of Law.[272]

Supporting Awolowo's argument, the Nigerian Tribune contended that the non-justiciability of Chapter II made its provisions useless to both the people and the government, and it was only by "making them enforceable in the court of law can they achieve the desired result."[273] According to the CDC, making Chapter II justiciable will result in endless confrontation between the judiciary, executive, and legislative.[274] Addressing this argument, the Nigerian Tribune stated that the reason adduced by the CDC were mere speculations and even if it were so, such confrontations were healthy.[275] The Nigerian Tribune further argued that any written Constitution which was legally enforceable had the possibility of producing such confrontations.[276] The Nigerian Tribune highlighted that the CDC's recommendation that the National Assembly established a tribunal to enforce Chapter II was an indication that the CDC admitted the need for an enforceable Chapter II.[277]

Furthermore, Joseph questioned the use of the term 'duties' by the CDC to refer to non-enforceable objectives.[278] The CDC had contended that the rationale behind Chapter II stemmed from the need to cast specific duties on

271 Awolowo (n 269) 43.
272 Ibid, 44.
273 Nigerian Tribune, 'Fundamental Objectives' in WI Ofonagoro, A Ojo, and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976/1977* (DTN 1977) 54.
274 Okere (n 267) 221.
275 Nigerian Tribune (n 273) 55.
276 Ibid.
277 Nigerian Tribune (n 273) 55. See also H Sani, 'Fallacies of the Nigerian Draft Constitution' in WI Ofonagoro, A Ojo, and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976/1977* (DTN 1977) 59.
278 RA Joseph, 'National Objectives and Public Accountability' in WI Ofonagoro, A Ojo, and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976/1977* (DTN 1977) 65.

the state towards its subjects based on the failure of the past Constitutions to so do.[279] Joseph argued that if the Chapter was non-justiciable, the use of the term 'duties' might pose a problem, as

> [I]t is part of the notion of Duty, in every one of its forms, that a person may rightfully be compelled to fulfil it. Duty is a thing which may be exacted from a person as one exacts a debt. Unless we think that it may be exacted from him, we do not call it duty.[280]

Adopting an opposing view, Ojo, argued that FODPSP were at best political party manifestoes and should not be included in the Constitution, and if they were included, they should be made non-justiciable.[281] In agreement with this argument, the CDC argued that the rights stipulated in the FODPSP were rights which could only come into existence after the Government has provided facilities for them.

> Thus, if there are facilities for education or medical services one can speak of the 'right' to such facilities. On the other hand, it will be ludicrous to refer to the 'right' to education or health where no facilities exist.[282]

The above argument by the CDC share resemblance with the widely held presumption on the distinction between civil and political rights and economic, social, and cultural rights,[283] which is, that the later are non-justiciable aspirational objectives that the government can achieve when it has resources. Addressing this error, according to the Committee on Economic, Social, and Cultural Rights (CESCR):

> In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social, and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions…The adoption of a rigid classification of economic, social, and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to

279 Ibid, 66.

280 Quoting John-Stuart Mill – see ibid.

281 A Ojo, 'The Objectives and Directives Must Be Expunged' in WI Ofonagoro, A Ojo, and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976/1977* (DTN 1977) 46.

282 Report of the Constitution Drafting Committee Vol 1 p.xv as cited in Okere (n 267) 223.

283 For details on this – see Chapter Two subsection 4.4.2: Civil and Political Rights and Economic, Social and Cultural Rights: Negative rights and Positive actions.

> protect the rights of the most vulnerable and disadvantaged groups in society.[284]

Taking cognisance of the argument adduced by the contributors at the symposium organised by the Daily Times, it is evident that majority canvassed for a justiciable Chapter II, in line with the above position of the CESCR. The enacted provisions of sections 6(6)(c), 13, and item 59(a) of the 1979 Constitution confirm that the CDC took into cognisance the issues raised at the debate.[285] The pertinent question is how the Nigerian courts have answered the question as to the justiciability or otherwise of Chapter II?

In the case of *Okogie v AG Lagos State*,[286] the Federal Court of Appeal determined whether Chapter II of the 1979 Constitution was justiciable.[287] Delivering the lead judgement, Nasir JCA, referring to the phrase '*except as otherwise'*[288] as stated in section 6(6) (c), identified section 13[289] and item 59(a)[290] as the two provisions which have *otherwise*[291] been provided by the Constitution.[292] Despite stating that pursuant to section 13, it is the duty of the judiciary to conform to and apply the provisions of Chapter II. Conversely, Nasir JCA holds that based on the ouster provisions of section 6(6)(c), "[I]t is clear therefore that section 13 has not made Chapter II of the Constitution justiciable."[293] Section 13 explicitly provides that,

> It shall be the duty and responsibility of all organs of government, and all authorities and persons, exercising legislative, executive, or judicial powers, to conform to, observe, and apply the provisions of this Chapter of this Constitution.[294]

According to Nasir JCA, the origins of the FODPSP can be traced to the Indian Constitution which has the same provision.[295] Thus, it can be argued that the

284 UNCHR, 'General Comment 9: The domestic application of the covenant' (3 December 1998) E/C.12/1998/24 <www.refworld.org/docid/47a7079d6.html> accessed 29 September 2018.
285 See The Constitution of the Federal Republic of Nigerian 1979.
286 *Okogie v AG Lagos State* (n 267).
287 At this juncture, it is pertinent to note that following her 1960 Independence Constitution, Nigeria has had the 1963 Constitution, 1979 Constitution, and the 1999 Constitution, which to a large extent is a replica of the 1979 Constitution.
288 Emphasis added.
289 Note that s 13 of the 1979 Constitution is the same as s13 of the 1999 Constitution (n 1).
290 Note that Item 57(a) of the Exclusive Legislative List 1979 Constitution is the same as Item 60(a) of the Exclusive Legislative List 1999 Constitution (n 1).
291 Emphasis added.
292 *Okogie v AG Lagos State* (n 267) 17-18.
293 Ibid, 18.
294 1999 Constitution (n 1).
295 *Okogie v AG Lagos State* (n 267) 19.

jurisprudence of the Indian Court would have a persuasive influence on the court's interpretation of the same in the Nigerian Constitution, which in this case, it did. Nasir JCA agreed with the Indian Supreme Court decision in the case of *State of Madras v Champakam* (1951) S.C.R. 252, where the court held that the directive principles of state policy are expressly unenforceable by any court.[296] Thus, prompting Nasir JCA to hold that "the arbiter for any breach of and the guardian of the Fundamental Objectives and Directive Principles of State Policy … is the legislature."[297] Also, that section 4(2) and item 59(a) of the Exclusive Legislative List makes it clear that the National Assembly has the duty to establish authorities with the power to promote and enforce the observance of Chapter II. [298] Thus, pending the establishment of such authorities by the Legislature, "it will be mere speculation to say which functions they may perform or in which way they may be able to enforce the provisions of Chapter II."[299] It is necessary to note that *Okogie v AG Lagos State* is a *locus classicus* with regards to the justiciability of Chapter II.

In *AG Ondo State v AG Federation*,[300] the Supreme Court reiterated the position that the FODPSP was similar to that in the Indian Constitution.[301] Like the Federal Court of Appeal in *Okogie v AG Lagos State*,[302] the Supreme Court, referred to the jurisprudence of the Indian court, in this instance, the case of *Mangru v Commissioners of Budge Budee Municipality* (1951) 87 CLJ 369,[303] where the Indian court held that

> [T]he Directive Principles require to be implemented by legislation, and so long as there is no law carrying out the policy laid down in a Directive neither the State nor an individual can violate any existing law or legal right under colour of following.[304]

Given the court's decision in *Okogie v AG Lagos* and *AG Ondo State v AG Federation*, it can be argued that the Nigerian courts have consistently relied on the jurisprudence of the Indian Courts to interpret the justiciability of Chapter II. Thus, since the Nigerian courts hold that the provisions of Chapter

296 Ibid.
297 Ibid.
298 Ibid, 19-20.
299 Ibid, 20.
300 *AG Ondo State v AG Federation* (n 101) 1165 NSCQR Vol 10.
301 Ibid, 1077 NSCQR Vol 10.
302 *Okogie v AG Lagos State* (n 267).
303 *AG Ondo State v AG Federation* (n 101) 1077 NSCQR Vol 10.
304 Ibid, 1077-1078 NSCQR Vol 10.

II are like section 37 of the Indian Constitution, it is necessary to examine the said provision.

Part IV of the Indian Constitution is titled 'Directive Principles of State Policy.' Section 37 explicitly states that,

> The provisions contained in this Part *shall not be enforceable by any court*, but the principles therein laid down are nevertheless fundamental in the governance of the country, and it shall be the duty of the state to apply these principles in making laws.[305]

From the wordings of this section, unlike section 6 (6)(c) of the Nigerian Constitution which provides an exception clause, section 37 of the Indian Constitution, explicitly bars the Indian court from enforcing the provisions of that Chapter. Section 37 of the Indian Constitution does not contain any exception clause.

In *Ugwu v Ararume*, Tobi JSC interpreted the meaning of 'shall not' when used in a statutory provision as implying "that something must not be done."[306] He further stated that where the jurisdiction of the court is ousted in statutory provisions, the draftsmen are not miserly with their language but rather "state their mind clearly in order to avoid any speculation or conjecture about their intention."[307] He indicated sections 6(6)(c)(d), 143(10), 188(10), and 308 as examples of ouster clauses.

By examining these ouster clauses highlighted by Tobi JSC, this research finds that sections 6(6)(d), 143(10), 188(10), and 308, explicitly use the phrases 'shall not,' [308] 'no proceedings,' [309] 'notwithstanding anything,' [310] without providing any exception clause. Section 6(6)(c), on the other hand, explicitly qualifies the phrase 'shall not' with '*except as otherwise provided by this Constitution.*' As indicated in *Okogie v AG Lagos State*, the exceptions provided by the Constitution are section 13 and item 60(a) of the Exclusive Legislative List.

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305 See s37 The Constitution of India (as of 9th November, 2015). Emphasis added.
306 *Ugwu v Ararume* (n 263).
307 Ibid.
308 S 6 (6) (d) 1999 Constitution (n 1).
309 ss143 (10) and 188(10) 1999 Constitution (n 1).
310 S 308 1999 Constitution (n 1).

Given Tobi JSC statement that the drafters are explicit when drafting an ouster clause, it can be argued that had the Constitution failed to further provide any exception provision – as obtainable in section 4(3) of the 1999 Constitution[311] – then it will be valid to categorise section 6(6)(c) as an ouster clause. Thus, taking cognisance of this, it is necessary to question why the court in *Okogie v AG Lagos State* after indicating that section 13 is an exception clause further held that based on the 'shall not' in section 6(6)(c), Chapter II remained non-justiciable.

It is essential to note that in 2004 – *FRN v Anache*[312] – the Supreme Court was again tasked with the duty to determine whether Chapter II of the 1999 Constitution was justiciable. Delivering the lead judgement, Tobi JSC held that

> In my humble view, the non-justiciability of section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words "except as otherwise provided by this Constitution." This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the courts… [313] By the provision of section 6(6)(c) of the Constitution, section 15(5) at it stands and on its face value, is not justifiable. But that is not the end of the issue. Reliance must be placed on item 60(a) of the Exclusive Legislative List of the Second Schedule to the Constitution…[314] A community reading of item 60(a) and section 15(5) results in quite a different package…[315] In my view, by the joint reading of the two provisions, Chapter 2 becomes clearly and obviously justiciable. And if I may fall back on section 6(6)(c) of the Constitution which provided for an exception clause, it is my view that section 6(6)(c) anticipates amongst other possible provisions, the provision of item 60(a)… [316] It is clear, therefore, that although section 15(5) of the Constitution is, in general, not justiciable, as soon as the National Assembly exercises its power under section 4 of the Constitution with respect to Item 60(a) of the Exclusive Legislative List, the provisions of section 15(5) of the Constitution becomes justiciable." In light of the above, I reject the argument[317] …that the provisions of Chapter 2 are not justiciable in virtue of section 6(6)(c) of the

311 See *AG Lagos State v AG Federation* (n 29) 979 NSCQR Vol 14.
312 *FRN v Anache* (n 145) NSCQR Vol 17.
313 Ibid, 195 NSCQR Vol 17.
314 Ibid, 197 NSCQR Vol 17.
315 Ibid.
316 Ibid.
317 Ibid, 200-201 NSCQR Vol 17.

> Constitution. I accept the argument…that the provisions could be justiciable.[318]

In examining *Okogie v AG Lagos State* and *AG Ondo State v AG Federation*, and *FRN v Anache*, it is evident that the Nigerian courts have maintained that for Chapter II to become justiciable, the legislature would need to establish authorities and enact legislation to promote and enforce the provision stipulated therein. According to Uwaifo JSC in *AG Ondo State v AG Federation*, "[w]e do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List."[319] Therefore, per Tobi JSC, once the National Assembly "exercises its power under section 4 of the Constitution with respect to Item 60(a) of the Exclusive Legislative List,"[320] that provision becomes explicitly justiciable.[321]

It is necessary to note that the ACHPR Act 1983 was enacted before the 1999 Constitution – which is the first Nigerian Constitution to provide for environmental protection. The significance of this observation is that if the court in 1980[322] held that by enacting an Act to enforce the observance of Chapter II, the National Assembly made that matter justiciable; and then in 1983, the ACHPR Act was enacted, having an explicit provision on environmental protection. This makes one question whether section 20 of the 1999 Nigerian Constitution was indeed intended to be non-justiciable.

Following these decisions of the Nigerian Supreme Court and Federal Court of Appeal (as it then was), this research argues that by enacting the ACHPR Act 1983, the National Assembly made provision for an explicit right to a healthy and clean environment, by extension, making section 20 of the 1999 Constitution justiciable. Thus, efficient enforcement of article 24 of the Schedule to the ACHPR Act 1983, might sufficiently ensure the protection of the right provided in section 20 of the 1999 Constitution.

318 Ibid, 201 NSCQR Vol 17.
319 *AG Ondo State v AG Federation* (n 101) 1164 NSCQR Vol 10.
320 *FRN v Anache* (n 145) NSCQR Vol 17. See also S Ibe, 'Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities' (2010) 10 AHRLJ 197, 202; Amao (n 267) 105.
321 See also *AG Lagos State v AG Federation* (n 29) 1164 NSCQR Vol 14.
322 *Okogie v AG Lagos State* (n 267).

Furthermore, it is argued that in addition to item 60(a), section 13 unequivocally makes Chapter II justiciable. This means that unlike the Indian Constitution Directive Principles provision which requires legislation before it can be justiciable, based on the exception clause provided in section 6(6)(c), Chapter II of the 1999 Constitution is made justiciable by section 13. Thus, the Constitution has made Chapter II justiciable in two ways, namely, (i) section 13, and (ii) item 60(a). The next subsection section shall further examine the validity of this argument that section 13 unambiguously makes Chapter II justiciable.

4.1.1 The Cannons of Statutory Interpretation and Chapter II

As indicated above, this research argues that section 13 explicitly makes Chapter II justiciable, even though the court in *Okogie v AG Lagos State* identified section 13 as one of the exceptions provided in section 6(6)(c), the Court held that section 13 does not make Chapter II justiciable. This subsection seeks to examine the validity of this position by using the cannons of statutory interpretation which the Nigerian courts have developed to guide them in the interpretation or construction of statutes, to interpret sections 6(6)(c) and 13 of the 1999 Constitution and section 37 of the Indian Constitution – which the courts have held is similar to the provision in the Nigerian Constitution.

In *Ugwu v Ararume*,[323] Tobi JSC held that:

> The underlying principle in the interpretation of a statute is that the meaning of the statute or legislation must be collected from the plain and unambiguous expressions or words used therein rather than from any notions which may be entertained as to what is just and expedient…The literal construction must be followed unless this would lead to absurdity and inconsistency with the provisions of the statute as a whole…This is because it is the duty of the judge to construe the words of a statute and give those words their appropriate meaning and effect…It is only when the literal meaning result in ambiguity or injustice that a judge may seek internal aid within the body of the statute itself or external aid from statutes in pari materia in order to resolve the ambiguity or avoid doing injustice… The above is an exception to the rule

323 *Ugwu v Ararume* (n 263).

> rather than the rule. In the construction of a statute, the primary concern of a judge is the attainment of the intention of the Legislature. If the language used by the Legislature is clear and explicit, the judge must give effect to it because, in such a situation, the words of the statute speak the intention of the Legislature…The words in a statute are primarily used in their ordinary grammatical meaning or common or popular sense and generally used as they would have ordinarily be understood.[324]

In addition to the above principles, when the court is tasked with interpreting a provision of the Constitution, the court is mandated to read the Constitution as a whole document to ascertain the objective of the provision in question. This is because unlike other statutes, the Constitution is the grundnorm[325] and fundamental law,[326] "an instrument of government under which laws are made, and it is not a mere Act or law."[327] Hence:

> A section must be read against the background of other sections of the Constitution to achieve a harmonious whole. The principle of whole statute construction is important and indispensable in the construction of the Constitution so as to give effect to it.[328]

These principles and cannon of interpretation shall be used to examine sections 6(6)(c) and 13 of the 1999 Constitution and section 37 of the Indian Constitution.

4.1.1.1 Section 6(6)(c)

As indicated above, the literal rule which states that statutes be construed in their natural and ordinary meaning [329] is the main rule to be applied when interpreting a statute or legislation; any other rule is the exception.[330] Thus,

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324 See also *Ifezue v Mbadugha* (n 62); *Ebele Okoye & ors v Commissioner of & ors* (2015) LPELR-24675 (SC); *AG of Bendel State v AG of the Federation & ors* (1982) 3 NCLR 1, (1981) 9 SC (Reprint) 1 at 78-79 as cited in *Global Excellence Communication Ltd & ors v Duke* (2007) LPELR-1323(SC) 18-19 paras A-D; *Victor Adegoke Adewumi & anor v AG of Ekiti State & ors* (2002) LPELR-3160 (SC); *The Registered Trustees of the Airline Operators of Nigeria v NAMA* (2014) LPELR-22372(SC); *The Military Governor Anambra State & ors v Job Ezemuokwe* (1997) LPELR-3187(SC); *Ojo v Asuelimhen* (2014) LPELR-22761(CA); *University of Lagos & ors v Uche* (2008) LPELR-5073(CA); *Wike v Federal Republic of Nigeria* (2009) LPELR-8077(CA); *Ocholi Enojo James SAN v Independent National Electoral Commission (INEC) & ors* SC.478/2013, 57-59, paras G-D.

325 *Abacha v Fawehinmi* (n 124) 93.

326 *NDP v INEC* (2007) All FWLR (Pt 358) 1124 at 1147-1149 paras F-D (CA).

327 *Attorney General of the Federation v Abubakar* (2007) LPELR-8995(CA).

328 *Hon Justice Raliat Elelu-Habeeb (Chief Judge of Kwara State) v AG Federation & 2 Ors* (2012) 2 SC (Pt 1) 145 as cited in *AG of Lagos State v AG of the Federation & ors* (2014) LPELR-22701(SC). See also *Action Congress & anor v Independent National Electoral Commission* (2007) LPELR-66 (SC); *Awuse v Odili* (2005) LPELR-11283(CA); *Inspector General of Police v ANPP* (2007) LPELR-8932(CA).

329 Brittania-U Nig Ltd v Seplat Petroleum Development Company Ltd & Ors (2016) LPELR-40007(SC).

330 *Ugwu v Ararume* (n 263).

applying the literal rule to section 6(6)(c), it is necessary to examine the word 'except'.

'Except' has a Latin origin which is translated to mean 'taken out.' [331] According to the Oxford Dictionary of English, where the word 'except' is a conjunction, it is "used before a statement that forms an exception to one just made."[332] The word 'except' is not in the Black's Law Dictionary. The closest is the phrase 'statutory exception' which is defined as "a provision in a statute exempting certain persons or conduct from the statute's operation."[333] Hence, a literal rule construction of section 6(6)(c) would mean that should the Constitution provide anywhere that the judicial powers shall extend to Chapter II, that provision exempts the application of the ouster phrase 'shall not.' The courts in *Okogie v AG Lagos State*[334] and *FRN v Anache* [335] acknowledged this.

However, Okeke and Okeke, relying on the decision of the court in *Okogie v AG Lagos State,* argue that when the literal rule is used to construe sections 6(6)(c) and 13 of the 1999 Constitution, it will demonstrate that the draftsman intended a non-justiciable Chapter II.[336] This research does not agree with the argument put by Okeke and Okeke for the following reasons. First, the authors did not show how they arrived at that conclusion. Second, this research argues that although it seems that the court in *Okogie v AG Lagos State* might have applied the literal rule because the court indicated that section 13 was an exception provision. However, by still maintaining that despite the exception provided in section 13, Chapter II remained non-justiciable based on section 6(6)(c), it is evident that the court refused to give effect to the language used by the Legislature despite it being clear and explicit.

Third, as indicated above, because the provision emanates from the Constitution, in addition to the principle on the literal rule, the principle of whole

331 See A Stevenson (ed), Oxford Dictionary of English (3rd edn, OUP 2015) <www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m_en_gb0278730?rskey=7s6kOU&result=29976> accessed 29 September 2018.

332 Ibid.

333 Garner (n 91) 683.

334 *Okogie v AG Lagos State* (n 267).

335 *FRN v Anache* (n 145) NSCQR Vol 17.

336 GN Okeke and CN Okeke, 'The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria' (2013) 7 IOSR-JHSS 9, 13.

statute construction applies. Thus, the court must read the Constitution as a whole to determine the intention of the legislature. Therefore, by not reading section 6(6)(c) against the background of section 13, the court failed to apply the principle of interpretation that the Constitution must be read as a whole document. "The principle of whole statute construction is important and indispensable in the construction of the Constitution to give effect to it."[337]

Hence, if the court had (i) given effect to the language used and (ii) read the exemption clause provided in section 6(6)(c) together with section 13, this research contends that the court would not have arrived at the conclusion it did. This is because the clear language used by the Legislature and a combined reading of both sections demonstrates that the draftsman intends a justiciable Chapter II and not a non-justiciable Chapter II as argued by Okeke and Okeke.

4.1.1.2 Section 13

Section 13 mandates the courts to observe, conform to, and apply the provisions of Chapter II. According to the Oxford English Dictionary, the words 'conform', 'observe', and 'apply', respectively mean, "comply with rules, standards, or laws;"[338] "fulfil or comply with;"[339] "bring or put into operation or use."[340] In *Ecobank Nigeria Plc v Kalu*,[341] Bage JCA stated that the duty of the court is to apply the law.[342]

Therefore, if as held in *Ecobank Nigeria Plc v Kalu*, it is the duty of the court to administer and apply the law, given that section 13 explicitly provides that it is the duty of the court to apply the provisions of Chapter II, is this not an unequivocal exemption to the ouster clause in section 6(6)(c)? Again, the court

337 See fn 328.
338 Stevenson (n 331).
339 Stevenson (n 331). Black's Law Dictionary defines it as "to adhere to or abide by" – see Garner (n 91) 1246.
340 Stevenson (n 331). Black's Law Dictionary defines it as "to put to use with a particular subject matter" – see Garner (n 91) 120.
341 (2014) LPELR-22721(CA) 10, paras A-F.
342 See also *AG Federation v Nse & Ors* (2016) LPELR-40518(CA); *Muhammadu Maigari Dingyadi & anor v Independent National Electoral Commission & ors* (2011) LPELR-950(SC).

in *Okogie v AG Lagos*[343] recognised that section 13 is indeed an exemption provision.

4.1.1.3 Section 37 of the Indian Constitution

A literal construction of section 37 of the Indian Constitution indicates that the provision is not in any way in *pari materia* with the provisions of the 1999 Constitution which the Nigerian courts have consistently compared.[344] This research contends that had the CDC retained section 7 of the 1979 Constitution as couched in the draft Constitution, then the courts would be right to compare section 7 with section 37 of the Indian Constitution. However, it is suggested that the CDC took into consideration the opinion of Nigerians, as to having a justiciable Chapter II, and as such, redrafted section 7 as sections 6(6)(c) and 13 of the 1979 Constitution.

It is argued that an application of the literal rule in construing sections 6(6)(c) and 13 of the 1999 Constitution, and section 37 of the Indian Constitution, demonstrates that the provisions of the Nigerian Constitution are not *in pari material* with that of the Indian Constitution. In *Ahmad v Sokoto House of Assembly*, Salami JCA, delivering the lead judgment, explicitly stated that, the construction of the Constitution is

> [N]ot guided by the construction of other constitutions in other common law jurisdictions unless a similar provision in *pari materia* was in question. This court will not give any provision of the Constitution a construction, which will defeat its obvious intention.[345]

Thus, it is evident that the courts have been wrong to compare the Nigerian Constitution with that of the Indian Constitution. By so doing, this research contends that they have given Chapter II of the Constitution a construction which has defeated its apparent intention. This study argues that the combined reading of sections 6(6)(c) and 13 proves that Chapter II is justiciable, and this means that by extension section 20 of the 1999 Constitution is justiciable.

343 *Okogie v AG Lagos State* (n 267).
344 Authors also make the same mistake – see Ibe (n 321).
345 *Abdullahi Maccido Ahmad v Sokoto State House of Assembly & anor* (2002) LPELR-10996(CA).

4.2 Article 24 of the Schedule to the ACHPR Act 1983

The Nigerian courts have consistently held that the ACHPR Act 1983 is domestic law, and like other domestic legislation, the court has judicial powers to enforce its provisions.[346] However, taking cognisance of its international flavour, the question has been whether the ACHPR Act 1983 is superior to other municipal laws. That is, where any municipal law (including the Constitution) is inconsistent with the ACHPR Act 1983, whether the ACHPR Act 1983 would prevail.

Clarifying this issue, the court in *Abacha v Fawehinmi*, [347] although acknowledging the 'international flavour' of the ACHPR Act 1983, however, held that it was not superior to the Constitution and can be repealed by an Act of the National Assembly. [348] The court further held that "the general rule is that a treaty which has been incorporated into the body of the municipal laws ranks at par with the municipal laws."[349] As an Act of the National Assembly, should any provision of the ACHPR Act 1983 be inconsistent with the 1999 Constitution, it shall be void. [350] Also, any Law enacted by the House of Assembly of any state which is inconsistent with the ACHPR Act 1983, shall to the extent of such inconsistency be void.[351]

From the above, it is evident that the citizens' right to a clean, safe and secure, healthy environment, which is recognised and guaranteed by article 24 of the Schedule to the ACHPR Act 1983 is justiciable. Buttressing this further, the court in *Gbemre v SPDC* identified the right to "clean, poison-free, pollution-free healthy environment"[352] as part of the constitutionally guaranteed rights.

5 HRAEP ENFORCEMENT MECHANISM IN NIGERIA

346 See *Peter Nemi & ors v The State* (1994) LPELR-24854(SC); *Ogugu v The State* (n 172); *Abacha v Fawehinmi* (n 124); *IGP v ANPP* (n 329); *Attorney General & Commissioner of Justice Kebbi State v HRH Alhaji Al-Mustapha Jokolo & ors* (2013) LPELR-22349(CA) 78, paras B-E; *Solomon Ohakosim v Commissioner of Police Imo State & ors* (2009) LPELR-8874 (CA) 26-28, paras C-F, (2009) 11 NMLR 94 para 34.

347 *Abacha v Fawehinmi* (n 124).

348 Ibid, 14-15 & 31-32.

349 Ibid, 92-93. See also *Hon Kehinde Odebunmi & anor v Ojo Oyetunde Oladimeji & ors* (2012) LPELR-15419(CA) 19-20, paras C-D.

350 S1(3) 1999 Constitution (n 1). See also *Ansa v RTPCN* (2008) 7 NWLR (Pt 1086) 421 at 446,paras D-H (CA); *Africa CB Plc v Losada Nig Ltd & anor* (1995) LPELR-205(SC); *Rabe v FRN* (2013) LPELR-20163(CA).

351 S4(5) 1999 Constitution (n 1).

352 *Gbemre v SPDC* (n 163) 29.

Section 4 of this chapter has sought to examine whether the identified human rights provisions on environmental protection are justiciable. In so doing, the section finds that both section 20 of the 1999 Constitution and article 24 of the Schedule to the ACHPR Act 1983, provide and guarantee justiciable means through which the environment can be protected. The pertinent question is how are can these rights be enforced?

Based on the provisions of sections 4, 13 and Item 60(a) of the Exclusive Legislative List, it can be argued that the Nigerian citizen can seek enforcement of section 20 before the Nigerian courts. As suggested above, by domesticating the Banjul Charter, the Nigerian Legislature enacted legislation on matters contained in Chapter II of the Constitution – and this includes the promotion and enforcement of section 20. Therefore, the enforcement of article 24 of the Schedule to the ACHPR Act 1983 realises the objective of section 20, which is to "protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other conveniences."[353] Hence, it can be argued that the ACHPR Act 1983 provides the means of enforcing section 20 of the 1999 Constitution.

According to the decision of the Nigerian Court of Appeal in *Salihu v Gana*,[354] both the 1999 Constitution and the ACHPR Act 1983 are the two major documents that provide and guarantee fundamental human rights in Nigeria.[355]Furthermore, the courts have consistently held that the Fundamental Rights (Enforcement Procedure) Rules – known as the FREP Rules – is the human rights enforcement mechanism in Nigeria.[356] The FREP Rules is designed as the enforcement procedure for instituting an action against the breach of any of the fundamental rights recognised and guaranteed by the Constitution and ACHPR Act 1983.[357] Once a citizen's fundamental right is threatened, this immediately activates a cause of action under the FREP

353 *AG Lagos State v AG Federation* (n 29) 919 NSCQR Vol 14.

354 *Alhaji Aliyu N Salihu v Suleiman Umar Gana & Ors* (2014) LPELR-23069 (CA) 24, paras C-G.

355 *Salihu v Gana* (n 354); *Ibrahim Master v Mohammed Mansur & ors* (2014) LPELR-23440 (CA) 23, paras D-F.

356 *Abacha v Fawehinmi* (n 124) 185; *Rumugu Air and Space Nigeria Limited v Federal Airports Authority of Nigeria & Anor* (2016) LPELR-41506 (CA) 14-15, paras F-E; *Nigeria Union of Teachers & ors v Conference of Secondary School Tutors (CSST) & ors* (2005) LPELR-5953 (CA) 26-27, paras D-D; *Ohakosim v Commissioner of Police Imo State* (n 346); *Grace Jack v University of Agriculture Makurdi* (2004) 102 NSCQR Vol 17; *Central Bank of Nigeria v Chief Daniel Obameneke Okemuo & anor* (2016) LPELR-41405 (CA) 6-8, paras E-A.

357 *Musa Hammawa Abba v Joint Admission and Matriculation Board & anor* (2013) CA/YL/7/2013, 19-20, paras C-B.

Rules.[358] Such a person need not wait for the actual breach before "seeking redress in the appropriate Court of law."[359] Thus, it is evident that the FREP Rules is the existing mechanism through which HRAEP can be enforced. Taking cognisance that the FREP Rules 2009 is the current enforcement procedure, in addressing HRAEP enforcement mechanism in Nigeria, the focus is on the FREP Rules 2009.

Order 1 rule 2 FREP Rules 2009 defines fundamental rights as any of the rights provided for in Chapter IV of the 1999 Constitution and ACHPR Act 1983.[360] According to Bada JCA, the FREP Rules is the only procedure through which an action can be brought to enforce rights.[361] The provisions of the FREP Rules guide the conduct of the proceedings of all actions to enforce rights.[362] Also, a matter brought under the FREP Rules can be described as "*sui generis,* i.e. a claim in a class of its own."[363] However, the action shares "a closer affinity to a civil action than criminal action."[364]

Karibi-Whyte JSC states that the FREP Rules is a special procedure which has been prescribed for the enforcement of human rights, of which a departure or non-compliance would be fatal to enforcing the remedy.[365] More so, because the FREP Rules are made pursuant to the provision of the Constitution, it possesses constitutional flavour.[366] Per Abba JCA, the objective of the FREP Rules is to

> [P]rovide a simple and effective process for the enforcement of fundamental rights in order to avoid the cumbersome procedure and technicalities for their enforcement under the rules of common law or other statutory provisions.[367]

358 *Mr IT Mbadike & ors v Lagos International Trade Fair Complex Management Board & Ors* (2017) LPELR-41968 (CA) 30.

359 Ibid.

360 See also *Abacha v Fawehinmi* (n 124) 38-39; *Mr James Olusegun Omoleye v Francis Oginni Olaniran & others* (2010) 10 NMLR 457-458 para 5.

361 *Mr Solomon Kporharor & anor v Mr Michael Yedi & ors* (2017) LPELR-42418 (CA) 8-13, paras F-A.

362 Ibid.

363 *Kporharor v Yedi* (n 361); *Solomon Adekunle v Attorney-General of Ogun State* (2014) LPELR-22569 (CA) 23-24, paras B-C.

364 *Kporharor v Yedi* (n 361).

365 *Raymond S Dongtoe v Civil Service Commission Plateau State* (2001) LPELR-959 (SC) 22, paras E-F.

366 *Zakari v IG Police* (n 192) 15 paras F-G; *Luke Loveday v The Comptroller of Prisons Federal Prisons Aba & ors* (2013)LPELR-22072 (CA) 34, paras F-G; *George Adumu v The Comptroller of Prisons Federal Prisons Aba & ors* (2013) LPELR-22069 (CA) 34, paras F-G.

367 *Loveday v The Comptroller of Prisons Federal Prisons Aba* (n 366) 38-39, paras E-A; *Adumu v The Comptroller of Prisons Federal Prisons Aba* (n 366) 38-39, paras E-A. See also *Madam Ujueke Enemuo (Chair person, Umuada-Umuchu) & anor v Alochukwu Ezeonyeka & ors* (2016) LPELR-40171 (CA) 21, paras A-C.

From the above, it is evident that the FREP Rules 2009 constitutes the existing mechanism through which Nigerian citizens can enforce their citizens' right to a clean, safe and secure, healthy environment. Furthermore, it can be argued that HRAEP within the Nigerian context is both substantive and procedural in scope. That is, the rights are provided for by substantive law and enforced through procedural law. Clarifying the distinction between substantive law and procedural law, Ayoola JSC in *Mobil Producing Nigeria (Unlimited) v Lagos State Environmental Protection Agency*,[368] held that even though sometimes the difference between substantive law and procedural law is blurred, however, "generally speaking, it may be said that substantive rules give or define the right which it is sought to enforce and procedural rules govern the mode or machinery by which the right is enforced."[369] In view of this, it is argued that while section 20 of the 1999 Constitution and article 24 of the Schedule to the ACHPR Act 1983 define the rights and obligations, on the other hand, the FREP Rules 2009, constitutes the mechanism by which the rights are enforced.

5.1 How adequate is the existing HRAEP enforcement mechanism in Nigeria?

Having identified the FREP Rules 2009 as the existing HRAEP enforcement mechanism, the relevant question then is whether the enforcement mechanism is adequate. The importance of this is that its efficacy might influence the achievement of an environmentally sustainable Nigerian extractive industry. Thus, in examining the adequacy of this enforcement mechanism, this subsection shall seek to answer the following four questions: (i) what is the procedure for enforcement; (ii) who can be a party in the proceeding; (iii) what orders can the court make; (iv) which court has jurisdiction in HRAEP enforcement? The intention is that the answers from these questions would provide insight as to the implementation of the mechanism and simultaneously indicate whether the FREP Rules 2009 is effective.

368 *Mobil Producing Nigeria (Unlimited) v Lagos State Environmental Protection Agency & Ors* (2003) 263 NSCQLR Vol 12.

369 *Mobil Producing Nigeria (Unlimited) v Lagos State Environmental Protection Agency* (n 368) 286; *Elder Monday Agwalogu & Ors v Tura International Limited Nigeria & Ors* (2017) LPELR-42284 (CA) 11-13, paras B-D.

5.1.1 Enforcement Procedure[370]

According to Order II of the FREP Rules 2009

> *Any person* who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur for redress…

The application is without the leave of court and may be by any originating process which the court accepts.[371] The application is supported by a statement and an affidavit,[372] and accompanied by a written address.[373] The statement should set out the name and description of the applicant, the relief being sought, and the grounds for seeking the reliefs.[374] The affidavit shall set out the "facts upon which the application is made."[375] The written address "shall be a succinct argument in support of the grounds of the application."

Ordinarily, the affidavit is to be made by the applicant but where the applicant is in unable to for any reason swear to an affidavit or is in custody, a person who has personal knowledge of the facts, or has been informed by the applicant, can make the affidavit and state that the Applicant is unable to do so personally.[376] It is crucial that the affidavit complies with the format prescribed in the Oaths Act, as failure to do so might render the affidavit incompetent; hence depriving the court jurisdiction to entertain the matter.[377]

It is necessary to note that the application is not affected by any limitation statute.[378] This means that there is no time limit within which to bring an application for enforcing HRAEP.[379] Furthermore, the FREP Rules 2009 stipulate the filing fees as five hundred Naira (NGN 500), fifty Naira (NGN 50)

370 For details see Or II FREP Rules 2009 (n 169); *Mr Paul Okafor & Ors v Obi Victor Ntoka & Ors* (2017) LPELR-42794 (CA) 18-20 paras F-E.
371 Ord II r 2 FREP Rules 2009 (n 169). Emphasis added.
372 Ibid, ord II r 3.
373 Ibid, ord II r 5.
374 Ibid, ord II r 3.
375 Ibid.
376 Ibid, ord II r 4.
377 *Okafor v Ntoka* (n 370) 6-13 paras F-A.
378 Ord III r 1 FREP Rules 2009 (n 169). See also *Mr James Olusegun Omoleye v Francis Oginni Olaniran & others* (2010) 10 NMLR 460-461 para 11.
379 See *Mallam Nasir Ahmed El-Rufai v Senate of the National Assembly & Ors* (2014) LPELR-231115 (CA) 47, paras B-E and 57-60, paras A-E; *Mrs Endurance Odubu v Lieutenant Olorunduyilemi Stephen & ors* (2012) LPELR-19792 (CA) 16-18, paras F-A.

for the affidavit, one hundred Naira (NGN 100) for a written address, and one hundred Naira (NGN 100) for other processes.[380] Even though these do not take cognisance of the legal fees, however, it indicates that the process might be affordable.

Once an application is filed, it shall be heard within seven days from the date of filing.[381] Due to the urgent nature of applications under the FREP Rules, the hearing of an application can only be adjourned "where extremely expedient; depending on the circumstances of each case, or upon such terms, as the court may deem fit to make."[382] Where delay in hearing the application may cause exceptional hardship to the applicant, and the court is satisfied that such is the case, the court may hear the applicant *ex parte*. An *ex parte* application shall be supported by an affidavit stating sufficient grounds why exceptional hardship would be caused to the applicant should hearing of the application be delayed.[383]

The Nigerian courts have consistently held that where an application is brought under the FREP Rules, the court will only have jurisdiction in the matter where the enforcement or securing of the enforcement of fundamental rights is the principal or fundamental claim.[384] The facts relied upon must disclose that the basis of the claim is the infringement of the applicant's fundamental right.[385] Furthermore, a claim to enforce common law rights or contractual rights is

380 Appendix A, FREP Rules 2009 (n 169).

381 Ibid, ord IV r 1.

382 Ibid, ord IV r 2.

383 Ibid, ord IV r 3.

384 *Kporharor v Yedi* (n 361) 15-16, paras F-E; *Rumugu Air and Space Nigeria Limited v Federal Airports Authority of Nigeria* (n 356) 24-27, paras F-B; *Chief Francis Igwe & ors v Mr Godoy Ezeanochie & ors* (2009) LPELR-11885 (CA) 25-28, paras G-A; *The Federal Republic of Nigeria & anor v Lord Chief Udensi Ifegwu* (2003) LPELR-3173 (SC) 32, paras D-G; *Alhaji Tsoho Dan Amale v Sokoto Local Government & Ors* (2012) LPELR-7842 (SC) 18-21, paras E-A; *University of Ilorin & anor v Idowu Oluwadare* (2006) 28-29 NSCQR Vol 27; *Sea trucks Nigeria Limited v Panya Anigboro* (2001)137-138 NSCQLR Vol 5; *Rev Prof Paul Emeka v Rev Dr Chidi Okoroafor & ors* (2017) LPELR-417 (SC) 67-73, paras F-B; *Adekunle v AG Ogun State* (n 363) 42-43, paras E-G; *Eze (Dr) Emma Umez Eronini & ors v Lady CA Eronini & ors* (2013) LPELR-20651 (CA); *Alhaji Abdulazeez Adefila & Anor v His Royal Majesty-Oba James Adedapo Popoola (Oore of Otun-Ekiti) & Ors* (2014) LPELR-22468 (CA) 14-15, paras F-B; *Federal Republic of Nigeria & Ors v Alhaji Mohammed Sani Abacha & Ors* (2014) CA) 116-117, paras F-F; *Abdulhamid v Akar* (n 192) 1450-1451; *Abba v Joint Admission and Matriculation Board* (n 357) 20-21, paras C-A; *Alhaji Sheu Abdul Gafar v The Government of Kwara State & ors* (2007) LPELR-8073 (SC) 21-22, paras E-D; *Grace Jack v University of Agriculture Makurdi* (2004) LPELR-1587 (SC) 18, paras B-F; *Central Bank of Nigeria v Okemuo* (n 356) 8-10, paras B-E & 16-17, paras A-C; *Okafor v Ntoka* (n 370) 22-25, paras D-B; *Mrs Ganiat Amope Dilly v Inspector General of Police & Ors* (2016) LPELR-41452 (CA) 23-24, paras E-B; *Mrs Ngozi Chile Oparaocha & anor v Barr Emeka A Obichere & Ors* (2016) LPELR-40615 (CA) 64-65, paras D-B.

385 *Rumugu Air and Space Nigeria Limited v Federal Airports Authority of Nigeria* (n 356) 17-20, paras D-E; *Igwe v Ezeanochie* (n 384).

incompetent under the FREP Rules, as it is not meant to enforce such rights unless the "contractual rights also infringe the Constitutional rights of the citizen."[386]

Per Obaseki-Adejumo JCA, the fundamental rights in question are the rights guaranteed under Chapter 4 of the 1999 Constitution and the provisions of the ACHPR Act 1983.[387] This restriction is collaborated by Order 1 rule 2 of the FREP Rules 2009, which defines 'fundamental rights' as any of the rights provided for in Chapter IV of the 1999 Constitution and any of the rights stipulated in the ACHPR Act 1983.[388]

Therefore, where (1) the enforcement or securing of the enforcement of fundamental rights constitutes an ancillary, accessory, or incidental claim to the substantive or principal claim; (2) where the alleged infringement "of a fundamental right is ancillary or incidental to the substantive claim of the ordinary civil or common law nature;"[389] and (3) "the claim shows a dispute under other areas of law,"[390] such application would be unable to succeed under the FREP Rules because the Court would become incompetent to properly invoke or exercise its jurisdiction,[391] resulting in the case being struck out for want of jurisdiction.[392]

Nevertheless, should the court continue the proceedings without having jurisdiction over the matter, the whole proceedings and the resultant judgement are null and void.[393] Emphasising the importance of jurisdiction, Peter-Odili JSC stated that

> Jurisdiction is the pillar under which the entire case stands. Once it is shown that the Court lacks jurisdiction, the foundation of the case is not only shaken, but it is

386 *Look Engine Parts Limited & ors v Ecobank Nigeria Plc & ors* (2014) LPELR-22522 (CA) 19-21, paras A-E.
387 *Central Bank of Nigeria v Okemuo* (n 356) 8-10, paras B-E; *Rumugu Air and Space Nigeria Limited v Federal Airports Authority of Nigeria* (n 356) 24-27, paras F-B; *Ohakosim v Commissioner of Police Imo State* (n 346).
388 Ord I r 2 FREP Rules 2009 (n 169); *El-Rufai v Assembly Senate of the National* (n 379) 57-60, paras A-E.
389 *Rumugu Air and Space Nigeria Limited v Federal Airports Authority of Nigeria* (n 356) 24-27, paras F-B.
390 *Mr Silas Jumbo Essien v Chief Akpan Inyang & ors* (2011) LPELR-4125 (CA) 24, paras C-D.
391 See fn 384.
392 *Mbadike v Lagos International Trade Fair Complex Management Board* (n 358) 34-35; *Omo Oba Adenire Adetona & ors v Economic and Financial Crimes Commission & ors* (2017) LPELR-42369 (CA) 33-35, paras B-C.
393 *Ziakade Patrick Akpobolokemi & ors v The Hon Captain Emmanuel Ihenacho & ors* (2016) LPELR-40563 (CA) 16; *Dongtoe v Civil Service Commission Plateau State* (n 365) 18, paras B-E; *Oparaocha v Obichere* (n 384) 54, paras C-D.

> entirely broken. The case crumbles, and in effect, there is no case before the Court for adjudication.[394]

The FREP Rules are such that any action founded on them are not subject to other rules of the court including the Sheriff and Civil Process Act.[395] The FREP Rules are specially and specifically designed with its own distinctive rules by the 1999 Constitution with the sole purpose of speedy enforcement of Nigerian citizens' fundamental rights.[396] "It makes no provision for the importation of any other rule of court for the enforcement of such rights."[397] However,

> Where in the course of any Human Rights proceedings, any situation arises for which there is or appears to be no adequate provision in these Rules, the Civil Procedure Rules of the Court for the time being in force shall apply.[398]

In bringing an application to enforce his or her fundamental rights, the applicant has to demonstrate in the application, facts and circumstance which prove that the respondent has actually or is likely to infringe on his or her rights.[399] The applicant also has the duty to "place before the court all vital evidence regarding the infringement or breach of such rights."[400] This is because the Court would scrutinise and evaluate the facts as disclosed by the affidavit evidence to ascertain whether as claimed there has been an infringement of the fundamental rights.[401]

Furthermore, the onus is on the applicant to specify which of the fundamental rights as guaranteed either in the 1999 Constitution and/or ACHPR Act 1983, has been, is being, or is likely to be infringed.[402] The standard of proof will be

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394 *Attorney General of Kwara State & anor v Alhaji Saka Adeyemo & ors* (2016) LPELR-41147 (SC) 41 paras C-D.

395 *Skye Bank Plc v Emerson Njoku & Ors* (2016) LPELR-40447 (CA) 20-22, paras A-E.

396 Ibid.

397 *Skye Bank Plc v Njoku* (n 395) 23-24; *Oparaocha v Obichere* (n 384) 59, paras B-F; *Romanus Ihejiobi & ors v Mrs Grace Chinyere Ihejiobi & anor* (2013) LPELR-21957(CA) 21-22, paras F-A.

398 See Or XV r 4 FREP Rules 2009 (n 169); *Skye Bank Plc v Njoku* (n 395); *Abayomi Fabunmi v Commissioner of Police Osun State & ors* (2011) LPELR-8776 (CA) 10-11, paras C-A.

399 *Faith Okafor v Lagos State Government & anor* (2016) LPELR-41066 (CA) 28 paras D-F; *Abbas Abdullhi Machika v Katsina State House of Assembly & Attorney General of Katsina State* (2010) 10 NMLR 404 para 57; *Stanley KC Okonkwo v Anthony Ezeonu & Ors* (2017) LPELR-42785 (CA) 10, paras D-F.

400 *Mr Michael Nzekwesi Anekwe & others v Mr Michael Aniekwensi (alias Morocco) & others* (2009) 10 NMLR 24 para 30; *Edwin Onuba v Innocent Onuba & Others* (2010) 11 NMLR 339 para 50; *Blessing Chibunna Okpalaibekwe v Ebere Cyrian Okpalaibekwe* (2010) 12 NMLR (Pt II) 99 para 15.

401 *Fort Royal Homes Limited & anor v Economic and Financial Crimes Commission & anor* (2017) LPELR-42807 (CA) 29, paras D-F; *HRH Eze Sir JE Ukaobasi v Berthram Ezimora & ors* (2016) LPELR-40174 (CA) 31, paras B-E; *Barr Eric Chukwuemeka Igweokolo v Mr Marvel Akpoyibo & Ors* (2017) LPELR-41882 (CA) 13-14, paras F-C.

402 *Okafor v Lagos State Government* (n 399) 28-29, paras F-C; *Federal Republic of Nigeria v Abacha* (n 384) 118, paras F-G; *Adekunle v AG Ogun State* (n 363) 42-43, paras E-G. See ss131-132 Evidence Act 2011.

that required to be discharged in civil cases; that is, on the balance of probabilities.[403] Although the infringement of fundamental rights might have elements of criminal acts, the standard of proof will remain on the balance of probabilities and not beyond reasonable doubt.[404] According to Tsammani JCA, notwithstanding that the allegations of breach of fundamental rights might have criminal connotations, it will not rise to the level of a criminal allegation as that

> [W]ill defeat the purpose of section 46(1) of the 1999 Constitution of Nigeria, which seeks a simple, easy to attain and thus effective judicial process for the enforcement of fundamental rights available to citizens…[405]

5.1.2 Who can be a party in the proceedings?

Order I rule 2 of the FREP Rules 2009, defines an applicant as "a party who files an application or on whose behalf an application is filed under these Rules."[406] Paragraph 3 (e) (i-v) of the Preamble to the FREP Rules 2009, further elaborates on who an applicant is. The provision states that an applicant in human rights litigation may include:

> Anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest; and Association acting in the interest of its members or other individuals or groups.[407]

The court is mandated to encourage and welcome public interest litigations in human rights enforcement applications.[408] Presently, no human rights cases may be struck out or dismissed for want of *locus standi*.[409] It is necessary to note that *locus standi* is an important element in bringing any action before the court. Thus, paragraph 3 (e) of the Preamble to the FREP Rules 2009 evidences that the FREP Rules 2009 provides wider access to the court

403 *Adekunle v AG Ogun State* (n 363) 23-24, paras B-C. See s134 Evidence Act 2011.
404 Ibid; See s135 Evidence Act 2011.
405 Ibid.
406 Ord I r 2 FREP Rules 2009 (n 169).
407 Para 3 (e) (i-v) Preamble to the FREP Rules 2009 (n 169); *Mr Niyi Aluko & anor v Commissioner of Police & ors* (2016) LPELR-41342 (CA) 26-27 paras D-B; *Dilly v Inspector General of Police* (n 384) 9-10, paras F-F.
408 Para 3 (e) Preamble to the FREP Rules 2009 (n 169).
409 Para 3 (e) Preamble to the FREP Rules 2009 (n 169); *Okafor v Lagos State Government* (n 399) 13-14, paras A-B; *Ovai Ekpe Okon v Ovai Bassey Enem Enyiefem & ors* (2016) LPELR-41168(CA)14-16, paras E-A; *Dilly v Inspector General of Police* (n 384)15-22, paras A-A*; Federal Road Safety Commission v Emmanuel A Ofoegbu* (2014) LPELR-24229 (CA).

compared to that provided in common law torts process. In addition, the FREP Rules 2009 explicitly provides for human rights activists, advocates, or groups, and non-governmental organisations (NGOs), to institute human rights applications on behalf of any potential applicant.[410]

A person can bring an application to enforce his/her fundamental rights against another person (natural or artificial), the state or federal government, and state or federal government agency.[411] Per Akintan JSC,

> The position of the law is that where fundamental rights are invaded not by government agencies but by ordinary individuals…such victims have rights against the individual perpetrators of the acts as they would have done against state actions. It follows therefore that in the absence of clear positive prohibition which precludes an individual to assert a violation or invasion of his fundamental rights against another individual, a victim of such invasion can also maintain a similar action in a court of law against another individual for his act that had occasioned wrong or damage to him or his property in the same way as an action he could maintain against the state for a similar infraction.[412]

Going by the above, it is suggested that since the Federal Ministry of Environment and the following parastatals, namely NOSDRA and NESREA, were established by the Federal Republic of Nigeria as organs through which the state actualises its mandate to protect and improve the Nigerian environment, the Nigerian citizen can bring an application to enforce his / her citizens' right to a clean, safe and secure, healthy environment against the Federal Ministry of Environment, NESREA, and NOSDRA. Furthermore, the right can be enforced against extractive industry entities and even individuals who are part of the NEIHC.

It is important to note that in *Kporharor v Yedi*, the court held that an application to enforce a right under the FREP Rules, cannot be filed by more than one person, as such application "is incompetent and liable to be struck out."[413] However, as provided for in paragraph 3 (e)(iii) FREP Rules 2009, "anyone acting as a member of, or in the interest of a group or class of

410 Para 3 (e) Preamble to the FREP Rules 2009 (n 169).
411 See fn 192.
412 *Abdulhamid v Akar* (n 192) 1449-1450.
413 *Kporharor v Yedi* (n 361) 8-13, paras F-A. See also *Okpara v SPDC* (n 164) 21-22.

persons,"[414] can apply to the court in the state to enforce the fundamental rights that has been, is being, or is likely to be infringed.[415] Thus, even though several persons cannot institute the same fundamental rights enforcement application, an individual can do so in the interest of the public, a group, or class of persons.[416] When acting in such representative capacity, the applicant is mandated to include in the statement the fact that he is acting on behalf of someone else.[417]

Where the relief being sought is a declaratory order, it is necessary that all persons who are likely to be affected by the order, be joined to the matter.[418] Failure to do so would mean that the court will not make any declaratory order, as its pronouncement will affect the conduct of such persons not joined.[419]

5.1.3 Orders the court can make

Paragraph 3 (c) of the Preamble to the FREP Rules 2009 states that the court "may make consequential orders as may be just and expedient for the purpose of advancing – and not restricting – the applicant's rights and freedoms."[420] Order XI further gives the court the discretion to make orders, issue writs, and give directions it considers "just or appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental rights"[421] guaranteed in the 1999 Constitution or ACHPR Act 1983.

Unlike in civil matters where the Court lacks the jurisdiction to grant relief or damages not specifically claimed and proved,[422] "the common law principles on the award of damages do not apply to"[423] the enforcement of fundamental rights matters. Per Ngwuta JSC,

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414 Para 3 (e) (iii) Preamble to the FREP Rules 2009 (n 169).
415 Ibid, ord II r 1.
416 *Okafor v Lagos State Government* (n 399) 13-14, paras A-B; *Okon v Enyiefem* (n 409) 14-16, paras E-A; *Dilly v Inspector General of Police* (n 384)15-22, paras A-A; *Federal Road Safety Commission v Ofoegbu* (n 409).
417 *Aluko v Commissioner of Police* (n 407).
418 *Adekunle v AG Ogun State* (n 363) 29-30, paras D-A.
419 Ibid.
420 Para 3 (c) Preamble to the FREP Rules 2009 (n 169).
421 Ord XI FREP Rules 2009 (n 169); *Mallam Umaru Kwage & ors v Upper Sharia Court Gwandu & ors* (2017) LPELR-42508(CA) 53-54, paras E-C.
422 *Okonkwo v Ezeonu* (n 399) 12-13, paras F-A & 63-64, paras F-A.
423 *Gabriel Jim-Jaja v Commissioner of Police Rivers State & ors* (2012) 363 NSCQR Vol 52; *Jide Arulogun v Commissioner of Police Lagos State & Ors* (2016) LPELR-40190 (CA) 13-14, paras A-A; *Igweokolo v Akpoyibo* (n 401) 30-32, paras B-D.

> Fundamental right matters are placed on a higher pedestal than ordinary civil matters in which a claim for damages resulting from a proven injury has to be made specifically and proved. Once the appellant proved the violation of his fundamental right by the respondents, damages in the form of compensation and even apology should have followed. In my view and with profound respect to their Lordships, the Justices of Appeal, erred when, having determined that the respondents violated the fundamental right of the appellant, they declined to award damages because none was claimed.[424]

In *Arulogun v Commissioner of Police Lagos State*, the court held that an applicant seeking to enforce fundamental rights is entitled to declarative and injunctive reliefs, in addition to the award of damages.[425] Consequently, once the court finds that the fundamental rights of a citizen have been infringed upon, even though no specific amount is claimed or requested for and no actual injury or damage was suffered; such infringement attracts the award of compensatory damages (or exemplary damages in some cases), in addition to a written apology.[426] The damages awarded must constitute a fair, balanced estimate of the injuries suffered by the applicant occasioned by the infringement of his / her fundamental rights.[427]

In addition to the above, given that the purpose of HRAEP includes maintaining or restoring the quality of the environmental media, the judgment or orders the court will make should prevent the emission of pollution or reduce the presence of polluting substance in the abiotic components. Therefore, it is suggested that the Nigerian courts can give the following judgments and orders when enforcing the Nigerian citizen's right to a clean, safe and secure, healthy environment against the Federal Republic of Nigeria, the state governments, agencies of government (federal or state), natural persons, or artificial persons. The orders include:

i. A declaration that the action or omission of the Federal Republic of Nigeria, the state governments, agencies of government (federal or

424 *Jim-Jaja v Commissioner of Police Rivers State* (n 423) 353 & 363.

425 *Arulogun v Commissioner of Police Lagos State* (n 423) 20-21 paras D-B.

426 *Arulogun v Commissioner of Police Lagos State* (n 423) 20-21 paras D-B; *Jim-Jaja v Commissioner of Police Rivers State* (n 423) 352-353 & 363; *Dilly v Inspector General of Police* (n 384) 39-40, paras F-B*; Igweokolo v Akpoyibo* (n 401) 34 paras D-F; *Skye Bank Plc v Njoku* (n 395) 31, paras D-E; *Oliver Iwununne v Morris Egbuchulem & Ors* (2016) LPELR-40515 (CA) 37-38, paras D-F; *Mr Olukunle Akinde & anor v Access Bank Plc & anor* (2014) LPELR-22857 (CA) 19, paras C-F; *Okonkwo v Ezeonu* (n 399) 11, paras B-D.

427 *Arulogun v Commissioner of Police Lagos State* (n 423) 21, paras B-C.

state), natural persons, or artificial persons, has led to the infringement of the applicant's right to a general satisfactory environment favourable to their development.[428]

ii. That the Federal Republic of Nigeria, the state governments, agencies of government (federal or state), natural persons, or artificial persons, discontinue the act or omission which is causing pollution and ecological degradation.

iii. That the Federal Republic of Nigeria, the state governments, agencies of government (federal or state), natural persons, or artificial persons, take reasonable and other measures to prevent the indicated pollution and ecological degradation.[429]

iv. That the Federal Republic of Nigeria, the state governments, agencies of government (federal or state), natural persons, or artificial persons, protect the external surroundings of the applicant and ensure that they live in a safe and secure atmosphere free from any danger to their health or other conveniences. [430]

v. That the Federal Republic of Nigeria, the state governments, agencies of government (federal or state), natural persons, or artificial persons, undertake appropriate monitoring and provide information to those communities exposed to hazardous materials and activities. [431]

vi. That the Federal Republic of Nigeria, the state governments, agencies of government (federal or state), natural persons, or artificial persons, restore the degraded environment as far as practicable to its immediate condition before the pollution and degradation.

vii. That the Federal Republic of Nigeria, the state governments, or agencies of government (federal or state), require and publicise

428 Art 24 of the Schedule to the ACHPR Act 1983 (n 2).
429 *SERAC* (n 152) paras 52-53.
430 See *AG Lagos State v AG Federation* (n 29) 919 NSCQR Vol 14.
431 *SERAC* (n 152) paras 52-53.

environmental and social impact studies before any major industrial development. [432]

viii. That the Federal Republic of Nigeria, the state governments, or agencies of government (federal or state), provide meaningful opportunities for Nigerian citizens who live in areas where the projects being carried out might affect their citizens' right to a clean, safe and secure, healthy environment to be heard and to participate in the development decisions affecting their communities.[433]

ix. That the activities of the Federal Republic of Nigeria, the state governments, agencies of government (federal or state), natural persons, or artificial persons, should promote environmental conservation.[434]

It is important to note that although the FREP Rules 2009 is silent on the procedure to enforce the order and judgement of the court, however, in *Ngere v Okuruket*, the Supreme Court held that "judgments take effect immediately they are delivered, and every court has inherent power to proceed to enforce judgments at once."[435] Furthermore, it can be argued that based on Order XV Rule 4, "the Civil Procedure Rules of the Court for the time being in force shall apply."[436] Therefore, the Sheriffs and Civil Process Act 1945 and the Sheriffs and Civil Process Act Judgements (Enforcement) Rules may apply to the extent of enforcing the judgments and orders of the court.

5.1.4 Which court has jurisdiction in HRAEP enforcement?

According to Order I rule 2, the term 'court' refers to the Federal High Court (FHC), or a State High Court (SHC), or the High Court of the Federal Capital Territory, Abuja (FCT HC).[437] This connotes that the FHC, SHC, and FCT HC, have concurrent jurisdiction to entertain fundamental rights enforcement

432 Ibid.
433 Ibid.
434 Ibid.
435 *Chief Ujile D Ngere & anor v Chief Job William Okuruket `Xiv' & ors* (2014) 13 NSCQR Vol 26.
436 FREP Rules 2009 (n 169).
437 Ibid, ord I r 2.

cases.[438] Needless to state that this can present a confusing situation as an applicant seeking to enforce HRAEP, has the dilemma of having to choose the appropriate court before whom his / her application is submitted.

In *Adetona v Igele General Enterprises Ltd*, the Supreme Court – which is the apex court in Nigeria[439] – resolved whatever confusion that might exist on this issue. The court held that:

> [W]here a person's fundamental right is breached, being breached or about to be breached, that person may apply under section 46 (1) to the judicial division of the Federal High Court in the State or the High Court of the State or that of the Federal Capital Territory in which the breach occurred or is occurring or about to occur. This is irrespective of whether the right involved comes within the legislative competence of the Federation or the State or the Federal Capital Territory…It has to, however, be noted that the exercise of this jurisdiction by the Federal High Court is where the fundamental right threatened or breached falls within the enumerated matters on which that court has jurisdiction. Thus, fundamental rights arising from matters outside its jurisdiction cannot be enforced by the Federal High Court…Equally, a High Court of a State shall lack jurisdiction to entertain matters of fundamental rights, although brought pursuant to section 46(2) of the Constitution where the alleged breach of such matters arose from a transaction or subject matter which fall within the exclusive jurisdiction of Federal High Court as provided by section 251 of the Constitution.[440]

From the above, it is evident that the FHC does not have automatic jurisdiction on fundamental rights enforcement matters, such issues would need to fall within matters enumerated in section 251 of the 1999 Constitution.[441] Thus, it is the subject matter of the applicant's claim that will determine which court has jurisdiction to entertain the action.[442] Nevertheless, one might ask which court

438 *Dr Chamberline Nwele v Mr Sunday Oduh* (2013) LPELR-21236 (CA) 14-15, paras F-A; *The Nigerian Navy v Garrick* (n 192) 47-49, paras C-G; *Loveday v The Comptroller of Prisons Federal Prisons Aba* (n 366) 34, paras D-E; *Adumu v The Comptroller of Prisons Federal Prisons Aba* (n 366) 34, paras D-F; *Jack v University of Agriculture Makurdi* (n 384)11, paras A-E; *Sir Jude Agbaso v Hon Simeon Iwunze & ors* (2014) LPELR-24108 (CA) 45-47, paras D-F; *Gafar v The Government of Kwara State* (n 384); *Economic and Financial Crimes Commission v Alhaji Baba Inuwa & anor* (2014) LPELR-23597 (CA) 14-15, paras F-G; *Attorney General of Lagos State & ors v Zanen Verstoep & Company Nigeria Limited & ors* (2016) LPELR-41402 (CA) 23-26, paras A-A; *Nnabuchi v IGP* (2007) All FWLR (Pt 368) 1158 at 1163, paras G-H (CA); *Dr Taiwo Oloruntoba-Oju v Attorney-General of the Federation & ors* (2016) LPELR-41250 (CA) 8, paras B-E.

439 S 235 1999 Constitution (n 1).

440 *Prince Abdul Rasheed Adetona & Ors v Igele General Enterprises Ltd* (2011) 39-40 NSCQR Vol 45; *Akpobolokemi v Ihenacho* (n 393) 32 -34, paras A-F; AG *Lagos State v Zanen Verstoep & Company Nigeria Limited* (n 438).

441 *Akpobolokemi v Ihenacho* (n 393) 34.

442 *The Nigerian Navy v Garrick* (n 192) 44-45, paras D-A; *Igwe v Ezeanochie* (n 384) 28-29, paras B-A; *Loveday v The Comptroller of Prisons Federal Prisons Aba* (n 366) 40, para D; *Adumu v The Comptroller of Prisons*

has jurisdiction where the federal government or its agency is a party to the action. It is necessary to note that:

> A company or agency created by the Federal Government does not make it an agency of the Federal Government unless it is an organ charged with running the affairs of the Federal Government or is an organ through which the Federal Government carries out its functions.[443]

Hitherto, the misconception has been that once the FG or agency is a party to any action, the FHC has exclusive jurisdiction to entertain the matter.[444] However, the Courts have consistently held that it is not sufficient for the FG or its agency to be a party to the action, the subject matter must be within the items provided in section 251(1)(a)-(s) of the 1999 Constitution.[445] Therefore, to have exclusive jurisdiction in a fundamental enforcement matter where the FG or its agency is a party, these two ingredients must co-exist: (i) the FG or its agency must be a party or parties to the action; and (ii) the subject matter must fall within the issues listed in section 251 of the 1999 Constitution.[446] In addition to the above,

> The claim of the party and the reliefs must be within the ambit of section 251 of the Constitution. And furthermore, the principal reliefs must be directed at the Federal Government or any of its agencies before the Federal High Court will have jurisdiction...The exclusive jurisdiction of the Federal High Court is exclusive only to the extent of the itemized areas and nothing more. It does not include claims founded outside the itemized areas nor contract or tort.[447]

Nevertheless, where the subject matter is one which the FHC, SHC, and FCT HC have concurrent jurisdiction – for example, fundamental human rights

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Federal Prisons Aba (n 366) 40, para D; *Chief Reagan Ufomba v Independent National Electoral Commission & ors* (2017) LPELR-42079 (SC) 11, paras B-F; *Federal University of Technology Yola v Musa Sani Futuless* (2004) LPELR-5629 (CA) 26, para A; *Fashogbon v Adeogun* (No 1) (2007) All FWLR (Pt 396) 661 at 679, paras C-D (CA).

443 *Bank of Industry Limited v Ajayi* (n 149) 32.

444 *Asset Management Corporation of Nigeria v Johnson O Esezoobo* (2017) LPELR-427000 (CA) 23-24; *Josiah Ayodele Adetayo & ors v Kunle Ademola & ors* (2010) 1155 NSCQR Vol 42; *National Electric Power Authority v Mr B Edegbero & 15 ors* (2003) 121 NSCQR Vol 12; *Dr Taiwo Oloruntoba-Oju & ors v Professor PA Dopamu & ors* (2008) LPELR-2595 (SC) 31-32, paras G-B; *Agbaso v Iwunze* (n 439) 41-43, paras F-C and 68-69, paras C-F; *Nnabuchi v IGP* (n 439) paras F-G; *Mrs Louisa A Agu v Central Bank of Nigeria* (2016) LPELR-41091 (CA) 24-25.

445 *Bank of Industry Limited v Ajayi* (n 149) 21; *Lord Amen Osunde & anor v Nasiru Shaibu Baba* (2014) LPELR-23217 (CA) 36-37 paras G-E; *Kunle Yinka Ademola v Attorney-General of the Federation & anor* (2015) LPELR-24784 (CA) 24-25, paras C-F; *Federal Republic of Nigeria v Abacha* (n 384) 112-113, paras F-C.

446 *Bank of Industry Limited v Ajayi* (n 149) 21-23; *Asset Management Corporation of Nigeria v Esezoobo* (n 444) 16; *Mrs Louisa A Agu v Central Bank of Nigeria* (n 444) 25-26.

447 *Asset Management Corporation of Nigeria v Esezoobo* (n 444) 17 & 20.

enforcement – it becomes relevant that one of the parties is the FG or an agency of the FG; thereby giving the FHC jurisdiction over the matter.[448]

Having identified that the FHC, SHC, and FCT HC, have concurrent jurisdiction to entertain issues on fundamental rights enforcement, it is necessary to answer the question which might be the appropriate court before whom enforcement of HRAEP as it relates to the extractive industry can be submitted. For three reasons, this research argues that the FHC might be the competent court with the jurisdiction to entertain this matter. First, in accordance with section 44(3) of the 1999 Constitution, the FG is vested with control of all mineral oils, mineral, and natural gas in Nigeria.[449] Also, the FHC has exclusive jurisdiction over civil causes and matters arising from mineral oils, mineral, and natural gas.[450] Per Ogakwu JCA, the SHC and FCT HC lacks the jurisdiction to entertain an application for the enforcement of fundamental rights where the subject matter "falls within the enumerated items in which exclusive jurisdiction has been vested in the FHC."[451]

Second, unlike the SHC and FCT HC whose jurisdiction is mostly over natural persons, FHC has jurisdiction over both natural and artificial persons[452] – this refers to "a company or a firm or some Governmental Agency or body."[453] Thirdly, where the infringement or threatened infringement splits across more than one state, the FHC presents a better route instead of seeking which SHC has complete and not partial jurisdiction.[454] Therefore, the FHC provides the competent court where any Nigerian citizen can enforce their right to a clean, safe and secure, healthy environment against fellow individuals, the FG or its agencies, any of the 36 states of the federation or their agencies, or any extractive industry entity (private or public).

448 *Nigerian National Petroleum Corporation v Mallam Idi Zaria & anor* (2014) LPELR-22362 (CA) 47-48, paras G-F; *Dr Taiye Dejo Akanji v Federal Ministry of Lands, Housing & Urban Development & ors* (2016) LPELR-41631(CA) 35-36, paras B-E.

449 See also s 1 Petroelum Act 1969; s 1 Nigerian Minerals and Mining Act 2007.

450 See s 251(n) 1999 Constitution (n 1). See also *United Cement Company of Nigeria Limited v Akamkpa Local Government Council & ors* (2016) LPELR-41370 (CA) 14-15, paras D-D.

451 *Osunde v Baba* (n 445).

452 *Adetona v Igele General Enterprises Ltd* (n 440) 38.

453 *Kwage v Upper Sharia Court Gwandu* (n 421) 16-17, paras E-D.

454 For explanation on which SHC has jurisdiction where the human rights infringement splits across two states see – *Mr. Eberechukwu Anyaeche & anor v Okwuchukwu Nduka* (2017) LPELR-42459(CA) 17-21, paras F-E.

6 CHAPTER CONCLUSION

This chapter has sought to achieve two primary objectives, namely, understanding the meaning of HRAEP within the Nigerian context and examine whether the existing enforcement mechanism provides a viable platform through which environmental sustainability can be achieved in the Nigerian extractive industry. Other issues include a broad discussion of environmental protection in Nigeria and an examination of the justiciability of the indicated rights which provide the human rights approach through which the environment can be protected.

From the discussion, it is evident that the concept of environmental protection is not foreign to Nigeria. The notion can be traced as far back as the pre-colonial era before the entity known as Nigeria was created. In seeking avenues to protect her environment, Nigeria has a myriad of environmental legislation and has created the Federal Ministry of Environment (including its parastatals such as NESREA and NOSDRA). It is argued that in discharging its obligation under section 20 of the 1999 Constitution, the Federal Republic of Nigeria, established these organs. The mandate of the Federal Ministry of Environment includes securing a quality environment conducive for good health and wellbeing of fauna and flora, restoring and maintaining the ecological processes, the ecosystem, and preserve biodiversity. Also, while NESREA, has the mandate to protect and develop Nigeria's environment and biodiversity, on the other hand, NOSDRA is responsible for the "preparedness, detection and response to all oil spillages in Nigeria."[455] In addition, it can be argued that the enactment of ACHPR Act 1983 and the NESREA Act 2007, forms part of the National Assembly fulfilment of its obligations under section 20 of the 1999 Constitution.[456]

It is suggested that a combined reading of section 20 of the 1999 Constitution and article 24 of the Schedule to the ACHPR Act 1983 indicates the existence of the citizens' right – individual right and not collective right – to a clean, safe and secure, healthy environment. Thus, HRAEP within the Nigerian refers to

455 S 1 NOSDRA Act 2006 (n 150).

456 Others include: NOSDRA Act 2006 (n 150); Harmful Waste Act 1988 (n 23); EIA 1992 (n 35); Endangered Species Decree CAP 108 LFN 1990; Nigerian Minerals and Mining Act 2007; Freedom of Information Act 2011.

the use human rights mechanism to enforce the Nigerian citizen's right to a clean, safe and secure, healthy environment. Furthermore, contrary to prevailing literature and court jurisprudence, it is argued that based on the exception provided by section 13 and item 60 (a) of the Exclusive List, section 6(6)(c) does not oust the powers of the court to entertain matters in Chapter II of the 1999 Constitution and hence, Chapter II, and ultimately section 20 of the 1999 Constitution, is justiciable.

Additionally, having examined whether the existing HRAEP mechanism – that is the FREP Rules 2009 – provides an adequate platform through which environmental sustainability can be achieved in the Nigerian extractive industry. It is suggested that the FREP Rules 2009 has the potential to provide – that is, where efficiently utilised – an adequate enforcement mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment. In conclusion, this chapter finds that the HRAEP might provide a feasible route through which environmental sustainability can be realised in the Nigerian extractive industry.

However, as noted in this chapter, although this mechanism exists, it seems that it is not utilised. As at the time of this research, there are only two cases where the FREP Rules was used to enforce the right to the environment as contained in article 24 of the Schedule to the ACHPR Act 1983.[457] Notwithstanding the seeming lack of awareness and utilisation of the HRAEP mechanism, Nigerian applicants have approached the human rights enforcement institutions at the African Union (AU) and the Economic Community of West African States (ECOWAS) to enforce this right.

Thus, given the absence of Nigerian court jurisprudence on interpreting the intendment of article 24 of the Schedule to the ACHPR Act, and the trend where Nigerians seek enforcement of this right at the AU and ECOWAS level, the next chapter shall examine whether the AU and ECOWAS human rights enforcement institutions might provide an effective avenue for the Nigerian citizen to enforce his/her rights to a clean, safe and secure, healthy environment. More so, the Banjul Charter is the primary human rights legal

457 See Orji (n 162) 290.

instrument at these levels. The chapter seeks to investigate whether these institutions might provide an African solution to this Nigerian challenge of achieving environmental sustainability in her extractive industry.

CHAPTER FIVE

THE AFRICAN UNION AND THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES HUMAN RIGHTS ENFORCEMENT INSTITUTIONS: AFRICAN SOLUTION TO A NIGERIAN CHALLENGE?

1 INTRODUCTION

As indicated in Chapter Three, despite the existence of an effective enforcement mechanism – that is, the Fundamental Rights (Enforcement Procedure) Rules 2009[1] – through which human rights approach to protecting the environment can be realised in Nigeria, a review of Nigerian cases demonstrate that Nigerian citizens have been hesitant to utilise this platform.[2] The exception being *Gbemre v SPDC*[3] and *Okpara v SPDC*.[4] Instead, the focus has been on "the common law torts of public and private nuisance, negligence, trespass, and the rule in *Rylands v Fletcher*"[5] as the means for receiving compensation for environmental pollution and degradation against extractive industry entities.[6]

The common law torts route is utilised by the Nigerian extractive industry host communities (NEIHCs) at the Nigerian courts,[7] and foreign jurisdictions such as the United States of America (USA),[8] United Kingdom (UK),[9] and the

1 The Constitution of the Federal Republic of Nigeria, Fundamental Rights (Enforcement Procedure) Rules 2009 under Chapter IV of the Constitution, B1365. Hereafter referred to as the FREP Rules 2009.

2 For examination of these cases see JG Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (LITVM 2000).

3 *Mr Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation, Attorney General of the Federation* (2005) Unreported, suit no: FHC/B/CS/53/05 of 14 November 2005.

4 *Ikecukwu Okpara & others v Shell Petroleum Development Company of Nigeria Limited & others* (2006) Unreported, suit no: FHC/PHC/C5/518/2005 of 29 September 2006.

5 OU Ndukwe, *Elements of Nigerian Environmental Laws* (UCP 2000) 112.

6 Frynas (n 2).

7 Ibid.

8 J Mouawad, 'Shell to pay $15.5 Million to settle Nigerian Case' The New York Times (New York, 8 June 2009) <www.nytimes.com/2009/06/09/business/global/09shell.html?_r=2&ref=global> accessed 30 September 2018.

9 Business & Human Rights Resource Centre, 'Shell lawsuit (re oil spills & Bodo community in Nigeria)' <http://business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria> accessed 30 September 2018; J Vidal, 'Niger Delta Communities to sue Shell in London for oil spill compensation' The

Netherlands.[10] However, USA's and UK's recent decisions in *Kiobel*[11] and *Okpabi*,[12] respectively, might indicate that these jurisdictions are no longer favourable for NEIHCs to pursue compensatory and damage claims against extractive industry entities for environmental degradation and pollution.

In the USA, the Aliens Tort Claims Act (ATCA) 1789 provided the platform for individuals and groups from NEIHCs to seek compensation and damages against companies like Shell Petroleum Development Company (SPDC).[13] In 2013, the USA Supreme Court, dismissing *Kiobel* case held that:

> [T]he presumption against extraterritoriality applies to claims under the ATS…On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.[14]

From the above, according to Thorgeirsson, potential litigants who might have hitherto utilised ATCA as an avenue to seek remedy against foreign corporations in the USA may be unable to do so.[15] Chander argues that even though the court's decision exonerates foreign corporations from being liable under the ATCA, however, the decision does not affect American corporations with headquarters and key personnel located in the USA.[16] This is because

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Guardian (7 January 2015) <www.theguardian.com/environment/2015/jan/07/niger-delta-communities-to-sue-shell-in-london-for-oil-spill-compensation> 30 September 2018.

10 Friends of the Earth Netherlands, 'Outcome appeal against Shell: victory for the environment and the Nigerian people – Friends of the Earth Netherlands' (Friends of the Earth International, 18 December 2015)<www.foei.org/news/outcome-appeal-shell-victory-environment-nigerian-people-friends-earth-netherlands> accessed 30 September 2018.

11 *Kiobel v Royal Dutch Petroleum Co* 133 S Ct 1659 (2013).

12 *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC) para 89.

13 See Mouawad (n 8).

14 Kiobel (n 11) paras III and IV, 13-14. It is interesting to note that the USA Supreme Court has maintained this position in a 2018 decision – see *Joseph Jesner et al v Arab Bank PLC 138 S Ct 1386* (2018); B Gershel, 'Weighing Corporate Liability under the Alien Tort Statute: What it Means for AML/CFT Controls' (Ballard Spahr LLP, 10 April 2017) <www.moneylaunderingwatchblog.com/2017/04/weighing-corporate-liability-under-the-alien-tort-statute-what-it-means-for-amlcft-controls/> accessed 30 September 2018.

15 S Thorgeirsson, 'Closing the courtroom door: Where can victims of human rights abuse by business find justice?' Business & Human Rights Resource Centre <www.business-humanrights.org/en/closing-the-courtroom-door-where-can-victims-of-human-rights-abuse-by-business-find-justice> accessed 30 September 2018.

16 A Chander, 'Agora: Reflections on Kiobel; Unshackling Foreign Corporations: Kiobel's unexpected legacy' (2013) 107 AJIL 829, 830.

American corporations are more likely to meet the standards specified by the Supreme Court, unlike the foreign corporations.[17]

Notwithstanding Chander's explanation, an understanding of how business is conducted in Nigeria would determine whether the companies operating in Nigeria can come within the description of American corporations.

According to the Nigerian Investment Promotion Commission Act 1995,[18] although a non-Nigerian can "invest and participate in the operation of any enterprise in Nigeria"[19] with exception to subject matters stipulated in the negative list,[20] the investor cannot commence business unless the company is incorporated or registered under the Companies and Allied Matters Act.[21] Therefore, it is evident that companies which operate in Nigeria must first be incorporated under the Companies and Allied Matters Act,[22] which then means that the companies are Nigerian companies because "the registered office of the company shall be situated in Nigeria."[23] Thus based on this, it is suggested that the extractive industry companies in Nigeria might not be adequately described as American Corporations. Consequently, given the USA Supreme Court's decision in *Kiobel* case, the ATCA seems a less accessible route for NEIHCs to seek redress against Nigerian extractive industry entities.

In 2017, a UK High Court ruled that it lacked the jurisdiction to entertain a claim brought by NEIHCs against SPDC.[24] The court held that:

> [T]here is simply no connection whatsoever between this jurisdiction and the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty and/or in common law for acts and omissions in Nigeria, by a Nigerian company[25]...Finally, it should not be thought that this judgment is expressing any view on the merits of the case in terms of minimising or ignoring the effects upon the claimants of the conditions in the Niger Delta. They do at least potentially have other redress available to them in

17 Ibid, 829.
18 Nigerian Investment Promotion Commission Act CAP N117 Decree No 16 of 1995 LFN. Hereafter referred to as NIPC Act 1995.
19 Ibid, s 17.
20 Ibid, ss 18 and 31.
21 Ibid, s 19(1).
22 Companies and Allied Matters Act 1990 CAP C20 LFN 2004. Hereafter referred to as CAMA 1990.
23 Ibid, s 27(1)(b).
24 Okpabi (n 12).
25 Ibid, para 119.

Nigeria against Shell Petroleum Development Corporation (SPDC).[26]

The above decision of the UK High Court indicates that the hitherto accessible routes might no longer be available. More so, the decisions in *Kiobel*[27] and *Okpabi*[28] point toward the fact that the foreign courts are unwilling to entertain matters which are within the jurisdiction of Nigerian courts and which the Nigerian courts might be better equipped to address since the companies are Nigerian companies. Thus, taking a cue from Fraser J conclusion on the other redress available to NEIHCs, this research has shown that the FREP Rules 2009 provides a possible mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment; and ensure that the environment is maintained or restored by the extractive industry entities. Nevertheless, as indicated, there is the minimal utilisation of this platform.

In addition to seeking redress in foreign jurisdictions, the NEIHCs have made use of the African Union human rights enforcement institutions (AHREIs) and the Economic Community of West African States human rights enforcement institution (EHREI). Presently, there is the drive towards seeking African solutions to African problems.[29] The concept recognises that long-term solutions to challenges encountered by the African states can only come from looking inward.[30] Nathan indicates that the concept "evokes a sense of self-reliance, responsibility, pride, ownership, and indigeneity."[31] According to Ayittey, the real African solution, however, is one "rooted in African culture, tradition, and heritage but not cut off from the rest of the world."[32]

It is necessary to note that this was the mindset Léopold Sédar Senghor, the then President of Senegal, encouraged the selected group of jurists who had

26 Ibid, para 122.
27 Kiobel (n 11).
28 Okpabi (n 12).
29 R Lobakeng, African solutions to African problems: a viable solution towards a united, prosperous and peaceful Africa? (IGD 2017). See also African Union, 'Agenda 2063 The Africa We Want: Framework Document' [2015] 25 <https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf> accessed 30 September 2018.
30 GBN Ayittey, 'The Somali Crisis: Time for an African Solution' (CIPA No 205, 1994) <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa205.pdf> accessed 30 September 2018.
31 L Nathan, 'African Solutions to African Problems: South Africa's Foreign Policy' <www.up.ac.za/media/shared/Legacy/sitefiles/file/46/1322/17295/welttrends92themanathansdafrikaafrikanischeunionsicherheitspolitikdiplomatie.pdf> accessed 30 September 2018.
32 GBN Ayittey, 'An African Solution' [2010] HIR <http://hir.harvard.edu/refugeesan-african-solution/> accessed 30 September 2018.

the mandate to draft the African (Banjul) Charter on Human and Peoples' Rights 1981[33] to embody. He asked the experts to take into cognisance the real needs of Africa and keep in mind the African values of civilisation,[34] as such providing African solution to Africa's issues when drafting the Charter.[35] The result was a Charter that was distinct from "the orthodoxies of the era."[36] The Banjul Charter set out to include innovative provisions unlike its contemporaries – European Convention on Human Rights and Inter-American Commission on Human Rights.[37] The Banjul Charter is the first international legal instrument to explicitly provide for a substantive right to a 'general satisfactory environment'.[38]

Taking cognisance of the fact that the hitherto accessible jurisdiction through which NEIHCs have sought remedy for environmental pollution and degradation against extractive industry entities might become unavailable, there is the probability that the AHREIs and the EHREI may experience increased applications from NEIHCs. This suggestion is made based on the following reasons: (i) Banjul Charter which is the principal human rights charter for Africa,[39] is enforced by both the AHREIs and the EHREI. (ii) Nigeria is a member of both the AU and the ECOWAS. (iii) Nigeria has domesticated the Banjul Charter,[40] giving it 'the force of law' as provided by section 12 of the

33 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58. Hereafter referred to as the Banjul Charter.

34 SB Keetharuth, 'Major African Legal Instruments' in A Bösl and J Diescho (eds), *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (MEN 2009) 167; AC Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights' (2001) 23 HRQ 327, 336; R Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 VJIL 667, 674; F Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (H Sutcliffe tr, KLI 2003) 41; RM D'Sa, 'The African Charter on Human and Peoples' Rights; Problems and Prospects for Regional Action' (1981-1983) 10 AYBIL 101, 128; S Gumedze, 'Bringing Communications before the African Commission on Human and Peoples' Rights' (2003) 3 AHRLJ 118, 119; KN Bojosi and GM Wachira, 'Protecting Indigenous peoples in Africa: An Analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6 AHRLJ 382, 383.

35 Gittleman (n 34) 671; NS Rembe, *The System of Protection of Human Rights under the African Charter on Human and Peoples' Rights: Problems and Prospects* (ISAS 1991) 3.

36 Odinkalu(n 34) 336; Gittleman (n 34) 668.

37 Gittleman (n 34) 668; Ouguergouz (n 34) 10; D'Sa (n 34) 116; SA Dersso, 'The Jurisprudence of the African Commission on Human Peoples' Rights with Respect to Peoples' Rights' (2006) 6 AHRLJ 358, 359; R Murray, *The African Commission on Human and Peoples' Rights and International Law* (HP 2000) 10.

38 Art 24 of the Banjul Charter (n 33); Ouguergouz (n 34) 203.

39 Gumedze (n 34) 119; AO Enabulele, 'Incompatibility of National Law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the Final Say' (2016) 16 AHRLJ 1, 2; JD Boukongou, 'The Appeal of the African System for Protecting Human Rights' (2006) 6 AHRLJ 268, 269.

40 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act CAP A9 LFN 1990. Hereafter referred to as ACHPR Act 1983.

1999 Constitution.[41] (iv) the AHREIs and the EHREI have entertained claims from NEIHCs seeking remedy against Nigeria and energy extractive industry entities like SPDC. (v) Per paragraph 3 (b)(ii) of the Fundamental Rights (Enforcement Procedure) Rules 2009,[42]the Nigerian courts are mandated to respect regional and international bills of rights cited before it, brought to its attention, or it is aware of. Thus, it is suggested that the AHREIs and EHREI decisions may have a persuasive influence on the Nigerian courts when seeking to interpret the rights provided in the Schedule to the ACHPR Act 1983 – specifically article 24.

Wachira and Ayinla indicate that the guarantee of human rights is only as good as its enforcement system. [43] Therefore, this chapter investigates the AHREIs[44] and EHREI[45] to determine the extent they may provide useful platforms for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment. Consequently, providing African solution to this Nigerian challenge – specifically, the realisation of an extractive industry which is environmentally sustainable. In examining each human rights enforcement institution, this chapter shall seek to answer four questions, namely, (i) what is the procedure for enforcement? (ii) who can be a party in the proceedings? (iii) what orders can the institution make? (iv) does this institution provide an adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment?

This chapter is further divided into three sections. Section 2 examines the AHREIs, section 3 investigates the EHREI, and lastly, section 4 presents the chapter conclusion.

41 Constitution of the Federal Republic of Nigeria 1999 (as amended). Hereafter referred to as 1999 Constitution.

42 FREP Rules 2009 (n 1).

43 GM Wachira and A Ayinla, 'Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy' (2006) 6 AHRLJ 465, 466.

44 See Section 2 of this Chapter.

45 See Section 3 of this Chapter.

2 AFRICAN UNION HUMAN RIGHTS ENFORCEMENT INSTITUTIONS (AHREIs)

This section examines the following AHREIs, namely, the African Commission on Human and Peoples' Rights (ACHPR), the African Court on Human and Peoples' Rights (AfCHPR), and the African Court of Justice and Human Rights (ACJHR). The basis for selecting these institutions is because first, they are listed as the AU's judicial and human rights institutions on the AU website[46] and second, they have the mandate to enforce the Banjul Charter.

2.1 The African Commission on Human and Peoples' Rights (ACHPR)

Article 30 of the Banjul Charter establishes the African Commission on Human and Peoples' Rights (ACHPR) as the body with the mandate to promote and ensure the protection of the human and peoples' rights guaranteed therein.[47] Situated at Adidas Ababa, Ethiopia, the ACHPR became operational in 1987,[48] a year after the Banjul Charter has come into force.[49] The ACHPR also has the mandate to interpret the Banjul Charter and its Protocols at the request of a state party, organs of the AU, or individuals;[50] and to perform any other tasks, the Assembly Heads of State and Government may assign to it.[51]

The Banjul Charter further mandates the ACHPR to create principles and rules designed at solving human and peoples' rights and fundamental freedoms legal problems.[52] These rules and principles are intended to form the bedrock upon which African Governments may found their legislation.[53] The ACHPR is also directed to collaborate with other African and international organisations

46 See African Union, 'Judicial and Human Rights Institutions' <https://au.int/organs/cj> accessed 30 September 2018.

47 See also art 45 (1)(2) of the Banjul Charter (n 33); r 3 Rules of Procedure of the African Commission on Human and Peoples' Rights 2010 <www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf> accessed 30 September 2018. Hereinafter referred to as RPACHPR 2010 .

48 African Commission on Human and Peoples' Rights, 'History' <www.achpr.org/about/history/> accessed 30 September 2018.

49 M Mutua, 'The African Human Rights System: A Critical Evaluation' 14 <http://hdr.undp.org/sites/default/files/mutua.pdf> accessed 30 September 2018; Murray (n 37) 10.

50 Art 45(3) of the Banjul Charter (n 33); African Commission on Human and Peoples' Rights, 'Mandate of the Commission' <www.achpr.org/about/mandate/> accessed 30 September 2018.

51 Art 45(4) of the Banjul Charter (n 33).

52 Ibid, art 45(1)(b).

53 Ibid.

whose mandate relates to the promotion and protection of human and peoples' rights.[54]

Although the Banjul Charter is elaborate on how the ACHPR can fulfil its mandate to promote human and peoples' rights, [55] however, the Banjul Charter is not as detailed regarding how the ACHPR can fulfil its mandate to ensure the protection of human and peoples' rights. [56] The ACHPR can fulfil its promotion of human and peoples' rights by conducting studies and researches on African problems relating to human and peoples' rights; coordinating seminars, conferences, and symposia; supporting national and local organisations dealing with human and peoples' rights, and making recommendations to Government as the need arise.[57]

To bridge the identified lacuna and enable ACHPR to fulfil the mandate to protect the human and peoples' rights guaranteed by the Banjul Charter, in May 2010, the ACHPR approved a new Rules of Procedure.[58] Its Rules of Procedure regulates the "detailed activities and procedure of the Commission." [59] Prior to 2010, the ACHPR had adopted its first Rules of Procedure in 1988 and amended the same in 1995.[60] The subsection shall seek to answer the questions posed above.[61]

2.1.1 Enforcement Procedure

The Banjul Charter provides two ways the ACHPR can receive communication on the violation of human and peoples' rights,[62] namely, communication from States[63] and other communications.[64]

54 Ibid, art 45(1)(c).
55 Ibid, art 45(1)(a)(b)(c).
56 Ibid, art 45(2).
57 Ibid, art 45(1)(a).
58 See r 1(1) RPACHPR 2010 (n 47).
59 African Commission on Human and Peoples' Rights, 'Rules of Procedure of the African Commission on Human and Peoples' Rights 2010' <www.achpr.org/instruments/rules-of-procedure-2010/> accessed 30 September 2018.
60 Ibid.
61 See Introduction section.
62 M Evans, T Ige and R Murray, 'The Reporting Mechanism of the African Charter on Human and Peoples' Rights' in MD Evans and R Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (CUP 2002) 36.
63 Art 47 of the Banjul Charter (n 33).

2.1.1.1 State Communication:

The Banjul Charter provides that where a state party "has good reason to believe that another state party" [65] has violated the provisions of the Banjul Charter, this state party can bring such violation to the notice of the other state party.[66] The notice shall be through written communication to the state party in question, also addressed to the Secretary-General of the Organisation of African Unity (OAU)[67] and the Chairman of the ACHPR.[68] The state party has the option to refer the matter directly to the ACHPR instead of bringing it to the notice of the state party in violation.[69] In referring the matter directly to the ACHPR, the state shall address the communication to the Chairman of the ACHPR, the Secretary-General of AU, and the state concerned.[70]

The ACHPR can only entertain state communication submitted to it after ascertaining that where local remedies exist, they have all been exhausted.[71] Unless the procedure for attaining "these remedies would be unduly prolonged."[72] The *Rules of Procedure of the African Commission on Human and Peoples' Rights 2010* (RPACHPR 2010) elaborates the process the ACHPR would follow in considering communications received in conformity with articles 47, 48, and 49 of the Banjul Charter.[73]

Notably, since the coming into force of the Banjul Charter, the ACHPR has received only one state communication[74] filed by the Congolese government against Burundi, Rwanda, and Uganda for violation of human and peoples' rights in the Congolese provinces. [75] The notion underpinning 'state communications' is that it provides an avenue for states parties to ensure that

64 Ibid, art 55.
65 Ibid, art 47.
66 Ibid.
67 Now African Union (AU) – see African Union, 'AU in a Nutshell' <https://au.int/history/oau-and-au> accessed 30 September 2018; arts 2 and 33(1) Constitutive Act of the African Union (adopted 07 November 2000, entered into force 26 May 2001). Hereafter referred to as Constitutive Act 2000.
68 Art 47 of the Banjul Charter (n 33).
69 Ibid, art 49.
70 Ibid.
71 Ibid, art 50.
72 Ibid.
73 For details see rr 86 - 90 RPACHPR 2010 (n 47).
74 *Communication 227/99 Democratic Republic of Congo / Burundi, Rwanda, and Uganda* (2003) ACHPR para 1. See also R Murray and D Long, *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (CUP 2015) 54; African Commission on Human and Peoples' Rights, 'Communications Procedure' <www.achpr.org/communications/procedure/> accessed 30 September 2018.
75 *Democratic Republic of Congo / Burundi, Rwanda, and Uganda* (n 74) para 2.

another party to the Banjul Charter does not violate human and peoples' rights. The expectation is that the states will submit the communication in "a representative sense on behalf not of its citizens per se, but of another country's citizens or residents."[76] Given that the ACHPR has received only one state communication since its inception, it is evident that states parties are unwilling to submit communications against a fellow state party where violations of human and peoples' rights occur in that state.

According to Gawanas, the "principle of non-intervention in member states' affairs"[77] which the OAU upheld might have influenced this reluctance. The author highlights that conversely, the AU adopts "a more interventionist approach."[78] Hansungule suggests that reluctance by states parties to utilise the state communication avenue is because states are cautious of creating a precedent which might be used against them; given that "each state has some skeletons in the closet."[79] This research aligns with Hansungule's suggestion because although as highlighted by Gawanas, the AU adopts an interventionist approach rather than the non-interventionist approach upheld by the OAU, nevertheless this interventionist approach has not encouraged states to submit communications against other states for violating human and peoples' rights. Thus, as suggested by Hansungule, the fear of creating a precedent might be the principal reason.

In addition to State Communication, the Banjul Charter mandates states parties to submit a report every two years indicating legislative or other measures they have taken to give domestic effect to the Banjul Charter.[80] Notwithstanding, the Banjul Charter did not stipulate the institution responsible for receiving and examining the report, the guidelines states should adhere to

76 M Hansungule, 'African Courts and the African Commission on Human and Peoples' Rights' in A Bösl and J Diescho (eds), *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (MEN 2009) 260.

77 B Gawanas, 'The African Union: Concepts and Implementation Mechanisms Relating to Human Rights' in A Bösl and J Diescho (eds), *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (MEN 2009) 139.

78 Gawanas (n 77).

79 Hansungule, 'African Courts and the African Commission' (n 76).

80 Art 62 of the Banjul Charter (n 33).

when drafting the report, and measures in ensuring that states comply with this mandate.[81]

Acknowledging this lacuna and seeking to proffer a solution, the ACHPR at its third ordinary session in 1988,[82] recommended that the Assembly of Heads of State and Government direct the General Secretariat of the OAU to receive the state reports submitted in accordance to article 62 of the Banjul Charter.[83] Having received the reports, the General Secretariat transfers this to the ACHPR which has the task to examine the reports.[84] The ACHPR also recommended that it be authorised to issue guidelines to the states on the content and form of the report.[85] The OAU Assembly of Heads of State and Government adopted this recommendation at its twenty-fourth ordinary session, held in the same year.[86] Consequently, the ACHPR "has been receiving and examining States' reports submitted under Article 62 of the Charter."[87]

The state reporting procedure ought to be an effective means for the ACHPR to ensure the protection and promotion of human and people's rights in AU member states.[88] Given the reluctance of states parties to utilise 'State Communications', the expectation is that state reporting will assist the ACHPR to monitor states parties progress in protecting the rights guaranteed by the Banjul Charter.[89] On the contrary, the experience has been low compliance amongst AU member states in submitting the periodic reports.[90] The states which comply, the reports submitted are scanty, do not follow the guidelines stipulated by ACHPR, submissions are erratic, and the ACHPR lacks the

81 Mutua (n 49) 20; F Viljoen, 'State Reporting under the African Charter on Human and Peoples' Rights: A Boost from the South' (2000) 44 JAL 110, 110.
82 African Commission on Human and Peoples' Rights, 'State Reporting Procedure', <www.achpr.org/states/reporting-procedure/> accessed 30 September 2018.
83 ACHPR, 'Recommendation on Periodic Reports' ACHPR/Recom.3 (III) 88 (Third Ordinary Session, 18 -28 April 1988) para 1.
84 Ibid, para 1-2.
85 Ibid, para 3.
86 AHG, 'Resolution on the African Commission on Human and Peoples' Right' AHG/Res.176 (XXIV) (Twenty-fourth Ordinary Session, 25-28 May 1988) para 5(c); African Commission on Human and Peoples' Rights, 'State Reporting Procedure' (n 82).
87 African Commission on Human and Peoples' Rights, 'State Reporting Procedure' (n 82).
88 Ibid.
89 African Commission on Human and Peoples' Rights, 'State Reporting Procedure' (n 82); Gawanas (n 77) 158.
90 Murray (n 37) 15; Gawanas (n 77) 158.

power to enforce compliance.[91] For instance, Nigeria, submitted her first periodic report in 1993, covering the year 1991-1992.[92] The next time she submitted her second periodic report was in 2006.[93] Notably, since 2011, Nigeria has complied with article 62 and is part of the member states with current submitted periodic reports.[94]

Although Hansungule concludes that state reporting "is a complete failure"[95] and Mutua argues that states do not take cognisance of the observations and comments given by the ACHPR on the submitted reports.[96] However, this research does not agree with these opinions. The reason is that an examination of the reports submitted by Nigeria indicates that notwithstanding the repetitive content, there is evidence of effort being made to implement the recommendations of the ACHPR on issues arising from the prior submitted report.[97]Hence, it is suggested that where adequately utilised, state reporting procedure might be a useful tool in promoting and protecting human and peoples' rights at the national level; though full participation and political will from the member states may be required.

91 Mutua (n 49) 21; TF Yerima, 'Over Two Decades of African Commission on Human and Peoples' Rights: Flying or Fledgeling' (2012) 12 GJHSSAH 54, 66; Viljoen, 'State Reporting under the African Charter on Human and Peoples' Rights' (n 81) 111; BT Nyanduga, 'Perspectives on the African Commission on Human and Peoples' Rights on the Occasion of the 20th Anniversary of the Entry into Force of the African Charter on Human and Peoples' Rights' (2006) 6 AHRLJ 255, 264.

92 African Commission on Human and Peoples' Rights, 'State Reports and Concluding Observations' <www.achpr.org/states/reports-and-concluding-observations/> accessed 30 September 2018.

93 African Commission on Human and Peoples' Rights, 'Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011 –2014)' <www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding_observations_nigeria_5th_sr_eng.pdf> accessed 30 September 2018.

94 African Commission on Human and Peoples' Rights, 'State Reports and Concluding Observations' (n 92); African Commission on Human and Peoples' Rights, '43rd Activity Report of the African Commission on Human and Peoples' Rights' (1 June 2017) para 22 <www.achpr.org/files/activity-reports/43/43rd_activity_report_eng.pdf> accessed 30 September 2018.

95 Hansungule, 'African Courts and the African Commission' (n 76) 255.

96 Mutua (n 49) 21.

97 For details see African Commission on Human and Peoples Rights, 'Nigeria: 4th Periodic Report, 2008-2010' <www.achpr.org/states/nigeria/reports/4th-2008-2010/> accessed 30 September 2018; African Commission on Human and Peoples' Rights, 'Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria' (n 93); Federal Republic of Nigeria, 'Nigeria's 6th Periodic Country Report: 2015-2016 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria' <www.achpr.org/files/sessions/62nd_os/state-reports/6th-2015-2016/nigeria_state_report_6th_2015_2016_eng.pdf> accessed 30 September 2018.

2.1.1.2 Other Communications:

Unlike state communications, the Banjul Charter is not explicit as to who can submit communication within the 'other communications' category. [98] Nonetheless, the ACHPR held that article 55 allows it to "receive and consider communications, other than from states parties."[99] Also, the ACHPR

> [H]as adopted the *action popularis* approach, a flexible approach that allows everyone including non-victim individuals, NGOs and pressure groups with interest to file a communication.[100]

According to Gittleman, in as much as the communication complies with the conditions stipulated in article 56 of the Banjul Charter, "there is no limit as to who may file a communication before the Commission."[101] Non-governmental organisations (NGOs) and individuals have taken advantage of this avenue to bring communications before the ACHPR, alleging the violation by a state party of one or more rights guaranteed in the Banjul Charter.[102] The majority of the communications received by the ACHPR since its inception has come from individuals and NGOs.[103]

According to the Banjul Charter, in addressing communications received through this route, the Secretary of the ACHPR is mandated to compose a list of communications other than those of the states parties before each session.[104] Following which members of the ACHPR by a simple majority shall

98 *Communication 321/2006 Law Society of Zimbabwe et al/ Zimbabwe* (2013) ACHPR, para 58.

99 *Communication 333/06 Southern Africa Human Rights NGO Network and Others / Tanzania* (2010) ACHPR, para 46.

100 *Communication 321/2006 Law Society of Zimbabwe* (n 98).

101 *Communication 321/2006 Law Society of Zimbabwe* (n 98); Gittleman (n 34) 712; Mutua (n 49) 17.

102 Organisation of African Unity, 'The African Commission on Human and Peoples' Rights Information Sheet No 3: Communication Procedure' 2 <www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf> accessed 30 September 2018.

103 Since its inception, the ACHPR has received 426 communications – see African Commission on Human and Peoples' Rights, 'Combined 32nd and 33rd Activity Report of the African Commission on Human and Peoples' Rights' (Executive Council Twenty-Second Ordinary Session, 21-25 January 2013) EX.CL/782(XXII) Rev 2, para 19. According to the IHRDA African Human Rights Case Law Analyser, as at the time of research, the ACmHPR is shown to have made a total of 235 decisions on communications submitted – see Institute for Human Rights and Development in Africa (IHRDA), 'African Human Rights Case Law Analyser' <http://caselaw.ihrda.org/body/acmhpr/> accessed 30 September 2018; Hansungule, 'African Courts and the African Commission' (n 76) 255; TF Yerima, 'Comparative Evaluation of the Challenges of African Regional Courts' (2011) 4 JPL 120, 123; M Hansungule, 'Towards a more Effective African System of Human Rights: "Entebbe Proposals" [1998] 8 <www.biicl.org/files/2309_hansungule_towards_more_effective.pdf> accessed 30 September 2018; Mutua (n 49) 28.

104 Art 55 (1) of the Banjul Charter (n 33).

decide which communications the ACHPR would consider.[105] Article 56 sets out conditions other communications must adhere to before the ACHPR can consider them.[106] Emphasising the importance of this, the ACHPR has consistently held that the seven conditions stipulated in article 56 of the Banjul Charter are "conjunctive, meaning that, if any one of them is absent, the communication will be declared inadmissible"[107] and the case closed.[108] However, the ACHPR has stated that where the complainant can provide sufficient justification as to why he/she was unable to meet any of the conditions, the communication will not be declared inadmissible.[109]

Expounding articles 55 and 56 of the Banjul Charter, the RPACHPR 2010 explicitly provides that any natural or legal person can submit a communication under article 55,[110] addressed to the Chairperson of the ACHPR through the Secretary.[111] The Secretary is mandated to ensure that the received communication fulfils the conditions stipulated in the Banjul Charter and other conditions set out by the ACHPR.[112] Satisfied that the communication includes all the necessary information, the Secretary is mandated to transfer the file to the ACHPR which shall decide on the seizure of the communication.[113]

Furthermore, unlike in article 55 (2) of the Banjul Charter where ACHPR members consider the communications by a simple majority, rule 95 of the RPACHPR 2010 provides that unless the ACHPR decides otherwise, it is mandated to consider communications in the order received by the Secretary. The Chairman of the ACHPR is mandated to bring to the notice of the state

105 Ibid, art 55(2).

106 Art 45 (2) also explicitly states that the ACHPR's mandate to ensure the protection of human and peoples' rights must be under the conditions provided by the Banjul Charter.

107 See *Communication 284/03 Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe/Republic of Zimbabwe* (2009) ACHPR, para 81; *Communication 299/05 Anuak Justice Council / Ethiopia* (2006) ACHPR, para 44; *Communication 70/92_9AR Ibrahima Dioumessi, Sekou Kande, Ousmane Kaba / Guinea* (1995) ACHPR, para 11; *Communication 304/05 FIDH, Organisation nationale des droits de l'Homme (ONDH) and Rencontre africaine pour la défence des droits de l'Homme (RADDHO) / Senegal* (2006) ACHPR, para 38.

108 Organisation of African Unity (n 102) 6.

109 See *Communication 310/05 Darfur Relief and Documentation Centre / Sudan* (2009) ACHPR, paras 60, 80, and 81.

110 R 93 (1) RPACHPR 2010 (n 47).

111 Ibid.

112 Ibid, for details see r 93(2)(a)-(j) RPACHPR 2010 (n 47).

113 R 93 (5) RPACHPR 2010 (n 47). See also Organisation of African Unity (n 102) 4.

concerned all communications against them before the ACHPR undertakes substantive consideration on such communications.[114]

Where one or more communications – whether state or other communications – relate to the existence of a sequence of grave or immense violations of human and people's rights, the ACHPR is mandated to draw the attention of the Assembly of Heads of State and Government.[115] In this situation, the Assembly has the discretion to request the ACHPR to undertake exhaustive research of the cases and make an accurate report on its findings, including recommendations.[116] Also, where the communication constitutes a case of emergency, the ACHPR shall submit this notice to the Chairman of the Assembly, who then has the discretion to request comprehensive research.[117]

There are two issues which are evident in article 58, namely, (i) the Banjul Charter is silent on the course of action Chairman of the Assembly and the Assembly, respectively, are expected to take once they receive the study undertaken by the ACHPR. (ii) The ACHPR lacks the power to address the issue of emergency, grave, or immense violations of human and peoples' rights should the Chairman of the Assembly and the Assembly, not wish to request exhaustive research on the subject matter.

The RPACHPR 2010 clarifies what constitutes matters of emergency, namely, "serious or massive human rights violations"[118] and when the circumstances "presents the danger of irreparable harm or requires urgent action to avoid irreparable damage."[119] Also, once the ACHPR decides that a situation is a matter of emergency,[120] the ACHPR is mandated to draw the attention of the following to the situation, namely, (i) the Chairperson of the Assembly; (ii) the Peace and Security Council; (iii) the Executive Council; and (iv) the Chairperson of the AU Commission.[121] In addition to informing the above persons, rule 80 RPACHPR 2010 provides that the ACHPR and its subsidiary

114 Art 57 of the Banjul Charter (n 33).
115 Ibid, art 58(1). Hereafter referred to as the Assembly.
116 Ibid, art 58(2).
117 Ibid, art 58(3).
118 R 79(1)(a) RPACHPR 2010 (n 47).
119 Ibid, r 79(1)(b).
120 Ibid, r 79(2)(3).
121 Ibid, r 80(1)(a)(b)(c)(d). The ACmHPR is mandated to do same where the situation relates to serious or massive violation of human rights – see ibid, r 84(1).

mechanisms shall take "any appropriate action including Urgent Appeals."[122] Also, where the situation relates to a severe or massive violation of human rights, the ACHPR has the discretion to refer the matter to the AfCHPR.[123] Thus, the RPACHPR 2010 improves on article 58 of the Banjul Charter, as it empowers the ACHPR to take action on issues which constitute emergency, grave, or immense violations of human and peoples' rights.

2.1.2 Who can be a party in the proceedings?

Parties to the proceeding are the state(s) and their representatives, and natural or legal persons and their representatives.[124] The natural or legal persons who can author communication include "non-victim individuals, NGOs, and pressure groups."[125] The communication author does not need to show that any specific personal rights have been violated.[126] The RPACHPR 2010 does not expatiate on who qualifies as the representative of the state party or the communication author.

Communications alleging the violation of the human and persons' rights guaranteed in the Banjul Charter can only be brought against states and not against natural and legal persons.[127] The communication must explicitly indicate the name of the state(s) whose actions or omissions have led to the alleged violations.[128] Additionally, the state(s) must be a party to the Banjul charter, failure of which the ACHPR would declare the communication inadmissible.[129]

122 Ibid, r 80(2).
123 Ibid, r 84(2). See ibid, r 2 for definition of 'African court'.
124 Ibid, r 94(1)(2).
125 *Communication 321/2006 Law Society of Zimbabwe* (n 98); Gittleman (n 34) 712; Mutua (n 49) 17.
126 *Communication 321/2006 Law Society of Zimbabwe* (n 98) para 59.
127 Organisation of African Unity (n 102) 3.
128 See art 56 of the Banjul Charter (n 33); r 93(2)(g) RPACHPR 2010 (n 47).
129 See *Communication 6/88 Dr Kodji Kofi / Ghana* (1988) ACHPR, para 3; *Communication 10/88 Gatachew Abebe / Ethiopia* (1988) ACHPR; *Communication 19/88 International PEN / Malawi, Ethiopia, Cameroon and Kenya* (1989) ACHPR, para 3; *Communication 7/88 Committee for the Defence of Political Prisoners / Bahrain* (1988) ACHPR, para 3; *Communication 9/88 International Lawyers Committee for Family Reunification / Ethiopia* (1988) ACHPR, para 3; *Communication 4/88 Coordinating Secretary of the Free Citizens Convention / Ghana* (1988) ACHPR, para 3; *Communication 33/89 Simon B Ntaka / Lesotho* (1988) ACHPR, para 3; *Communication 37/90 Georges Eugene / United States of America and Haiti* (1990) ACHPR, para 4; *Communication 142/94 Muthuthurin Njoka / Kenya* (1995) ACHPR, para 5.

It is necessary to note that although the ACHPR lacks the power to entertain communications against non-state actors for violating the rights guaranteed in the Banjul Charter. However, in 2017, the ACHPR acknowledged the legal obligation extractive industry entities have to respect these rights[130] and called on states parties to adopt legislation or amend existing ones – amongst others:

> (i) Provide non-judicial and judicial grievance mechanisms accessible to affected communities and adequately equipped and resourced for handling cases involving extractive industries.[131]
>
> (ii) Ensure the application of human rights and relevant safety and environmental standards for protecting individuals and communities involved in and dependent on artisanal mining with particular attention to the rights of children, women, indigenous populations/communities and other vulnerable groups.[132]
>
> (iii) Recognise and enshrine the obligations of extractive industries to respect the rights in the African Charter throughout their operation cycle, including…Paying due compensation to affected communities for all material and non-material damages suffered and for the cleaning and rehabilitation of affected environment in cases of despoliation of the environment.[133]
>
> (iv) Enforce such requirements where sufficient legislation currently exists including the provision of grievance mechanisms for all cases of violations of rights guaranteed in the African Charter.[134]

Hence, it is evident that the ACHPR recognises that states parties must ensure that the operations of the extractive industry entities do not violate the human and peoples' rights guaranteed in the Banjul Charter. It is suggested that in seeking to enforce this duty, in 2001, Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) submitted communication against Nigeria, alleging that the extractive industry entities operations had:

130 See ACHPR, 'Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector' ACHPR/Res. 367 (LX) 2017 (Sixtieth Ordinary Session, 8 - 22 May 2017) preamble para 6.

131 Ibid, para 1.

132 Ibid.

133 Ibid, para 2.

134 Ibid, para 4.

> [N]o regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.[135]

The ACHPR found Nigeria in violation of the provisions of the Banjul Charter and appealed to the Federal Republic of Nigeria to ensure the protection of the health, the environment, and livelihood of the affected communities.[136] Also urging that the ACHPR be made aware of the actions undertaken by the Federal Ministry of Environment to address this.[137]

2.1.3 Orders the ACHPR can make

The ACHPR has a quasi-judicial mandate and can only make recommendations. [138] However, recommendations do not have legal consequences and are non-binding, as their objective is to provide a medium through which the institution makes its views known on the subject matter brought before it and proposes a line of action without compelling any legal duty on those addressed.[139] Hence, the ACHPR recommendations are not legally binding on the concerned states. [140] Notwithstanding, the ACHPR opines differently.

According to the ACHPR to the extent that states parties ratify the Banjul Charter without reservations, there is consensus on the part of these states to accept the authority and the crucial role of the ACHPR in promoting and

135 *Communication 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria* (2001) ACHPR, para 2.

136 Ibid, para 69.

137 Ibid.

138 See r 110(1) RPACHPR 2010 (n 47); Organisation of African Unity (n 102) 8; ACHPR, 'Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties' ACHPR/Res.97 (XXXX) 06 (Fortieth Ordinary Session, 15 - 29 November 2006), preamble para 2.

139 European Union, 'Regulations, Directives and other acts' <https://europa.eu/european-union/eu-law/legal-acts_en> accessed 5 February 2018.

140 Organisation of African Unity (n 102) 8; Yerima, 'Comparative Evaluation of the Challenges of African Regional Courts' (n 103) 120; Ouguergouz (n 34) 71.

protecting human and peoples' rights in Africa.[141] Therefore, states parties' compliance with the ACHPR recommendations will contribute to the fulfilment of its mandate.[142] The ACHPR calls on states parties to "respect without delay the recommendations of the Commission"[143] and within 90 days of receiving notification of the recommendation, indicate difficulties encountered and/or measures taken while seeking to implement the recommendation.[144] The ACHPR further resolved to update the Executive Council at every session, by submitting a report on states parties' compliance with ACHPR recommendation.[145]

Bekker states that both the states parties and the ACHPR have failed to observe this resolution.[146] Hence, while states parties have continued to ignore the recommendations of the ACHPR, on the other hand, the ACHPR has not been consistent with submitting "at every session of the Executive Council a report on the situation of the compliance with its recommendations by states parties."[147] An example of states parties' blatant refusal to implement the recommendations of the ACHPR is the *Good* case.[148] Reacting to the recommendation given against it, Botswana through a diplomate note, unambiguously informed the ACHPR that Botswana was "not bound by the decision of the Commission."[149]

The lack of binding decisions and institutionalised follow-up mechanisms have been identified as reasons for the low level of states' implementation of ACHPR recommendations.[150] Also, the ACHPR lacks the machinery to compel states to abide by its decisions, as it depends on the states' goodwill.[151]

141 ACHPR/Res.97 (XXXX) 06 (n 138) preamble para 3; Murray (n 37) 55.
142 Ibid, preamble para 7.
143 Ibid, para 2.
144 Ibid, para 4.
145 Ibid, para 3.
146 G Bekker, 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations' (2013) 13 HRLR 499, 522.
147 Ibid.
148 *Communication 313/05 Kenneth Good / Republic of Botswana* (2010) ACHPR.
149 ACHPR, EX.CL/782(XXII) Rev 2 (n 103) para 24.
150 Open Society Justice Initiative, From Judgement to Justice: Implementing International and Regional Human Rights Decisions (OSF 2010) 23; Organisation of African Unity (n 102) 9; N Udombana, 'Eying the Promised Land: The Wearisome Quest for an Effective Human Rights Enforcement Mechanism in Africa' (2014) 1 THRR 179, 182; R Murray and E Mottershaw, 'Mechanisms for the Implementation of Decisions of the African Commission on the Human and Peoples' Rights'(2014) 36 HRQ 349, 351; Wachira and Ayinla (n 43) 471; Murray (n 37) 22; Bojosi and Wachira (n 34) 383; C Mbazira, 'Enforcing the Economic, Social and Cultural

Seeking to remedy this position, the RPACHPR 2010 mandates the ACHPR to publish its decision on its website after authorisation by the Assembly.[152] The ACHPR is mandated to submit to each Ordinary Session of the Assembly a report of its activities – that is protection, promotion, and other activities.[153] The ACHPR Activity Report shall include (i) report on any protection mission and its attendant comments from state party concerned and other concerned parties;[154] (ii) concluding observations of the ACHPR from state reports;[155] (iii) and information on any follow-up activities done by the ACHPR concerning state party implementing its decisions.[156]

Furthermore, when submitting its Activity Report to the Assembly, the ACHPR may request the Assembly to take the required process to implement the ACHPR decisions. [157] The ACHPR is mandated to bring "all its recommendations to the attention of the Sub-Committee on the Implementation of the Decisions of the African Union of the Permanent Representative Committee."[158]

In addition to the above, after the Assembly has considered the ACHPR Activity Report, the Secretary to the ACHPR is mandated to notify the parties of the communication within thirty days.[159] Where the decision is against a state party, the state is mandated to update the ACHPR in writing within one hundred and eighty days of being informed of the decision of the Commission, of all measure (if any) that the state is taking or has taken to implement the decision.[160] Within ninety days of receiving the update from the state, the ACHPR may invite it to submit further information on the measures it has taken to implement the ACHPR decision.[161] If the ACHPR receives no response from

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Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6 AHRLJ 333, 355.

151 Organisation of African Unity (n 102) 9; Hansungule, 'African Courts and the African Commission' (n 76) 234; Hansungule, 'Towards a more Effective African System of Human Rights' (n 103) 6; Mutua (n 49) 20.

152 R 110 (4) RPACHPR 2010 (n 47).

153 Ibid, r 59.

154 Ibid, r 60(6).

155 Ibid, r 77(3).

156 Ibid, r 112(9).

157 Ibid, r 125(1).

158 Ibid, r 125(2).

159 Ibid, r 112(1).

160 Ibid, r 112(2).

161 Ibid, r 112(3).

the state on this matter, it may send a reminder to the state to submit such information within ninety days.[162]

Still, on follow-up mechanism, the RPACHPR 2010 provides that the ACHPR shall assign a Rapporteur to every communication it receives.[163] The Rapporteur assigned to the communication is mandated to monitor the measures taken by the state to implement the decision of the ACHPR.[164] Additionally, the Rapporteur may take such action as may be appropriate in fulfilling the assignment, including making recommendations "for further action by the ACHPR as may be necessary."[165] The Rapporteur shall also present during the Public Session at each Ordinary Session of the ACHPR his/her report on the implementation of the ACHPR's recommendations.[166]

In situations of non-compliance, the ACHPR is mandated to "draw the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union."[167] The ACHPR is also mandated to "include information on any follow-up activities in its Activity Report."[168]

The RPACHPR 2010 further provides that

> At any time after the receipt of a communication and before a determination on the merits, the Commission may either on its initiative or at the request of a party to the communication request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim(s) of the alleged violation as urgently as the situation demands.[169]

The ACHPR is mandated to send a copy of the letter requesting provisional measures to the Assembly, the Peace and Security, and the African Union Commission.[170] The ACHPR is mandated to request the state party to update the ACHPR on the implementation of the provisional measures requested.[171]

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162 Ibid, r 112(4).
163 Ibid, r 97(1).
164 Ibid, r 112(5).
165 Ibid, r 112(6).
166 Ibid, r 112(7).
167 Ibid, r 112(8).
168 Ibid, r 112(9).
169 Ibid, r 98(1).
170 Ibid, r 98(3).
171 Ibid, r 98(4).

Where the state refuses to comply with the request for provisional measures, the ACHPR has the discretion to refer the communication to the AfCHPR and inform the parties of the communication accordingly.[172]

Despite these laudable provisions and efforts by the ACHPR to fulfil its mandate to protect and promote human and peoples' rights, there remains low "level of compliance by States Parties with the Commission's Decisions, Requests for Provisional Measures and Letters of Urgent Appeal."[173] The ACHPR continues to recommend that states parties implement its decisions, the provisional measures issued, and respond to urgent letters of appeal.[174] Also, recommends that the Assembly of Heads of State and Government ensure that states parties implement ACHPR's decisions and recommendations.[175]

2.1.4 Does the ACHPR provide an adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment?

The communications submitted to the ACHPR alleging states' violation of article 24 of the Banjul Charter are few.[176] From that minuscule number of communications, only three communications [177] have been declared admissible, and the ACHPR found a violation of article 24 of the Banjul Charter in only one.[178] In Chapter Three, the research extensively examined the ACHPR interpretation of article 24.[179] It found that the ACHPR had divergent interpretations as to the connotation of peoples'. The research also found that article 24 imposes a clear obligation on states to protect, fulfil, promote, and

172 Ibid, r 118(2).
173 African Commission on Human and Peoples' Rights, '43rd Activity Report of the African Commission on Human and Peoples' Rights' (n 94) para 27- 30; ACHPR, EX.CL/782(XXII) Rev 2 (n 103) paras 28.
174 African Commission on Human and Peoples' Rights, '43rd Activity Report of the African Commission on Human and Peoples' Rights' (n 94) para 59; ACHPR, EX.CL/782(XXII) Rev 2 (n 103) para 66.
175 ACHPR, EX.CL/782(XXII) Rev 2 (n 103) para 66.
176 See *SERAC and CESR* (n 135); *Communication 338/07 Socio-Economic Rights and Accountability Project (SERAP) / Federal Republic of Nigeria* (2010) ACHPR; *Communication 328/06 Front for the Liberation of the State of Cabinda / Republic of Angola* (2013) ACHPR; *Communication 266/03 Kevin Mgwanga Gunme et al / Cameroon* (2009) ACHPR; *Communication 336/07 AFTRADEMOP and Global Welfare Association (on behalf of the Moko-oh Indigenous Peoples of Cameroon) / Cameroon* (2013) ACHPR.
177 *SERAC and CESR* (n 135); *Front for the Liberation of the State of Cabinda* (n 176); *Gunme* (n 176).
178 *SERAC and CESR* ((n 135).
179 See Chapter Two of this research.

respect the peoples' right to a generally satisfactory environment.[180] This obligation requires the state:

> [T]o take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources…desist from directly threatening the environment of their citizens …[by] not carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual…must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[181]

Notwithstanding, before the Nigerian citizen can access the ACHPR to enforce the right to a clean, safe and secure, healthy environment, the communication must fulfil the seven conditions stipulated in article 56 of the Banjul Charter. Thus, the prospective complainant has to ensure that the communication explicitly indicates the author.[182] Also, the communication must be against the Federal Republic of Nigeria and not against natural or artificial persons; must explicitly indicate the rights protected by the ACHPR that has been violated, and this violation must have occurred after Nigeria ratified the Banjul Charter or has continued after ratification.[183]

Furthermore, the communication must not be in disparaging, or insulting language;[184] must not be exclusively based on mass media;[185] the complainant must have exhausted local remedies[186] and must submit "within a reasonable period from the time local remedies are exhausted."[187] The case should not be an issue that the Federal Republic of Nigeria has settled according to the

180 *SERAC and CESR* (n 135) paras 44-47.
181 Ibid, paras 52-53.
182 Art 56 (1) of the Banjul Charter (n 33).
183 Art 56 (2) of the Banjul Charter (n 33). The ACmHPR in Gunme case defined what the ACHPR meant by 'condition relating to compatibility with the African Charter' – see *Gunme* (n 176) paras 71.
184 Art 56 (3) of the Banjul Charter (n 33).
185 Ibid, art 56(4).
186 Ibid, art 56(5).
187 Ibid, art 56(6).

"principles of the Charter of the United Nations, or the Charter of the Organization of African Unity, or the provisions of the Banjul Charter."[188]

When arguing against the admissibility of any communication against it, in almost all cases, states parties often contend that the communication author had failed to exhaust local remedies.[189] According to the ACHPR, the exhaustion of local remedies rule affords the respondent state the opportunity to remedy the alleged violation through its domestic legal system before the matter is submitted to an international body.[190] Also, exhaustion of local remedies precludes the ACHPR from serving as a court of first instance instead of an institution of last resort.[191]

Article 56 (5) of the Banjul Charter specifies that where it is evident that the local remedy procedure is unjustifiably prolonged, the ACHPR can waive the exhaustion of local remedies rule.[192] The ACHPR has outlined the criteria which ascertain whether a local remedy exists within the state party's domestic legal framework, and they are, availability, effective, and sufficient.[193] To qualify as being available, the petitioner should be able to pursue the remedy without impediment.[194] An effective remedy is one which offers hope of success; and to be sufficient, it must be competent in solving the complaint.[195] Also, the remedy must be pursued before the domestic courts, that is, must be judicial and not quasi-judicial.[196] Hence, remedies from national human rights

188 Ibid, art 56(7).

189 *Communication 147/95-149/96 Sir Dawda K Jawara / Gambia (The)* (2000) ACHPR para 30; NJ Udombana, 'So Far, so Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 TAJIL 1, 2-3; ST Ebobrah, 'The Admissibility of Case before the African Court on Human and Peoples' Rights: Who Should do What' (2009) 3 MLJ 87, 96; Hansungule, 'African Courts and the African Commission' (n 76) 262.

190 *Jawara* (n 189); *Communication 73/92_13AR Mohammed Lamin Diakité / Gabon* (2000) ACHPR, para 16; *Communication 278/2003 Promoting Justice for Women and Children (PROJUST NGO) / Democratic Republic of Congo* (2013) ACHPR, paras 59-61; *Communication 250/02 Liesbeth Zegveld and Mussie Ephrem / Eritrea* (2003) ACHPR, para 23. See also Udombana, 'So Far, so Fair' (n 189) 3; F Viljoen, 'Admissibility under the African Charter' in MD Evans and R Murray (eds), The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000 (CUP 2002) 81.

191 *Jawara* (n 189); *Communication 48/90-50/91-52/91-89/93 Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa / Sudan* (1999) ACHPR, para 32; Ebobrah, 'The Admissibility of Case' (n 189) 96.

192 See also Viljoen, 'Admissibility under the African Charter' (n 190) 91.

193 *Jawara* (n 189) para 31; *SERAP / Federal Republic of Nigeria* (n 176) para 59; Viljoen, 'Admissibility under the African Charter' (n 190) 85; Ebobrah, 'The Admissibility of Case' (n 189) 96.

194 *Jawara* (n 189) para 32.

195 Ibid.

196 Viljoen, 'Admissibility under the African Charter' (n 190) 84.

institutions (NHRIs) or ombudsman might not suffice as having exhausted local remedies.[197]

It is necessary to note that the ACHPR holds that an applicant must pursue a remedy if there is the slightest likelihood that such a remedy will be effective. Where the applicant has failed to take advantage of this remedy, the argument that the indicated local remedy might not be successful would not prevail.[198] The ACHPR would interpret it that the applicant has not exhausted available local remedy.[199] Nonetheless, the ACHPR will waive the condition to exhaust local remedies in cases of serious and massive violations of human rights.[200]

Having fulfilled the seven requirements stipulated by the Banjul Charter, and should the ACHPR find that Nigeria has indeed violated the identified rights, the Nigerian citizen has to depend on the goodwill of the Nigerian government to implement the recommendation of the ACHPR.[201] Thus, given the continued lack of implementation by states parties of the ACHPR decisions, it is suggested that although the ACHPR provides a platform for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment; based on the stringent conditions and the lack of enforceable decisions, the ACHPR might not be an adequate route.

2.2 The African Court on Human and Peoples' Rights (AfCHPR)

Taking cognisance that the ACHPR is not well equipped to fulfil its mandate of ensuring the protection of human and peoples' rights, the Assembly of the OAU (as it then was) established the AfCHPR.[202] The AfCHPR is created to supplement and reinforce the protective mandate of the ACHPR.[203] The AfCHPR has the jurisdiction to entertain all cases and disputes based on the

197 Ibid.
198 *Communication 299/05 Anuak Justice Council* (n 107) paras 58; *SERAP / Federal Republic of Nigeria* (n 176) para 65.
199 *Communication 299/05 Anuak Justice Council* (n 107) paras 58; *SERAP / Federal Republic of Nigeria* (n 176) para 65.
200 *SERAP / Federal Republic of Nigeria* (n 176) para 67.
201 Organisation of African Unity (n 102) 9.
202 Art 1 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004). Hereafter referred to as Protocol to the AfCHPR 1998; Murray and Mottershaw (n 150) 351.
203 See para 7 Preamble and art 2 Protocol to the AfCHPR 1998 (n 202).

interpretation of the Banjul Charter, its application, the protocol establishing the AfCHPR, and any other applicable human rights instruments that have been ratified by the states concerned.[204] The AfCHPR is also the body designated to interpret matters arising from the application and implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003.[205] Given the focus of this research, it is necessary to note that article 18 Maputo Protocol 2003 provides that "women shall have the right to live in a healthy and sustainable environment."[206] The relevance of highlighting this provision is that it further provides support in enforcing the right of the Nigerian woman who lives where the operations of the extractive industry entities infringe on her right to a clean, safe and secure, healthy environment as provided and guaranteed by article 24 of the Banjul charter and article 18 of the Maputo protocol 2003.

2.2.1 Enforcement Procedure

The AfCHPR Rules of Procedure provides the conditions under which the AfCHPR considers the matter before it.[207] The AfCHPR takes into account the requirements stipulated in article 56 of the Banjul Charter when deciding whether a case is admissible.[208] The AfCHPR, at its discretion, can also request the opinion of the ACHPR concerning the admissibility of the case before it[209] or transfer the case entirely to ACHPR.[210]

Cases before the AfCHPR are by way of application,[211] and there is no filing fee or administrative fee.[212] The applicant is mandated to submit an application

204 Art 3(1) Protocol to the AfCHPR 1998 (n 202); r 26(1) Rules of Court African Court on Human and Peoples' Rights 2010. Hereafter referred to as Rules of the AfCHPR 2010.

205 See art 32 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 01 July 2003, entered into force 25 November 2005). Hereafter referred to as Maputo Protocol 2003.

206 Ibid, art 18(1).

207 Arts 8 and 33 Protocol to the AfCHPR 1998 (n 202).

208 Art 6 (2) Protocol to the AfCHPR 1998 (n 202); rr 34(4) and 40 Rules of the AfCHPR 2010 (n 204).

209 Art 6 (1) Protocol to the AfCHPR 1998 (n 202).

210 Art 6 (3) Protocol to the AfCHPR 1998 (n 202); *005/2011 Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airline* (2011) AfCHPR, para 9; *008/11 Ekollo Moundi Alexander v Cameroon and Nigeria* (2011) AfCHPR, paras 11-12.

211 R 34(1) Rules of the AfCHPR 2010 (n 204).

212 SAB Akuffo, 'Report of the African Court on Human and Peoples' Rights on the Relevant Aspects Regarding the Judiciary in the Protection of Human Rights in Africa' (The First Summit of Constitutional, Regional and Supreme Court Justices, Mexico City, November 2012) para 11.

to the Court Registry.[213] This application can be submitted either in person or by email or fax (with the original sent by courier or post).[214] The application must be written in one of the AfCHPR official languages, namely, Arabic, English, French, and Portuguese.[215] The application must include: (i) summary of the facts of the case; (ii) clear particulars of the applicant; (iii) clear particulars of the party or parties whom the application is against; (iv) particulars of the applicant's representatives; (v) the evidence adduced; (vi) the alleged violation; (vii) evidence that local remedies have been exhausted, or evidence of delay encountered when seeking it, and (viii) the orders or reliefs sought.[216]

It is important to note that the AfCHPR lacks jurisdiction to entertain an application where the subject matter is an appeal from the domestic court of a state party.[217]

2.2.2 Who can be a party in the proceedings?

Article 5 of the Protocol to the AfCHPR 1998 identifies entities that have access to present human and peoples' rights violation cases before the AfCHPR. These entities include: the ACHPR; states parties who have lodged complaints or complaints have been lodged against them at the ACHPR; a state party whose citizen's human rights have been violated; African Inter-governmental organisations (AIOs); a state party with interest in a case before the AfCHPR; individuals; and NGOs.[218] Also, these entities can be represented or assisted by legal counsel or any other person of their choice.[219]

213 R 34(1) Rules of the AfCHPR 2010 (n 204).

214 African Court on Human and Peoples' Rights, 'Frequently Asked Questions' <www.african-court.org/en/index.php/faqs/frequent-questions#official_Languages> accessed 30 September 2018; African Court on Human and Peoples' Rights Practice Directions 2012. Hereafter referred to as AfCHPR Practice Directions 2012.

215 R 34(3) Rules of the AfCHPR 2010 (n 204); African Court on Human and Peoples' Rights, 'Frequently Asked Questions' (n 214).

216 R 34(1)(2)(4) Rules of the AfCHPR 2010 (n 204). For details as to format, style, and content see paras 12-21 AfCHPR Practice Directions 2012 (n 214).

217 *001/13 Ernest Francis Mtingwi v Republic of Malawi* (2013) AfCHPR, paras 14-15.

218 Art 5(1)(2)(3) Protocol to the AfCHPR 1998 (n 202); r 33 (1) Rules of the AfCHPR 2010 (n 204).

219 R 28 Rules of the AfCHPR 2010 (n 204).

It is necessary to note that applications can only be brought against states parties to the Banjul Charter and Protocol to the AfCHPR 1998.[220] Therefore, applications cannot be brought against the ACHPR, AIOs, NGOs, and individuals – simply, non-state actors. The AfCHPR lacks jurisdiction to entertain an application where (i) the international organisation is not a party to the protocol,[221] (ii) the respondent is not a member state of the AU and has not ratified the Protocol.[222] Also, even though the ACHPR, the states parties indicated, and AIOs have automatic access to the AfCHPR, however, individuals and NGOs have restricted access.[223] According to article 34(6) Protocol to the AfCHPR 1998, AfCHPR would not have jurisdiction to determine an application from individuals and NGOs against a state party who is yet to make the declaration accepting the competence of the AfCHPR to receive cases against it from individuals and NGOs.[224]

Therefore, where the state party has not deposited the declaration affording the AfCHPR jurisdiction to entertain applications from individuals and NGOs against that state, the AfCHPR cannot receive complaints from individuals and NGOs involving such state party.[225] At present, only seven states out of thirty states which have ratified the Protocol to the AfCHPR 1998 have made that declaration.[226] Nigeria is not one of the states parties.

In an innovative move to compel Nigeria to deposit this declaration, Femi Falana, a Nigerian human rights lawyer, brought an application before the AfCHPR against the African Union as a representative of it 53 member

220 See *001/2011 Femi Falana v The African Union* (2012) AfCHPR (Separate Opinion of Judge Fatsah Ouguergouz) para 9-11.
221 *001/2011 Femi Falana v The African Union* (2012) AfCHPR, paras 70-73.
222 *007/11 Youssef Ababou v Morrocco* (2011) AfCHPR, para 12.
223 Mutua (n 49) 28.
224 Arts 5(3) and 34(6) Protocol to the AfCHPR 1998 (n 202).
225 *007/12 Baghdadi Ali Mahmoudi v Republic of Tunisia* (2012) AfCHPR, paras 10-13; 004/2012 *Emmanuel Joseph Uko & Ors v The Republic of South Africa* (2012) AfCHPR, paras 10-12; *005/2012 Amir Adam Timam v The Republic of Sudan* (2012) AfCHPR, paras 6-8; *002/2012 Delta International Investment SA, Mr AGL De Lange and Mrs M De Lange v The Republic of South Africa* (2012) AfCHPR, paras 8-10; *012/2011 National Convention of Teachers Trade Union (CONASYSED) v The Republic of Gabon* (2011) AfCHPR, paras 10-11; *Amare* (n 210) paras 7-8; *001/2008 Michelot Yogogombaye v Republic of Senegal* (2009) AfCHPR, para 39.
226 Namely, Burkina Faso, Malawi, Mali, Tanzania, Ghana, Cote d'Ivoire, Benin – see African Union, 'List of Countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples 'Rights on the Establishment of an African Court on Human and Peoples' Rights' <https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf> accessed 30 September 2018.

states.[227] The AfCHPR held that the AU was not a party to the Protocol to the AfCHPR 1998 and thus, cannot be a party to any matter pertaining to it.[228] More so, because the AU is an international organisation having a separate legal personality from its members,[229] the AU "cannot be sued before the court on behalf of its member states."[230] Therefore, the AfCHPR lacked the jurisdiction to hear the matter.[231]

Even where a state party has made the declaration, the ability of such individual or NGO to institute the case before the AfCHPR remains at the discretion of the AfCHPR.[232] In addition to state party declaration and the permission required by the AfCHPR, where an NGO lacks observer status before the ACHPR, the AfCHPR lacks the jurisdiction to entertain the matter.[233] It is important to note that states parties have the option to withdraw the deposited declaration.[234] The withdrawal can only take effect one year after the state party had deposited the declaration.[235] Within that year, new cases can be brought against the state party and at the expiration of the one year, cases still pending before the AfCHPR would not be affected.[236]

Explaining the rationale behind article 34(6) Protocol to the AfCHPR 1998, Akuffo J, Ngoepe J and Thompson J, in their dissenting opinion in *Falana* case, stated that

> The law [Article 34(6)] is not against an individual *per se*, but is aimed at protecting the State Party which has not made the declaration; that is why even a foreign individual can sue a State Party that has made the declaration.[237]

Going further to examine whether article 34(6) Protocol to the AfCHPR 1998 was inconsistent with the Banjul Charter, the Judges opined that the Protocol

227 Falana (n 221) para 3.
228 Ibid, para 67.
229 Ibid, para 71.
230 Ibid, para 72.
231 Ibid, para 75.
232 Arts 5(3) Protocol to the AfCHPR 1998 (n 202).
233 See CONASYSED (n 225) paras 8, 10-11.
234 F Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 ICLQ 63, 65.
235 Ibid, 66.
236 Ibid.
237 See *001/2011 Femi Falana v The African Union* (2012) AfCHPR (Dissenting Opinion of Akuffo J, Ngoepe J and Thompson J) para 8.5.

to the AfCHPR 1998 was adopted under article 66 of the Banjul Charter.[238] The article provides for the making of special protocols when necessary to supplement the provisions of the Banjul Charter towards the protection of human rights.[239] Hence, being a Protocol of the Banjul Charter, the Protocol to the AfCHPR 1998 is subservient to the Banjul Charter.[240] Also, since the Protocol to the AfCHPR 1998 was adopted especially to enhance the protection of human and peoples' rights through the AfCHPR in complementarity with the ACHPR:

> To the extent that Article 34(6) denies individuals direct access to the Court, which access the Charter does not deny, the Article, far from being a supplementary measure towards the enhancement of the protection of human rights, as envisaged by Article 66 of the Charter, does the very opposite. It is at odds with the objective, language and spirit of the Charter as it disables the Court from hearing applications brought by individuals against a state which has not made the declaration, even when the protection of human rights entrenched in the Charter, is at stake. We, therefore, hold that it is inconsistent with the Charter.[241]

Akuffo J, Ngoepe J and Thompson J, further held that even though the most logical step for the AfCHPR to take after deciding that article 34 (6) was inconsistent with the Banjul Charter, is to declare the article null and void or set it aside.[242] The Judges acknowledged that this might have been possible in a domestic court, such that where any statute is found to be inconsistent with the Constitution which is the supreme law it can be declared null and void.[243] The domestic court can do this because the Constitution empowers it to do so.[244] The AfCHPR as a creature of the Protocol to the AfCHPR 1998, derives its competencies from same.[245] Therefore, in the absence of any provision in the Protocol to the AfCHPR 1998 empowering the AfCHPR to do such, the AfCHPR cannot declare article 34 (6) null and void, or set it aside.[246]

238 Falana (Dissenting Opinion) (n 237) para 13.1.
239 Ibid.
240 Ibid, paras 13.1 and 15.
241 Ibid, para 16.
242 Ibid, para 17.
243 Ibid.
244 Ibid.
245 Ibid.
246 Ibid.

2.2.3 Orders the AfCHPR can make

The AfCHPR is empowered to make proper orders to remedy the violation of a human or peoples' rights. These orders include "payment of fair compensation and reparation."[247] Significantly, the judgment of the AfCHPR is binding on all the parties, final, and not subject to appeal.[248] Furthermore, the states parties are mandated to comply with the judgment and guarantee its execution within the time stipulated by the AfCHPR.[249] The AfCHPR has the power to review its decision should new evidence on the matter surface.[250] Concerning orders, the AfCHPR is mandated to adopt such provisional measures it considers essential where the case is of extreme gravity, urgency, and it is important to avoid irreparable harms to persons.[251]

An applicant seeking an order of reparation is mandated to include that request in the application.[252] The applicant would need to also submit within the time frame given by the AfCHPR, the amount requested and evidence relating to it.[253] The AfCHPR will only address monetary claims where the applicant submits detailed records of expenses, costs, damages incurred.[254]

The AfCHPR is mandated to give judgment within ninety after its deliberations,[255] after which it is to notify the Council of Ministers of the said judgment.[256] The Council of Ministers is the body with the mandate to monitor on behalf of the Assembly the execution of AfCHPR judgement.[257] Where a state party has refused to enforce the AfCHPR judgement, the AfCHPR shall specify such in the report it is mandated to submit to each regular session of the Assembly.[258]

247 Art 27(1) Protocol to the AfCHPR 1998 (n 202).
248 R 61 (4)(5) Rules of the AfCHPR 2010 (n 204); Art 28(2) Protocol to the AfCHPR 1998 (n 202).
249 Art 30 Protocol to the AfCHPR 1998 (n 202).
250 Ibid, art 28(3).
251 Ibid, art 27(2).
252 R 34 (5) Rules of the AfCHPR 2010 (n 204).
253 Ibid, r 34(5).
254 O Windridge, 'A Watershed Moment for African Human Rights: Mtikila & Others v Tanzania at the African Court on Human and Peoples' Rights' (2015) 15 AHRLJ 299, 327.
255 Art 28(1) Protocol to the AfCHPR 1998 (n 202).
256 Ibid, art 29(2).
257 Ibid.
258 Ibid, art 31.

Since the AfCHPR became operational in 2006, it has received a hundred and twenty-four (124) applications and as at 2016, disposed of thirty-four (34) cases.[259] Regrettably, a substantial number of these cases are either against non-state actors, states that are yet to ratify the protocol, states that are yet to deposit the declaration granting access to individuals and NGOS, or brought by NGOs that lack observer status before the ACHPR.[260] Thus, the AfCHPR has had to hold that it lacks the jurisdiction to hear these cases.[261]

Although the AfCHPR' judgments are binding, however, there is still the challenge of non-compliance by states parties.[262] Noting this challenge in its recent report to the Executive Council, the AfCHPR recommended that states parties comply with its decisions.[263]

2.2.4 Does the AfCHPR provide an adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment?

Compared to the ACHPR, there are some areas where it seems the AfCHPR might have improved provision on effective HRAEP enforcement mechanism. First, in addition to the mandate that states parties comply and guarantee the execution of the AfCHPR judgement within the stipulated period, the AfCHPR judgment is binding and final. Second, in contrast with the ACHPR 28 days ordinary session per annum,[264] the AfCHPR 60 days ordinary session per annum[265] is an improvement, as it affords the AfCHPR more time to address the issues of human and peoples' rights violations brought before it.

In the interest of justice, the AfCHPR has the discretion to provide free legal representation or assistance within the confines of the available financial resources.[266] Also, given the absence of filing fees, there is no monetary

259 African Court on Human and Peoples' Rights, 'Report on the Activities of the African Court on Human and Peoples Rights(AfCHPR)' (Executive Council Thirtieth Ordinary Session, 22 – 27 January 2017) EX.CL/999(XXX), para 11 and 13.
260 Akuffo (n 212) paras 13-17.
261 Ibid.
262 AfCHPR, EX.CL/999(XXX) (n 259) para 52.
263 Ibid, para 60.
264 R 25(1) RPACHPR 2010 (n 47).
265 R 14(1) Rules of the AfCHPR 2010 (n 204).
266 Art 10(2) Protocol to the AfCHPR 1998 (n 202); r 31 Rules of the AfCHPR 2010 (n 204).

encumbrance to file an application.[267] With the combination of no filing fee and free legal representation/assistance, it is evident that the AfCHPR has sought to take consideration of indigent persons, thus, pushing towards making the AfCHPR accessible to such applicants.

Regardless of the above-identified improvements, there is the challenge of non-compliance of this binding and final judgments by states parties.[268] Furthermore, articles 5(3) and 34(6) of the Protocol to the AfCHPR 1998 disenfranchises individuals and NGOs from directly accessing the AfCHPR. It is necessary to note that the AfCHPR has consistently indicated this as one of its significant challenges, in addition to the low rate of ratification of the Protocol by states parties.[269] Despite the continuous urging by the Executive Council, there remains the low level of ratification and deposition of the declaration by states parties.[270]

Given that the utmost intention underlining the establishment of the AfCHPR is that it would "strengthen the regional system and realise its promise,"[271] the limited access stipulated in article 34(6) of the Protocol to the AfCHPR 1998 is described as a "backward step,"[272] "fundamental flaw,"[273] and "serious shortcoming."[274] Also, article 34(6) of the Protocol to the AfCHPR 1998 "effectively shuts the door against many individuals and NGOs,"[275] and "may have a negative impact on the enforcement of human rights on the continent."[276] According to Juma, perhaps the assumption in granting direct access to states parties while individuals and NGOs have limited and discretionary access could be the expectation that states will be willing to bring cases on behalf of individuals against other states, or themselves.[277] Juma likens this to the "poacher turned gamekeeper."[278] Gleaning from the attitude

267 Para 11 AfCHPR Practice Directions 2012 (n 214).
268 AfCHPR, EX.CL/999(XXX) (n 259) para 56-57.
269 Akuffo (n 212) para 19; AfCHPR, EX.CL/999(XXX) (n 259) para 53.
270 AfCHPR, EX.CL/999(XXX) (n 259) para 54.
271 Mutua (n 49) 25.
272 Yerima, 'Comparative Evaluation of the Challenges of African Regional Courts' (n 103) 123.
273 D Juma, 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper' (2007) 4 EHRR 1, 3.
274 Hansungule, 'Towards a more Effective African System of Human Rights' (n 103) 8; Mutua (n 49) 28.
275 Udombana, 'Eying the Promised Land' (n 150) 204.
276 Keetharuth (n 34) 226.
277 Juma (n 273) 4.
278 Ibid, 3.

of states parties to article 47 of the Banjul Charter, it is suggested that states parties may never assume this role.[279]

From the above, although it can be argued that unless states parties submit the declaration, article 34 (6) has succeeded in barring the multitude of individuals in the African continent from accessing the protection mandate of the AfCHPR. Nonetheless, having examined the dissenting opinion given by Akuffo J, Ngoepe J and Thompson J in *Falana* case, this research identifies three options through which potential individuals may be able to circumvent this situation. They are (i) the principle of *forum prorogutum*, (ii) using the ACHPR route, and (iii) an amendment of the articles 5(3) and 34 (6).

2.2.4.1 The principle of forum prorogutum:

According to Ouguergouz J, there are three ways a state party can express consent to the jurisdiction of the AfCHPR with regards to accepting applications from individuals and NGOs. Namely (i) where the state party had submitted the declaration stipulated by article 34(6) Protocol to the AfCHPR 1998 before an application is filed against it. (ii) Through submitting the declaration after an application has been filed against it. (iii) Implicitly through *forum prorogutum* (prorogation of competence).[280]

Forum prorogutum refers to where a state party either expressly or tacitly through an unequivocal behaviour or a decisive act, accepts the jurisdiction of an international judicial body which hitherto lacked such.[281] This 'decisive act' may include where the state party participates in the proceedings by:

> [P]leading on the merits, or making findings on the merits, or any other act implying lack of objection against any future decision on the merits. The International Court of Justice has held that such conduct can be tantamount to tacit acceptance of its jurisdiction, which cannot subsequently be revoked by virtue of the *bona fide* or *estoppel* principle.[282]

279 Yerima, 'Comparative Evaluation of the Challenges of African Regional Courts' (n 103) 123; Juma (n 273) 4.

280 *001/2008 Michelo Yogogombaye v Senegal* (2009) AfCHPR (Separate Opinion of Judge Fatsah Ouguergouz) para 31; GJ Naldi, 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14 AHRLJ 366, 377.

281 Yogogombaye (Separate Opinion) (n 280) para 32.

282 Ibid, para 32 fn 15.

Ouguergouz J argues that if a state can at any time accept the jurisdiction of the AfCHPR by submitting an optional declaration, the state can do same after the introduction of the application against it "in a manner other than through the optional declaration."[283] Hence, *forum prorogutum* might present another means through which states parties that are yet to deposit the declaration can express their recognition of the jurisdiction of the AfCHPR to deal with application brought against them by individuals and NGO.

Although Ouguergouz J proposes the option of applying the principle of *forum prorogutum*, however, in most of his dissenting judgments and separate opinions, his position indicates differently. According to Ouguergouz J, where *prima facie* the application before the AfCHPR discloses that the state party is yet to deposit the declaration, the AfCHPR should reject the application "*de plano* through a simple letter from the Registrar."[284] The reason is so as not to give unwarranted or untimely publicity to applications where the AfCHPR explicitly lacks jurisdiction. He further states that it is only where the state party in question accepts the jurisdiction of the court that such an application can be placed on the AfCHPR general list because the practice of the AfCHPR giving judicial treatment and delivering a decision on such application is contrary to the provisions of article 34 (6).

It can be surmised that Ouguergouz J position is confusing, this is because while he proposes an option where a state party by participating in the proceedings, gives AfCHPR jurisdiction over the matter. On the other hand, he emphatically states that the practice of giving an audience to an application which *prima facie* does not meet the requirement stipulated in article 34(6) is contrary to the provision. This seeming conflicting position of Ouguergouz J, leads one to question which is which? Notwithstanding, it is suggested that *forum prorogutum* might provide that access sought by an individual or NGO.

283 Ibid, para 29.

284 See Yogogombaye (Separate Opinion) (n 280) para 40*; 010/2011 Efoua Mbozo'o Samuel v The Pan African Parliament* (2011) AfCHPR (Separate Opinion of Judge Fatsah Ouguergouz) para 1; *012/2011 National Convention of Teachers Trade Union (CONASYSED) v The Republic of Gabon* (2011) AfCHPR (Separate Opinion of Judge Fatsah Ouguergouz) para 1; *008/11 Ekollo Moundi Alexander v Cameroon and Nigeria* (2011) AfCHPR (Separate Opinion of Judge Fatsah Ouguergouz) para 1; *Falana (Separate Opinion)*(n 220) para 1 and 3.

2.2.4.2 Using the ACHPR route:

Taking cognisance that the ACHPR is empowered to receive communications from individuals and NGOs as long as they comply with the requirements stipulated in article 56 of the Banjul Charter and that the ACHPR has full access to the AfCHPR. It is suggested that individuals and NGOs can utilise this route to enforce their HRAEP.[285] According to rule 118 (4) of the RPACHPR 2010, the ACHPR has the discretion to seize the AfCHPR "at any stage of the examination of a communication if it deems necessary."[286] Also, where a state party has not complied or is unwilling to comply with the ACHPR recommendation within one hundred and eighty days of being informed of the ACHPR decision, the ACHPR has the discretion to submit that communication to the AfCHPR.[287]

Taking advantage of its entitlement to bring communications before the AfCHPR, in 2011, the ACHPR brought an application against Libya based on the successive complaints it had received against the state.[288] In the communication submitted to the ACHPR, the ACHPR concluded that the actions of the state had amounted to "serious and widespread violations of the rights"[289] guaranteed under the Banjul Charter. Although the ACHPR did not request the AfCHPR to order provisional measures,[290] the AfCHPR did so *suo moto*.[291] Also, in 2013, based on a communication submitted before ACHPR by an individual on behalf of another individual,[292] the ACHPR filed an application to AfCHPR against Libya, seeking provisional measures.[293] The AfCHPR, amongst others, reaffirmed its jurisdiction to entertain application filed by the ACHPR and ordered Libya to submit within sixty days of the notification of the judgment, a report to the AfCHPR on the measures it has taken to guarantee the rights it had violated.[294] Both cases evidence that

285 Yerima, 'Comparative Evaluation of the Challenges of African Regional Courts' (n 103) 123.
286 R 118(4) RPACHPR 2010 (n 47).
287 R 118(1) RPACHPR 2010 (n 47).
288 *004/11_PM African Commission on Human and Peoples' Rights v Libya* (2011) AfCHPR (Provisional Measures) para 1.
289 Ibid, para 3.
290 Ibid, para 9.
291 Ibid, para 25.
292 *002/2013 The African Commission on Human and Peoples' Rights v Libya* (2016) AfCHPR para 1 and 4.
293 Ibid, para 5.
294 Ibid, para 97.

individuals and NGOs can utilise the ACHPR route to enable them to access the AfCHPR without the constraints of articles 5 (3) and 34 (6).[295]

2.2.4.3 An amendment of the articles 5(3) and 34 (6)

According to article 35(2) Protocol to the AfCHPR 1998, the AfCHPR through the Secretary-General of the OAU (as it then was), is mandated to propose amendments to the Protocol to the AfCHPR 1998 as it may deem necessary.[296] Therefore, since the AfCHPR in *Falana* case found articles 5(3) and 34 (6) to be inconsistent with the Banjul Charter,[297] it is suggested that the AfCHPR should propose for the amendment of the provisions.

Another route would be where the AfCHPR is requested to provide opinion on any legal matter concerning the Banjul Charter at the initiative of either the AU commission, a member state of the AU, any of the AU organs, or any African organisation recognised by the OAU (now AU).[298] In its 2017 Activity Report, the AfCHPR references its ongoing "study on the impact of Article 34(6) of the Protocol on the protection of human rights on the continent."[299] It is suggested that the study undertaken by the AfCHPR provides an essential platform for the AfCHPR to put forward the finding that articles 5(3) and 34 (6) are inconsistent with the Banjul Charter, hence, should be amended.

Notwithstanding, taking cognisance of the impending coming into force of the Protocol and Statute establishing the ACJHR,[300] the AfCHPR exits principally on borrowed time.[301] Thus, although it can be argued that it might not be realistic to propose an amendment of these provisions, however, given that same provisions are maintained in the Protocol and Statute establishing the ACJHR, an amendment might still serve the desired purpose.

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295 See also R 29(3)(c) Rules of the AfCHPR 2010 (n 204).

296 *Falana (Separate Opinion)(*n 220) para 37.

297 *Falana (Dissenting Opinion)* (n 237) para 16.

298 Art 35(2) Protocol to the AfCHPR 1998 (n 202); *Falana (Separate Opinion)* (n 220) para 37.

299 AfCHPR, EX.CL/999(XXX) (n 259) para 24.

300 African Union, 'List of countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights' <https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_3.pdf> accessed 30 September 2018.

301 Art 2 Protocol on the Statute of the African Court on Justice and Human Rights (adopted 1 July 2008, not yet in force). Hereafter referred to as Protocol on the Statute of ACJHR 2008.

Having examined the AfCHPR, in answer to the question as to whether the AfCHPR provides an adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment. It is argued that with the combination of the limitations imposed by articles 5(3) and 34(6) of the Protocol to the AfCHPR 1998; the stringent conditions specified in article 56 of the Banjul Charter; and the low level of compliance of the binding judgments, the AfCHPR might not provide an adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment.

The *Alexander* case[302] is an example of what Nigerian citizens would expect should they seek to access the AfCHPR, given that Nigeria is yet to submit the declaration. In that case, the AfCHPR unambiguously held that it lacked the jurisdiction to entertain the application before it as Nigeria which is a state party to the Protocol had not deposited the declaration and Cameroon, in turn, had not ratified the Protocol.[303]

2.3 *The African Court of Justice and Human Rights (ACJHR)*

Established by the article 2 of the Protocol on the Statute of the African Court on Justice and Human Rights 2008,[304] the ACJHR is not included in the list of judicial and human rights institution on the AU website[305] and handbook.[306] Primarily, because both the Protocol on the Statute of ACJHR 2008 and the Statute[307] which is annexed to it, are yet to come in force.[308] Hence, the ACJHR is not yet in operation. The Protocol on the Statute of ACJHR 2008 and the annexed Statute of ACJHR 2008 will enter into force once ratified by

302 Alexander (n 210).
303 Ibid, paras 6-10.
304 Art 2 Protocol on the Statute of ACJHR 2008 (n 301).
305 See African Union, 'Judicial and Human Rights Institutions' <https://au.int/organs/cj> accessed 30 September 2018.
306 African Union, *African Union Handbook: A Guide for those working with and within the African Union* (AUC and NZC 2014) 73 – 81.
307 Statute of the African Court of Justice and Human Rights (adopted 1 July 2008, not yet in force). Hereafter referred to as Statute of ACJHR 2008.
308 African Union, 'List of countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights' (n 300).

fifteen states.[309] As of 23 February 2014, only six member states have ratified the instrument,[310] and Nigeria is not one of them.

Notwithstanding, the ACJHR is examined in this chapter because article 2 of the Statute of ACJHR 2008 identifies the ACJHR as the primary judicial organ of the AU[311] and the ACJHR shall replace the AfCHPR once the Protocol comes into force.[312] It is for these salient reasons that the research examines the ACJHR ability to provide an adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment.

The ACJHR has both original and appellate jurisdiction to entertain all cases and disputes relating to – amongst others – the interpretation and application of the Banjul Charter, African Charter on the Rights and Welfare of the Child (ACRWC) 1990,[313] Maputo Protocol 2003, or any other human rights legal instruments ratified by states parties; including international criminal jurisdiction.[314] One of the reasons for establishing the ACJHR is to create a judicial organ that would supplement and strengthen the mission of both the ACHPR and African Committee of Experts on the Rights and Welfare of the Child (ACERWC)[315] in protecting human rights.[316]

In examining the ACJHR, it is pertinent to note that in 2014, an amendment to the Protocol on the Statute of ACJHR 2008 was adopted.[317] Although the amendment is focused on the inclusion of the international criminal law section in the ACJHR,[318] there are other changes which are relevant to this research. For example, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (PAPSACJHR) 2014 replaces

309 Art 9 Protocol on the Statute of ACJHR 2008 (n 301).
310 African Union, 'List of countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights' (n 300).
311 Art 2(1) Statute of ACJHR 2008 (n 307).
312 Arts 1and 2 Protocol on the Statute of ACJHR 2008 (n 301).
313 African Charter on the Rights and Welfare of the Child (adopted 01 July 1990, entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990). Hereafter referred to as ACRWC 1990.
314 Art 28 Statute of ACJHR 2008 (n 307); art 3 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014, not yet in force). Hereafter referred to as PAPSACJHR 2014. For additional jurisdiction of ACJHR as amended see art 6 Statute of the African Court of Justice and Human and Peoples' Rights (adopted 27 June 2014, not yet in force). Hereafter referred to as Statute of the ACJHPR 2014.
315 ACERWC is established mainly to promote and protect the rights and welfare of the child as provided and guaranteed by the ACRWC 1990 – see art 32 ACRWC 1990 (n 313).
316 Para 5 and 9 Preamble Protocol on the Statute of ACJHR 2008 (n 301); art 4 PAPSACJHR 2014 (n 314).
317 PAPSACJHR 2014 (n 314).
318 Art 3(1) PAPSACJHR 2014 (n 314); art 6 Statute of the ACJHPR 2014 (n 314).

the nomenclature ACJHR with African Court of Justice and Human and Peoples' Rights (ACJHPR).[319] In order to limit confusion and create a semblance of unity, article 6bis PAPSACJHR 2014 states that when it comes into force[320] and a member state is yet to ratify it; the ACJHPR will be able to exercise any jurisdiction concerning either the AfCHPR or the ACJHR that such member state had hitherto accepted.

2.3.1 Enforcement Procedure

The ACJHR / ACJHPR is divided into three sections, namely; general affairs, human and peoples' rights, and international criminal law.[321] The section that is relevant to this research is the human rights section.[322] Article 38 Statute of ACJHR 2008 provides for the procedures of the ACJHR to be guided by its Rules of Court. However, since the ACJHR is not yet in operation, there is the absence of an adopted Rules of Court.

Nevertheless, article 34 Statute of ACJHR 2008 specifies the institution of proceedings before the ACJHR human rights section. Given that this procedure is not amended in the Statute of the ACJHPR 2014, it can be gleaned that the same will continue to apply when the ACJHPR comes into force. Therefore, in bringing a case alleging a violation of human and peoples' rights before the ACJHR/ACJHPR, a written application shall be submitted to the Registrar. This application must indicate the alleged violated rights and the provisions from either the Banjul Charter, ACRWC 1990, Maputo Protocol 2003, or any other relevant human rights instrument ratified by the state concerned, on which the alleged violation is based.[323]

Compared to the ACHPR and AfCHPR, the Statute of ACJHR 2008 is silent on applicants having to fulfil the conditions stipulated in article 56 of the Banjul Charter. Perhaps this might change once the ACJHR/ACJHPR adopts its rules

319 Art 8 PAPSACJHR 2014 (n 314).

320 Currently, only ten member states have signed the instrument and there is no ratification. Nigeria is yet to sign this instrument – see African Union, 'List of countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights'<https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> accessed 29 September 2018.

321 Art 16 Statute of ACJHR 2008 (n 307); Art 6 Statute of the ACJHPR 2014 (n 314).

322 Art 34 Statute of ACJHR 2008 (n 307).

323 Art 34(1) Statute of ACJHR 2008 (n 307).

of court. In the absence of an adopted Rules of Court, it is suggested that the ACJHR/ACJHPR has a simplified procedure compared to the ACHPR and AfCHPR. Also, applicants do not have to exhaust local remedies to access the ACJHR/ACJHPR. Given this simplified procedure, it can be argued that individuals and NGOs – given the focus of this research, NHEICs – might find it easier to access the ACJHR/ACJHPR, than what is obtainable at the ACHPR and AfCHPR. Although a simplified procedure might aid access to the ACJHR/ACJHPR, however, its capacity to provide an effective enforcement mechanism cannot be verified by this single aspect.

2.3.2 Who can be a party in the proceedings?

Given its broad jurisdiction and its division into three sections, this chapter is focused on entities who are eligible to access the ACJHR/ACJHPR on matters which concern the violation of any right provided and guaranteed by the Banjul Charter, ACRWC 1990, Maputo Protocol 2003, or any other relevant human rights instrument ratified by the state concerned. According to article 30 of the Statute of ACJHR 2008, these entities are: the states parties to the Protocol on the Statute of ACJHR 2008; the ACHPR; the ACERWC; AIOs accredited to the AU or its organs; African National Human Rights Institutions (ANHRIs); individuals; and NGOs accredited to the AU and its organs.[324]

The Statute of ACJHR 2008 maintains the limited access granted to individuals and NGOs as stipulated in article 34(6) of the Protocol to the AfCHPR 1998.[325] Article 16 of the Statute of the ACJHPR 2014 amends this provision to unambiguously indicate that the individuals and NGOs entitled to bring human rights violation cases before the ACJHPR are African individuals and African NGOs.[326] Also, article 16 explicitly stops the court from entertaining cases or applications where the state party against whom the allegation is made is yet to submit the declaration accepting the competence of the ACJHPR to receive such cases.[327] The effect of this is that the principle of *forum prorogutum* may no longer provide an avenue through which NHEICs can access the

324 Art 30 Statute of ACJHR 2008 (n 307).
325 See art 30(f) Statute of ACJHR 2008 (n 307); art 8 Protocol on the Statute of ACJHR 2008 (n 301).
326 Art 16 Statute of the ACJHPR 2014 (n 314).
327 Ibid.

ACJHR/ACJHPR by circumventing the option of Nigeria having to make the declaration.[328]

It is suggested that the amendment in article 16 took into cognisance: (i) the observation of Akuffo J, Ngoepe J and Thompson J in *Falana* case, where they held that a foreign individual (that is, a non-African) "can sue a State Party that has made the declaration." [329] (ii) The consistent opinion of Ouguergouz J, that the AfCHPR should automatically reject an application involving a state party that has not made the declaration as provided in article 34(6) Protocol to the AfCHPR 1998.[330]

It is essential to note that the AfCHPR has described what constitutes an African NGO. In a request for an advisory opinion submitted to the AfCHPR by SERAP, the Court held that:

> [T]he Court is of the opinion that an organization can be considered 'African', with regards to NGOs…if they are registered in an African State, has structures at the sub-regional, regional or continental level, or undertakes its activities beyond the territory where it is registered, as well as any organization in the Diaspora recognized as such by the African Union.[331]

Although access to the ACJHR/ACJHPR for individuals and NGOs is pegged to states parties making the declaration, however, once the state party deposits the declaration, the individual or NGO is entitled to submit cases before the ACJHR/ACJHPR. This is an improvement from the discretionary access stipulated in the Protocol to the AfCHPR 1998, where even though the state party against whom the allegation is brought has made the declaration, nevertheless, the AfCHPR has the discretion to either accept or not accept the application. It is necessary to note that the NGO still must have observer status with the AU or its organs or institutions.

328 See subsection 2.2.4.1: The principle of forum prorogutum.

329 See *Falana (Dissenting Opinion)* (n 237) para 8.5.

330 See fn 284.

331 *Request No 001/2013 - Socio Economic Rights and Accountability Project (SERAP), Advisory Opinion* (2017) AfCHPR, para 48. The AfCHPR reaffirmed this positon in – *Request No 002/2014 - Rencontre Africain pour la Défense des Droits de l'Homme (RADDHO), Advisory Opinion* (2017) AfCHPR, para 31; *Request No 002/2016 - Request for Advisory Opinion Association Africaine de Defense des Droits de l'Homme, Advisory Opinion* (2017) AfCHPR, para 27.

Article 36 Statute of ACJHR 2008 provides that parties in a proceeding before it are to be represented: (i) states parties – agents or if required, be assisted by counsel or advocates. (ii) ACHPR, ACERWC, AIOs, and ANHRIs – any person chosen for that purpose. (iii) For individuals and NGOS – a person of their choice.[332] Also, the ACJHR has the discretion to provide free legal aid for an individual, should it be required in the interest of justice.[333]

2.3.3 Orders the ACJHR/ACJHPR can make

According to article 45 Statute of ACJHR 2008, where the ACJHR considers that there has been a violation of a human or peoples' rights, it has the discretion to order any appropriate measures, including fair compensation, to remedy the violation. Amending this provision, article 20(1) Statute of the ACJHPR 2014 states that the Rules of Court shall establish the principles concerning reparations, restitution, compensation, and rehabilitation to or in respect of victims. Either upon request or by itself in exceptional circumstances, the ACJHPR has the discretion to determine the extent and scope of "any damage, loss or injury to, or in respect of, victims and will state the principles on which it is acting."[334]

The difference between article 45 Statute of ACJHR 2008 and the amended article 20(1) Statute of the ACJHPR 2014, is that in the former, there is no specification for parties to request compensation from the ACJHR. From reviewing article 45, it can be inferred that where the ACJHR considers a violation has taken place, to remedy this, one of the orders the ACJHR can make is that of fair compensation. Nonetheless, based on the amended article 20(1), it is evident that even though the ACJHPR still maintains the discretion to make an order, it can only do so on its own where the circumstance is exceptional. Excluding which the order for compensation and other measures must be explicitly requested. Additionally, pending the adoption of the Rules of Court, the principles on which the ACJHPR can make such orders are unknown.

332 Art 36(1)(2)(4)(5) Statute of ACJHR 2008 (n 307).
333 Ibid, art 52(2).
334 Art 20(1) Statute of the ACJHPR 2014 (n 314).

Similar to the AfCHPR, the judgment of the ACJHR/ACJHPR is binding on the parties and is final.[335] Parties are mandated to guarantee its execution and to comply within the timeline specified by the ACJHR.[336] The ACJHR is mandated to refer the matter to the Assembly should a party fail to comply, upon which the Assembly shall decide the measures necessary to implement the judgment.[337] Also, pursuant to article 23(2) of the Constitutive Act 2000, the Assembly has the discretion to impose sanctions on the member state that has failed to comply with the judgment of the ACJHR.[338]

It is necessary to note that the decisions of the Assembly can be issued as regulations, directives, recommendations, declarations, resolutions, opinions, and so on.[339] Where the decision is issued as regulation, it applies to all member states, which are mandated to undertake all necessary measures to implement the regulation.[340] Where the decision is issued as a directive, it can be "addressed to any or all Member States, to undertakings or individuals."[341] Member states are bound to the objectives the directive seeks to achieve, and national authorities have the discretion to decide how the directive would be implemented.[342] While regulations and directives are binding on "member states, organs of the Union and Regional Economic Communities (RECs),"[343] and their non-implementation attracts the sanction stipulated in article 23 of the Constitutive Act 2000.[344] On the other hand, this is not applicable where the decision is issued as either recommendations, declarations, resolutions, or opinions. This is because such a decision is not binding, and the intention is "to guide and harmonise the viewpoints of Member States."[345]

Therefore, it can be deduced that the Assembly has two options when addressing the failure of a state party to comply with the judgement of the ACJHR/ACJHPR: namely (i) the Assembly can choose to equate the

335 Art 46 (1)(2) Statute of ACJHR 2008 (n 307); Art 21(2) Statute of the ACJHPR 2014 (n 314).
336 Art 46 (3) Statute of ACJHR 2008 (n 307).
337 Ibid, art 46(4).
338 Ibid, art 46(5).
339 R 33 Assembly of the African Union, Rules of Procedure of the Assembly of the Union' ASS/AU/2(I) – a (First Ordinary Session, 9-10 July 2002).
340 Ibid, r 33(1)(a).
341 Ibid, r 33(1)(b).
342 Ibid.
343 Ibid, r 34(2).
344 Ibid, r 33(2).
345 Ibid, r 33(1)(c).

judgement of the ACJHR/ACJHPR as either regulation or directive; (ii) The Assembly can choose to regard the judgement of the ACJHR/ACJHPR as either recommendations, declarations, resolutions, or opinions. This raises a pertinent question of whether the Assembly would be content to issue recommendations, declarations, resolutions, or opinions which are not binding and do not attract sanctions; or take the proactive measure of regarding the judgement of the ACJHR/ACJHPR as either regulation or directive which is binding and attracts sanctions should it not be implemented.

Given the constant challenge of non-compliance experienced by both the ACHPR and AfCHPR, it is suggested that to avoid the same occurrence with the final and binding decisions of the ACJHR/ACJHPR; the Assembly should regard the judgment as either regulation or directive, further enforcing its binding nature. Also, the fact that non-compliance with ACJHR/ACJHPR judgement attracts sanctions, states parties might be influenced to implement these judgements. The sanctions include "denial of transport and communications links with the other Member States, and other measures of a political and economic nature to be determined by the Assembly."[346]

Concerning the effectiveness of sanctions, Isanga argues that in dealing with states parties' non-compliance, the AU has not shown "serious, concerted and consistent commitment."[347] This research does not agree with Isanga's opinion. The AU Assembly is empowered to impose sanctions on member states in three instances: (i) where a member state defaults in paying its contributions;[348] (ii) where a member state refuses to comply with the decision and policies of the AU without good cause;[349] (iii) where there are unconstitutional changes of government in a member state.[350] Given that the AU Assembly has never hesitated to impose sanctions on member states who

346 Art 23(2) Constitutive Act 2000 (n 67); R 36 (2) ASS/AU/2(I) – a (n 339); African Union, 'African Union Handbook' (n 306) 181; JM Isanga, 'The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?' (2013) 11 SCJIL 267, 297; AM Ibrahim, 'Evaluating a decade of the African Union's protection of human rights and democracy: A post-Tahrir assessment' (2012) 12 AHRLJ 30, 34; CAA Packer and D Rukare, 'The New African Union and Its Constitutive Act' (2002) 96 TAJIL 365, 373; SA Elvy, 'Theories of State Compliance with International Law: Assessing the African Union's Ability to Ensure State Compliance with the African Charter and Constitutive Act' (2013) 41 GJILCL 75, 87; EY Omorogbe, 'A Club of Incumbents? The African Union and Coups d'État' (2011) 44 VJTL 123, 137.

347 Isanga (n 346) 297-298.

348 Art 23(1) Constitutive Act 2000 (n 67); R 35 ASS/AU/2(I) – a (n 339).

349 Art 23(2) Constitutive Act 2000 (n 67); R 36 ASS/AU/2(I) – a (n 339).

350 R 37 ASS/AU/2(I) – a (n 339).

default in paying contributions[351] or where there has been an unconstitutional change in government.[352] It is suggested that there is the probability the AU Assembly would act in the same manner should a member state refuse to comply with its decisions or policies.

It is necessary to note, however, that imposition of sanctions where the member state has refused to comply with the Assembly's decisions, and policies are at the recommendation of the Executive Council.[353] The pertinent question is, where the Executive Council fails to make such a recommendation, what happens? Given the absence of any stipulations as to what action the ACJHR/ACJHPR can undertake when the Executive Council fails to make such recommendation, it is suggested that article 23 (2) of the Constitutive Act 2000

> [B]e revised to clearly provide for the imposition of political and economic sanctions in the event of a violation of the human rights…contained in the Constitutive Act, the African Charter, or any other convention, protocol, or instrument adopted by the African Union.[354]

In addition to referring the matter to the Assembly, the ACJHR is mandated to submit to the Assembly an annual report which shall specifically indicate cases where the parties have not complied with the judgment of the ACJHR.[355] Elaborating on the contents of the annual activity report, article 23 Statute of the ACJHPR 2014 provides that the report shall explicitly identify "pending and concluded investigations, prosecutions and decisions and cases in which a party has not complied with the judgement, sentence, order or penalty of the Court."[356] According to Isanga, although the naming and shaming approach might potentially assist the efforts to enforce the ACJHR judgments, however,

351 Executive Council, 'Decision on the Report of the Ministerial Committee on Scale of Assessment and Contributions Doc. EX.CL/1097(XXXIII)' EX.CL/Dec.1022(XXXIII) (Thirty-Third Ordinary Session, 28-29 June 2018) para 3; Executive Council, 'Decision on the scale of Assessment and Contributions Doc. EX.CL/1064(XXXII)' EX.CL/Dec.1001(XXXII)Rev 1 (Thirty-Second Ordinary Session, 25-26 January 2018) para 5; Executive Council, 'Decision on the Activities of the Permanent Representatives' Committee Doc. PRC/Rpt(XXXI)' EX.CL/Dec.899(XXVIII)Rev 2 (Twenty-Eighth Ordinary Session, 23-28 January 2016) para 46.

352 Elvy (n 346) 102-108; F Amao, 'Could African Union law shape a new legal order for the continent?' (The Conversation, 9July 2018) <https://theconversation.com/could-african-union-law-shape-a-new-legal-order-for-the-continent-99245> accessed 30 September 2018; Omorogbe (n 346) 138-154; ME Olivier, 'The role of African Union law in integrating Africa' (2015) 22 SAJIA 513, 527.

353 R 36(1) ASS/AU/2(I) – a (n 339).

354 Elvy (n 346) 92.

355 Art 57 Statute of ACJHR 2008 (n 307).

356 Art 23 Statute of the ACJHPR 2014 (n 314).

its effectiveness is dependent "on the degree to which African states care about shame and criticism."[357]

2.3.4 Does the ACJHR/ACJHPR provide an adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment?

Part of the objectives in establishing the ACJHR/ACJHPR is to create an organ that would promote justice, human and peoples' rights,[358] complement and reinforce the protection mandate of the ACHPR and the ACERWC.[359] According to Hansungule, a court with such double jurisdiction like the ACJHR/ACJHPR[360] is the first of its kind in international law.[361] In effect, it might be assumed that the ACJHR/ACJHPR finally provides an adequate mechanism through which African citizens can enforce the rights guaranteed in the Banjul Charter and other human rights instruments ratified by states parties. Notwithstanding, having examined the instruments creating these courts, for the following reasons, it is suggested that this might not be the case.

First, even though *prima facie*, because of the absence of requesting applicants to fulfil the seven conditions specified in article 56 of the Banjul Charter, it seems that compared with the ACHPR and AfCHPR, the ACJHR/ACJHPR offers applicants simplified access. However, based on the absence of an adopted Rules of Court, caution is necessary for making this assumption as it is possible that the adopted Rules of Court might provide otherwise.

Second, given the consistent criticism against the restricted access available to individuals and NGOs based on article 34 (6) of the Protocol to the AfCHPR 1998, the expectation would be that the new Protocols take cognisance of that criticism and remove the limitation. Nonetheless, the Protocols which establish the ACJHR/ACJHPR maintain this limited access. The improvement is

357 Isanga (n 346) 298.
358 Para 13 Preamble of the PAPSACJHR 2014 (n 314).
359 Para 6 Preamble of the Protocol on the Statute of ACJHR 2008 (n 301).
360 Based on the addition of criminal section, the ACJHPR has triple jurisdiction – see art 3 of the PAPSACJHR 2014 (n 314)and art 6 Statute of the ACJHPR 2014 (n 314).
361 Hansungule, 'African Courts and the African Commission' (n 76) 237.

removing the discretion of the court to accept the application after the state party has made that declaration. Taking cognisance of the fact "that the concept of human rights developed largely to protect the individual or groups of individuals from the inimical conduct of the state;"[362] and that "the primary function of a human rights court is to protect citizens against the state and other governmental agencies."[363] The pertinent question is if individuals and NGOs have limited access to receive remedy against the state party that has violated the human and people's rights the ACJHR/ACJHPR is created to protect and promote. How would the ACJHR/ACJHPR achieve its objective of promoting justice, human and peoples' rights, in addition to strengthening the protection mandate of the ACHPR and the ACERWC? It is argued that the limited access granted to individuals and NGOs reduces the main judicial organ of the AU to a body that cannot effectively protect the human and peoples' rights of the African citizen.[364]

Although individuals and NGOs are unable to have direct access to the ACJHR/ACJHPR, however, the automatic access available to ACHPR, ACERWC, and ANHRIs provide an avenue to circumvent this limitation.[365] At its fifth Ordinary Session in 1989, the ACHPR highlighted the need for the establishment of national and regional committees which would assist and support the ACHPR in fulfilling its mandate of promoting human and peoples' rights;[366] also "help governments solve their national or local problems relevant to human rights."[367] The ACHPR invited states parties to establish national institutions with the mandate of promoting and protecting human rights.[368] In 1995, following the resolution of the UNGA mandating "member states to establish national human rights institutions for the promotion and protection of

362 Juma (n 273) 3.
363 Mutua (n 49) 28.
364 Yerima, 'Comparative Evaluation of the Challenges of African Regional Courts' (n 103) 123.
365 Ibid.
366 ACHPR, 'Resolution on the Establishment of Committees on Human Rights or Other Similar Organs at National, Regional or Sub-regional level' ACHPR/Res.2 (V) 89 (Fifth Ordinary Session, 3-14 April 1989) preamble para 3.
367 Ibid.
368 Ibid, para 1.

human rights,"[369] Nigeria established her National Human Rights Commission (NHRC).[370]

At its 32nd and 33rd Ordinary Sessions, the ACHPR granted NHRC affiliate status.[371] This status means that the NHRC has the responsibility to assist the ACHPR in promoting and protecting human rights in Nigeria.[372] Hence given its mandate to promote and protect human rights, it is suggested that the NHRC can present cases enforcing Nigerian citizens' their right to a clean, safe and secure, healthy environment before the ACJHR/ACJHPR. Notwithstanding, taking cognisance of the fact that Nigeria is yet to ratify the Protocol on the Statute of ACJHR 2008[373] and PAPSACJHR 2014,[374] it is argued that presently, the ACJHR/ACJHPR remains an unavailable route for the Nigerian citizen.

Third, even though from the wording of the Protocol on the Statute of ACJHR 2008 it is evident that the drafters intend creating a court capable of giving enforceable judgments. However, given the continuous refusal of states parties to comply with the final and binding judgements of the AfCHPR, there is the probability that history is likely to repeat itself. According to Oder, by making it the duty of the Council of Ministers to monitor the execution of the AfCHPR judgments, this ensured that the judgments were not dependent on the goodwill of the states' parties as prevalent in the ACHPR.[375] As discussed above,[376] despite this provision, states parties refuse to comply with the decisions of the AfCHPR. Scholars indicate factors which influence the lack of

369 National Human Rights Commission, 'The Commission' <www.nigeriarights.gov.ng/Commission.php> accessed 30 September 2018.

370 See National Human Rights Act 1995 CAP N46 LFN 2004; National Human Rights Commission, 'The Commission' (n 369). The legislation was amended in 2010 – see s 1 National Human Rights Commission (Amendment) Act 2010. Hereafter referred to as NHRC Act 2010.

371 African Commission on Human and Peoples' Rights, 'Sixteenth annual activity report of the African Commission on Human and Peoples' Rights 2002-2003' para 64 <www.achpr.org/files/activity-reports/16/achpr32and33_actrep16_20022003_eng.pdf> accessed 30 September 2018.

372 ACHPR, 'Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialised human rights institutions in Africa' ACHPR/Res.370 (LX) 2017 (Sixth Ordinary Session, 8-22 May 2017) para 6(5).

373 Although Nigeria has signed the Protocol, she is yet to ratify it – see African Union, 'List of countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights' (n 300).

374 Nigeria has neither signed nor ratified it – see African Union, 'List of countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (n 320).

375 J Oder, 'The African Court on Human and Peoples' Rights Order in Respect of the Situation in Libya: A Watershed in Regional Protection of Human Rights' (2011) 11 AHRLJ 495, 505.

376 See subsection 2.2: The African Court on Human and Peoples' Rights (AfCHPR).

implementation by states parties to include: the lack of political will on the part of states parties, citizens lack awareness of their human rights, high rate of illiteracy, resource constraint on the part of the judicial organs to follow-up and ensure that their decisions are implemented.[377]

Thus, given the probability of the continuous existence of these indicated factors when the ACJHR/ACJHPR comes into operation, it is likely that states parties may continue to ignore the decisions of this court. Although, it can be argued that the option of imposing sanctions might influence the attitude of states parties to implement the judgments of the court, however, this is not certain. To resolve this situation, Mbazira recommends that because the domestic courts are close to the populace and often assume the role of translating international norms into domestic law using the jurisprudence of international courts;[378] the continental court should concentrate on:

> [D]eveloping jurisprudence which has the capacity to influence the judgements of domestic courts. This is because the domestic courts are close to the enforcement mechanisms and are likely to be able to issue more meaningful and enforceable remedies.[379]

Given the challenges indicated above, needless to state that this research agrees with this recommendation. Nigeria is yet to ratify the instruments establishing the ACJHR/ACJHPR. Even if she does, individuals and NGOs are unable to access the court until Nigeria makes the declaration. Also, given that the declaration is optional, having done so, Nigeria can withdraw that declaration.

Furthermore, taking cognisance of the history of lack of compliance, there is no guarantee that even where that declaration is made, and there is a judgement against Nigeria, that the judgement would be implemented. Therefore, it can be argued that the ACJHR/ACJHPR may not provide an adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment. The next section shall examine the EHREI.

377 Murray and Mottershaw (n 150) 350; Wachira and Ayinla (n 43) 471; F Viljoen and L Louw, 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation' (2004) 48 JAL 1, 2.

378 Mbazira (n 150) 356-357.

379 Ibid, 357.

3 ECONOMIC COMMUNITY OF WEST AFRICAN STATES HUMAN RIGHTS ENFORCEMENT INSTITUTION (EHREI)

Unlike the AU which has more than one judicial and human rights institutions, ECOWAS has only one, and that is the Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ).[380] Established by articles 6 and 15 of the ECOWAS Revised Treaty 1993,[381] and article 2 of the Protocol on the Community Court of Justice 1991,[382] the ECCJ is the primary legal organ of the ECOWAS.[383] The jurisdiction of the ECCJ encompasses any dispute relating to – amongst others[384] – the determination of human rights violations in any ECOWAS member state.[385] Hence, while the AHREIs are accessible to every AU member state, the EHREI is limited to ECOWAS member states.

Also, unlike the AU, no specific ECOWAS instrument recognises and guarantees human rights like the Banjul Charter.[386] Nonetheless, according to the ECCJ, ECOWAS member states established the court as a mechanism to guarantee and protect human rights within the "framework of ECOWAS to implement the human rights contained in all the international instruments they are signatories to."[387] This includes the human rights instruments stipulated in

380 Economic Community of West African States (ECOWAS), 'Institutions' <www.ecowas.int/institutions/> accessed 30 September 2018.

381 Arts 6(1)(e) and 15 (1) Economic Community of West African States (ECOWAS) Revised Treaty (adopted 24 July 1993, entered into force 23 August 1995). Hereafter referred to as ECOWAS Revised Treaty 1993.

382 Art 2 Protocol A/P.l/7/91 on the Community Court of Justice (adopted 6 July 1991, entered into force 6 July 1991). Hereafter referred to as Protocol on the CCJ 1991.

383 Ibid, art 2(1).

384 See art 9 Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9, and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol. Hereafter referred to as Supplementary Protocol on the CCJ 2005.

385 Art 9(4) Supplementary Protocol on the CCJ 2005 (n 384). See also *ECW/CCJ/JUD/03/05 Jerry Ugokwe v Nigeria* (2005) ECOWAS para 28; *ECW/CCJ/APP/0808 Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria Universal Basic Education Commission* (2009) ECOWAS para 12; *ECW/CCJ/JUD/18/12 SERAP v Federal Republic of Nigeria* (2012) ECOWAS paras 25-26; *ECW/CCJ/RUL/12/12 Aliyu Tasheku v Federal Republic of Nigeria* (2012) ECOWAS para 8; ES Nwauche, 'Regional Economic Communities and Human Rights in West Africa and the African Arabic Countries' in A Bösl and J Diescho (eds), *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (MEN 2009) 332.

386 *ECW/CCJ/JUD/18/12 SERAP* (n 385) para 28. Although there has been calls for ECOWAS to adopt a regional human rights charter, it is yet to materialise – see ECOWAS Community Court of Justice, 'Community Court President Calls for Regional Human Rights Charter for ECOWAS Citizens' (ECOWAS Community Court of Justice, 07 February 2015) <www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=239:community-court-president-calls-for-regional-human-rights-charter-for-ecowas-citizens&catid=14:pressrelease&Itemid=36> accessed 30 September 2018.

387 *ECW/CCJ/JUD/18/12 SERAP* (n 385) para 29. See also article 1(h) Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention,

article 4 (g) of the Revised Treaty of ECOWAS and article 19 of the Protocol on CCJ 1991.[388] Thus, the ECCJ has the jurisdiction to examine matters in which applicants invoke the rights recognised and guaranteed by the Banjul Charter, the UDHR, ICCPR, and ICESCR.[389] Notwithstanding, the success of an application is not dependent on the number of international instrument or provisions invoked.[390]

According to the ECCJ:

> When various articles of different instruments sanction the same rights, the said instruments may, as far as those specific rights are concerned, be considered equivalent. It suffices therefore to cite the one which affords more effective protection to the right allegedly violated.[391]

Even though the ECCJ has the jurisdiction to entertain cases on infringement of human and peoples' rights provided and guaranteed in the Banjul Charter, however, the AHREIs are not superior to the EHREI. That is, the AHREIs and EHREI are independent of each other and appeals do not proceed from the ECCJ to any of the AHREIs. The decisions of the ECCJ are final, binding, and immediately enforceable on ECOWAS member states.[392] More so, "there is no order of hierarchy between such international courts, and it follows that none among them should be competent to revise the decision of another international court."[393]

Regardless of its seeming extensive human rights jurisdiction,[394] the ECCJ lacks the competence to adjudicate on matters which are strictly within the jurisdiction of member states' domestic courts;[395] or revise the decisions made by such courts[396] as the ECCJ is neither a court of appeal nor a court of

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Management, Resolution, Peacekeeping and Security (adopted 21 December 2001, entered into force 20 February 2008). Hereafter referred to as Protocol on Democracy and Good Governance 2001.

388 Ugokwe (n 385) para 29.

389 See *ECW/CCJ/JUD/18/12 SERAP* (n 385) paras 28 and 40; *ECW/CCJ/APP/0808 SERAP* (n 385) paras 13; Tasheku (n 385) para 16; *ECW/CCJ/APP/01/09 Amouzou Henry and 5 Others v Republic of Cote d'Ivoire* (2009) ECOWAS 4; Nwauche, 'Regional Economic Communities' (n 385) 333.

390 *ECW/CCJ/JUD/18/12 SERAP* (n 385) para 92.

391 Ibid.

392 Art 19 (2) Protocol A/P.I/7/91 on the Community Court of Justice.

393 *ECW/CCJ/JUD/06/08 Hadijatou Mani Koraou v Niger* (2008) ECOWAS para 52.

394 KJ Alter, LR Helfer and JR McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community of Justice' (2013) 107 TAJIL 737, 738.

395 Ugokwe (n 385) para 33.

396 *ECW/CCJ/JUD/03/07 Moussa Léo Kéïta v Mali* (2007) ECOWAS para 26; *ECW/CCJ/JUD/17/12 Sa'adatu Umar v The Federal Republic of Nigeria* (2012) ECOWAS para 21; *ECW/CCJ/JUG/06/12 Isabelle Manavi Ameganvui and others v Republic of Togo* (2012) ECOWAS as cited in Open Society Justice Initiative, 'Human Rights

cassation.[397] Notwithstanding, the domestic court or parties in the litigation can request the ECCJ to interpret the provisions of the ECOWAS Revised Treaty 1993, other ECOWAS Protocols or Regulations.[398] Also, where the matter has been decided by another international body, the ECCJ would decline jurisdiction and declare the case inadmissible.[399]

As indicated in the introduction section of this chapter, the objective is to examine the EHREI to determine the extent it provides an effective mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment. To achieve this, this section shall seek to answer the questions posed in the introduction section, namely: (i) what is the procedure for enforcement; (ii) who can be a party in the proceedings; (iii) what orders can the ECCJ make; (iv) does ECCJ provide an adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment?

3.1 Enforcement Procedure[400]

Both the Rules of the Community Court of Justice of the Economic Community of West African States (ECOWAS) 2002[401] and the Practice Directions 2012[402] regulate the procedure for submitting cases before the ECCJ. In seeking redress for human rights violation before the ECCJ, the complainant shall submit an application addressed to the Court Registry.[403] This application must include the particulars of the applicant; the designation of the person who committed the action or omission; the order sought; the type of evidence offered in support;[404] "the subject-matter of the proceedings and a summary of

Decisions of the Community Court of Justice of West African States (ECOWAS)' (Case Digests, OSJI 2013) 7 <www.opensocietyfoundations.org/sites/default/files/community-court-justice-west-african-states-digest-20130726.pdf> accessed 30 September 2018.

397 Ugokwe (n 385) para 32; Ameganvui (n 396) 7; Nwauche, 'Regional Economic Communities' (n 385) 334; ST Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) 54 JAL 1, 9.

398 *Kéïta* (n 396) para 26. See also Art 10(f) Supplementary Protocol on the CCJ 2005 (n 384).

399 *ECW/CCJ/JUG04/12 Mme Aziblevi Yovo and 31 others v Togo Telecom Society and Republic of Togo* (2012) ECOWAS as cited in Open Society Justice Initiative (n 396) 3-4.

400 For details see Rules of the Community Court of Justice of the Economic Community of West African States (ECOWAS) 2002. Hereafter referred to as Rules of the CCJ, ECOWAS 2002.

401 See Rules of the CCJ, ECOWAS 2002 (n 400); art 32 Protocol on the CCJ 1991 (n 382).

402 Community Court of Justice, ECOWAS Instructions to the Chief Registrar and Practice Directions 2012. Hereafter referred to as CCJ, ECOWAS Practice Directions 2012.

403 Art 11(1) Protocol on the CCJ 1991 (n 382).

404 Art 11(1) Protocol on the CCJ 1991 (n 382); art 33 Rules of the CCJ, ECOWAS 2002 (n 400).

the pleas in law on which the application is based."[405] On receiving the application, the Court Registry is mandated to immediately serve the other party notice of the application and all document relating to the issue in dispute.

The ECCJ has elaborated on the conditions an application seeking relief for human rights violation must fulfil. The application must not be anonymous, and the subject-matter cannot be one which has been submitted for adjudication before another international court;[406] must explicitly state the violated rights, provide sufficient and convincing evidence to prove the violation of the said rights, and the facts of the case must be a human rights violation issue.[407]

In *Garba*'s case, the ECCJ held that an anonymous application assumes that the author is not identified, meaning that the name of the applicant, profession, nationality, or status is unknown.[408] Nonetheless, where the applicant engages the services of a legal representative, this condition is deemed fulfilled.[409] According to the ECCJ, article 4(d)(i)(ii) seeks to prevent the abuse of the system by individuals and avoid the situation where several international courts are handling the same subject matter.[410] Thus, the ECCJ would not adjudicate on any matter that is pending before an international body; where an international body has given judgement on the subject matter; or where the subject matter has been examined by an international body and contains no new information.[411] From the position of the ECCJ, it is suggested that where the case is pending before a domestic court, that the applicant can bring the matter before the ECCJ, insofar the said domestic court had not given judgement on the issue.[412]

405 Art 11(1) Protocol on the CCJ 1991 (n 382); art 33 Rules of the CCJ, ECOWAS 2002 (n 400).
406 Art 10(d)(i)(ii) Supplementary Protocol on the CCJ 2005 (n 384).
407 See Kéïta (n 396) para 34; *ECW/CCJ/JUD/05/07 Etim Moses Essien v The Gambia* (2007) ECOWAS para 37; *ECW/CCJ/JUD/01/10 Daouda Garba v Benin* (2010) ECOWAS para 43; *ECW/CCJ/JUD/07 /12 Mrs Oluwatosin Rinu Adewale v Council of Ministers and others* (2012) ECOWAS para 55; *ECW/CCJ/JUD/02/12 Femi Falana and Waidi Moustapha v Republic of Benin, The Federal Republic of Nigeria and Republic of Togo* (2012) ECOWAS para 41.
408 *Garba* (n 407) paras 28 - 30.
409 Ibid.
410 *Koraou* (n 393) para 50.
411 See *Koraou* (n 393) para 51; *Yovo* (n 399) 4.
412 See *Umar* (n 396) paras 13-15,20-21; *Koraou* (n 393) paras 35,50,53.

Proceedings before the ECCJ consist of both written and oral proceedings.[413] It is necessary to note that the proceedings are free of charge.[414] However, the ECCJ has the discretion to order a refund from a party that has caused the ECCJ to incur an avoidable cost.[415] Also, where Chief Register considers that the copying or translated work requested by a party to a proceeding has caused the ECCJ to incur an excessive cost, that party shall pay for the work on the scale of charges fixed by the ECCJ.[416]

Concerning the limitation of time within which an applicant can submit an application seeking redress of human and peoples' rights violation, according to article 9 Supplementary Protocol on the CCJ 2005:

> Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose.[417]

Notably, the ECCJ has handed down conflicting decisions on the limitation of time as to when to institute human rights violation cases. In *Koraou* case, the ECCJ held that since human rights are sacred, inalienable, inherent in the human person, and irrevocable, it "cannot, therefore, suffer any limitation whatsoever."[418] Confirming this position in *Bayi* case, the ECCJ emphasised that article 9(3) Supplementary Protocol on the CCJ 2005 is specific to cases brought against the Community or by the Community, and not cases brought by individuals or legal persons against a member state of the Community or her agents.[419] However, in *Falana and Moustapha* case, the ECCJ held that the "statute of limitation would apply to human rights cases except in respect of gross violation of rights."[420]

In the *SERAP* case, although the ECCJ neither affirmed its position in *Koraou* case nor that of *Falana and Moustapha* case, however, the ECCJ held that it would not consider human rights violations that occurred before the adoption

413 Art 11(1) Protocol on the CCJ 1991 (n 382).
414 Art 68 Rules of the CCJ, ECOWAS 2002 (n 400).
415 Ibid, art 68(a).
416 Ibid, art 68(b).
417 Art 9(3) Supplementary Protocol on the CCJ 2005 (n 384).
418 Koraou (n 393) para 56.
419 *ECW/CCJ/JUD/01/09 Djot Bayi & 14 Others v Federal Republic of Nigeria & 4 others* (2009) ECOWAS para 30.
420 *Falana and Moustapha* (n 407) para 30.

of the Supplementary Protocol on the CCJ 2005 as the Protocol cannot be applied retroactively.[421] The ECCJ further held that human rights violations which occurred after the enactment of the Supplementary Protocol on the CCJ 2005 would be subjected to the statute of limitation based on whether the act is isolated or persistent and continuous.[422] Where the violation is isolated, it is statute barred, but

> [I]it is trite law that in situations of continued illicit behaviour, the statute of limitation shall only begin to run from the time when such unlawful conduct or omission ceases.[423]

It is vital to note that in *SERAP* case, the ECCJ contradicted an earlier decision given on the issue of the retroactive application of the Supplementary Protocol on the CCJ 2005. In *Falana* case, hinging on the Nigerian Supreme Court decision in *Ibrahim v Barde*,[424] the ECCJ stated that article 9 of the Protocol on the CCJ 1991 had been repealed and substituted by the new article 9 of the Supplementary Protocol on the CCJ 2005.[425] Thus,

> [W]here a statute is passed for the purpose of supplying provisions in the former statute, the subsequent or latter statute is returned back to the time when the prior statute was passed.[426]

Given the above, it can be argued that the ECCJ's decision regarding the non-retrospective application of the Supplementary Protocol on the CCJ 2005 in *SERAP* case might be wrong. One thing, however, is clear; the ECCJ maintains that current applications alleging the violation of human rights would need to be filed within three years of the act or omission taking place.

Recently, the ECCJ overturned this position in *Federation of African Journalists* case;[427] explicitly holding that:

> [T]he previous decisions of this Court relating to limitation of actions against Member States in human rights cases after three years that the cause of action arose were decided per incuriam…and are hereby overruled. Accordingly, in actions for enforcement of fundamental

421 *ECW/CCJ/JUD/18/12 SERAP* (n 385) para 59.
422 Ibid, para 60.
423 Ibid, para 62.
424 *Ibrahim v Barde* (1996) 9 NWLR (pt 477) at 577 as cited in *Falana and Moustapha* (n 407) para 27.
425 *Falana and Moustapha* (n 407) para 28.
426 Ibid.
427 *ECW/CCJ/JUD/04/18 Federation of African Journalists and Ors v The Republic of Gambia* (2018) ECOWAS para 21-22.

> rights against member States, the Court holds that the Statute of limitation does not apply.[428]

The ECCJ further held that even if it is assumed that article 9(3) of the Supplementary Protocol on the CCJ 2005 "subsists as to deny the existence of a right of action,"[429] where the wrongful act or omission is incessant, the statute of limitation would only apply once this ceases to exist.[430] Accordingly, prior to the *Federation of African Journalists* case, it was paramount that any Nigerian citizen who wishes to enforce his/her right to a clean, safe and secure, healthy environment at the ECCJ, would have to do so immediately the act or omission occurs, due to limitation of time within which to file the application. However, based on the ECCJ's decision in *Federation of African Journalists* case, whether the violation of the right to a clean, safe and secure, healthy environment is a recent incident or continuous event, there is no time limit to approach the ECCJ on the matter.

3.2 Who can be a party in the proceedings?

Article 10 Supplementary Protocol on the CCJ 2005 explicitly specifies entities that have access to the ECCJ in human rights violation cases and they are: (i) member states or the Executive secretary where the matter relates to the failure of a member state to fulfil its obligation; (ii) individuals and corporate bodies where the act or omission of a Community official leads to the violation of the rights of an individual or corporate body; (iii) an individual seeking relief for violation of their human rights.[431]

The Protocol on the CCJ 1991 mandates each party to nominate an agent or agents that will represent them before the ECCJ.[432] Agents have the discretion to request the assistance of one or more advocates or counsels who are licensed by the laws and regulations of the member states to appear before the court in their area of jurisdiction.[433]

428 Ibid.
429 Ibid.
430 Ibid.
431 Art 10(a)(c)(d) Supplementary Protocol on the CCJ 2005 (n 384).
432 Art 12 Protocol on the CCJ 1991 (n 382).
433 Ibid.

The ECCJ has consistently held that natural persons have direct access before the court to seek redress for human rights violation.[434] Nonetheless, the ECCJ has given conflicting decisions on whether the same applies to corporate bodies. In *Ugokwe* case, the ECCJ held that the combined effect of articles 9(4) and 10(d) Supplementary Protocol on the CCJ 2005 indicated that both individuals and corporate bodies could bring matters on any violation of human rights in any member state to the ECCJ.[435] The ECCJ confirmed this in *Kéïta* case where it included "individuals and corporate bodies victim of violation of human rights,"[436] as persons with the status to bring cases before the ECCJ. Maintaining this position in *CNDD* case,[437] the ECCJ held that article 10(d) Supplementary Protocol on the CCJ 2005 did not explicitly state that it applies to natural persons and not legal persons; therefore

> [I]f it is trite that rights and freedoms guaranteed by international instrument relating to human rights are made so for individuals, it is nonetheless the case that legal persons equally have rights they can claim…legal persons can institute proceedings before a legal adjudicating body, for violation of rights guaranteed by instruments relating to human rights.[438]

The ECCJ further unequivocally emphasised that article 1(h) of the Protocol of Democracy and Good Governance 2001 invest corporate bodies with access before ECCJ for human rights violation.[439] Also, the ECCJ held that where two measures are at the same time applicable in human rights protection, primacy is accorded to the measure which grants greater protection.[440] As such, article 10(d) Supplementary Protocol on the CCJ 2005 must be interpreted "in accordance with the spirit and letter of article 1(h) of Protocol A/SP1/12/01 of 21st December 2001, on Democracy and Good Governance."[441]

Nonetheless, in Ocean *King Nigeria Ltd*,[442] the ECCJ contradicted its above position. The ECCJ stated that article 10 Supplementary Protocol on the CCJ

434 Nwauche, 'Regional Economic Communities' (n 385) 332; HS Adjolohun, 'The ECOWAS Court as a Human Rights Promoter: Assessing Five Years' Impact of the Koraou Slavery Judgement' (2013) 31 NQHR 342, 343.
435 *Ugokwe* (n 385) para 28.
436 *Kéïta* (n 396) para 28.
437 *ECW/CCJ/JUD/05/09 The National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD) v Côte d'Ivoire* (2009) ECOWAS.
438 Ibid, para 24 and 27.
439 Ibid, para 28.
440 Ibid, para 29.
441 Ibid.
442 *ECW/ CCJ/JUD/07/11 Ocean King Nigeria Ltd v Republic of Senegal* (2011) ECOWAS.

2005 explicitly stipulated persons that have access to the ECCJ and the relevant cases they can bring before it.[443] "Thus, an applicant will lack the requisite standing to bring a claim to the Court for determination if the issue raised does not fall within those over which they have been granted the right of access."[444]

The ECCJ further held that although article 10(c) Supplementary Protocol on the CCJ 2005 granted access to individuals and corporate bodies, article 10(d) Supplementary Protocol on the CCJ 2005 explicitly gave only individuals access in human rights violation causes.[445] Expatiating on the term 'individuals', the ECCJ stated that:

> '[I]ndividuals' within the context of article 10 of the Protocol refers to only human beings and no more. This is so because article 10 (c) mentioned individuals and corporate bodies. What that means is that the legislation sought to distinguish between human beings and other legal entities. Thus, by expressly giving access to only individuals, the Supplementary Protocol sought to give that right exclusively to individual human beings who are victims of human rights abuse to the exclusion of all others. The fact that human rights, by its very nomenclature, is human centred, finds expression from the Preamble to the 1948 Universal Declaration of Human Rights ...The plaintiff is a body corporate and cannot, therefore, rely on the provisions of article 10(d).[446]

Notwithstanding, in *SERAP* case, the ECCJ went back to its former position, stating that legal persons are entitled to bring cases of human rights violations before it.[447] From the ECCJ position, in this case, it might be assumed that the issue of legal persons being able to institute human rights violation cases before the ECCJ is a settled matter. Nonetheless, the information available on the ECCJ website indicates otherwise. While maintaining that 'individuals and corporate bodies' can bring issues relating to the act of the Community which violates the rights of such individuals or corporate bodies,[448] on the other hand, on the website, the term 'persons' is used to indicate victims who have access

443 Ibid, para 44.
444 Ibid, para 45.
445 Ibid, para 48.
446 Ibid, para 49-50.
447 *ECW/CCJ/JUD/18/12 SERAP* (n 385) para 7.
448 ECOWAS Community Court of Justice, 'About Us' <www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5> accessed 30 September 2018.

to the ECCJ on human rights violation cases.[449] The website fails to expatiate whether 'persons' denotes both natural and legal persons. Given this distinction of explicitly using 'individuals and corporate bodies' and 'persons', it is suggested that the information available on the ECCJ website is an indication that the ECCJ's position in *Ocean King Nigeria Ltd*[450] is the current jurisprudence regarding entities that can bring cases of human rights violations before the ECCJ.

Although article 10 Supplementary Protocol on the CCJ 2005 does not indicate that NGOs can access the ECCJ on human rights violation cases, the ECCJ in *SERAP v President of FRN,*[451] held that NGOs can file cases of human rights violation before it.[452] To do so, the NGO must be registered under any ECOWAS member state national law and hold observer status before ECOWAS institutions.[453] Also, victims of the alleged human rights violation complaint must be a large group of individuals or an entire community and not a single individual.[454] Also, the NGO does not need the permission of the group or community to bring the complaint before the ECCJ.[455]

Even though NGOs are unable to bring cases of human rights violation having an individual victim before the ECCJ, however, NGOs can assist the individual with legal representation. An example of this is *Koraou* case, where the individual victim of slavery was assisted by a professional Partnership of lawyers and INTERIGHTS international legal human rights NGO based in London.[456]

Locus standi is established when the applicant evidences that the application is to protect or defend the infringement of an interest that is personal, direct, and certain.[457] Nevertheless, in public interest litigation, the applicant need not

449 Ibid.
450 *Ocean King Nigeria Ltd* (n 442) para 48-50.
451 *ECW/CCJ/APP/07/10 The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria & Ors* (2010) ECOWAS <www.worldcourts.com/ecowasccj/eng/decisions/2010.12.10_SERAP_v_Nigeria.htm> accessed 30 September 2018.
452 Ibid, para 61.
453 Ibid.
454 Ibid.
455 Ibid, para 62.
456 See Koraou (n 393) para 2.
457 *ECW/CCJ/JUD/01/08 Odafe Oserada v ECOWAS Council of Ministers* (2008) ECOWAS para 27.

prove that his/her rights have been infringed or have suffered a personal loss or has a particular interest in need of protection. All that is required to establish *locus standi* is to prove that there is a justiciable public right which is worthy of protection and which has allegedly been breached.[458] Also, the ECCJ adopts "a more flexible approach to standing in order to allow persons not directly affected by the alleged violation to have access to Court to seek justice on behalf of the actual victim."[459]

According to the ECCJ, the member states and the Community institutions are the only entities the Court has the jurisdiction to hold accountable for human rights violation.[460] The ECCJ does not have the jurisdiction to entertain human rights violations cases brought against corporate bodies and individuals.[461] This is because, as an international court with human rights jurisdiction, the ECCJ applies international human rights instruments to which member states are parties as the principal subject of international law.[462]

Also, the ECCJ is a mechanism established by member states to hold it accountable for its commitment or failure to the human rights international instruments it has signed.[463] As such, since individuals and corporations are not parties to these international instruments, the ECCJ lacks jurisdiction to enforce compliance on individuals and corporations.[464] Nonetheless, as held in *Petrostar (Nigeria) Limited* case,[465] the ECCJ automatically assumes jurisdiction where contractual agreement indicates that the ECCJ shall settle any dispute.[466]

According to the ECCJ, the rights provided in articles 19-24 of the Banjul Charter "protect peoples rather than individuals"[467] and are the "rights of all

458 *ECW/CCJ/APP/0808 SERAP* (n 385)para 33-34.
459 *Federation of African Journalists* (n 427) 17.
460 *SERAP v President of FRN* (n 451) para 71; *ECW/CCJ/RUL/-/11 Peter David v Ambassador Raph Uwechue* (2011) ECOWAS para 18; *ECW/CCJ/JUD/18/12 SERAP* (n 385); ES Nwauche, 'The ECOWAS Community Court of Justice and the Horizontal Application of Human Rights' (2013) 13 AHRLJ 30, 30-31.
461 *SERAP v President of FRN* (n 451) paras 73 and 77.
462 Ibid, para 72.
463 Ibid.
464 Ibid, para 73.
465 *ECW/CCJ/JUD/05/11 Petrostar (Nigeria) Limited v Blackberry Nigeria Limited and Ifeanyi Paddy Eke* (2011) ECOWAS para 3.
466 M Happold and R Radović, 'The ECOWAS Court of Justice as an Investment Tribunal' (2018) 19 TJWIT 95, 103.
467 *ECW/CCJ/JUD/11/12 Kemi Pinheiro (SAN) v The Republic of Ghana* (2012) ECOWAS para 36.

peoples in contrast to the rights of every individual."[468] Also, people and not individuals, are the beneficiaries of those rights.[469] Therefore, the peoples' rights provided in articles 19-24 of the Banjul Charter are meant to be enjoyed collectively and not individually.[470]

This study does not agree with this interpretation given by the ECCJ. In Chapters Two and Three, this research extensively discussed who constitutes 'peoples' when seeking to enforce the rights provided in the Banjul Charter. The definition of 'people' is not a settled matter as claimed by the ECCJ. The ACHPR in *Katanga* case – which the ECCJ referenced[471] – explicitly stated that there is no consensus as to the definition of peoples.[472] The ACHPR has given diverse interpretations of the term.[473] Also, there is no uniform agreement on what constitutes the notion of collective rights. This research takes the view that 'people' refers to the citizens of the state. Therefore, any citizen of that state can enforce that right against another citizen, *vice versa*.

3.3 Orders the ECCJ can make

Article 20 Protocol on the CCJ 1991 gives the ECCJ discretion to order any provisional measures or instructions it deems necessary in a case before it. Article 66 Rules of the CCJ, ECOWAS 2002 provides for the ECCJ to make orders as to cost. Although the Protocol on the CCJ 1991, Supplementary Protocol on the CCJ 2005, and Rules of the CCJ, ECOWAS 2002, are silent on the orders the ECCJ can make on human rights violation cases.[474] However, bridging this lacuna, the ECCJ in SERAP case held that part of its mandate to protect human rights included the obligation to grant relief where the rights are violated. In doing so, the ECCJ "acts indeed within the limits of

468 Ibid.
469 Ibid.
470 Ibid, para 39.
471 Ibid, para 37.
472 *Communication 75/92 Congrès du peuple katangais / DRC* (1995) ACHPR, para 3; United Nations Educational, Scientific and Cultural Organization, 'International Meeting of Experts on further study of the concept of the rights of peoples: Final Report and Recommendations' SHS-89/CONF.602/7 (Paris, 27-30 November 1989), para 22.
473 Dersso (n 37) 359 and 376.
474 Bayi (n 419) para 47.

its prerogatives when it indicates for every case brought before it, the reparation it deems appropriate."[475]

According to the ECCJ, "any individual who is a victim of a violation of his rights is entitled to just and equitable reparation."[476] The primary basis for monetary compensation is not to punish but rather "vindicate the injured feelings of the victim and to restore his rights and human dignity."[477] The ECCJ has stated that a request for pecuniary compensation must explicitly identify the victim to whom the award would be made.[478] Especially where the human rights violation is on behalf of a group of individuals or the community.[479] Also, where the human rights violation affects a large population or a vague number of victims,

> [C]ompensation shall not come as an individual pecuniary advantage but as a collective benefit adequate to repair, as completely as possible, the collective harm that a violation of a collective right causes.[480]

The judgement of the ECCJ is "binding on the member states, the institutions of the community and on individual and corporate bodies."[481] Article 24 Supplementary Protocol on the CCJ 2005 further provides that the ECCJ judgement shall be binding on national of member states or member states where it has financial implications.

To implement the judgement of the ECCJ, the Registrar is mandated to submit a writ of execution to the relevant member state for execution pursuant to member state rules of civil procedure.[482] Member states are mandated to designate a competent national authority with the responsibility of receiving and processing the writ of execution and notifying the ECCJ accordingly.[483]

475 *ECW/CCJ/JUD/18/12 SERAP* (n 385) para 118.
476 Bayi (n 419) para 45.
477 ECW/CCJ/JUD/08/10 Musa Saidykhan v The Gambia (2010) ECOWAS para 43; Bayi (n 419) para 46.
478 *ECW/CCJ/JUD/18/12 SERAP* (n 385) para 114.
479 Ibid, para 115.
480 Ibid, para 116.
481 Art 15(4) ECOWAS Revised Treaty 1993 (n 381); art 62 Rules of the CCJ, ECOWAS 2002 (n 400).
482 Art 24(2) Supplementary Protocol on the CCJ 2005 (n 384); HS Adjolohun, 'Giving effect to the Human Rights Jurisprudence of the Court of Justice of the Economic Community of West African States: Compliance and Influence' (LLD Thesis, University of Pretoria 2013) 55.
483 Art 24(4) Supplementary Protocol on the CCJ 2005 (n 384).

Once a member state designated authority verifies that the writ is from the ECCJ, it shall be enforced.[484]

Even though the ECCJ decision is final, however, the ECCJ has the power to revise its decision.[485] The application for a review must be based on the discovery of new facts that are decisive, unknown to the ECCJ or the applicant, provided this is not due to ignorance. Also, it is filed within three months of discovering the new fact(s); and made within five years of the delivery of the decision, which the applicant is seeking to review.[486]

3.4 Does ECCJ provide an adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment?

Like the ACHPR, the ECCJ has sought to interpret the intendment of article 24 of the Banjul Charter. Indicating that quality of the environment affects the well-being and quality of life of humans,[487] the ECCJ defined environment as "an indivisible whole, comprising the biotic and abiotic natural resources, notably air, water, land, fauna and flora and the interaction between these same factors."[488] The ECCJ highlighted that article 24 of the Banjul Charter assigns "an obligation of attitude and obligation of result" [489] on states parties.[490] As a party to the Banjul Charter, Nigeria is required:

> [T]o take every measure to maintain the quality of the environment understood as an integrated whole, such that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development. It is by examining the state of the environment and entirely objective factors, that one judges, by the result, whether the State has fulfilled this obligation. If the State is taking all the appropriate legislative, administrative and other measures, it must ensure that vigilance and diligence are being applied and observed towards attaining concrete results.[491]

484 Ibid, art 24(3).

485 *ECW/CCJ/JUD/07/10 The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)* (2010) ECOWAS para 12 <www.worldcourts.com/ecowasccj/eng/decisions/2010.11.30_SERAP_v_Nigeria.htm> accessed 30 September 2018; Adjolohun, 'Giving effect to the Human Rights' (n 482) 54.

486 Bayi (n 419) paras 7-8.

487 *ECW/CCJ/JUD/18/12 SERAP* (n 385) para 100.

488 Ibid.

489 Ibid.

490 Ibid, para 101.

491 Ibid, para 29

Therefore, even though Nigeria has established several agencies and enacted a myriad of legislative provisions to safeguard the environment,[492] the ECCJ found that Nigeria failed to "seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger Delta Region."[493] Therefore:

> [I]t is precisely this omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities, with clear expectation of impunity, that characterises the violation by the Federal Republic of Nigeria of its international obligations under [article] 24 of the African Charter on Human and Peoples' Rights.[494]

The ECCJ found that the omission of the Nigerian government has led to its violation of article 24 of the Banjul Charter. The ECCJ ordered the Nigerian government to:

> i. Take all effective measures, within the shortest possible time, to ensure the restoration of the environment of the Niger Delta;
> ii. Take all measures that are necessary to prevent the occurrence of damage to the environment;
> iii. Take all measures to hold the perpetrators of the environmental damage accountable.[495]

The significance of this is that the ECCJ's jurisprudence might influence how the Nigerian courts will interpret article 24 of the ACHPR Act 1983. Thus, where the operations of the extractive industry has caused environmental degradation and pollution, the decision of the ECCJ confirms that the Nigerian citizen can enforce his/her right to a clean, safe and secure, healthy environment against the Federal Republic of Nigeria for not taking effective measure to prevent the pollution and hold the perpetrators accountable. It is suggested that NGOs and Civil Societies can take advantage of this opportunity to increase pressure on the Nigerian government to take active steps towards ensuring the protection of the Nigerian environment.

In comparison with the AHREIs, the conditions which an individual, community, or legal persons need to fulfil to access the ECCJ are not convoluted. According to article 10 Supplementary Protocol on the CCJ 2005, these

492 Ibid, para 103 and 110.
493 Ibid, para 110.
494 Ibid, para 111.
495 Ibid, para 121.

applicants need only fulfil two conditions, namely, (i) not submitting an anonymous application, (ii) the matter should not be before another international court for settlement.[496] Recently, the ECCJ reaffirmed these conditions in *Federation of African Journalist* case.[497]

Furthermore, there is no obligation to exhaust local remedies before approaching the ECCJ.[498] Although the absence of the condition on exhausting local remedies has been viewed as a lacuna which the ECCJ has to fill,[499] however, the ECCJ has explicitly held that the Supplementary Protocol on the CCJ 2005 does not provide for the exhaustion of local remedies before an application on human rights violation can be filed before it.[500] Hence, exhaustion of local remedies has no relationship with the procedure for accessing the ECCJ.[501]

Explaining the reason why an applicant is not obliged to exhaust local remedy, in *Ocean King Nigeria Ltd*, the ECCJ took cognisance of article 39 Protocol on Democracy and Good Governance 2001. This provision indicates that the ECCJ would be approached on human rights violation cases after "attempts to resolve the matter at the national level have failed."[502] The ECCJ emphasised that in amending the Protocol on the CCJ 1991, the Supplementary Protocol on the CCJ 2005 did not stipulate in any of its provisions - whether implicitly or explicitly - the requirement for an applicant to exhaust local remedies before approaching the ECCJ.[503] The ECCJ further held that any provision of a prior Protocol that is inconsistent with the Supplementary Protocol on the CCJ 2005, is null and void to the extent of that inconsistency.[504] Hence, the stipulation to exhaust local remedies as provided in article 39 Protocol on Democracy and

496 Art 10(d)(i)(ii) Supplementary Protocol on the CCJ 2005 (n 384); Nwauche, 'Regional Economic Communities' (n 385) 332.

497 *Federation of African Journalists* (n 427) 27.

498 *Essien* (n 407) para 13; *Koraou* (n 393) para 36; *Ocean King Nigeria Ltd* (n 442) para 41 and 72; *Federation of African Journalists* (n 427) 27; Nwauche, 'Regional Economic Communities' (n 385) 334; Adjolohun, 'The ECOWAS Court as a Human Rights Promoter' (n 434) 344; AO Enabulele, 'Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice' (2012) 56 JAL 268, 270; Ebobrah, 'Critical Issues in the Human Rights' (n 397) 9; Alter, Helfer and McAllister (n 394) 738.

499 See *Koraou* (n 393) para 36.

500 *Koraou* (n 393) para 53; *Ocean King Nigeria Ltd* (n 442) para 72.

501 *Essien* (n 407) para 13.

502 Art 39 of the Protocol on Democracy and Good Governance 2001 (n 387).

503 *Ocean King Nigeria Ltd* (n 442) para 38.

504 Ibid, para 40.

Good Governance 2001 conflicts with Supplementary Protocol on the CCJ 2005 and therefore to the extent of that conflict, null and void.[505]

Furthermore, the ECCJ states that:

> [T]here are no grounds for considering the absence of preliminary exhaustion of local remedies as a lacuna which must be filled within the practice of the Community Court of Justice, for the Court cannot impose on individuals more onerous conditions and formalities than those provided for by the Community texts without violating the rights of such individuals.[506]

Criticising the absence of applicants to exhaust local remedies before approaching the ECCJ, Enabulele argues that "while the rule has not been expressly made a condition of admissibility, it has, nonetheless, not been expressly excluded." [507] The author further accuses the ECCJ of not deciphering the real intent of the states' parties to the Supplementary Protocol on the CCJ 2005 and not taking cognisance of the general trend in international law.[508] Recently, in the *Federation of African Journalists* case, the ECCJ reiterated its position on the need for applicants to exhaust local remedies. The ECCJ held:

> There is no requirement of the exhaustion of local remedies before accessing this Court. The Defendant argued that the Applicants failed to exhaust local remedies as a condition precedent for approaching this court and therefore in flagrant violation to articles 26, 50, and 56(5) of the African Charter on Human and Peoples' Rights. We need to start by making it clear that the provision relied upon by the Defendant is a procedural rule applicable by the African Court and this Court is not bound by the procedural provisions of the African court. This Court has held in a number of cases that exhaustion of local remedies is not a condition precedent for bringing human rights claims before it and this issue need not be over flogged.[509]

From the above, it is evident that the ECCJ continues to maintain its position that the applicant does not need to exhaust local remedies to access the ECCJ. Also, on the issue of time limitation, based on the *Federation of African Journalists* case, Nigerian citizens are no longer constrained by time limit

505 Ibid, para 40.
506 *Koraou* (n 393) para 45.
507 Enabulele, 'Sailing Against the Tide (n 498) 288.
508 Ibid.
509 *Federation of African Journalists* (n 427) 17.

within which to seek relief against violation of the right enshrined in article 24 of the Banjul Charter.

With the combination of free of charge proceedings, no need to exhaust local remedies, and the absence of time limitation, compared with the AHREIs, it suggested that the EHREI might provide a less complicated route Nigerian citizens may wish to take advantage. Notwithstanding the identified positives, two factors challenge the EHREI ability to provide a satisfactory mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment. They are (i) the non-compliance of ECCJ decisions by the ECOWAS member states, (ii) limiting article 24 to rights that can only be enjoyed collectively and not individually.

1. ***Non-compliance of ECCJ decisions by the ECOWAS Member States***

According to Adjolohun, international bodies are generally confronted with the challenge of non-compliance with their decisions.[510] Hence, like the AHREIs, the EHREI suffers the plight of low rate implementation of its decisions by member states. The absence of designated authorities by most member states is indicated as part of the reasons for the low rate of compliance with the ECCJ's decisions.[511] Notably, Nigeria has communicated her designated authority[512] as the Attorney General and Minister of Justice of Nigeria.[513]

There have been several suggestions on how the ECCJ can ensure that ECOWAS member states comply with its judgements.[514] These include (i) that

510 Adjolohun, 'Giving effect to the Human Rights' (n 482) 15-16.

511 ECOWAS Community Court of Justice, 'Community Court President Calls' (n 386); ECOWAS Community Court of Justice, 'Court President calls on Ministers Responsible for Regional Integration to facilitate the Implementation of its Decisions' (ECOWAS Community Court of Justice, 19 May 2015) <www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=251:court-president-calls-on-ministers-responsible-for-regional-integration-to-facilitate-the-implementation-of-its-decisions&catid=14:pressrelease&Itemid=36> accessed 30 September 2018; ECOWAS Community Court of Justice, 'Legal and Human Rights Experts Propose Measures for improving the efficiency of the ECOWAS Court in implementing Human Rights mandate' (ECOWAS Community Court of Justice, 23 March 2015) <www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=246:legal-and-human-rights-experts-propose-measures-for-improving-the-efficiency-of-the-ecowas-court-in-implementing-human-rights-mandate&catid=14:pressrelease&Itemid=36> accessed 30 September 2018.

512 ECOWAS Community Court of Justice, 'Court President calls on Ministers' (n 511).

513 *Ugokwe* (n 385) para 10.

514 ECOWAS Community Court of Justice, 'President calls for establishment of regional fund to support under privileged litigants in ECOWAS Court' <www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=248:president-calls-for-

the ECCJ create an appellate chamber for its decisions;[515] (ii) establish a unit in the registry whose mandate would be to ensure compliance and implementation of ECCJ decisions.[516] Odinkalu (the former chairman of the NHRC) suggests that the position of a judge-rapporteur is created to liaise with the ECCJ registry and report to the ECCJ the member states implementing its judgments. [517] Furthermore, Odinkalu suggests that the ECCJ consider invoking sanctions as an instrument for guaranteeing compliance.[518]

Even though the ECOWAS Revised Treaty 1993, Protocol on the CCJ 1991, and Supplementary Protocol on the CCJ 2005, are silent as to actions the ECCJ can undertake when member states or Community institutions fail to implement its decisions.[519] Nevertheless, article 77 of the ECOWAS Revised Treaty 1993 gives the Authority of Heads of State and Government the discretion to sanction any member state that has failed to fulfil its obligations to the Community. The sanctions include, suspend new loans, assistance, community projects being given to the member state; excluding the member state from presenting candidates for statutory and professional posts; suspend member state voting rights; and suspend the member state from participating in the activities of the Community.[520]

In addition to article 77 of the ECOWAS Revised Treaty 1993, according to Adjolohun, in 2012, ECOWAS adopted a Supplementary Act which explicitly provides sanctions applicable to the Member States that fail to comply with the community decisions. [521] Adjolohun states that the Supplementary Act "confirms that non-compliance with the decisions of the Court amounts to a failure to abide by a Community obligation and attracts sanctions from the Authority."[522]

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establishment-of-regional-fund-to-support-under-priviledged-litigants-in-ecowas-court&catid=14:pressrelease&Itemid=36 > accessed 18 September 2018.

515 ECOWAS Community Court of Justice, 'Legal and Human Rights Experts Propose Measures' (n 511).

516 ECOWAS Community Court of Justice, 'President calls for establishment of regional fund' (n 514).

517 ECOWAS Community Court of Justice, 'Community Court President Calls' (n 386).

518 Ibid.

519 MOA Alabi, 'Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa' (PhD Thesis, University of Leicester 2013) 212.

520 Art 77(2) ECOWAS Revised Treaty 1993 (n 381).

521 Supplementary Act on Sanctions Applicable to member states for failure to abide by Community Decisions A/SA13/02/12. It is necessary to note that the writer was unable to access this Supplementary Act and so relies on the information given by Adjolohun – see Adjolohun, 'Giving effect to the Human Rights' (n 482).

522 Adjolohun, 'Giving effect to the Human Rights' (n 482) 56-57.

Furthermore, the Supplementary Act "expressly provides for compliance monitoring mechanisms backed by sanctions,"[523] namely:

> [A]rticle 14 of the Act provides that the Authority, a Member State, or the President of the ECOWAS Commission may initiate a procedure for sanction against a Member State which does not fulfil its obligations to the Community…in terms of article 15(1) of the Act, reports of non-compliance may be filed by any natural or legal person of a Member State, by any institution of the Community, and by any Member State. The reports will be examined by either the Council of Ministers or the Authority. The prominent role of the ECOWAS Commission is emphasised by the provision under article 15(2) that non-compliance reports filed by institutions of the Community, individuals and legal persons are sent to the President of the Commission. Non-institutional reports may be channelled through national authorities in charge of regional integration.[524]

Thus, from the above, it is evident that the Supplementary Act A/SA13/02/12 provides two avenues through which the constant non-compliance challenge can be resolved. They are (i) initiating sanction procedure against the defaulting member state, and (ii) natural or legal persons having the option to file a report of non-compliance. The Supplementary Act A/SA13/02/12 is silent on actions the Council of Ministers or the Authority should undertake after examining the report filed by the natural or legal persons. Perhaps it is expected that they then initiate the sanction proceeding against the indicted member state.

Taking cognisance that Nigeria is the focus of this research, the pertinent question is can the ECCJ rely on article 77 of the ECOWAS Revised Treaty 1993 and the Supplementary Act A/SA13/02/12 to sanction Nigeria for failure to comply with her decisions? Background of the ECOWAS is necessary to answer this. Nigeria has always been and continues to be critical to the formation and operation of ECOWAS as an entity.[525] In addition to being the "largest single contributor to the Community budget,"[526] the permanent sites of ECOWAS three arms of governance,[527] namely, the ECOWAS parliament,[528]

523 Ibid, 59.
524 Ibid, 61.
525 Alter, Helfer and McAllister (n 394) 742-748.
526 Y Gowon, 'The Economic Community of West African States: A Study in Political and Economic Integration' (PhD thesis, University of Warwick 1984) 491.
527 ECOWAS Commission, '2012 ECOWAS Annual Report Annexes' <http://events.ecowas.int/wp-content/uploads/2013/03/2012-Annual-Report_Annexes_English_final.pdf> accessed 30 September 2018.

ECCJ,[529] and ECOWAS Commission,[530] are situated in Nigeria. According to Gowon, there can be no active West African Community without Nigeria.[531]

Therefore, given the financial and influential role Nigeria occupies in ECOWAS, the critical question is whether the Authority of the Heads of State and Government would be willing to sanction Nigeria for not complying with the decisions of the ECCJ? This research argues that the answer to this question is in the negative. Hence, sanctions might not provide an effective route to compel Nigeria's implementation of the ECCJ's decisions.[532] Also, considering the sovereign status of the member states, it is unlikely that the ECCJ would assume jurisdiction like domestic courts to punish for contempt of court.[533] Thus, leaving the ECCJ at the goodwill of states to implement its decision.

Furthermore, the ECCJ lacks adequate funding,[534] and this might hinder the establishment of an appellate chamber, position of a judge-rapporteur, and a unit in the registry whose mandate is to monitor implementation of the decision. Many ECOWAS member states are unable to meet their monetary commitment for the underlying reason that they also require financial aid.[535]

It is necessary to note that despite having the option to impose sanctions as provided in article 77 of the ECOWAS Revised Treaty 1993 and the Supplementary Act A/SA13/02/12, it seems the ECCJ is reluctant to take this route and has continued to experience low implementation rate of its decisions by Member states.[536] According to the Chief Register of the ECCJ, since the ECCJ became operational, it has handed 64 enforceable decisions, and member states have implemented only 22.[537]

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528 ECOWAS Parliament, 'About us'<http://parl.ecowas.int/en/about-us/> accessed 30 September 2018.
529 Community Court of Justice -ECOWAS, 'Contact us' <www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=109&Itemid=19> accessed 30 September 2018.
530 Art 86 ECOWAS Revised Treaty 1993 (n 381).
531 *Gowon* (n 526) 238.
532 See discussion below on the most probable options Nigerian citizens may want to utilise to compel the implementation of ECCJ judgments.
533 Alabi (n 519) 212-213.
534 Ibid, 236.
535 Ibid.
536 A Adesomuju, 'Don't disregard our decisions, ECOWAS Court begs Nigeria, 14 others' Punch (9 October 2017) <https://punchng.com/dont-disregard-our-decisions-ecowas-court-begs-nigeria-14-others-2/> accessed 30 September 2018.
537 ECOWAS Community Court of Justice, 'Chief Registrar calls for the Review of the Enforcement Mechanism for Decisions of ECOWAS Court'

Although there might be varied reasons why ECOWAS member states consistently find it difficult to implement the ECCJ decisions, however, this research examines three reasons why Nigeria may not implement these decisions, and they are (i) not having domesticated the 1993 ECOWAS Revised Treaty and its Protocols; (ii) the aftermath of *Ugokwe*'s case; and (ii) historical perspective arising from the Petitions Right Act in Nigeria.

(i) *Not having domesticated the 1993 ECOWAS Revised Treaty and its Protocols*: Section 12 of the 1999 Constitution explicitly provides that "[N]o 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."[538] Therefore, given that Nigeria is yet to domesticate the ECOWAS Revised Treaty 1993, Protocol on the CCJ 1991, and Supplementary Protocol on the CCJ 2005, it suggested that these instruments do not have the force of law in Nigeria. Thereby, hampering the implementation of ECCJ decisions in Nigeria. According to Enabulele and Ewere, in the absence of this domestication, the judgments of the ECCJ "would naturally fall within the definition of a foreign judgment (and come before Nigerian courts as such) for the purpose of enforcement."[539] As a foreign judgment, the ECCJ's decision will be enforced by the relevant rules of civil procedure of the Nigerian Courts.[540]

Given that the ECCJ is the judicial organ of the ECOWAS, and ECOWAS is not a country, but an organisation made up of several member countries; more so, the jurisdiction of the ECCJ is created by international law. Hence, it is evident that the judgment of the ECCJ might not be regarded as foreign judgment as this would be contrary to the intention of the Nigerian legislature.

<www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=425&Itemid=36> accessed 30 September 2018.

538 S 12(1) 1999 Constitution (n 41).

539 AO Enabulele and AO Ewere, 'Can the Economic Community of West African States Community Court of Justice Enforce the African Charter Replicas of the Non-Justiciable Chapter II Human Rights Provisions of the Nigerian Constitution against Nigeria?' (2012) 1 IHRLR 312, 328.

540 Enabulele and Ewere (n 539) 329.

The Foreign Judgements (Reciprocal Enforcement) Act[541] refer to the judgment given by a domestic court outside the shores of Nigeria, essentially, judgements from foreign jurisdictions. For that foreign judgment to be enforceable in Nigeria, the Minister of Justice must confirm that judgements emanating from the Nigerian courts will be accorded same treatment in that foreign jurisdiction.[542] Therefore, since the ECCJ is neither a national court nor can the ECCJ guarantee that it will enforce Nigerian court judgements, the suggestion adduced by Enabulele and Ewere might not apply.

Furthermore, concerning the enforcement of the judgment by Nigerian rules of civil procedure, as already noted the Protocol of the ECCJ is not domesticated in Nigeria, and so its judgements might not be recognised as judgements of a court with direct enforceability. It can be argued that the simple fact that is yet to be domesticated means it does not have the force of law in Nigeria, which inevitably means that whatever arises from it does not have the force of law in Nigeria. Thus, it implies that the route of enforcing ECCJ through any Nigerian civil procedure rule is barred, as that would be tantamount to giving the force of law to what has not been domesticated in Nigeria, which is contrary to the *grundnorm* - the Nigerian constitution.

(ii) *The aftermath of Ugokwe's case*: This was the first case the ECCJ received just shortly after its mandate had been expanded to include human rights jurisdiction.[543] The case dealt with election matter where the applicant prayed the ECCJ to issue a special interim order.[544] The order was to restrain the Independent National Electoral Commission from invalidating the certificate of attestation declaring Ugokwe elected as a member of the National Assembly and to prevent the National Assembly from relieving him of his position as a member of the House of Assembly.[545] The ECCJ issued the interim order based on which the Nigerian Minister of

541 CAP F35 LFN 1990.
542 S 3 Foreign Judgement (Reciprocal Enforcement) Act CAP F35 LFN 1990.
543 Alter, Helfer and McAllister (n 394) 758.
544 Ugokwe (n 385) para 7.
545 Ibid.

Justice addressed a letter to the Speaker of the House of Assembly to cease further actions until the ECCJ had fully decided on the matter.[546]

According to Alter, Helfer and McAllister, this move by the ECCJ resulted in both political and judicial uproar as to the lack of jurisdiction by the ECCJ to entertain an issue that was strictly within the competence of domestic legislation and the domestic courts.[547] Even though the ECCJ subsequently held that it lacked the jurisdiction to entertain the matter, however, this "change of position did nothing to quell the underlying legal and political controversy."[548] *Ugokwe*'s case put the ECCJ "in direct conflict with the Nigerian judiciary and political establishment."[549] It is suggested that the event left deep marks which the Ministry of Justice might be hesitant to reopen. Additionally, contrary to the view that section 12 of the Nigerian constitution creates a hindrance to implementing the ECCJ judgement, *Ugokwe*'s case proves that the Minister of Justice can implement the writ of execution. Nevertheless, the political will to do so is critical.

(iii) *Historical perspective arising from the Petitions Right Act in Nigeria*: It is suggested that although the Petition Rights Act[550] is repelled, however, the history of not being liable for any wrong or remedies might have influenced the Nigerian government's attitude of refusing to obey court orders.[551] The Act traces its origin from the common law doctrine that the King can do no wrong.[552] Hence, there has been a general tendency for the executive arm of government to ignore court orders based on the judiciary's reliance on the government's agent to enforce its decision. These agents may choose not to implement the decision. Thus, given that even domestic courts face the challenge of implementing their decisions when the judgement is against the government, it is suggested that the ECCJ's challenge of low compliance with its decisions, might not be unique to it.

546 Ibid, para 10.
547 Alter, Helfer and McAllister (n 394) 759.
548 Ibid.
549 Ibid, 760.
550 CAP 149 LFN (as amended) as cited in JO Fabunmi and OO Akai, 'Execution of Judgments and Means of Enforcement Available to a Court in Nigeria' (1988) 32 JAL 164, 173.
551 Fabunmi and Akai (n 550) 180-181.
552 Ibid, 178.

Notwithstanding the reasons indicated above, in seeking practical solutions which might compel the Minister of Justice to implement the ECCJ decisions, it is suggested that one of the means of ensuring that the ECCJ decisions are implemented in Nigerian is through the active involvement of the NHRC. As an extra-judicial body mandated with the protection of human rights, dignity, and freedoms in Nigeria,[553] the NHRC is empowered to – amongst others: (i) deal with all matters relating to the promotion and protection of human rights as stated in the preamble; (ii) assist human rights violation victims and seek on their behalf appropriate remedies and redress. (iii) Receive and investigate complaints on human rights violations; (iv) appropriately determine the human rights violation complaints received. (v) Report on actions that should be taken at either the federal, state, or local government level to comply with relevant international human rights instruments; (vi) refer any matter of human rights violation requiring prosecution to the Attorney General of the Federation or State; and (vii) collaborate with local and international organisations on promoting and protecting human rights.[554]

Therefore, in accordance with this mandate, it is suggested that by undertaking the following actions, the NHRC might be able to apply pressure and in turn, ensure implementation of ECCJ decisions on human rights violation in Nigeria: (i) The NHRC may liaise with the ECCJ to bring to the notice of the Minister of Justice the writ of execution sent by the ECCJ that should be implemented. (ii) The NHRC may also publish the writ of execution that is yet to be performed. (iii) Regarding its mandate to "promote the understanding of public discussions of human rights issues in Nigeria,"[555] the NHRC can publicise – using both traditional and contemporary media – the decisions of the ECCJ that are yet to be implemented by the Minister of Justice who has been appointed the designated authority. (iv) The NHRC has the power to "institute any civil action on any matter it deems fit in relation to the exercise of its functions."[556] This means that the NHRC can institute a civil action against the Minister of Justice compelling him or her to enforce the decision of the ECCJ.

553 National Human Rights Commission, 'The Commission' (n 369).
554 S 5 NHRC Act 2010 (n 370).
555 Ibid, s 5(m).
556 Ibid, s 6(b).

2. ***Limiting article 24 of the Banjul Charter to rights that can only be enjoyed collectively and not individually***

As discussed in Chapters Two and Three of this research defining peoples' rights as collective rights inevitably means that only a set of people have that right and the right cannot be enforced against them. The pertinent question is how the ECCJ would define these sub-groups given the varied ethnic groups in Nigeria, and so on? Also, this means that a Nigerian citizen cannot as an individual seek to enforce his/her right to a clean, safe and secure, healthy environment. This Nigerian citizen would need to enforce that right in a representative capacity to succeed. This research argues that 'people' in article 24 of the Banjul Charter should be interpreted as a 'Nigerian citizen' and not sub-groups.

Having examined the EHREI, it is suggested that compared to the AHREIs, it might provide a less complicated route which Nigerian citizens can take advantage. Notwithstanding, the challenges of non-compliance might hamper this. Additionally, given the current jurisprudence of the ECCJ, right to a clean, safe and secure, healthy environment can only be enjoyed collectively and not individually, thereby limiting individuals' ability to enforce this right. Based on these, it is suggested that the EHREI might not provide the adequate mechanism for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment.

4 CHAPTER CONCLUSION: AFRICAN SOLUTION TO NIGERIA'S CHALLENGE?

This chapter investigated the human rights enforcement mechanisms at the continental (AU) and regional (ECOWAS) level to determine the extent to which they might provide adequate platforms for Nigerian citizens to enforce their right to clean, safe and secure, healthy environment; and in turn, simultaneously ensuring an environmentally sustainable Nigerian extractive industry. Given the gross environmental degradation and pollution associated with the Nigerian extractive industry, the proposition is that an efficient AU and ECOWAS human rights enforcement mechanisms might provide an African solution to this Nigerian challenge.

Having examined both the AHREIs and EHREI, it is evident that they share the common challenge of low implementation rate of their decisions by member states. Although the decisions of these institutions have been identified as having the potential to develop "Africa's human rights jurisprudence," [557] however, according to Murray and Mottershaw, "the potential for improvement in human rights protection held by such judgements and decisions can only be realised with implementation."[558] Wachira and Ayinla succinctly describe how the low rate of implementation affects Africa's human rights system. The authors state that "without the necessary enforcement mechanisms to ensure states' implementation…human rights protection on the continent remains elusive."[559]

In addition to the non-compliance challenge, other factors that might impinge the ability of these institutions to provide an African solution to the Nigerian challenge include:

(i) As an international body, claims can only be brought against the state and not individuals or corporations.

(ii) AfCHPR and ACJHR/ACJHPR grant individuals and NGOs restricted access.

(iii) The ECCJ interpretation of article 19-24 of the Banjul Charter as rights that can only be enjoyed as a collective and not as an individual. Even though the ECCJ did not specifically examine article 24 of the Banjul Charter, however, given the absence of Nigerian jurisprudence on article 24 of the Banjul Charter / ACHPR Act 1983, it is suggested that the jurisprudence available on the matter might influence the Nigerian courts. As argued in Chapters Two and Three of this research, interpretation of 'people' should be the Nigerian citizens as provided for by the 1999 Constitution. The Constitution starts with "We the people of the Federal Republic of Nigeria."[560] This means that the Nigerian citizen is the right-holder, making article 24 of the Banjul Charter a right that

557 Yerima, 'Comparative Evaluation of the Challenges of African Regional Courts' (n 103) 121.
558 Murray and Mottershaw (n 150) 350.
559 Wachira and Ayinla (n 43) 471.
560 See the Preamble to the 1999 Constitution (n 41).

can be enjoyed as an individual. This right can also be enforced against the individual.[561]

(iv) The stringent conditions stipulated in article 56 of the Banjul Charter. Accentuating the need to fulfil the condition of exhausting local remedies, the ACHPR in *Anuak Justice Council* case held that:

> This Commission is of the view that it is incumbent on every complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of, local remedies. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated or past incidences…The African Commission can therefore not declare the communication admissible based on this argument. If a remedy has the slightest likelihood to be effective, the applicant must pursue it. Arguing that local remedies are not likely to be successful, without trying to avail oneself of them, will simply not sway this Commission.[562]

It is suggested that this decision of the ACHPR underscores the significance of the FREP Rules 2009 as an existing HRAEP enforcement mechanism. This means that Nigerian citizens might not be able to access the ACHPR if they have not exhausted the existing HRAEP enforcement mechanism. Note, that this might be different from the ECCJ, given that there is no need to exhaust local remedies before accessing the court.

In view of the above, although both the AHREIs and EHREI can be described as having "unexplored potentials to be tapped into"[563] or "a gold mine for rights realisation,"[564] it is suggested that the AHREIs and the EHREI might not provide effective mechanisms for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment. The challenges present in seeking to enforce HRAEP through the AHREIs and EHREI highlights the need for adequate HRAEP enforcement mechanisms at the national level. Notwithstanding, the AHREIs and EHREI jurisprudence on article 24 of the

561 See Chapters Two and Three of this research.

562 *Anuak Justice Council* (n 198) paras 58. The ACHPR reaffirmed this position in *SERAP / Federal Republic of Nigeria* (n 176) para 65.

563 Keetharuth (n 34) 226.

564 ST Ebobrah, 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community of Justice' (2007) 7 AHRLJ 307, 328.

Banjul Charter would be useful to the Nigerian courts when interpreting the intendment of the same provision in the ACHPR Act 1983.

Furthermore, it is argued that the existing HRAEP enforcement mechanism – that is, the FREP Rules 2009 – provides an effective avenue through which Nigerian citizens might enforce their HRAEP. Nonetheless, there is the need to strengthen the continental (AU) and regional (ECOWAS) HRAEP enforcement mechanism. The next chapter shall examine the environmental sustainability concept and investigate the extent to which the operations of the Nigerian extractive industry do not ensure environmental sustainability.

CHAPTER SIX

ENVIRONMENTAL SUSTAINABILITY AND THE NIGERIAN EXTRACTIVE INDUSTRY

1 INTRODUCTION

The definition of the ES concept within the context of this research refers to the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative capacity of the environment in which they operate, without degrading its future waste absorptive capacity.

Given the extensive body of existing literature which indicates that the operations of the extractive industry entities have led to the degradation and pollution of the host communities' environment.[1] This chapter shall examine the second hypothesis which states that the operations of the Nigerian extractive industry entities are not environmentally sustainable. In doing so, the chapter relies extensively on secondary data where scholars have discussed the impact of extractive industry operations on the host communities'. The data is sourced from journal articles, institutions and government agencies reports – such as UNEP Report and Federal Ministry of Environment.[2] It is significant to note that using the same data, there is the possibility that other researchers might arrive at a different conclusion from what this chapter finds.

1 See CO Ikporukpo, 'Environmental deterioration and public policy in Nigeria' (1983) 3 AG 303, 307-309; O Odeyemi and OA Ogunseitan, 'Petroleum Industry and its Pollution Potential in Nigeria' (1985) 2 OPP 223, 225-227; O Oyewo, 'Problem of Environmental Regulation in the Nigerian Federation' in JA Omotola (ed*), Environmental Law in Nigeria Including Compensation* (UL 1990) 108; PC Onianwa, 'Petroleum Hydrocarbon Pollution of Urban Topsoil in Ibadan City, Nigeria' (1995) 21 EI 341, 341; Federal Ministry of Environment and others, 'Niger Delta Natural Resource Damage Assessment and Restoration Project: Phase 1 – Scoping Report' (31 May 2006) <https://cmsdata.iucn.org/downloads/niger_delta_natural_resource_damage_assessment_and_restoration_project_recommendation.doc> accessed 1 October 2018; United Nations Development Programme (UNDP), 'Niger Delta Human Development Report' (UNDP 2006) 73 <http://hdr.undp.org/en/content/human-development-report> accessed 1 October 2018; United Nations Environment Programme (UNEP), Environmental Assessment of Ogoniland (UNEP 2011); United Nations Development Programme (UNDP) and Global Environment Facility (GEF), 'UNDP Project Document: Niger Delta Biodiversity Project' [2012] <www.undp.org/content/dam/undp/documents/projects/NGA/Niger%20Delta%20Biodiversity_Prodoc.pdf> accessed 1 October 2018.

2 UNEP (n 1); Federal Ministry of Environment and others (n 1).

In achieving its stated objective, the chapter is further divided into three sections. Section 2 examines the different measurement tools that can be used to study environmental sustainability levels.

Developed to measure the environmental sustainability levels of countries,[3] section 3 adapts the environmental sustainability index (ESI) as a tool with which to investigate the extent to which the operations of the Nigerian extractive industry entities are environmentally unsustainable. Section 4 presents the chapter conclusion.

2 EVALUATING THE EXTENT TO WHICH THE NIGERIAN EXTRACTIVE INDUSTRY IS ENVIRONMENTALLY SUSTAINABLE

Having defined the ES as the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative capacity of the environment in which they operate, without degrading its future waste absorptive capacity. The pertinent question then becomes how one can determine whether the environmental sink service is being maintained *vis-á-vis* the activities of the Nigerian extractive industry? It is necessary to note that various measurement tools have been created to aid policymakers and the public[4] evaluates national and cross-country progress towards achieving set out environmental policies or goals.[5] Also, these

3 See D Esty and M Levy, 'Pilot Environmental Sustainability Index' (ISPS Interdisciplinary Faculty Discussion Seminar on the Environment 2000) <http://archive.epi.yale.edu/files/pilot_esi_presentation.pdf> accessed 1 October 2018; K Samuel-Johnson, DC Esty and MA Levy, '2001 Environmental Sustainability Index' [2001] 7 <www.start.org/Projects/AIACC_Project/resources/ele_lib_docs/ESI_2001.pdf> accessed 1 October 2018 2018; T Haberland (ed), 'Analysis of the Yale Environmental Performance Index (EPI)' (FEA [Umweltbundesamt] 2008) 6 and 21 <www.umweltbundesamt.de/sites/default/files/medien/publikation/long/3429.pdf> accessed 1 October 2018; T Srebotnjak and DC Esty, 'Measuring Up: Applying the Environmental Sustainability Index' [2005] YJIA 156,157; National Aeronautics and Space Administration (NASA), 'Environmental Sustainability Index (ESI)' <http://sedac.ciesin.columbia.edu/data/collection/esi/> accessed 1 October 2018; Global Leaders of Tomorrow Environment Task Force, Yale Center for Environmental Law & Policy and Center for International Earth Science Information Network Columbia University, 'Pilot Environmental Performance Index 2002' 1-2 <http://sedac.ciesin.columbia.edu/es/esi/EPI2002_11FEB02.pdf> accessed 1 October 2018; J Emerson and others, '2010 Environmental Performance Index' (YCELP 2010) 65 <www.ciesin.org/documents/EPI_2010_report.pdf> accessed 1 October 2018.

4 For detailed discussion on the benefits and scope of environmental indicators – see A Hammond and others, *Environmental Indicators: A Systematic Approach to Measuring and Reporting on Environmental Policy Performance in the Context of Sustainable Development* (WRI 1995).

5 B Moldan and S Janoušková and T Hák, 'How to understand and measure environmental sustainability: indicators and targets' (2012) 17 EI 4, 12; V Veleva and others, 'Indicators for measuring environmental sustainability: A case study of the pharmaceutical industry' (2003) 10 BAIJ 107, 107.

indicators through national averages, "reflect the state of the environment or an aspect thereof." [6]

The measurement tools include: human development index; environmental sustainability index; environmental performance index; happy planet index; Emergy performance index; commitment to development index; ecological footprint; ecosystem wellbeing index; environmental vulnerability index; living planet index; sustainable society index; genuine progress indicator; city development index; well-being of nations; Commission on sustainable development indicators; millennium development indicators; genuine savings index; and indicators for the European Union sustainable development strategy.[7]

Generally referred to as sustainability or environmental indicators, as indicated by their names, these measurement tools are designed to meet specific purposes and needs. Given that environmental sustainability forms part of the primary focus of this research, it is suggested that the ESI is the closest the measurement tool which might be most relevant to determine whether the activities of the Nigerian extractive industry entities has led to the maintenance of the environmental sink service.

Developed in 2000, from the partnership between World Economic Forum's Global Leaders for Tomorrow (GLT) Environment Task Force, the Yale Center for Environmental Law and Policy (YCELP), and the Columbia University Center for International Earth Science Information Network (CIESIN); the ESI is designed to measure cross-country progress towards achieving environmental sustainability and construct states' environmental sustainability

6 KMK Stepping, *Challenges in Measuring the State of the Environment in Developing Countries* (GDI 2013) 50; CJA Bradshaw, X Giam and NS Sodhi, 'Evaluating the Relative Environmental Impact of Countries' (2010) 5 PO 1, 1 <https://doi.org/10.1371/journal.pone.0010440> accessed 1 October 2018.

7 See T Srebotnjak and DC Esty, 'Measuring Up: Applying the Environmental Sustainability Index' [2005] YJIA 156, 156; G Van de Kerk and AR Manuel, 'A comprehensive index for a sustainable society: The SSI – the Sustainable Society Index' (2008) 66 EE 228, 230; C Szigeti and others, 'GDP Alternatives and their Correlations' (2013) 3 JES 35, 37-38; Stepping (n 6) 11-42; RM Ewers and RJ Smith, 'Choice of Index Determines the Relationship between Corruption and Environmental Sustainability' (2005) 12 ES <www.ecologyandsociety.org/vol12/iss1/resp2/> accessed 1 October 2018; Bradshaw, Giam and Sodhi (n 6) 1; JR Siche and others, 'Sustainability of nations by indices: Comparative study between environmental sustainability index, ecological footprint and the emergy performance indices' (2008) 66 EE 628, 629.

profiles.[8] The ESI sought to bridge the lacuna inherent in the Millennium Development Goals (MDG) 7, specifically, the absence of adequate indicators through which states could gauge progress towards achieving the goal.[9] Additionally, though ensuring environmental sustainability forms the objective of MDG 7, the MDG document does not define the meaning of the concept.[10]

According to Emerson and others, "the ESI was the first attempt to rank countries on 76 different elements of environmental sustainability."[11] While a high ESI ranking demonstrates that a country had achieved a higher level of environmental sustainability;[12] a low ESI ranking, on the other hand, was indicative that the country had significant challenges in meeting the environmental sustainability goal.[13]

To arrive at the accurate means of measuring ES, Samuel-Johnson, Esty and Levy, suggest that ES can be presented as a function of the following five components:[14]

(i) "The state of the environmental systems; that is a country is environmentally sustainable to the extent that its vital environmental systems are maintained at healthy levels, and to the extent to which levels are improving rather than deteriorating."[15] Although Samuel-Johnson, Esty and Levy, did not explicitly defined what they meant by the phrase 'environmental systems', they specified that it includes both natural and managed environmental systems.[16] However, from the indicators highlighted, it is possible to gauge what the authors mean by 'environmental systems'. The indicators include: "cultivated systems,

8 See Esty and Levy (n 3); Samuel-Johnson, Esty and Levy (n 3) 7; Haberland (n 3) 6 and 21; Srebotnjak and Esty (n 3)157; NASA (n 3); GLT, YCELP and CIESIN (n 3) 1-2; Emerson and others (n 3) 65.

9 DC Esty and others, '2005 Environmental Sustainability Index: Benchmarking National Environmental Stewardship' (YCELP 2005) 8 <http://archive.epi.yale.edu/files/2005_esi_report.pdf> accessed 1 October 2018.

10 United Nations Development Programme, 'Making Progress on Environmental Sustainability: lessons and recommendations from a review of over 150 MDG country experiences' [2006] 12 <www.cbd.int/doc/books/2009/B-03148.pdf> accessed 1 October 2018.

11 JW Emerson and others, '2012 Environmental Performance Index and Pilot Trend Environmental Performance Index' (YCELP 2012) 11 <https://wbc-rti.info/object/document/7519/attach/2012EPI_Report.pdf> accessed 1 October 2018; Esty and others, '2005 Environmental Sustainability Index' (n 9) 33.

12 Samuel-Johnson, Esty and Levy (n 3) 7.

13 Ibid.

14 Ibid, 8-9.

15 Esty and others, '2005 Environmental Sustainability Index' (n 9) 11.

16 Ibid, 393.

managed forests, fisheries, water quantity, water quality, air quality, landscape, biodiversity, and sensitive ecosystems."[17]

(ii) "The stresses on those systems; that is a country is environmentally sustainable if the levels of anthropogenic stress are low enough to engender no demonstrable harm to its environmental systems." [18] Indicators include: "air pollution, water pollution, water consumption, stresses on ecosystem functioning, waste and consumption, releases of toxins, carcinogens, and endocrine disruptors and other known or potentially hazardous chemicals, soil degradation, and population."[19]

(iii) "The human vulnerability to environmental change; that is a country is environmentally sustainable to the extent that people and social systems are not vulnerable (in the way of basic needs such as health and nutrition) to the environmental disturbances."[20] Indicators include: "food security, environmental health, susceptibility to environmentally-related natural disasters, and economic security."[21]

(iv) "The social and institutional capacity to cope with environmental challenges; that is a country is environmentally sustainable to the extent that it has in place institutions and underlying social patterns of skills, attitudes and networks that foster effective responses to environmental challenges."[22] Indicators include: "environmental governance, science and technology, private sector responsiveness to environmental challenges, and eco-efficiency."[23]

(v) "The ability to respond to the demands of global stewardship; that is a country is environmentally sustainable if it cooperates with other countries to manage common environmental problems, and if it reduces negative extra-territorial environmental impacts on other countries to levels that

17 Ibid, 393-394.
18 Ibid, 11.
19 Ibid, 394.
20 Ibid, 11.
21 Ibid, 394 - 395.
22 Ibid, 11.
23 Ibid, 395.

cause no serious harm."[24] Indicators include: "greenhouse gas emissions, participation in international collaboration, transboundary environmental pressures, and environmental impacts of trade, investment, and consumption flows." [25]

Although in 2006, the GLT, YCELP and CIESIN, developed another environmental indicator, that is, the environmental performance index (EPI).[26] However, it is necessary to note that the EPI neither replaces the ESI nor is it an extension of the ESI. The EPI is an independent index with different objectives from the ESI. The EPI seeks to measure cross-country environmental performance as opposed to the level of achieving environmental sustainability.[27]

Having identified the ESI as the most relevant tool in determining whether the activities of the Nigerian extractive industry entities has led to the maintenance of the environmental sink service, it is necessary to note that the ESI was designed to measure national or cross-country ES levels, and not that of industries. Notwithstanding, it is suggested that an adaptation of the ESI components might provide the suitable tool to examine the maintenance level of the environmental sink at the locations where the extractive industry activities take place. Thus, an adaptation of the ESI components as an extractive industry evaluation framework would read like this:

I. The environmentally sustainable extractive industry is one where environmental systems are maintained at healthy levels, constantly improving rather than deteriorating. Within the context of this research, 'environmental systems' refers to 'environmental sink

24 Ibid, 11.
25 Ibid, 395 - 396
26 DC Esty and others, 'Pilot 2006 Environmental Performance Index' (YCELP 2006) 7 <http://archive.epi.yale.edu/files/2006_pilot_epi_report.pdf> accessed 1 October 2018; A Hsu and others, '2016 Environmental Performance Index: Global Metrics for the Environment' (YU 2016) <https://wedocs.unep.org/bitstream/handle/20.500.11822/7501/-Global_metrics_for_the_environment_The_Environmental_Performance_Index_ranks_countries%E2%80%98_performance_on_high-priority_environmental_issues-2016glob.pdf?sequence=3&isAllowed=y> accessed 1 October 2018.
27 See NASA (n 3); GLT, YCELP and CIESIN (n 3) 1-2; Emerson and others (n 3) 65.

services';[28] that is "disposal services which reflect the functions of the natural environment as an absorptive sink for residuals."[29]

II. The environmentally sustainable extractive industry is one where its waste emissions are low enough not to cause demonstrable harm to the environmental systems.

III. The environmentally sustainable extractive industry is one where the host community is not exposed to environmental disturbances that affect the Nigerian citizen's right to a clean, safe and secure, healthy environment.

IV. The environmentally sustainable extractive industry is one with existing institutional, regulatory, and enforcement frameworks which provide adequate responses to environmental challenges.

V. The environmentally sustainable extractive industry is one whose environmental impact on other industries is reduced to a level as not to cause serious harm. Also, cooperates with other industries/ sectors to manage common environmental problems.

Although the ESI components are designed as measurement tools, this research seeks to use the adapted ESI components as a framework to critically examine the environmental sustainability profile of the Nigerian extractive industry. Thus, the focus is not to measure the progress level of the Nigerian extractive industry towards achieving ES, as this is not within the ambit of this research. The benefit of using the ESI components as a framework to analyse the Nigerian extractive industry is that it enables NEIHCs, industry stakeholders, policymakers, and the public to identify which component requires further improvement, thereby aiding the provision of adequate and targeted development in that component.

28 See R Goodland, 'The Concept of Environmental Sustainability' (1995) 26 ARES 1, 2, 5-6.

29 United Nations Department for Economic and Social Information and Policy Analysis, 'Studies in Methods: Glossary of Environment Statistics' (ST/ESA/STAT/SER.F/67, United Nations 1997) 30 <http://unstats.un.org/unsd/publication/SeriesF/SeriesF_67E.pdf> accessed 1 October 2018.

3 THE NIGERIAN EXTRACTIVE INDUSTRY AND THE ADAPTED ESI FIVE COMPONENTS

Within the context of this research, extractive industry connotes organisations whose primary operations involve exploring, extracting, and processing, of crude oil, natural gas, and solid minerals.[30] Namely, (i) the Nigerian government oil, gas, and solid minerals agencies – that is, Nigerian National Petroleum Corporation (NNPC)[31] and the Nigerian Mining Corporation;[32] (ii) indigenous and multinational owned oil, gas, and solid minerals companies; (iii) artisanal miners; and (iv) illegal entities engaging in such operations.

Taking cognisance that the Nigerian extractive industry comprises of both the petroleum and mining sectors, for ease of discussion, the operations of the extractive industry entities in these sectors is divided into two, namely the Nigerian energy extractive industry (NEEI) for the petroleum sector, and the Nigerian non-energy extractive industry (NNEI) for the mining sector.

3.1 How environmentally sustainable is the Nigerian Energy Extractive Industry (NEEI)?

Although NEEI operations began in 1908 when Nigeria was still a British colony,[33] however, it was not until 1956 that Shell D'Arcy discovered crude oil in commercial quantities at Oloibiri,[34] situated in present day Bayelsa State,[35] in the Niger Delta region. Due to its straddling characteristic,[36] crude oil

30 C Sigam and L Garcia, 'Extractive Industries: Optimizing Value Retention in Host Countries' (UNCTAD/SUC/2012/1, UNCTAD 2012) 3 <http://unctadxiii.org/en/SessionDocument/suc2012d1_en.pdf> accessed 1 October 2018; Financial Times, 'Definition of extractive industry' <http://lexicon.ft.com/Term?term=extractive-industry> accessed 1 October 2018.

31 S 5 Nigerian National Petroleum Corporation Act, Chapter 320, LFN 1990.

32 S 4 Nigerian Mining Corporation Act 1972 LFN 2004.

33 Nigerian National Petroleum Corporation (NNPC), 'History of the Nigerian Petroleum Industry' <http://nnpcgroup.com/nnpcbusiness/businessinformation/oilgasinnigeria/industryhistory.aspx> accessed 1 October 2018.

34 Ibid.

35 A Fentiman and N Zabbey, 'Environmental degradation and cultural erosion in Ogoniland: A case study of the oil spills in Bodo' (2015) 2 TEIS 615, 616; S Oyadongha and E Idio, '60 years after Nigeria's first crude: Oloibiri oil dries up, natives wallow in abject poverty' Vanguard (13 March 2016) <www.vanguardngr.com/2016/03/60-years-after-nigerias-first-crude-oloibiri-oil-dries-up-natives-wallow-in-abject-poverty/> accessed 1 October 2018.

36 P Stevens (ed), *Oil and Gas Dictionary: An Encyclopaedic Dictionary of Economic and Financial Concepts and Terms* (Springer 1988) 37.

exploitation and exploration cover eight other neighbouring states, and they are Ondo, Edo, Delta, Imo, Rivers, Abia, Akwa Ibom, and Cross River.[37]

According to Ako, 'Niger Delta' can be defined from either a political, economic, or geographical perspective.[38] From a political delineation, 'Niger Delta' refers to "the south-south political zone of Nigeria, consisting of six states, that is, Akwa Ibom, Bayelsa, Cross River, Edo, Delta, and Rivers."[39] Geographically, the term 'Niger Delta' refers to the "area covered by the natural delta of the Niger River and the areas to the east and west."[40] States that make up this area are Rivers, Delta, and Bayelsa state.[41] As an economic definition, 'Niger Delta', is used to describe all the petroleum producing states in Nigeria, which currently are Abia, Akwa-Ibom, Bayelsa, Cross-River, Delta, Edo, Imo, Ondo, and Rivers state.[42]

Pursuant to section 30 of the Niger-Delta Development Commission Act 2000, 'Niger Delta' can also be used to describe any oil-producing state in Nigeria.[43] Based on this provision, it suggested that given that Lagos state officially joined the league of Nigerian oil-producing states in 2016,[44] Lagos State can be categorised as part of the Niger Delta oil-producing states.[45] In addition to Lagos state, although crude oil is said to have been found in commercial quantities in Kogi, Enugu, and Anambra states, however, they are yet to be declared oil-producing states.[46] It is necessary to note that there has been

37 Niger Delta Development Commission (NDDC), 'Niger Delta Regional Development Master Plan: Niger Delta Region Land and People' 74 <http://nddc.gov.ng/NDRMP%20Chapter%201.pdf> accessed 1 October 2018.

38 RT Ako, 'Resolving the conflicts in Nigeria's oil industry – A critical analysis of the role of public participation' (PhD Thesis, University of Kent 2009) 81.

39 Nigeria is divided into six geo-political zones and they are: the North-East, North-West, North-Central, South-East, South-West, and South-South – see Ako (n 38) 82; African Development Bank (AfDB), Organisation for Economic Co-operation (OECD) and Development and United Nations Development Programme (UNDP), 'Regional Development and Spatial Inclusion: African Economic Outlook 2015' [2015] 184 <www.un.org/en/africa/osaa/pdf/pubs/2015afrecooutlook-afdb.pdf> accessed 1 October 2018.

40 PO Oviasuyi and J Uwadiae, 'The Dilemma of Niger-Delta Region as Oil Producing States of Nigeria' [2010] JPCD 110, 117.

41 Ako (n 38) 82.

42 S 30 Niger Delta Development Commission Act 200, CAP N86, LFN 2004. Hereafter referred to as NDDC Act 2000.

43 Ibid.

44 T Alao, 'Lagos officially joins oil producing states' *The Guardian* (17 May 2016) <https://guardian.ng/news/lagos-officially-joins-oil-producing-states/> accessed 1 October 2018.

45 E Alike, 'Ambode: Lagos to start getting 13% Derivation Fund from December' *Thisday* (16 November 2016) <www.thisdaylive.com/index.php/2016/11/16/ambode-lagos-to-start-getting-13-derivation-fund-from-december/> accessed 1 October 2018.

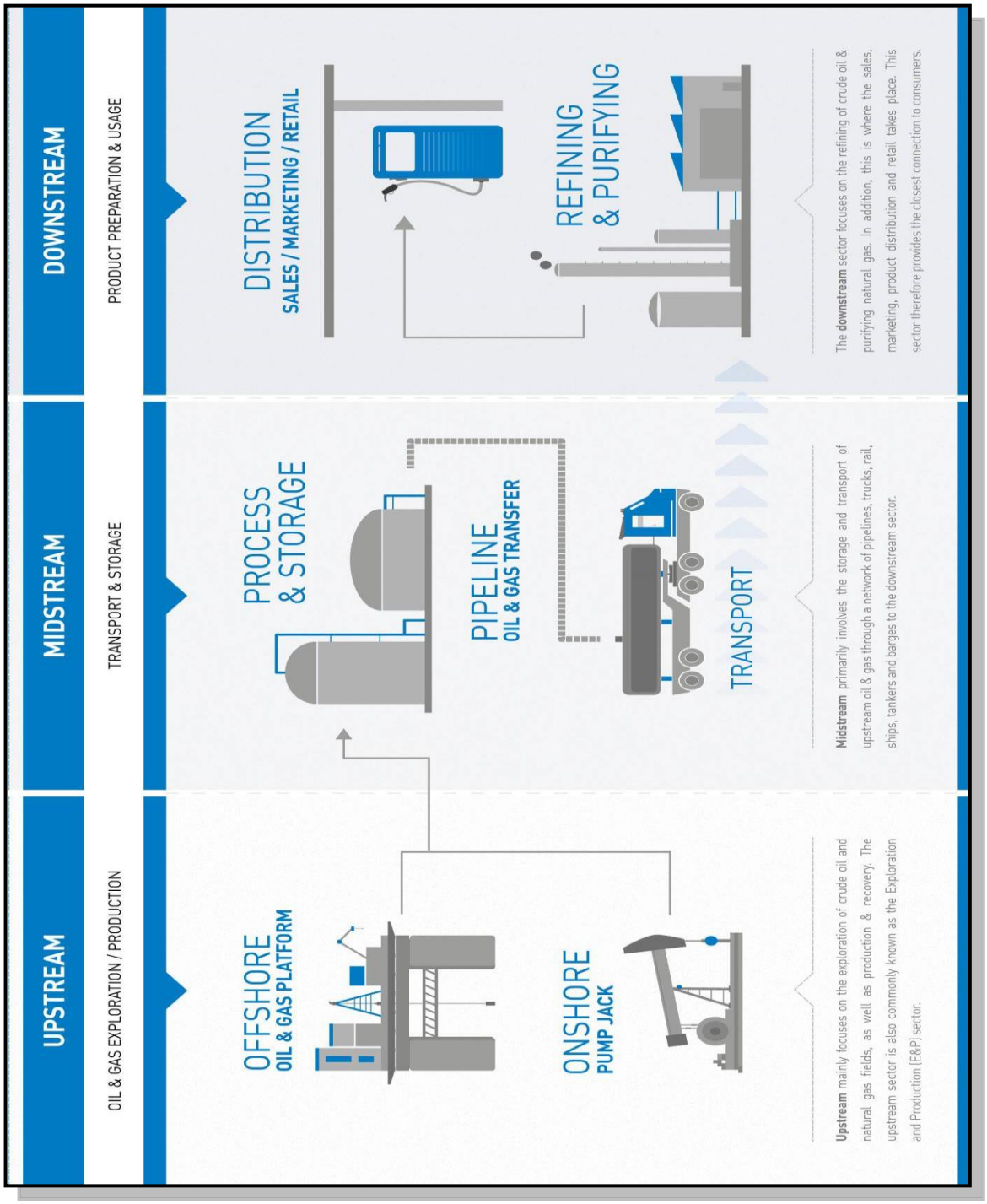
46 N Ayitogo, 'Reps want Kogi, Enugu, Anambra declared oil producing states' (9 March 2017) *Premium Times* <www.premiumtimesng.com/news/top-news/225686-reps-want-kogi-enugu-anambra-declared-oil-producing-states.html> accessed 1 October 2018.

ongoing petroleum exploitation in the northern parts of Nigeria, in search of crude oil and natural gas.[47] Thus, if crude oil is found in commercial quantities in the northern part of Nigeria, this research argues that the area might be ensconced within the Niger Delta economic definition.[48]

47 See Nkemjioka and S Matori, *Oil Exploration in Northern Nigeria: Problems and Prospects* (GML 2003); M Eboh, 'Intensify oil exploration in Northern Nigeria, Presidency order NNPC' *Vanguard* (26 July 2016) <www.vanguardngr.com/2016/07/presidency-orders-nnpc-intensify-oil-exploration-northern-nigeria/> accessed 1 October 2018.

48 M Eboh, 'Crude oil discovered in Borno State – FG' *Vanguard* (16 December 2016) <www.vanguardngr.com/2016/12/crude-oil-discovered-in-borno-state-fg/> accessed 1 October 2018.

Figure 1: Image showing the different segments of the oil and gas industry[49]



49 See ECOM Instruments, 'Oil and Gas Industry' <www.ecom-ex.com/solutions/sectors/oil-gas-industry/> accessed 22 September 2018.

The NEEI is made up of the upstream, midstream, and downstream segments,[50] with operations taking place both offshore and onshore.[51] Given the diverse meaning of the term 'Niger Delta' as seen above, it is necessary to note that within the context of this research, 'Niger Delta' broadly refers to host communities where NEEI upstream, midstream, and downstream operations take place.

According to Waskow and Welch, irrespective of the level of environmental regulation, each phase of petroleum development has an adverse impact on every abiotic component, namely air, water, and land.[52] In addition, Vinogradov describes the industry as being characteristically environmentally intrusive, based on the several environmental problems encountered throughout its development cycle. [53]

As early as the 1980s, there has been continual publications on the environmental pollution and degradation arising from the NEEI.[54] In 2006, the Federal Ministry of Environment in collaboration with Nigeria Conservation Foundation, WWF UK, and CEESP-IUCN Commission on Environmental, Economic, and Social Policy, [55] and the United Nations Development Programme (UNDP), [56] respectively, produced extensive reports on the impact the NEEI has had on the Niger Delta. Similarly, in 2011, under the auspices of the United Nations Environmental Programme (UNEP), another report on the negative impact the NEEI has on its NEIHCs was published.[57]

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50 NNPC (n 33); Sigam and Garcia (n 30) 3.

51 T Falola and A Genova, *The Politics of the Global Oil Industry: An Introduction* (GPG 2005) 9; OCD Anejionu, PAN Ahiarammunnah and CJ Nri-ezedi, 'Hydrocarbon pollution in the Niger Delta: Geographies of impacts and appraisal of lapses in extant legal framework' (2015) 45 RP 65, 67.

52 See D Waskow and C Welch, 'The Environmental, Social, and Human Rights Impacts of Oil Development' in S Tsalik and A Schiffrin (eds), *Covering Oil: A Reporter's Guide to Energy and Development* (OSI 2005) 102; Sigam and Garcia (n 30) 14; AE Ite and others, 'Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta' (2013) 1 AJEP 78, 82; Earthworks, 'Oil and Gas Pollution Fact Sheet' [2006] <https://earthworks.org/cms/assets/uploads/archive/files/publications/Oilandgaspollution.pdf> accessed 1 October 2018.

53 S Vinogradov, 'Environmental protection in petroleum industry' in C Amadei (ed), *Encyclopaedia of Hydrocarbons; Volume IV Hydrocarbons: Economics, Policies and Legislation* (FDGTSpA 2007) 507 <www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Scienze_applicate/enciclopedia/inglese/inglese_vol_4/507-524_x10.3x_ing.pdf> accessed 1 October 2018.

54 See fn 1.

55 Federal Ministry of Environment and others (n 1).

56 UNDP (n 1).

57 UNEP (n 1); UNDP and GEF (n 1). Note, the UNEP report is the current comprehensive report.

Although there is no dearth of information on the environmentally unsustainable operations of the NEEI, however, none of the existing literature has applied the ESI components as a framework in discussing this issue. Therefore, using the adapted ESI components (I, II, III, and V), this section shall examine how the NEEI operations have impacted on the environmental systems, host communities, and other industries – mainly agriculture. The agriculture industry is highlighted because it is indicated as the immediate industry that is often affected when operations of the extractive industry entities result in environmental degradation and pollution.[58] Also, bearing in mind that the NEEI operations take place both off-shore and on-shore, it is essential to specify that the operations being examined in this research are limited to the on-shore operations.

3.1.1 NEEI impact on environmental systems

Nigeria is described as the largest wetland in Africa and the third largest globally.[59] A large proportion of Nigeria's wetland is located at the Niger Delta,[60] which is indicated amongst the "ten most important wetlands and marine ecosystems in the world."[61] The Niger Delta is described as being rich in biodiversity and is home to a large number of national and international endangered plants and animals.[62] The term 'biodiversity' refers to the

58 See generally I Okonta and O Douglas, *Where Vultures Feast: Shell, Human Rights, and Oil in the Niger Delta* (Reprint, Verso 2003); TG Apata and J Ayo 'Linkages between Crude-oil Exploration and Agricultural Development in Nigeria: Implications for relevant qualitative data collection and analysis to improve rural economy' (Third Wye City Conference, Washington, May 2010) <www.fao.org/economic/ess/ess-capacity/wyegroup/wye3/en/> accessed 1 October 2018; IB Odafe and OB Titus, 'Implications of Oil Exploration on Agricultural Development in Delta State, Nigeria' (2013) 2 IJHSSI 59; TA Abii and PC Nwosu, 'The Effect of Oil-Spillage on the Soil of Eleme in Rivers State of the Niger-Delta Area of Nigeria' (2009) 3 RJES 316; J Ahmadu and J Egbodion, 'Effect of Oil Spillage on Cassava Production in Niger Delta Region of Nigeria' (2013) 3 AJEA 914; OM Adekola and M Igwe, 'Effects of Oil Spillage on Community Development in the Niger Delta Region: Implications for the Eradication of Poverty and Hunger (Millennium Development Goal One) in Nigeria' (2013) 1 WJSS 27; ZA Elum, K Mopipi and A Henri-Ukoha, 'Oil exploitation and its socioeconomic effects on the Niger Delta region of Nigeria' (2016) 23 ESPR 12889.

59 B Manby, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (HRW 1999) 49; CNC Ugochukwu and J Ertel, 'Negative impacts of oil exploration on biodiversity management in the Niger De area of Nigeria' (2008) 26 IAPA 139, 141; O Adekola and G Mitchell, 'The Niger Delta wetlands: threats to ecosystem services, their importance to dependent communities and possible management measures' (2011) 7 IJBSESM 50, 51.

60 Manby (n 59) 49; PC Mmom and SB Arokoyu, 'Mangrove Forest Depletion, Biodiversity Loss and Traditional Resources Management Practices in the Niger Delta, Nigeria' (2010) 2 JASET 28, 29.

61 Federal Ministry of Environment and others (n 1) 1; AA Kadafa, 'Oil Exploration and Spillage in the Niger Delta of Nigeria' (2012) 2 CER 38, 38.

62 Manby (n 59) 49; Federal Ministry of Environment and others (n 1) 1. See UNDP and GEF (n 1) 7-11,161-164 for detailed discussion on the Niger Delta biodiversity.

miscellany of life on earth, ranging from humans to bacteria.[63] Biodiversity is essential to the human well-being as its services include the production of medicines, air and water purification, cycling of nutrients, shelter, food, drought and flood control, fresh water, and clean air.[64] Wagner and Armstrong, describe biodiversity as simply "the basis for the earth's life support system."[65] According to the UNDP and GEF report, factors which principally threaten the Niger Delta biodiversity include "pollution, habitat degradation and land-use change, over-harvesting of natural resources, and invasive alien species."[66] The report finds that not all the threats stem from the operations of the NEEI.[67] The threats which arise from NEEI operations are: "oil pollution which affects both land and water; gas flaring; and the clearing of lands for establishing oil wells, pipelines, and plants."[68]

Section 37 of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007,[69] defines 'pollution' as "manmade or man-aided alteration of the chemical, physical, or biological quality of the environment beyond acceptable limits."[70] Given this definition, Ndukwe emphasises that the issue is not the alteration but that such alteration is damaging to the environment.[71] Ekundayo, Olakunle and Ekundayo, describe pollution as "the undesirable change in the physical and biological characteristics of all the components of an environment."[72] Adedeji and Adetunji, define pollution as "the addition of a material or substance that is potentially harmful to life, at a rate faster than the ecosystem can accommodate."[73] Osuide states that pollution is a threat to human health, natural systems, and aesthetic sensibilities.[74] From these definitions, it is evident that any activity of the NEEI which leads to the entrance of a

63 J Wagner and K Armstrong, 'Managing environmental and social risks in international oil and gas projects: Perspectives on compliance' (2010) xx JWELB 1, 8.
64 Ibid.
65 Ibid.
66 UNDP and GEF (n 1) 31.
67 See also IG Jackson, 'Mangrove Resources Utilization in Nigeria: An Analysis of the Andoni Mangrove Resources Crisis' (2011) 1 SJES 49, 60. The author identifies increasing population as one of the threats.
68 UNDP and GEF (n 1) 31-32.
69 Hereafter referred to as NESREA Act 2007.
70 NESREA Act 2007 (n 69).
71 OU Ndukwe, *Elements of Nigerian Environmental Laws* (UCP 2000) 8.
72 FO Ekundayo, OF Olukunle and EA Ekundayo, 'Biodegradation of Bonnylight crude oil by locally isolated fungi from oil contaminated soils in Akure, Ondo State' (2012) 8 MJM 42, 42.
73 OB Adedeji and VE Adetunji, 'Aquatic Pollution in Nigeria: the Way Forward' (2011) 5 AEB 2024, 2025.
74 SO Osuide, 'Environmental Pollution in Nigeria' (1990) 14 HI 5, 5.

substance or material at such a rate faster than the environmental sink can accommodate, consequently causing damaging alterations to the chemical, physical, and biological components of the environmental sink; that activity can be described as being environmentally unsustainable.

Hence, combining adapted ESI components I and II, this subsection investigates whether the operations of the NEEI has led to (i) healthy-level maintained environmental systems, and (ii) environmental systems that have not been impaired by NEEI operations waste emissions. This is examined under three headings: (a) alteration from land clearing for exploration, pipeline laying, and others; (b) oil spillage; and (c) gas flaring.

3.1.1.1 The alteration from land clearing for exploration, pipeline laying, and others

As indicated above, every phase of oil and gas exploitation, exploration, and production, creates the ambience for harmful alterations of the physical, biological, and chemical components of the environment. These sources include:

i. The use of explosives during seismic survey which causes cracks in NEIHCs houses, noise pollution, scares wildlife, and generally damage the physical, biological, and chemical components of the area.[75]

ii. Dredging and building of canals increase turbidity; causes fragmentation of habitats; acidification of waterbodies; disrupt traditional fishing grounds; eliminates the natural boundary between saltwater and freshwater, leading to the invasion of salt water in the hitherto freshwater area.[76]

iii. Clearing land to lay seismic lines and pipelines leads to the destruction of pristine forests and the destruction of hitherto

75 Ugochukwu and Ertel (n 59) 143; EC Onwuka, 'Oil extraction, environmental degradation and poverty in the Niger Delta region of Nigeria: a viewpoint' (2005) 62 IJES 655, 658; TR Ajayi and others, 'Natural radioactivity and trace metals in crude oils: implication for health' (2009) 31 EGH 61, 62.

76 UNDP and GEF (n 2) 36; Manby (n 59) 63-4; Anejionu, Ahiarammunnah and Nri-ezedi (n 51) 72.

protected habitat by making prior inaccessible forest accessible to hunters, loggers, and invasive species.[77]

iv. Open and unlined pits which contain "toxic wastes, drill cuttings, cement slurry/dust, condemned pipes, filter, and machinery parts."[78]

v. Inadequate disposal of drilling mud, run-off of oil and water injected into well, and other fluids used for well treatment.[79]

vi. The pipelines consisting of crude oil, gas, and other petroleum products run across the mangrove swamps, creeks, and rivers – areas that are "fragile and highly sensitive to stress."[80] These pipelines cause the destruction of the seabed and sensitive estuaries during installation; erosion and flooding due to the removal of vegetation and soil during installation; leaking pipelines can cause water pollution;[81] and obstruct access to farmlands and waterways.[82]

vii. The pipelines are situated close to residential areas and accessible to potential vandals.[83] Pipeline vandalisation can cause oil spill and fire explosion, leading to human, fauna, and flora mortality,[84] also "elimination of whole populations of endangered species."[85]

77 UNDP and GEF (n 1) 36; M Osti and others, 'Oil and gas development in the World Heritage and wider protected area network in sub-Saharan Africa' (2011) 20 BC 1863, 1864; S Pegg and N Zabbey, 'Oil and water: the Bodo spills and the destruction of traditional livelihood structures in the Niger Delta' (2013) 18 CDJ 391, 393; B Anifowose and others, 'Attacks on oil transport pipelines in Nigeria: A quantitative exploration and possible explanation of observed patterns' (2012) 32 AG 636, 636.

78 UNDP and GEF (n 1) 36.

79 CS Egedeuzu and IC Nnorom , 'Total Petroleum Hydrocarbon and Metal Contents of Soil, Plant and Borehole Water Samples from Crude Oil Spill Sites in Owaza, Abia State' (2013) 3 ABSUJEST 405, 405; Anejionu, Ahiarammunnah and Nri-ezedi (n 51) 68.

80 FA Ogwu, 'Challenges of Oil and Gas Pipeline Network and the role of Physical Planners in Nigeria' (2011) 10 FORUMEJ 41, 43; FC Onuoha, 'Oil pipeline sabotage in Nigeria: Dimensions, actors and implications for national security' (2008) 17 ASR 99, 103.

81 Ibid, 43.

82 Ibid, 47.

83 Ogwu (n 80) 47; KN Aroh and others, 'Oil spill incidents and pipeline vandalisation in Nigeria; Impact on public health and negation to attainment of Millennium development goal: the Ishiagu example' (2010) 19 DPM 70, 74; N Zabbey, K Sam and AT Onyebuchi, 'Remediation of contaminated lands in the Niger Delta, Nigeria: Prospects and challenges' (2017) 586 STE 952, 961.

84 Ogwu (n 80) 43; EO Omodanisi, AO Eludoyin, and AT Salami, 'A multi-perspective view of the effects of a pipeline explosion in Nigeria' (2014) 7 IJDRR 68, 72; Aroh and others (n 83) 75; Anejionu, Ahiarammunnah and Nri-ezedi (n 51) 69; FO Okorodudu, PO Okorodudu and EK Irikefe, 'A Model of Petroleum Pipeline Spillage Detection System for use in the Niger Delta Region of Nigeria' (2016) 4 IJRG 1, 3; Kadafa (n 61) 44.

85 Ugochukwu and Ertel (n 59) 144.

3.1.1.2 Oil Spillage

Oil spillage is indicated as one of the major conduits of environmental degradation and pollution, consequent of the activities of the NEEI entities.[86] The sources of oil spillage include: pipeline vandalization and sabotage; pipeline explosion; pipeline leakage due to internal or external corrosion, operational accidents, or machine failure; oil tanker accidents; refinery effluents; carelessness during loading and unloading vessels; well blowouts; failure to adequately control oil wells; ground erosion; storage facility failure; and human error.[87]

In Nigeria, oil spillage is a frequent occurrence,[88] which according to the World Bank, averages around 6.6 million gallons annually.[89] See Figure 2 and Figure 3 below for an illustration of the magnitude and scope of oil spillage in Nigeria. The satellite images show that the oil spill is not limited to the Niger Delta region but extends to the northern parts of Nigeria (examples are Zaria and Gombe).[90] The fact that oil spillage is not limited to areas where the crude oil is explored and produced indicates that oil spillage is a national challenge and supports this study's definition of Niger Delta as host communities where NEEI upstream, midstream, and downstream operations take place.

86 See DF Ogeleka, LE Tudararo-Aherobo and FE Okieimen, 'Ecological effects of oil spill on water and sediment from two riverine communities in Warri, Nigeria' (2017) 11 IJBCS 453, 453; Anejionu, Ahiarammunnah and Nri-ezedi (n 51) 68; E Okoko, 'Women and Environmental Change in the Niger Delta, Nigeria: Evidence from Ibeno' (1999) 6 GPC 373, 373; BA Ugbomeh and AO Atubi, 'The Role of the Oil Industry and the Nigerian State in Defining the Future of the Niger Delta Region of Nigeria' (2010)4 ARR 103, 109.

87 Ugochukwu and Ertel (n 59) 143; UNDP and GEF (n 2) 33; Kadafa (n 61) 42; E Adishi and MO Hunga, 'Oil Theft, Illegal Bunkering and Pipeline Vandalism: Its's impact on Nigeria Economy, 2015-2016' (2017) 3 IIARDIJEBM 47, 55; Okorodudu, Okorodudu and Irikefe (n 84) 4; IE Daniel and PJ Nna, 'Total Petroleum Hydrocarbon Concentration in Surface Water of Cross River Estuary, Niger Delta, Nigeria' [2016] AJEE 1, 2; Anejionu, Ahiarammunnah and Nri-ezedi (n 51) 68; TM Kayode-Isola and others, 'Response of Resident Bacteria of a Crude Oil-Polluted River to Diesel Oil' (2008) 1 AEJA 6, 6; AN Nwachukwu and JC Osuagwu, 'Effects of Oil Spillage on Groundwater Quality in Nigeria' (2014) AJER 271, 271; K Sam, F Coulon and G Prpich, 'A multi-attribute methodology for the prioritisation of oil contaminated sites in the Niger Delta' (2017) 579 STE 1323, 1325; Ugochukwu, Ertel and Schmidt (n 15) 152; JK Nduka, FO Obumselu, and NL Umedum, 'Crude Oil and Fractional Spillages Resulting from Exploration and Exploitation in Niger-Delta Region of Nigeria: A Review About the Environmental and Public Health Impact' in M Younes (ed), *Crude Oil Exploration in the World* (IT 2012) 51-52.

88 Ogeleka, Tudararo-Aherobo and Okieimen (n 86) 453-454; Okoko (n 86) 375; Federal Republic of Nigeria, 'Nigeria's Path to Sustainable Development through Green Economy: Country Report to the Rio+20 Summit' [2012] 31 <https://sustainabledevelopment.un.org/content/documents/1023nigerianationalreport.pdf> accessed 1 October 2018.

89 UNDP and GEF (n 1) 33.

90 National Oil Spill Detection and Response Agency (NOSDRA), 'Nigerian Oil Spill Monitor' <https://oilspillmonitor.ng/> accessed 1 October 2018.

Research highlight the adverse effects oil spillage has on humans, animals, vegetation, soil, air, and water.[91] According to Ugochukwu and Ertel, most reported oil spillage occur in the mangrove swamp forest of the Niger Delta.[92] Based on their physiology, the mangroves are extremely vulnerable to oil pollution.[93] The presence of bacteria at the oil spillage sites in the mangrove area create "dead zones were no marine, or aquatic life can be sustained."[94] Oil spillage contaminates the soil, reducing oxygen and increasing acidity; hence decreases soil fertility; hindering vegetation and food crop growth.[95] Oil spill also contaminates surface and groundwater.[96] Seafood and fishing gears can be tainted by oil spillage; tainted seafood acquires "an objectionable oil-derived taste."[97] According to the UNDP and GEF report, there is the absence of reliable figures indicating the "extent and condition of the Niger Delta mangrove forest in relation to the oil spill."[98] However, from the UNEP report, it is evident that:

1. "Oil pollution in many intertidal creeks left mangroves denuded of leaves and stems, leaving roots coated in bitumen-like substance and since

91 Including but not limited to: UNEP (n 1); UNDP (n 1); Federal Ministry of Environment and others (n 1); UNDP and GEF (n 1); International Tanker Owners Pollution Federation Limited, 'Effects of Oil Pollution on the Marine Environment' (Technical Information Paper 13, ITOPF 2014) <www.itopf.com/knowledge-resources/documents-guides/document/tip-13-effects-of-oil-pollution-on-the-marine-environment/> accessed 1 October 2018.

92 Ugochukwu and Ertel (n 59) 144. See also Figure 3: Satellite Image of Oil Spills in Nigeria (2).

93 International Tanker Owners Pollution Federation Limited, 'Effects of Oil Pollution on the Marine Environment' (n 91) 8; UNDP and GEF (n 1) 33-34. For detailed exposition on the impact oil pollution has on mangrove – see NC Duke, 'Oil spill impacts on mangroves: Recommendations for operational planning and action based on a global review' (2016) 109 MPB 700.

94 UNDP and GEF (n 1) 34; SO Aghalino and B Eyinla, 'Oil Exploration and Marine Pollution: Evidence from the Niger Delta, Nigeria' (2009) 28 JHE 177, 180; Zabbey, Sam and Onyebuchi (n 83) 956.

95 JN Okereke, SO Obiekezie and KO Obasi, 'Microbial flora of oil-spilled sites in Egbema, Imo State, Nigeria' (2007) 6 AJB 991, 993; OE Essien and IA John, 'Impact of Crude-Oil Spillage Pollution and Chemical Remediation on Agricultural Soil Properties and Crop Growth' (2010) 14 JASEM 147, 147; MO Onuh, DK Madukwe and GU Ohia, 'Effects of Poultry Manure and Cow Dung on the Physical and Chemical Properties of Crude Oil Polluted Soil' (2008) 3 SWJ 45, 45.

96 JKC Nduka, E Constance and E Obiakor, 'Selective Bioaccumulation of Metals by Different Parts of Some Fish Species from Crude Oil Polluted Water' (2006) 77 BECT 846, 846; INE Onwurah and others, 'Crude Oil Spills in the Environment, Effects and Some Innovative Clean-up Biotechnologies' (2007) 1 IJER 307, 307; Nwachukwu and Osuagwu (n 87) 271; FM Adebiyi and AF Adeyemi, 'Determination of the contamination profile of groundwater in the vicinity of petroleum products retailing stations in Nigeria' (2015) 26 MEQIJ 250, 250; OC Eneh, 'Crippling Poverty Amidst Corporate Social Actions: A Critique of Peripheral Corporate Community Involvement in the Niger Delta Region of Nigeria' (2011) 1 AJRD 1, 2.

97 International Tanker Owners Pollution Federation Limited, 'Effects of Oil Pollution on Fisheries and Mariculture' (Technical Information Paper 11, ITOPF 2014) 2 <www.itopf.com/knowledge-resources/documents-guides/document/tip-11-effects-of-oil-pollution-on-fisheries-and-mariculture/> accessed 1 October 2018; Manby (n 59) 61.

98 UNDP and GEF (n 1) 34.

mangroves are spawning areas for fish and nurseries for juvenile fish, the extensive pollution impacts the fish life-cycle as well."[99]

2. "Absence of continuous clay layer on the land thus exposing groundwater to hydrocarbons spilt on the surface."[100]

3. "Crops in areas directly impacted by oil spills get damaged, and root crops such as cassava become unusable."[101]

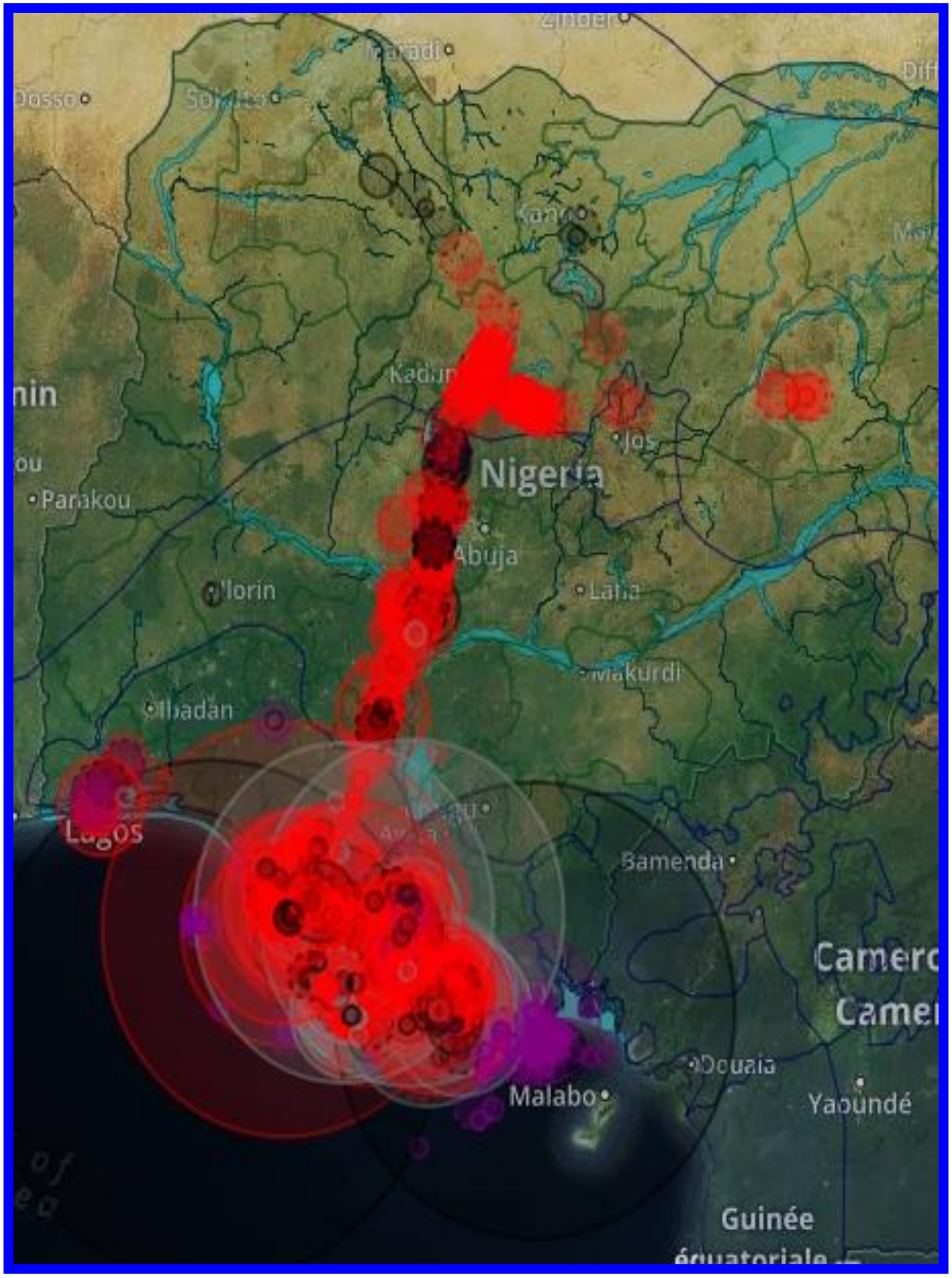
4. "Oil spills lead to fire break out which in turn destroy vegetation and create a crust over the land, making remediation and revegetation difficult."[102]

5. "The surface water throughout the creeks contained hydrocarbons; floating layers of oil varying from thick black oil to thin sheens."[103]

6. "The wetlands around the Niger Delta are highly degraded and face disintegration."[104]

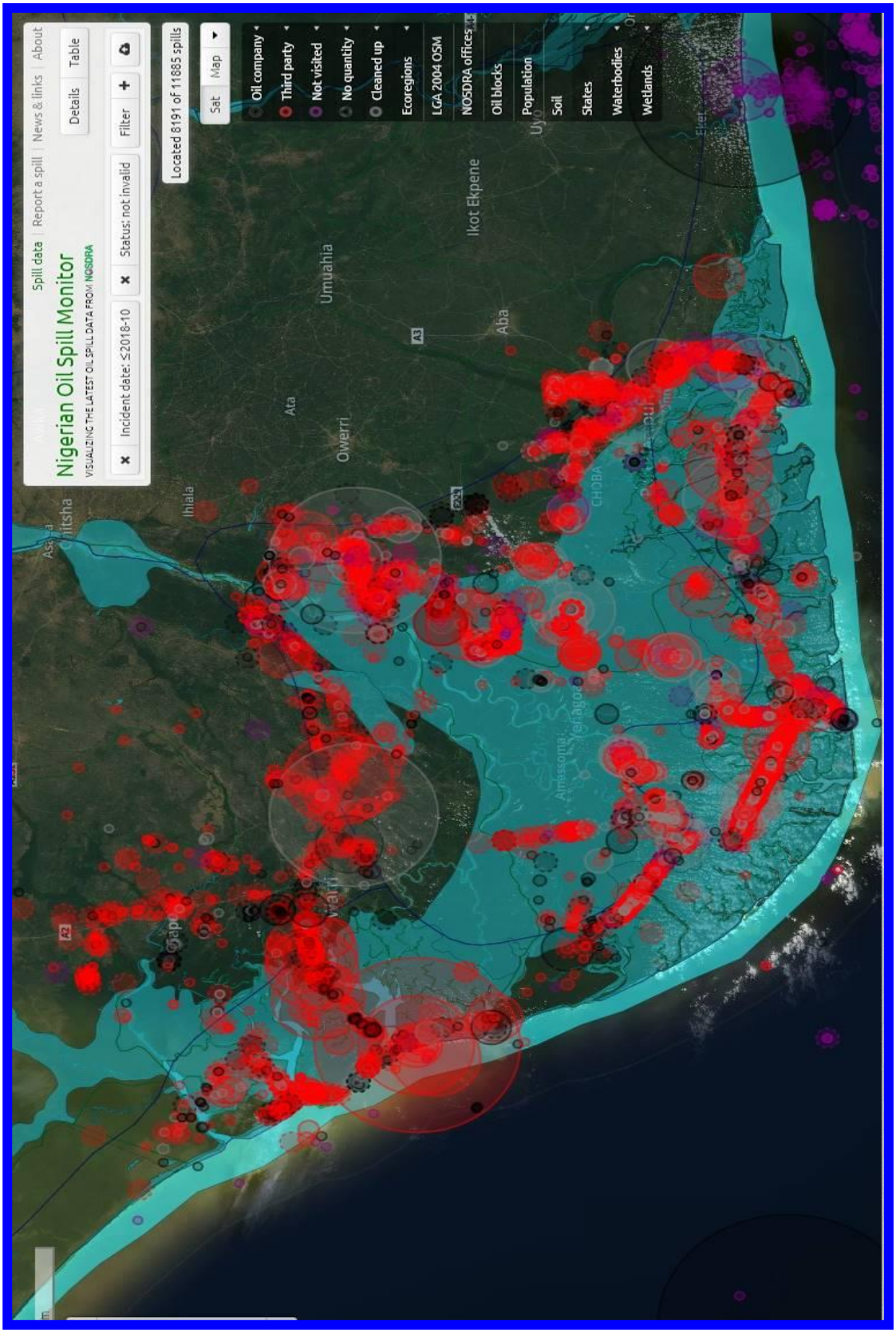
99 UNEP (n 1) 10.
100 Ibid, 9.
101 Ibid, 10.
102 Ibid.
103 Ibid.
104 Ibid.

Figure 2: Satellite Image of Oil Spills in Nigeria (1)[105]



105 NOSDRA, 'Nigerian Oil Spill Monitor' (n 172).

Figure 3: Satellite Image of Oil Spills in Nigeria (2)[106]



106 NOSDRA, 'Nigerian Oil Spill Monitor' (n 172).

3.1.1.3 Gas Flaring

Similar to oil spillage, gas flaring is indicated as a significant source of environmental degradation and pollution resulting from the activities of the NEEI entities.[107] Ekpoh and Obia refer to the oil spill and gas flare as the "twin evils that accompany petroleum development."[108] There are three types of gas flaring: emergency, process, and production.[109] The prevalent type of gas flare that is experienced in Nigeria is production flare,[110] and this refers to where flaring is continuously carried out for as many years as the oil is explored and produced.[111]

Natural gas can either be associated or non-associated. Nigeria's natural gas is predominantly associated and less non-associated. [112] Associated gas presents itself as either "gas-cap associated gas overlaying the oil phase in the reservoir," [113] or "associated gas dissolved in the oil at the reservoir conditions."[114] Associated natural gas is usually considered a nuisance[115] as it is impossible to produce the crude oil, without having to produce the associated gas simultaneously.[116] There are three ways petroleum producers address the issue of associated gas, namely, (i) the gas is "injected back into the well to help maintain the reservoir pressure, which aids the flow mid extraction of oil."[117] (ii) The associated gas is harnessed for commercial or

107 OCD Anejionu, GA Blackburn and JD Whyatt, 'Satellite survey of gas flares: development and application of a Landsat-based technique in the Niger Delta' (2014) 35 IJRS 1900, 1920; A Babatunde, 'The Impact of Oil Exploration on the Socio-Economic Life of the Ilaje-Ugbo People of Ondo State, Nigeria' (2010) 12 JSDA 61, 64; Okoko (n 86) 375.

108 IJ Ekpoh and AE Obia, 'The role of gas flaring in the rapid corrosion of zinc roofs in the Niger Delta Region of Nigeria' (2010) 30 Environmentalist 347, 347.

109 OG Fawole, XM Cai and AR MacKenzie, 'Gas flaring and resultant air pollution: A review focusing on black carbon' (2016) 216 EP 182, 187.

110 Ugochukwu, Ertel and Schmidt (n 15) 152.

111 Fawole, Cai and MacKenzie (n 109) 187.

112 NC Maduekwe, 'The Nigerian Natural Gas Industry: Critical Policies and Legal Issues' (Nigeria Annual International Conference and Exhibition, Lagos, August 2015) 6 <www.onepetro.org/conference-paper/SPE-178270-MS> accessed 1 October 2018; UJ Orji, 'Moving from gas flaring to gas conservation and utilisation in Nigeria: a review of the legal and policy regime'[2014] OPECER 149,149.

113 A Rojey, *Natural Gas: Production, Processing, Transport* (ÉT 1997) 15.

114 Ibid.

115 DG Howell and others, 'An Introduction to "The Future of Natural Gas" in DG Howell (ed), *The Future of Energy Gases* (USGSPP 1993) 3.

116 Rojey (n 113) 18.

117 Orji (n 112) 150; Howell and others (n 115) 3.

domestic use, or (iii) disposed of through combustion (also known as venting or flaring).[118]

As at 1958 when crude oil production actively began in Nigeria,[119] "natural gas was a relative newcomer as an important fuel on the world energy scene,"[120] and as such, there was low demand for natural gas and high demand for crude oil.[121] Thus, given the focus on crude oil production, the infrastructures were neither designed to inject the associated gas back into the oil well nor harnessing for domestic or international use. In the absence of these provisions, gas flaring became the adopted practice.[122] Although, when compared to the 1950s, there is progressive development in the natural gas market, such that 22% of world's energy stems from natural gas,[123] however, the NEEI continue the practice of flaring gas. This is in addition to the several gas flaring deadlines, policies, and legal frameworks set by the Nigerian government to arrest the situation.[124] According to the Global Gas Flaring Reduction Partnership (GGFR) data, Nigeria ranks amongst the top-ten nation-states with the highest records of gas flaring.[125] Figure 4 and Figure 5 shows the extent of the gas flare in Nigeria.

Gas flaring has been found to negatively impact on humans, animals, vegetation, air, water, and soil.[126] Gas flares constitute the primary source of black carbon,[127] which is indicated as the second highest global warming contributor, after carbon dioxide.[128] In addition to black carbon, gas flares

118 Orji (n 112) 150; Howell and others (n 115) 3.
119 NNPC (n 33).
120 M Radetzki, 'World Demand for Natural Gas: History and Prospects' (1994) 15 TEJ 219, 220.
121 See Table 1 – Radetzki (n 120) 220; OCD Anejionu and others, 'Contributions of gas flaring to a global air pollution hotspot: Spatial and temporal variations, impacts and alleviation' (2015) 118 AE 184, 184.
122 Orji (n 112) 150; Anejionu and others (n 121) 184; AS Abdulkareem and JO Odigure, 'Economic Benefit of Natural Gas Utilization in Nigeria: A Case Study of the Food Processing Industry' (2010) 5 ES 106, 106; SO Giwa and others, 'Gas flaring attendant impacts of criteria and particulate pollutants: A case for Niger Delta region of Nigeria' [2017] JKSU 1, 1.
123 International Energy Agency, 'Natural Gas' <www.iea.org/topics/naturalgas/> accessed 1 October 2018.
124 Maduekwe (n 112) 7-10 and 24-25; US Energy Information Administration, 'Country Analysis Brief: Nigeria' 14 <www.eisourcebook.org/cms/January%202016/Nigeria%20Country%20Analysis%20Brief.pdf> accessed 1 October 2018; Federal Republic of Nigeria (n 88) 31; Ite and others (n 52) 83; EJ Dung, LS Bombom and TD Agusomu, 'The effects of gas flaring on crops in the Niger Delta, Nigeria' (2008) 73 GJ 297, 297.
125 Global Gas Flaring Reduction Partnership (GGFR), 'Top 30 flaring countries (2013-16)' <www.worldbank.org/en/programs/gasflaringreduction#7> accessed 1 October 2018.
126 See fn 91.
127 Giwa and others (n 122) 1; Fawole, Cai and MacKenzie (n 109) 183 and 187; Ite and others (n 52) 83.
128 Fawole, Cai and MacKenzie (n 109) 188.

produce up to 250 toxins,[129] which include: carbon dioxide; polycyclic aromatic hydrocarbons; carbon monoxide; nitrogen oxide; aliphatic; carbon oxide; hydrogen sulphide; sulphur dioxide; methane; volatile organic compounds such as benzene, xylene, toluene; particulate matter;[130] and metals such as "barium, cyanide, selenium, cadmium, chromium, iron, manganese, lead, and copper."[131]

Gas flaring is shown as one of the key sources of acid rain,[132] which in turn pollutes both surface and groundwater; proliferates water acidity; increases soil acidity, causing low crop yield; and generally leads to loss of biodiversity.[133] Kadafa argues that the Niger Delta has a higher concentration of acid rain compared to other parts of Nigeria because of the continuous gas flaring which takes place.[134] The heat from gas flares destroy surrounding vegetation; "exposes the crops to a semblance of continuous daylight;"[135] increases soil temperature and makes it hard; further decreasing its use for agricultural purposes.[136] In addition to air, water, and land pollution, gas flares create noise pollution, which scares wildlife away from the area.[137]

129 Ekpoh and Obia (n 108) 348.

130 Earthworks, 'Think Again – Oil and Gas Air Pollution Fact Sheet' [2005] <https://earthworks.org/cms/assets/uploads/archive/files/publications/Airpollution.pdf> accessed 22 September 2018; Kadafa (n 61) 45; AI Sodimu, VM Yilwa and GB Onwumere, 'The Impact of Gas Flaring from the Kaduna Refinery and Petrochemical Industry (KRPC) on Plant Diversity in Kaduna Northern Guinea Savanna Eco-Region of Nigeria' (2017) 69 WSN 168, 169; EI Seiyaboh and SC Izah, 'A Review of impacts of Gas Flaring on Vegetation and Water Resources in the Niger Delta Region of Nigeria' (2017) 2 IJEEE 48, 49; SO Giwa, OO Adama and OO Akinyemi, 'Baseline black carbon emissions for gas flaring in the Niger Delta region of Nigeria' (2014) 20 JNGSE 373; Ite and others (n 52) 83; Anejionu, Ahiarammunnah and Nri-ezedi (n 51) 70.

131 Seiyaboh and Izah (n 130) 51.

132 SI Efe, 'Spatial Variation of Acid Rain and its Ecological Effect in Nigeria' (Environmental Management Conference, Abeokuta, September 2011) 383.

133 Nduka, Obumselu and Umedum (n 87) 62; UNDP and GEF (n 1) 35 -36; Dung, Bombom and Agusomu (n 124) 298; Ekpoh and Obia (n 108) 348; Anejionu, Ahiarammunnah and Nri-ezedi (n 51) 71; Giwa, Adama and Akinyemi (n 130) 374; Efe (n 132) 382 and 391.

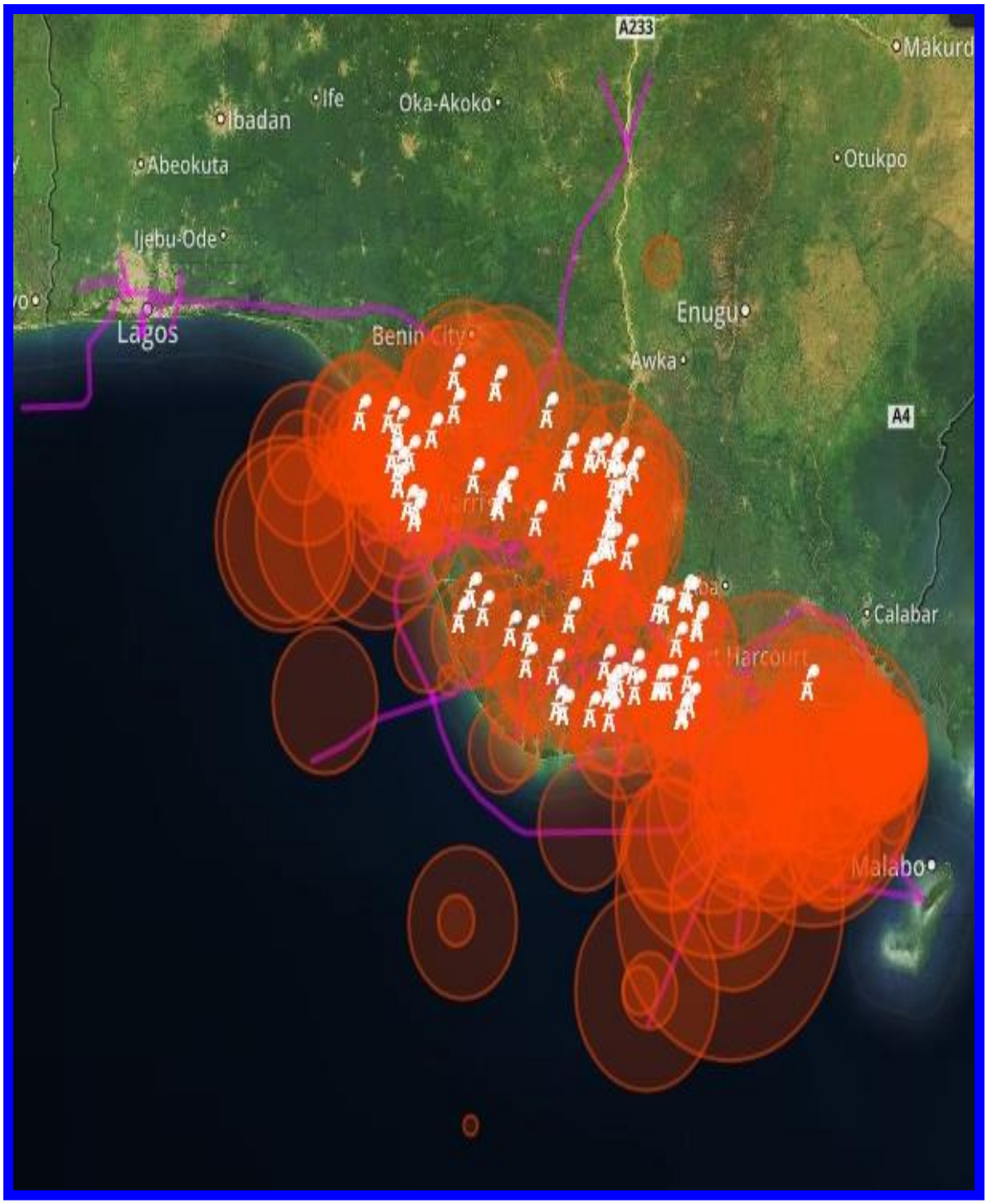
134 Kadafa (n 61) 44.

135 Dung, Bombom and Agusomu (n 124) 304.

136 Kadafa (n 61) 45; Sodimu, Yilwa and Onwumere (n 130) 169; Seiyaboh and Izah (n 130) 49; Anejionu, Ahiarammunnah and Nri-ezedi (n 51) 72. Also see Dung, Bombom and Agusomu (n 124) for detailed discussion on how gas flare heat affects different types of crops.

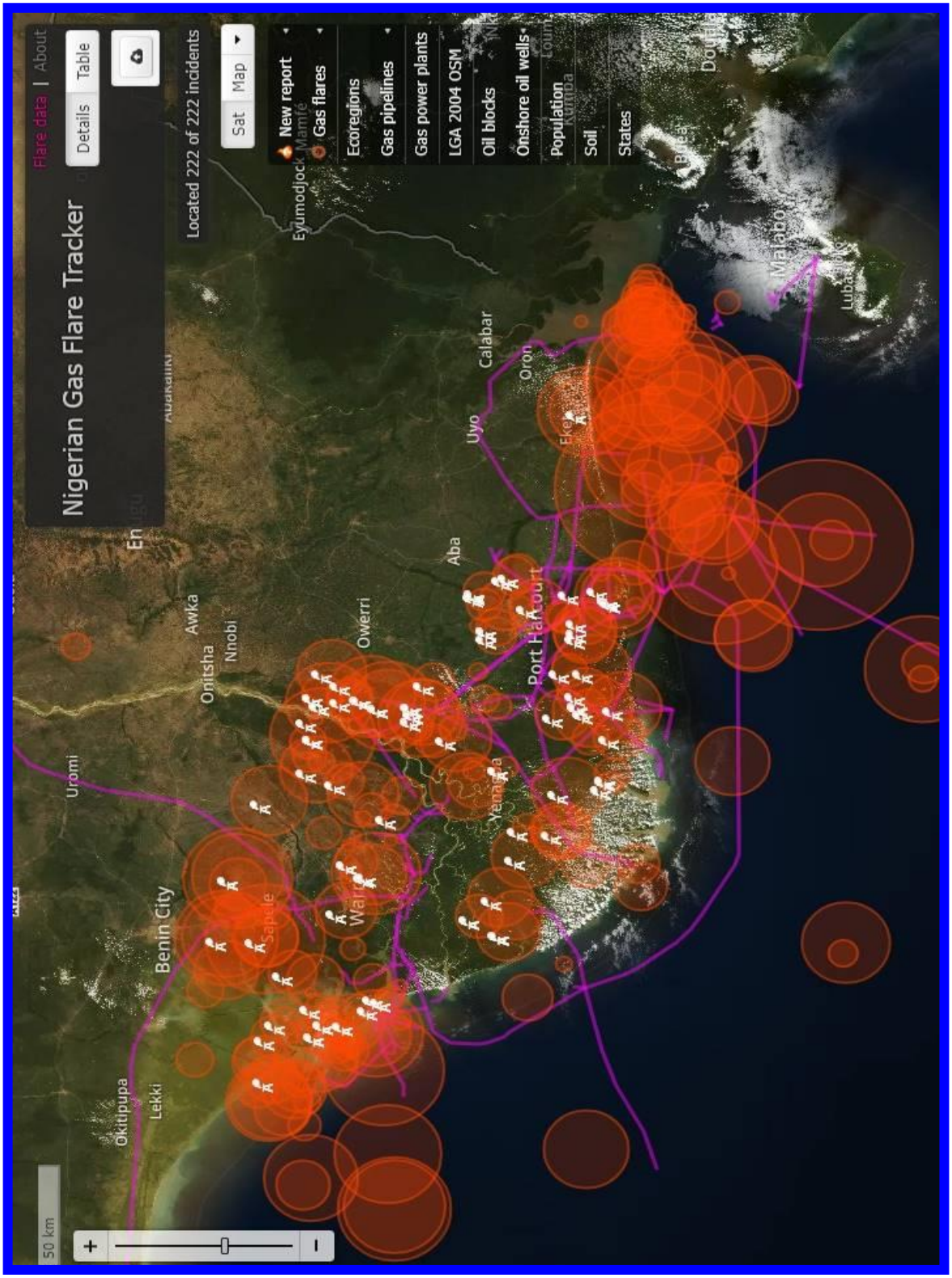
137 Seiyaboh and Izah (n 130) 49.

Figure 4: Satellite Image of Gas Flares in Nigeria (1)[138]



138 See Gas Flare Tracker, 'Mapping Nigeria's Gas Flares' <http://gasflaretracker.ng/application/> accessed 1 October 2018.

Figure 5: Satellite Image of Gas Flares in Nigeria (2)[139]



139 Ibid.

Bearing in mind the aim of this subsection which is to examine whether the operations of the NEEI have maintained continuously, improved, and kept waste emissions to a level where it has not caused apparent harm to the environmental systems. Also, taking cognisance of the definition of ES within the context of this research as, the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative ability of the environment in which they operate, without degrading its future waste absorptive capacity.

The discussion above shows that the activities of the NEEI entities – whether legal or illegal[140] – have neither sustained the vital environmental systems at a healthy level nor continuously improved it, instead, what is visible is the deterioration of the environmental systems. Also, it is argued that the waste emissions of the NEEI entities have not been kept to a low level. These waste emissions have consistently caused demonstrable harm to the environmental systems, degrading their future waste absorptive ability. According to the report by the Federal Ministry of Environment, "the Niger Delta is one of the world's most severally petroleum-impacted ecosystems."[141] Based on the above issues discussed, this research argues that the operations of the NEEI entities are environmentally unsustainable.

3.1.2 NEEI impact on NEIHCs

Taking cognisance of the adapted ESI component III, this subsection examines whether the operations of the NEEI has exposed NEIHCs to environmental disturbances which infringe on their citizens right to a clean, safe and secure, healthy environment. As discussed in Chapter Two of this research, section 20 of the 1999 Nigerian Constitution,[142] gives NEIHCs the positive right to protected external surroundings and guarantee to live in a safe and secure atmosphere, free from any danger to their health or other

140 UNEP (n 1) 104; CI Ezekwe and IC Utong, 'Hydrocarbon Pollution and Potential Ecological Risk of Heavy Metals in the Sediments of Oturuba Creek, Niger Delta, Nigeria' (2017) 10 JEG 1, 8; Adishi and Hunga (n 87) 55; M Obenade and GT Amangabara, 'Perspective: the Environmental Implications of Oil Theft and Artisanal Refining in the Niger Delta Region' (2014) 1 AREES 25.

141 Federal Ministry of Environment and others (n 1) 1.

142 Constitution of the Federal Republic of Nigeria 1999 (as amended). Hereafter referred to as the 1999 Constitution.

conveniences.[143] Also, article 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 entitles NEIHCs to "a general satisfactory environment favourable to their development."[144] Which mandates the federal government of Nigeria to amongst others, take reasonable measures to prevent ecological degradation and pollution, also ensure the ecologically sustainable development of resources.[145]

In addition to the degradation and pollution of the environmental systems, as discussed above, NEEI operations also negatively impinged on the health and economic development of the NEIHCs.

3.1.2.1 Health

According to the UNEP report,

> [E]nvironmental contamination associated with oil spills and its effect on livelihoods and general quality of life could reasonably be expected to cause stress among members of affected communities, and stress alone can adversely affect health.[146]

The report finds that NEIHCs encounter hydrocarbons through the air they breathe; the polluted ground or surface water used to take their bath, cook, drink, wash clothes, and do domestic chores; fish from the polluted creek; touching or eating contaminated soil or sediment.[147] The report found that dermal exposure led to

> [S]kin redness, oedema, dermatitis, rashes, blisters; inhalation exposure caused red, watery, and itchy eyes, coughing, and throat irritation, shortness of breath, headache, and confusion; while ingestion of hydrocarbon could lead to nausea and diarrhoea.[148]

Daniel and Nna, posit that contact with petroleum compounds can affect the human nervous system, and "produce a carcinogenic and mutagenic effect on humans."[149] Nduka, Constance and Obiakor, state that hydrocarbon

143 *Attorney-General of Lagos State v The Attorney-General of the Federation & Ors* NSCQR Vol 14 2003 919. Hereafter referred to as *AG Lagos State v AG Federation*.
144 CAP 10 LFN 1990. Hereafter referred to as ACHPR Act 1983.
145 *Communication 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria* (2001) ACHPR paras 52-53.
146 UNEP (n 1) 40.
147 UNEP (n 1) 39; Fentiman and Zabbey (n 35) 618.
148 UNEP (n 1) 40.
149 Daniel and Nna (n 87) 2.

contaminated water exposes "the people to skin, lung, breasts, and abdominal cancer."[150] Other health problems consist of "enlarged liver, kidney, and spleen;"[151] "catarrh, cough, cholera, and diarrhoea;"[152] "gastroenteritis, respiratory and chromosomal damage, problems, skin irritation, high risk of miscarriage, stillbirth, birth deformities, headache, skin melanoma."[153]

The health impact of gas flaring on the NEIHCs include: high blood pressure; miscarriages; ectopic pregnancy; insomnia; respiratory illness like chronic bronchitis, wheezing, and experiencing difficulty in breathing; skin related illness like persistent body itch and heat rash; deformity in children; impotency; endocrine disruption; neurological damage; gastrointestinal, cardiovascular-related, lung related, and renal-related diseases; asthma; hypertension; prolonged coughing; excessive heat and discomfort; partial deafness from the noise of the flare; and cancer.[154] Also, pipeline explosions have caused loss of limbs, hands, and ultimately, loss of life.[155]

3.1.2.2 Economic

Majority of NEIHCs engage in agricultural production as their means of livelihood. "Fishing and food crop cultivation constitutes the mainstay of the economy and provides the necessities of life for the communities."[156] The mangrove in addition to providing food forms a key source of revenue.[157] Pegg and Zabbey, identify twenty-four different goods the mangrove produces for the communities, in addition to nine different services the mangrove forest renders to the communities.[158] These include a breeding ground for

150 Nduka, Constance and Obiakor (n 96) 846; Osuide (n 74) 8.
151 Onwurah and others (n 96) 310.
152 Aghalino and Eyinla (n 94) 179.
153 Aroh and others (n 83) 80-81; Zabbey, Sam and Onyebuchi (n 83) 955; V Aigbokhaevbo and N Aniekwu, 'Environmental Abuses in Nigeria: Implications for Reproductive Health' (2013) XIX ASICL 233, 236-237 and 262.
154 Sodimu, Yilwa and Onwumere (n 130) 170; Seiyaboh and Izah (n 130) 49; Ekpoh and Obia (n 108) 348; Nduka, Obumselu and Umedum (n 87) 64; Earthworks, 'Think Again' (n 130); Efe (n 132) 392; Aigbokhaevbo and Aniekwu (n 153) 236-237 and 262.
155 Okorodudu, Okorodudu and Irikefe (n 84) 3; Omodanisi, Eludoyin, and Salami (n 84) 72; Anejionu and others (n 121) 185.
156 EE Osagae, 'The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State' (1995) 94 AA 325, 325; UNEP (n 1) 165; Dung, Bombom and Agusomu (n 124) 298; Pegg and Zabbey (n 77) 393; Babatunde (n 107) 63; Sam, Coulon and Prpich (n 87) 1324-1325; Fentiman and Zabbey (n 35) 617; Eneh (n 96) 8; Ugbomeh and Atubi (n 86) 104.
157 Mmom and Arokoyu (n 60) 32.
158 See Pegg and Zabbey (n 77) 392.

commercially viable fish, shellfish, crabs, and molluscs; wildlife; logging; source of traditional medicines; honey; wood for fuel and building constructions.[159] The UNEP report noted that the "mangroves are not just ecologically significant but are critical to the livelihood and food security of the Delta community."[160]

Oil spills and gas flaring cause pollution and degradation of arable farmlands, creeks, rivers, reduced access to wildlife, and destroys economic trees;[161] consequently, forcing farmers, fishers, and hunters to migrate to other communities.[162] The effect has been the addition of stress on existing limited resources, sometimes resulting in conflicts between the communities.[163] Also, the loss of fish has meant that communities which hitherto enjoyed and had access to fish from the rivers and creeks, now buy imported frozen fish (informally known as iced or carton fish).[164]

Furthermore, many young men leave the villages to the city in search of non-existent employments;[165] leaving their wives and children behind.[166] According to Okoko, the practice of husbands leaving their wives in the villages to seek alternative employment in the cities has led to the prevalence of absentee husbands, emotional stress for the wives, the burden of having to care for the children alone, and having to provide sustenance for the family.[167] The loss of means of livelihood further exacerbates poverty levels of the NEIHCs.[168] Aroh and others specify poverty as one of the contributory factors why NEIHCs engage in oil pipeline vandalisation, sabotage, and militancy.[169] Furthermore, because the acid rain causes discolouration of buildings, cars, and corrosion of

159 UNDP and GEF (n 1) 34-35; Mmom and Arokoyu (n 60) 32; Pegg and Zabbey (n 77) 392; Aghalino and Eyinla (n 94) 179.
160 UNEP (n 1) 154.
161 Manby (n 59) 60; E Ugwu, 'FG Urged to Investigate Oil Spill in Abia Community' *Thisday* (Umuahia, 22 June 2016) <www.thisdaylive.com/index.php/2016/06/22/fg-urged-to-investigate-oil-spill-in-abia-community/> accessed 1 October 2018; Okoko (n 86) 374-375.
162 RE Egbe and D Thompson, 'Environmental Challenges of Oil Spillage for Families in Oil Producing Communities of the Niger Delta Region' (2010) 13 JHER 24, 26.
163 Egbe and Thompson (n 162) 26; Zabbey, Sam and Onyebuchi (n 83) 956.
164 Egbe and Thompson (n 162) 29.
165 Egbe and Thompson (n 162) 26, 29-30; Eneh (n 96) 7.
166 Okoko (n 86) 375.
167 Ibid, 377.
168 Nwachukwu and Osuagwu (n 87) 271; Onwuka (n 157) 655.
169 Aroh and others (n 83) 72-73 and 80; Zabbey, Sam and Onyebuchi (n 83) 955—956.

the zinc roofs in the homes of NEIHCs.[170] This imposes additional financial burdens of having to periodically change roofs, compared to houses in other parts of Nigeria.[171]

From the above discussion, an application of the adapted ESI component III evidences that the operations of the NEEI infringe on NEIHCs citizens right to a clean, safe and secure, healthy environment. The NEEI operations also do not create an environment favourable to NEIHCs development, as guaranteed by article 24 ACHPR Act 1985. Therefore, this research argues that the NEEI activities are environmentally unsustainable.

3.1.3 NEEI impact on other industries

Applying adapted ESI component V, this subsection examines whether the environmental impact of the NEEI is reduced to a level that does not cause severe harm to other industries, in addition to its level of cooperation with other industries in managing common environmental problems. As has been indicated above, NEIHCs are mostly farmers, hunters, and fishermen, who depend on the farmland, forest, creeks and the rivers for their sustenance.[172] Thus, agriculture is identified as the predominant industry.[173] Having examined NEEI impact on the environmental systems and NEIHCs, it is suggested that the negative impact of NEEI on the environmental systems has adversely affected the agriculture industry. The impacts include:

(i) Almost 100% loss in crop yield cultivated 200 meters away from gas flare site, 45% loss for crops planted 600 meters, and 10% for crops planted 1 kilometre.[174]

(ii) Gas flares cause stunted growth in crops, in addition to reduced nutritional quality.[175]

(iii) Oil spillage has led to the destruction of almost 10% of the mangrove ecosystem[176] which constitutes a breeding area for fishes and other

170 Manby (n 59) 67; Anejionu, Ahiarammunnah and Nri-ezedi (n 51) 72; Ekpoh and Obia (n 108) 348; Ite and others (n 52) 83, Efe (n 132) 392; Anejionu and others (n 121) 185.
171 Kadafa (n 61) 44; Ekpoh and Obia (n 108) 351.
172 See fn 238.
173 Ibid.
174 Ugochukwu and Ertel (n 59) 144.
175 Dung, Bombom and Agusomu (n 124) 303.

aquatic animals.[177] Mangrove destruction causes reduction of fisheries in the area.[178]

(iv) Oil spillage has been found to destroy a year's supply of food crop.[179]

(v) Oil spillage in creeks and rivers reduces the existing oxygen in the water while preventing oxygen from dissolving in the water thereby causing asphyxiation and death of fish.[180]

(vi) Oil spillage cause tainting in fish and other aquatic animals, making them acquire a kerosene-like taste; [181] consequently making them lose commercial value.[182]

(vii) Oil spill renders arable land "unfertile and unsuitable for plant growth."[183]

(viii) Because of the oil spill, adult fish migrate to other non-polluted waters.[184]

(ix) Gas flares induced acid rains increase water acidity which in turn kill eggs of fishes like goldfish and tilapia, make fishes to develop deformed bone structure and poor growth; furthermore, the high acidity prevents amphibians from spawning.[185]

An application of adapted ESI component V to the above indicates that the environmental impact of NEEI operations has caused severe harm to other industries – in this context, the agriculture industry. This is based on its impact on the environmental systems, which affects crop yields, pasturelands for livestock, and fishing. Hence, this research maintains that the activities of the NEEI are environmentally unsustainable.

176 UNDP and GEF (n 1) 33.
177 Duke (n 175) 701.
178 Zabbey, Sam and Onyebuchi (n 83) 956.
179 UNDP and GEF (n 1) 35.
180 Ogeleka, Tudararo-Aherobo and Okieimen (n 86) 454 and 458; Daniel and Nna (n 87) 2; Aghalino and Eyinla (n 94) 179.
181 M Horsfall, FE Ogban and AI Spiff, 'Petroleum hydrocarbon pollution: the distribution in sediment and water of the New Calabar River, Port Harcourt, Nigeria' (1994) 1411 TSTE 217, 217; Aghalino and Eyinla (n 94) 179; Manby (n 59) 61; International Tanker Owners Pollution Federation Limited, 'Effects of Oil Pollution on Fisheries and Mariculture' (n 179) 2 and 4.
182 Daniel and Nna (n 87) 2.
183 Zabbey, Sam and Onyebuchi (n 83) 956; Onuh, Madukwe and Ohia (n 177) 45.
184 Nduka, Obumselu and Umedum (n 87) 60.
185 Efe (n 132) 391.

3.2 How environmentally sustainable is the Nigerian Non-Energy Extractive Industry (NNEI)?

Having examined the environmental sustainability of NEEI operations, this subsection aims to do the same with the NNEI. Although the objective is not to compare these sectors, however, it is necessary to indicate that the NEEI and NNEI have different backgrounds. Unlike the NEEI whose operations began in 1908,[186] the NNEI activities date over 2,400 years as evidenced by the "Nok culture (340BC), Igbo Ukwu bronze civilisation (705AD), Ife Bronze works (1163-1200AD), and Benin Bronze works (1630-1648AD)."[187] Alexander states that tin ore mining operations in Nigeria date as far back as 900 BC.[188] Thus, it can be surmised that the NNEI is an older industry compared to the NEEI. Some communities trace their existence to the mining activity carried on in that area; examples are Jos in Plateau state for tin and Enugu in Enugu state for coal.[189]

In 1884, the National African Company under Sir William Wallace discovered that natives in Bauchi Plateau area had a long history of tin mining, smelting, and trade with Ashanti, Nile, and Tripoli.[190] This influenced the mineral survey of the northern and southern protectorates [191] in 1902 by the Niger Company.[192] The Niger Company discovered tin in 1902 in present-day Jos Plateau,[193] and in 1906,[194] coal in Enugu.[195] These discoveries shifted mining

186 NNPC (n 33).

187 Geological Survey of Denmark and Greenland ,GEUS (UK) and others, 'Federal Republic of Nigeria and Nigeria Extractive Industries Transparency Initiative (NEITI): Scoping Study on the Nigerian Mining Sector' [2011] 12 <http://documents.worldbank.org/curated/en/647231468292929219/pdf/Nigeria0scopin0Draft0Report00510911.pdf> accessed 1 October 2018; IIY Mallo, 'Environmental, health and socio-economic implications of solid minerals mining in Nigeria' (2010) 8 AJEPH 62, 68; IT Oramah and others, 'Artisanal and small-scale mining in Nigeria: Experiences from Niger, Nasarawa and Plateau states' (2015) 2 TEIS 694, 694; YM Ahmed and ED Oruonye, 'Socioeconomic Impact of Artisanal and Small Scale Mining on the Mambilla Plateau of Taraba State, Nigeria' (2016) 3 WJSSR 1, 1.

188 MJ Alexander, 'Reclamation after Tin Mining on the Jos Plateau Nigeria' (1990)156 TGJ 44, 44.

189 MI Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (PhD Thesis, University of Leicester 2011) 53.

190 G Fell, 'The Tin Mining Industry in Nigeria' (1939) XXXVIII AA 246, 246; BW Hodder, 'Tin Mining on the Jos Plateau of Nigeria' (1959) 35 EG 109, 109.

191 Prior to the 1914 amalgamation which created the political entity known as 'Nigeria', the British colony was referred to as northern and southern protectorates – see P Eric, 'The Amalgamation of Nigeria: Revisiting 1914 and the Centenary Celebrations' (2016) 12 CSS 66, 66.

192 Fell (n 190) 246. It is necessary to note that according to Hodder, the mineral survey took place between 1904 to1909; see Hodder (n 190) 109 and 111.

193 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 109.

194 Some authors indicate it as 1909 – see IF Odesola, E Samuel and T Olugasa, 'Coal Development in Nigeria: Prospects and Challenges' (2013) 4 IJEAS 64, 64.

operations from the small-scale artisanal mining hitherto practised by the natives to large-scale mining under the auspices of the colonial government.[196]

In addition to tin ore and coal, other solid minerals discovered include columbite, galena, lead-zinc ore, monzonite, marble deposits, brine springs, lignite deposits, iron ore, and limestones.[197] By 1936, Nigeria became known as a producer and exporter of tin concentrate, coal, gold, silver, columbite, lead-zinc, and wolfram.[198] The mining sector contributed immensely to the revenue of the colonial government.[199] Such that by 1943, Nigeria was the 6th largest tin producer in the world and accounted for 95% of columbite global supply, also ranked 4th amongst British mineral producing colonies.[200]

Unlike NEEI where resources are situated within some states,[201] solid minerals are located in all the 36 states including the federal capital territory.[202] Nigeria has vast proven reserves of solid minerals, ranging from over 38 identified precious metals, gemstones, metallic minerals, industrial minerals, speciality metals; to mineral fuels such as bitumen, coal, and lignite.[203] However, not all the deposits are commercially viable.[204] The Nigerian government has

195 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 109.

196 Alexander (n 188) 44; Fell (n 190) 246.

197 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 109.

198 Nigeria Extractive Industries Transparency Initiative, 'Financial, Physical and Process Audit: An Independent Report Assessing and Reconciling Physical and Financial Flows within Nigeria's Solid Minerals Sector 2014' (December 2016) 19 <www.neiti.gov.ng/phocadownload/NEITI-SMA-REPORTS/2014-SMA-REPORT/NEITI-SMA-Report-2014-Full-301216.pdf> accessed 1 October 2018; Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 110.

199 DO Olalekan, NO Afee and AS Ayodele, 'An Empirical Analysis of the Contribution of Mining Sector to Economic Development in Nigeria' (2016) 19 KJHSS 88, 88; Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 109; OS Ayodele, A Sabastine and UP Nnadozie, 'Economic Diversification in Nigeria: Any Role for Solid Mineral Development' (2013) 4 MJSS 691, 691; NEITI 2014 (n 198) 14 and 19.

200 See Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 109; Ayodele, Sabastine and Nnadozie (n 199) 691; K Fayemi, 'Nigeria's Solid Minerals Sector: Alternative Investment Opportunities' [2016] 3 <www.chathamhouse.org/sites/files/chathamhouse/events/2016-05-19-Nigeria-solid-minerals-appg-transcript.pdf> accessed 1 October 2018; Oramah and others (n 187) 694; AS Aliyu and others, 'Radioecological impacts of tin mining' (2015) 44 Ambio 778, 780.

201 Niger Delta Development Commission (n 37) 74.

202 National Bureau of Statistics, 'State Disaggregated Mining and Quarrying Data' (2017) 2-62 <http://nigerianstat.gov.ng/download/797> accessed 1 October 2018.

203 Vison 2020 National Technical Working Group on Minerals and Metals Development, 'Report of the Vison 2020 National Technical Working Group on Minerals and Metals Development' [2009] 86-118 <www.ibenaija.org/uploads/1/0/1/2/10128027/minerals__metals_ntwg_report.pdf> accessed 1 October 2018.

204 M Chindo, 'An Extensive Analysis of Mining in Nigeria Using GPS' (2011) 3 JGG 3, 3; Nigerian Investment Promotion Commission, 'Solid Minerals: Mining our way to economic freedom' <www.nipc.gov.ng/?wpfb_dl=11> accessed 1 October 2018.

indicated seven solid minerals critical to Nigeria's economic development and part of the government's strategy to diversify the Nigerian economy from crude oil revenue-dependence.[205] They are namely lead/zinc, bitumen, gold, coal, barite, iron ore, and limestone.[206] As of 2016, the top ten solid minerals produced, include limestone, granite, laterite, clay, sand, shale, coal, granite aggregate, granite dust, and manganese.[207]

As stated above, the mining sector provided immense revenue for the colonial government and even the newly independent state until the late 1970s. The decline and eventual collapse of the mining sector is based on a number of factors; namely decline in global tin demand; alluvial reserve depletion; the discovery of crude oil in 1956 and the 1970s oil boom; the Indigenisation Decree of 1972 and 1977; the Nigerian civil war; and state neglect of the mining sector because crude oil seemingly brought more revenue.[208] Compared to the petroleum sector, the solid minerals sector is currently underdeveloped.[209] According to the CBN Annual Report 2015, the solid minerals sector accounted for 0.7% of non-oil export revenue; as against the

205 Ministry of Mines and Steel Development, 'Roadmap for the Growth and Development of the Nigerian Mining Industry' (2016) 18 <www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf> accessed 1 October 2018; The World Bank, 'International Development Association Project Appraisal Document on a Proposed Credit in the amount of SDR 110.4 million (US$150 Million Equivalent) to the Federal Republic of Nigeria for a Mineral Sector Support for Economic Diversification Project (MINDIVER)' [2017] 10 <http://projects.worldbank.org/P159761/?lang=en&tab=documents&subTab=projectDocuments> accessed 1 October 2018; O Onwuemenyi, 'Mining: Nigeria govt targets $27bn contribution to GDP in 2025' SweetCrude (Abuja, 11 July 2017) <http://sweetcrudereports.com/2017/07/11/mining-nigeria-govt-targets-27bn-contribution-to-gdp-in-2025/> accessed 1 October 2018.

206 Onwuemenyi (n 205); Ministry of Mines and Steel Development (n 205) 39.

207 National Bureau of Statistics (n 202) 2.

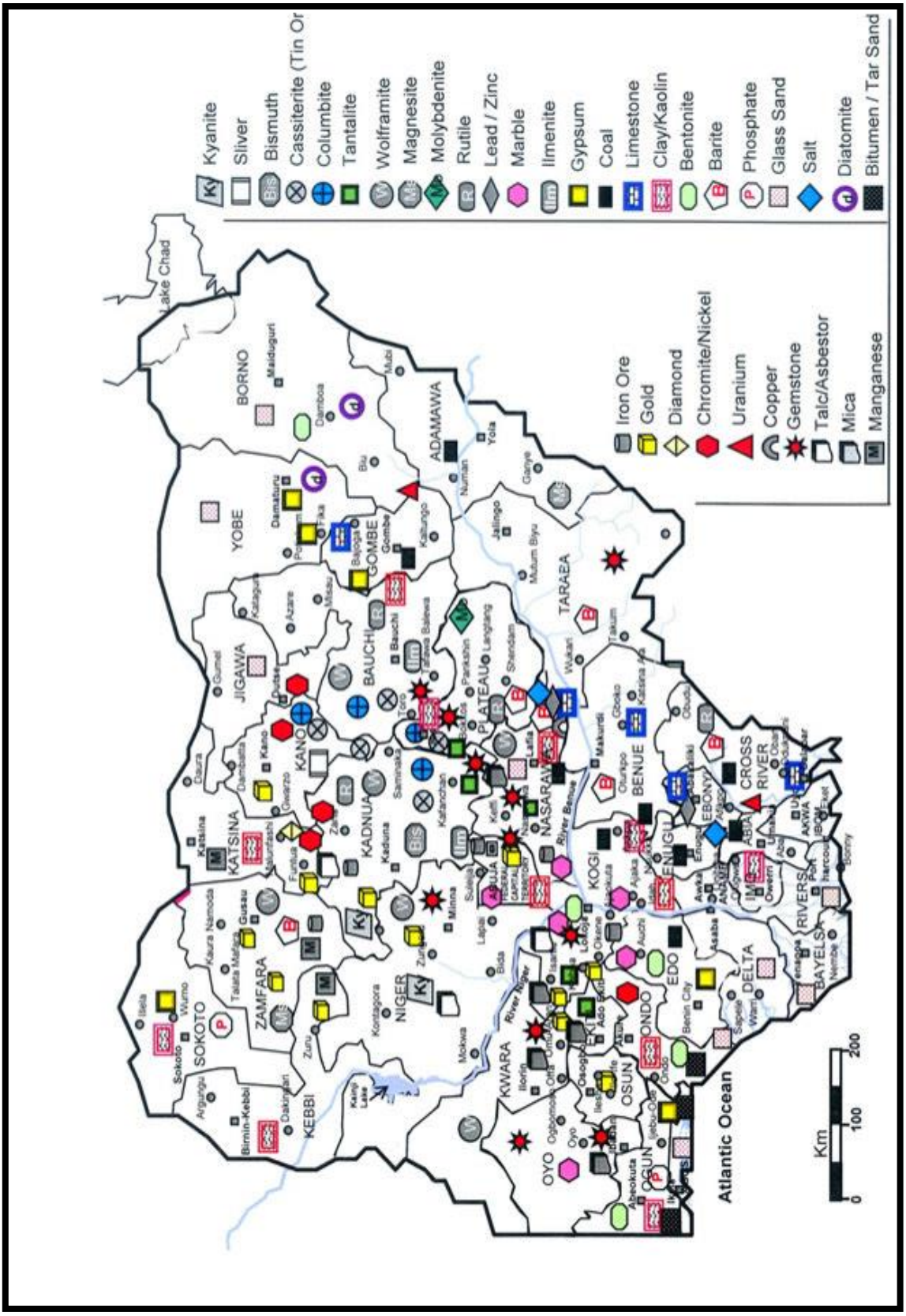
208 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 112; Odesola, Samuel and Olugasa (n 194) 64; Olalekan, Afee and Ayodele (n 199) 88; KPMG, 'Nigerian Mining Sector Brief' [2017] <https://home.kpmg.com/ng/en/home/insights/2017/06/nigeria-mining-sector--an-overview.html > accessed 1 October 2018; Ayodele, Sabastine and Nnadozie (n 199) 693; EC Merem and others, 'Assessing the Ecological Effects of Mining in West Africa: The Case of Nigeria' (2017) 6 IJMEMP 1, 2; Nigeria Extractive Industries Transparency Initiative, 'Financial, Physical and Process Audit: An Independent Report Assessing and Reconciling Physical and Financial Flows Within Nigeria's Solid Minerals Sector 2012' [2015] <https://eiti.org/sites/default/files/documents/2012_nigeria_eiti_report_mining.pdf> accessed 1 October 2018; Fayemi (n 200) 3; Oramah and others (n 187) 694; Aliyu and others (n 200) 1; G Adeniji, 'The Legal and Regulatory Framework for Mining in Nigeria' (National Mining Policy Dialogue Conference and Exhibition, Abuja, July 2004) 1; AI Olatunbosun, MO Adeleke and OO Ayorinde, 'Legal Regime for Exploring Solid Minerals for Economic Growth in Nigeria' (2013) 9 CSS 67, 67.

209 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 13; The World Bank (n 205) 12; G Ojo, 'Nigeria: An Outlook on the Mining Industry' [2015] 6 <www2.deloitte.com/content/dam/Deloitte/za/Documents/energy-resources/ZA_NigeriaCue-Cards-Mining-141015.pdf> accessed 1 October 2018; Merem and others (n 208) 2; Nigerian Investment Promotion Commission (n 204) 2; Fayemi (n 200) 4; MI Chindo, 'Communities Perceived Socio-Economic Impacts of Oil Sands Extraction in Nigeria' (2011) 5 JSRHG 69, 69.

55.4% brought by oil revenue.[210] It is necessary to note that although the Draft 2017 Annual Report indicates that oil revenue constitutes 56.2% of the Federal revenue, however, it is silent on the percentage the solid minerals sector accounts for in the non-oil revenue.[211]

210 Central Bank of Nigeria, *2015 Annual Report* (CBN 2015) 109 and 164.
211 See Central Bank of Nigeria, *2017 Draft Annual Report* (CBN 2017) 161.

Figure 6: Map showing solid mineral resources locations in Nigeria[212]

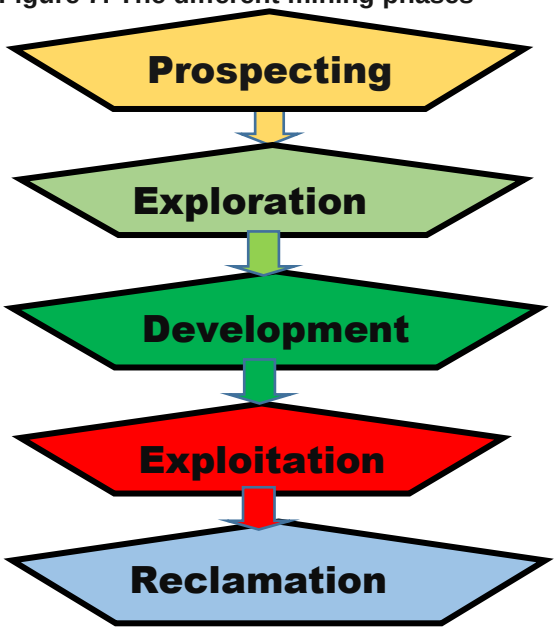


212 Vison 2020 National Technical Working Group on Minerals and Metals Development (n 203) 19.

3.2.1 NNEI impact on environmental systems

This subsection examines whether the operations of the NNEI has led to healthy-level maintained and non-degraded environmental systems, namely the adapted ESI components I and II. In examining this, as earlier indicated, compared to the NEEI, there is minimal literature on the environmental impact NNEI operations have had on their environment.[213] This does not negate the fact that NNEI operations have impacted negatively on the environmental systems. This is evidenced by the over 1,500 dangerous mining ponds – relics from the colonial mining period – which have become part of the Jos Plateau landscape.[214]

Figure 7: The different mining phases[215]



The colonial mining companies brought a different way of mining than what was practised by the locals. Before the entrance of colonial mining companies, the communities where solid minerals are located engaged in artisanal mining. For example, the tin mining in Jos, the community miners would

213 MA Adabanija and MA Oladunjoye, 'Geoenvironmental assessment of abandoned mines and quarries in South-western Nigeria' (2014) 145 JGE 148, 149.

214 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 111.

215 HL Hartman and JM Mutmansky, Introductory Mining Engineering (2nd edn, JWSI 2002) 6-13; Environmental Law Alliance Worldwide (ELAW), *Guidebook for Evaluating Mining Projects EIAs* (ELAW 2010) 3.

> [W]ade into the river, loosen the gravel under water and scoop it into large calabashes. The gravel was then washed, and the resulting rough concentrate cleaned, sundried, and packed into boxes or skins for transport.[216]

However, the colonial companies introduced large-scale, open-pit, and mechanised mining.[217] From using pick and shovel which allowed for digging up to 3 to 4 metres of the surface, to bulldozers which allowed up to 10 metres, to dragline excavators which increased the depth to 10-30 metres.[218] The colonial companies also refused to adopt "the usual practice of phased overburden removal."[219] This meant that "excavations involved the simultaneous removal of the topsoil, subsoil, and overburden."[220] This method made it difficult for reclamation. The companies refused to reclaim and close the mines because these companies "saw restoration as putting money down the drain."[221] Open-pit mining is labelled as one of the "most environmentally-destructive types of mining."[222] According to Alexander, this mining practice left a legacy of ruined and wasted landscape, prompting the then state government in 1982 to describe Plateau central area as a disaster.[223]

The decline of the mining sector led to the closure of the large-scale mining companies who left behind "thousands of abandoned and/or inactive mine sites."[224] The attendant loss of income for the mine workers created the conducive platform for the illegal (informal) artisanal and small-scale mining (ASM) which currently dominates the mining sector – estimated at 95%.[225]

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216 Fell (n 190) 246.

217 Fell (n 190) 250-254; Alexander (n 188) 45; JY Dung-Gwom, 'The Impact of Tin Mining on Economic Activities in Plateau State' [2001] 44 <www.researchgate.net/publication/259623867_The_Impact_of_Tin_Mining_on_Economic_Activities_in_Plateau_State> accessed 24 September 2018.

218 Alexander (n 188) 44; Fell (n 190) 251 and 253.

219 Alexander (n 188) 45.

220 Ibid.

221 Dung-Gwom (n 217) 44.

222 ELAW (n 215) 4.

223 Alexander (n 188) 44-45.

224 Adabanija and Oladunjoye (n 213) 148.

225 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 113; A Essaghah, C Ogbonna and MO Alabi, 'Environmental and Socio-Economic Impacts of Lead and Zinc Ores Mining in Shaiagu Community of Ebonyi State, Nigeria' (2013) 1 JGES 30, 31; Chindo, 'An Extensive Analysis of Mining in Nigeria Using GPS' (n 204) 8; Merem and others (n 208) 2 and 14; Mallo (n 187) 68; NEITI 2014 (n 198) 19; NEITI 2012 (n 208) 16; C Azobu, 'Developing the solid minerals sector: Quick wins for the new government' (PWCL 2015) 3 <www.pwc.com/ng/en/assets/pdf/developing-the-solid-minerals-sector-2015.pdf> accessed 1 October 2018; Oramah and others (n 187) 694; Adeniji (n 208) 1; Olatunbosun, Adeleke and Ayorinde (n 208) 67; The World Bank (n 205) 12; Geological Survey of Denmark and Greenland, GEUS (UK) and others (n 187) 13; Dung-Gwom (n 217) 51.

These miners adopt the open-pit mining favoured by the colonial companies, [226] and they work on the old mines or find new ones.[227] The mining operations are mostly unlicensed, seasonal, nomadic, and influenced by deposit exhaustion.[228]

It is significant to note that the operations are carried out without attention to environmental protection or having conducted an environmental impact assessment.[229] Chindo describes artisanal mining as "a livelihood strategy with poor working conditions, health and safety risks that cause widespread environmental degradation."[230] Thus, an examination of the impact NNEI has had on its environmental systems would need to take into consideration the collective environmental impacts of the past operations of the colonial companies and the current operations of the ASM miners. The impact of NNEI operations on the environmental systems shall be examined from two perspectives: (i) its impact on land and vegetation, (ii) impact on water and air.

3.2.1.1 Impact on land and vegetation

During the prospecting stage, the land is cleared of vegetation in order to gain access to the minerals and preparing "the staging areas that would house project personnel and equipment." [231] This leads to "removal of native vegetation areas, tree logging, clear-cutting, and burning of vegetation."[232] The process of clearing vegetation affects the biodiversity of the area, causes deforestation, loss of shelter and food for wildlife.[233]

> [A]ccess to the deposit is gained either by stripping the overburden, which is the soil and /or rock covering the deposit, to expose the near-surface ore for mining or by excavating openings from the surface to access more

226 Adabanija and Oladunjoye (n 213) 149.
227 The World Bank (n 205) 11; AM Arogunjo and others, 'Uranium and thorium in soils, mineral sands, water and food samples in a tin mining area in Nigeria with elevated activity' (2009) 100 JER 232, 233.
228 Oramah and others (n 187) 695.
229 Essaghah, Ogbonna and Alabi (n 225) 31.
230 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 125; TA Ako and others, 'Environmental Impact of Artisanal Gold Mining in Luku, Minna, Niger State, North Central Nigeria' (2014) 2 JGG 28, 28.
231 ELAW (n 215) 4; Thomas Wälde, 'Environmental Policies Towards Mining in Developing Countries' (1992) 10 JENRL 327, 329.
232 ELAW (n 215) 4.
233 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 48 and 176; A Salami, MA Jimoh and JI Muoghalu, 'Impact of Gold Mining on Vegetation and Soil in Southwestern Nigeria' (2003) 60 IJES 343, 350; Ako and others (n 230) 32.

> deeply buried deposits to prepare for underground mining.[234]

Research finds that the process of mining and quarrying may lead to amongst others: soil development of coarse texture and high acidity; the creation of swamps; ground vibration; land degradation; subsidence, erosion, flooding, landslides due to overburden and land disturbance; sinkholes created by overlaying strata which collapses into the void mines; alteration of the natural components of radionuclides in the soil causing ecosystem disruption; the soil and slope failures.[235]

3.2.1.2 Impact on water and air

Mining operations are water intensive, hence putting this abiotic component at the highest risk of mine-related pollution.[236] Mining is a major source of surface and groundwater pollution.[237] Mining-related water pollution stems from acid drainage; tailings dam burst; hazardous chemicals used in processing metals such as mercury, alkaline compounds, and cyanide; leaching of toxic elements like metals, arsenic and selenium; mine wastes and rock dumps which cause turbidity flooding; and erosion of mine area.[238]

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234 Hartman and Mutmansky (n 215) 10.

235 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 46; Essaghah, Ogbonna and Alabi (n 225) 36; Salami, Jimoh and Muoghalu (n 233) 344; Ako and others (n 230) 28, 31-32; Adabanija and Oladunjoye (n 213) 153; Arogunjo and others (n 227) 232; CI Adamu, TN Nganje and A Edet, 'Major and trace elements pollution of sediments associated with Abandoned Barite Mines in parts of Oban Massif and Mamfe Embayment, SE Nigeria' (2015) 151 JGE 17, 17; S Akinbiola and others, 'Floristic indicators of tropical landuse systems: Evidence from mining areas in Southwestern Nigeria' (2016) 7 GEC 141, 142; AM Taiwo and JA Awomeso, 'Assessment of trace metal concentration and health risk of artisanal gold mining activities in Ijeshaland, Osun State Nigeria – Part 1' (2017) 177 JGE 1, 1; I Aigbedion and SE Iyayi, 'Environmental effect of mineral exploitation in Nigeria' (2007) 2 IJPS 33, 36; O Olusegun, A Adeniyi and GT Adeola, 'Impact of Granite Quarrying on the Health of Workers and Nearby Residents in Abeokuta Ogun State, Nigeria' (2009) EJESM 1, 1; Hodder (n 190) 117; OG Oladipo, A Olayinka and OO Awotoye, 'Ecological impact of mining on soils of Southwestern Nigeria' (2014) 12 EEB 179, 179; PC Ogbonna, EC Nzegbule and PE Okorie, 'Environmental impact assessment of coal mining at Enugu, Nigeria' (2015) 33 IAPA 73, 76; EP Ikemefuna, 'Evaluating the influence of open cast mining of solid minerals on soil, landuse and livelihood systems in selected areas of Nasarawa State, North-Central Nigeria' (2012) 4 JENE 62, 65; DK Twerefou, 'Mineral Exploitation, Environmental Sustainability and Sustainable Development in EAC, SADC and ECOWAS Regions (ATPC 2009) 12-14<www1.uneca.org/Portals/atpc/CrossArticle/1/WorkinProgress/79.pdf> accessed 1 October 2018.

236 Sigam and Garcia (n 30) 14; Twerefou (n 235) 12; ELAW (n 215) 8.

237 Sigam and Garcia (n 30) 14; Arogunjo and others (n 227) 233.

238 ELAW (n 215) 8; Twerefou (n 235) 10; Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 46 and 48; Ako and others (n 230) 32; Wälde (n 231) 328; Adamu, Nganje and Edet (n 235) 17; Taiwo and Awomeso (n 235) 2; SC Obiora and others, 'Assessment of Heavy Metal Contamination in Soils Around Lead (Pb)-Zinc(Zn) Mining Areas in Enyigba, Southeastern Nigeria' (2016) 87 JGSI 453, 454; HI Ezeigbo and BN Ezeanyim, 'Environmental Pollution from Coal Mining Activates in the Enugu Area Anambra State Nigeria' (1993) 12 MWE 53, 59.

Acid mine drainage is indicated as one of the most dangerous sources of mine-related water pollution.[239] This is because once mine starts generating acid, the acid drainage continues even long after the end of the mining operation.[240] This stiff resistance makes acid mine drainage "very expensive to clean up."[241] Thus, often presenting an indefinite water pollution challenge.[242]

Mine waste and rock dumps increase the sediment level of streams, consequently changing "the stream morphology by disrupting a channel, diverting stream flow, and changing the slope of bank stability of the stream."[243] This decreases the depth of the stream and its capacity to avoid flooding should high stream flow occur.[244] The effects of mine-related water pollution include fish and other aquatic organisms' mortality; water becomes hard, water becomes acidic, destroying aquatic habitat, affects community access to safe water, the death of community members who consume it.[245] The mining process also causes air pollution by releasing dust particles; and noise pollution from the blasting.[246]

Thus, having examined the NNEI vis a vis the adapted ESI components I and II, it is evident that the operations of the NNEI have not resulted in healthy-level, continuously-improved, and non-degraded environmental systems. Instead, it has led to the pollution and degradation of the environmental systems.

3.2.2 NNEI impact on NEIHCs

The impact of the NNEI operations on the NEIHCs *vis-à-vis* their right to a clean, safe and secure, healthy environment, shall be examined from health and economic perspectives.

239 ELAW (n 215) 8; Twerefou (n 235) 11
240 ELAW (n 215) 9.
241 Twerefou (n 235) 11.
242 ELAW (n 215) 9.
243 Ako and others (n 230) 31-32.
244 Ibid, 32.
245 ELAW (n 215) 9; Twerefou (n 235) 11; Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 48; Ako and others (n 230) 32; Adabanija and Oladunjoye (n 213) 149.
246 Essaghah, Ogbonna and Alabi (n 225) 33 and 36; Oramah and others (n 187) 702; Aigbedion and Iyayi (n 235) 36; Olusegun, Adeniyi and Adeola (n 235) 1; Oladipo, Olayinka and Awotoye (n 235) 179; ELAW (n 215) 12-13; Merem and others (n 208) 9.

3.2.2.1 Health

Mining operations release harmful materials into the soil, water, and air.[247] The NEIHCs inhale these toxic materials from rock blast, and mine waste disposal generated dust. [248] Also, children play around the mining sites, tailings, and dumps, during which they come in contact with the toxic materials through inhalation and hand to mouth contact.[249] The generated suspended particulate matter from the rock blasts and quarrying, may lead to reduced air visibility, lung cancer, eye pain, fatigue, silicosis, convulsions, headache, pneumoconiosis, intensify prevailing health conditions such as asthma, emphysema, and bronchitis.[250]

The surface water from streams and abandoned mining pits are used by NEIHCs for domestic chores, cooking, and bathing,[251] thus, creating a medium for contact with the toxic materials. Research find increased levels of copper, aluminium, mercury, lead, arsenic, iron, cadmium, nickel, and silver in soil area where ASM take place, presenting the risk for these metals to be dispersed into community's surface and groundwater.[252]

The open pits are sometimes filled with water which is used by NEIHCs as drinking water, for fish farming, and irrigation purposes.[253] Also, creating a source through which humans encounter these toxic chemicals. Exposure to lead, arsenic, copper, nickel, cadmium, mercury, aluminium, and silver, can lead to mental retardation, kidney and liver damage, cancer, respiratory and cardiovascular failure, renal dysfunction, increased blood pressure, skin disorder, delayed development in children, miscarriages during pregnancy, seizures, foetus malformation, neurological disorder, loss of memory, nerve damage, brain damage, dementia, psychosis, damage to gastrointestinal tract,

247 Ako and others (n 230) 28.
248 ELAW (n 215) 12.
249 UA Lar, CS Ngozi-Chika and EC Ashano, 'Human exposure to lead and other potentially harmful elements associated with galena mining at New Zurak, central Nigeria' (2013) 84 JAES 13,13.
250 Essaghah, Ogbonna and Alabi (n 225) 34; Aigbedion and Iyayi (n 235) 35; Oramah and others (n 187) 702; Merem and others (n 208) 9.
251 Essaghah, Ogbonna and Alabi (n 225) 32; Ako and others (n 230) 32.
252 Ako and others (n 230) 28; Salami, Jimoh and Muoghalu (n 233) 344.
253 Arogunjo and others (n 227) 233; Dung-Gwom (n 217) 48; Salami, Jimoh and Muoghalu (n 233) 344.

and death.[254] Other health impacts of NNEI operations include death from land subsidence, loss of limbs, vision and hearing loss.[255]

Abandoned mines are located within community settlements, farmlands, and major roads.[256] These pits (whether empty or filled with water), become death-traps for man and animals and sometimes become a habitat for snakes.[257] Also, NEIHCs use mine wastes – which are found to have a high level of carcinogenic radioactive materials – to construct homes and roads.[258] The radioactive elements have been seen to cause deaths, for example, the Zamfara saga[259] and Jos.[260]

Also, NEIHCs farm on the soil generated from mine waste[261] exposing the NEIHCs to technologically occurring radioactive materials.[262] These communities do not see the tailings as dangerous. Hence, the practice of using soil from mining site for construction and farming purposes persist.[263] According to Arogunjo and others, "radionuclides have been reported in foodstuffs from mining site"[264] and lead contents higher than the FAO/WHO guideline found in oil palm and cassava tubers.[265] Supporting this position, Adabanija and Oladunjoye, state that

> [C]ultivation of crops for human consumption on contaminated soil can potentially lead to the uptake and accumulation of trace metals in the edible plants with a resulting risk to human and animal health.[266]

254 Ako and others (n 230) 34-35; Environmental Law Institute, 'Artisanal and Small-Scale Gold Mining in Nigeria: Recommendations to Address Mercury and Lead Exposure' (ELI 2014) 3 <www.eli.org/sites/default/files/eli-pubs/nigeria-asgm-assessment-final-report.pdf>accessed 1 October 2018; Taiwo and Awomeso (n 235) 1 and 8; AO Eludoyin and others, 'Effects of artisanal gold mining activities on soil properties in a part of southwestern Nigeria' (2017) 3 CES 1, 3.

255 Dung-Gwom (n 217) 51; Ogbonna, Nzegbule and Okorie (n 235) 77-78.

256 Merem and others (n 208) 10.

257 Ako and others (n 230) 30-31; Merem and others (n 208) 10.

258 IGE Ibeanu, 'Tin mining and processing in Nigeria: cause for concern?' (2003) 64 JER 59, 60 and 64; Merem and others (n 208) 10; Arogunjo and others (n 227) 233.

259 See Chapter One of this Study.

260 Merem and others (n 208) 10.

261 Ibeanu (n 258) 60 and 64.

262 Arogunjo and others (n 227) 233.

263 Ibeanu (n 258) 60 and 64.

264 Arogunjo and others (n 227) 233.

265 Salami, Jimoh and Muoghalu (n 233) 351.

266 Adabanija and Oladunjoye (n 213) 149.

3.2.2.2 Economic

Before large-scale mining, agriculture was the predominant source of livelihood for NEIHCs.[267] The resultant soil, air, and water pollution from mining reduced the availability of arable farmlands, [268] consequently, causing migration of farmers to other areas in search of farmlands.[269] Most importantly, mining operations changed the economic structure of these communities. Because these communities were agrarian in structure, young, abled men worked in the farms. However, this stopped with the arrival of large-scale mining.

According to Dung-Gwom "active males left farming, initially seasonally, but later more permanently, in search for wage-labour in the mines."[270] Also, the income from mining increased the standard of living in these areas.[271] Where hitherto the proceeds from agriculture were sufficient to meet the simple needs of the NEIHCs, mine-income created opportunities for wants and a higher standard of living.[272]

Thus, with more young men engaging in mining and less in agriculture, it unwittingly created the ambience for a high level of poverty when the mining sector declined. The massive entrenchment resulting from the decline of the mining sector created "a large pool of unemployed and vagrant labour force on the minefield"[273] who then reverted to the ASM prevalent in Nigeria today. According to Hilson and Gatsinzi, ASM "is heavily linked to poverty and/or a lack of economic opportunities."[274] Thus, although ASM is known to cause widespread environmental degradation and pollution, the persistent poverty might be indicated as the reason for the disregard

> [O]f pressing and imminent environmental degradation with visible direct cost when immediate income beckons; hence slanting the risk/reward, short-term/long-term,

267 Fell (n 190) 249; Hodder (n 190) 119; Essaghah, Ogbonna and Alabi (n 225) 32.
268 Essaghah, Ogbonna and Alabi (n 225) 36; Dung-Gwom (n 217) 50; Hodder (n 190) 1119-120.
269 Dung-Gwom (n 217) 50; Essaghah, Ogbonna and Alabi (n 225) 36.
270 Dung-Gwom (n 217) 50.
271 Fell (n 190) 249.
272 Ibid.
273 Dung-Gwom (n 217) 51.
274 G Hilson and A Gatsinzi, 'A rocky road ahead? Critical reflections on the futures of small-scale mining in sub-Saharan Africa' (2014) 62 Futures 1, 1.

> direct benefit versus indirect damage equations in favour of the immediate direct reward.[275]

Notwithstanding its adverse impact on the environment, ASM remains a critical livelihood strategy. Smith and others, state that ASM embodies a key strategy to reduce poverty.[276] According to Hilson, ASM is "one of the most important livelihood activities in Africa."[277] The peculiarity of ASM is that it provides income for both the miners and their service providers. Hence, in addition to mining for minerals, businesses grow around the mine site to cater to the needs of the miners; such as food sellers, water, transportations, and other types of businesses.[278] Also, mining was one of the main driving forces behind the infrastructural development of colonial Nigeria. These include good road network; railways; dams for hydroelectricity production; schools, health facilities, and water for employees.[279] Recently, the Nigerian government secured a loan from the World Bank to develop her mining sector – specifically, to formalise the currently informal ASM operations.[280]

The mining sector demonstrates a continuous tension between economic developments on the one hand and environmental protection on the other hand. According to Oramah and others, ASM miners have minimal knowledge of the impact their activities have on their health and the environment.[281] For instance, despite the high and increasing toll of deaths in Zamfara state due to lead-poisoning from ASM, the "miners continue to ignore advice from local environmental auditors."[282]

Having examined whether the operations of the NNEI infringe on the NEIHC right to a clean, safe and secure, healthy environment, in applying the adapted ESI component III, it is evident that NNEI activities do not promote this right. Although, ASM is identified as a means to reduce poverty and increase development opportunities of NEIHCs, however, this study contends that NNEI

275 Wälde (n 231) 346.
276 NM Smith and others, 'Human health and safety in artisanal and small-scale mining: an integrated approach to risk mitigation' (2016) 129 JCP 43, 43.
277 G Hilson, 'Farming, small-scale mining and rural livelihoods in Sub-Saharan Africa: A critical review' (2016) 3 TEIS 547, 548.
278 Oramah and others (n 187) 700.
279 Fell (n 190) 250; Hodder (n 190) 122; Dung-Gwom (n 217) 45-49.
280 See The World Bank (n 205) 1.
281 Oramah and others (n 187) 701.
282 Lar, Ngozi-Chika and Ashano (n 249) 13; Oramah and others (n 187) 696.

operations are environmentally unsustainable because they constitute mediums for soil, water, and air pollution.

Furthermore, unlike the NEEI whose entities predominantly consist of multinationals and indigenous companies, essentially entities that can be referred to as externals, the operations in the NNEI are undertaken mainly by members of the host communities. Thus, the activities of these members cause an infringement of other members' right to a clean, safe and secure, healthy environment. This research argues that the affected members can seek redress against these members whose activities cause an infringement of their right.

3.2.3 NNEI impact on other industries

As stated above, large-scale mining extensively affects the agricultural economy of the NEIHCs. Mining is seen as being more lucrative and attractive than farming, despite the dangers posed by mining. Hence, more communities where substantial solid minerals are found engage mostly in mining than farming.[283] According to Oramah and others, these communities leave farming to engage in ASM because of the extra income ASM provides compared to farming which is mainly for subsistence.[284] Consequently, some communities which hitherto primarily engaged in farming have abandoned agriculture for ASM.[285]

Furthermore, mining operations have caused the degradation of arable farmlands, by reducing soil fertility which in turn lead to slow plant growth, reduced farm yields, dwindling forest products, loss of natural vegetation, and death of plants. [286] Mine-related soil pollution has led to "radioactive

283 Lar, Ngozi-Chika and Ashano (n 249) 13; Oramah and others (n 187) 696.
284 Oramah and others (n 187) 700.
285 Oramah and others (n 187) 694.
286 Essaghah, Ogbonna and Alabi (n 225) 35-36; Ako and others (n 230) 35-36; Aigbedion and Iyayi (n 235) 35; Ikemefuna (n 235) 65.

contamination of soils in its vicinity,"[287] also, the destruction and decline of economic crops such as kola nut and cocoa.[288]

Therefore, applying the adapted ESI component V, it is evident that NEEI operations-related environmental degradation and pollution have caused severe harm to the agriculture industry, which forms the other dominant source of livelihood.

3.3 Existing HRAEP Enforcement Mechanism in the NEEI and NNEI

The adapted ESI component IV describes an environmentally sustainable extractive industry as having existing institutional, regulatory, and enforcement frameworks which provide adequate responses to environmental challenges. As indicated by the ECCJ in *SERAP* case,[289] although Nigeria has several institutional, regulatory, and enforcement frameworks which ordinarily should provide an adequate response to environmental challenges, however,

> [T]hese measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered…the core of the problem in tackling the environmental degradation in the Region of Niger Delta resides in lack of enforcement of the legislation and regulation in force, by the Regulatory Authorities of the Federal Republic of Nigeria in charge of supervision of the oil industry.[290]

Based on the above, it can be argued that the existing frameworks do not provide adequate responses to environmental challenges. While concurring with this position, however, this research argues that where utilised, the FREP Rules 2009 which is the existing HRAEP enforcement mechanism in Nigeria, might provide that adequate response to resolving environmental challenges. Described as being in a class of its own, it is suggested that the FREP Rules 2009 it is specifically designed to ensure and enhance the advancement of the

287 Ibeanu (n 258) 60.

288 Chindo, 'An Examination of the Socio-economic and Environmental Impact of Planned Oil Sands Development in Nigeria' (n 189) 173; NO Adeoye, 'Land degradation in gold mining communities of Ijesaland, Osun state, Nigeria' (2016) 81 Geojournal 535, 546; M Chindo, 'Environmental risks associated with developing oil sands in southwestern Nigeria' (2015) 36 SJTG 3, 11.

289 *ECW/CCJ/JUD/18/12 SERAP v Federal Republic of Nigeria* (2012) ECOWAS paras 102-104.

290 Ibid, paras 105 and 108.

rights of citizens.[291] Also, unlike the common law Torts, applicants are not required to have *locus standi*. The FREP Rules 2009 mandates the Nigerian courts to

> [P]roactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented.[292]

Despite the identified benefits of this enforcement mechanism, however, there is the minimal utilisation of this avenue as a dominant approach has been the use of Torts common law route – for example, strict liability and negligence.[293] In Chapter Three, the research demonstrates that section 20 of the 1999 Constitution and article 24 of the ACHPR Act 1983, combined, provide the citizens' right to a clean, safe and secure healthy, environment which is enforceable through the FREP Rules 2009. It is argued that where effectively harnessed, the FREP Rules 2009 as the existing HRAEP enforcement mechanism, has the potential to influence an environmentally sustainable Nigerian extractive industry.

4 CHAPTER CONCLUSION

Several studies indicate that the activities of the Nigerian extractive industry entities are environmentally unsustainable.[294] In seeking to answer the question of whether HRAEP provides a viable platform to achieve environmental sustainability in Nigeria's extractive industry, it was necessary to ascertain the underlining hypothesis that their activities are environmentally unsustainable. The definition of the ES concept within the context of this research refers to the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative capacity of the environment in which they operate, without degrading its future waste absorptive capacity.

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291 *Rumugu Air and Space Nigeria Limited v Federal Airports Authority of Nigeria & Anor* (2016) LPELR-41506 (CA) 23-24, paras B-E.

292 Para 3 (d) Preamble to the FREP Rules 2009 (n 1).

293 See JG Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (LITVM 2000).

294 See 1: Introduction and Section 3: The Nigerian Extractive Industry and the Adapted ESI Five Components.

The chapter adapted the ESI five components developed by Samuel-Johnson, Esty and Levy [295] as a framework to determine the extent to which the operations of the Nigerian extractive industry has been able to support its environmental sink service. Having examined the operations of the Nigerian extractive industry entities through this framework, it is suggested that indeed these activities have resulted in devastating environmental pollution and degradation on the entities' immediate and extended environmental systems. The pollution has affected the livelihood of host communities and caused severe harm to other industries.

Concisely, the operations of the Nigerian extractive industry entities have neither resulted in the maintenance of the environmental sink service nor have the entities kept their waste emissions within the sink's assimilative ability. Instead, the activities of the Nigerian extractive industry entities have continuously degraded the future capacity of the environmental sink service to absorb waste. Thus, the chapter finds that the activities of the Nigerian extractive industry entities are indeed environmentally unsustainable.

295 Samuel-Johnson, Esty and Levy (n 3) 8-9.

CHAPTER SEVEN

CONCLUSION

1 INTRODUCTION

Flowing from the principal research question, which is whether the use of human rights mechanism to protect the environment provides a possible tool to achieve environmental sustainability in the Nigerian extractive industry, the following hypotheses were identified, namely, (i) that HRAEP within the Nigerian context provides a viable mechanism, and (ii) that the operations of the Nigerian extractive industry entities are environmentally unsustainable. While Chapters Two, Three, and Four explored the first hypothesis, the second postulation was examined in Chapter Five.

It is important to reiterate that this research is not canvassing for the adoption of HRAEP in Nigeria. The objective of the study was to investigate whether – as suggested by scholars[1] – the concept of using a human rights mechanism to protect the environment provides an adequate tool through which the environment can be protected. The research focused on examining the HRAEP concept to determine whether the concept might promote the achievement of environmentally sustainable extractive industry in Nigeria.

This chapter presents the research summary, its contribution to existing literature, recommendations, and suggestions for future research.

2 RESEARCH SUMMARY

The Nigerian extractive industry has been and continues to be an immense revenue contributor to the economy.[2] Despite this positive aspect, the extractive industry has also caused severe environmental degradation and pollution, such that the environmental sink is rapidly losing its capacity to

1 See discussion in Chapter One – Section 2: Purpose of the Research and Section 3: Significance of the Research.

2 See Chapter Five – Section 6: The Nigerian Extractive Industry and the adapted Five ESI Components.

absorb future waste emissions.[3] Seeking to resolve this challenge, scholars have proposed the use of a human rights mechanism to protect the environment.[4] Given this suggestion, the present study investigates whether a human rights approach provides a feasible means to protect the environment and in turn, ensure that the operations of the Nigerian extractive industry entities maintain the environmental sink such that its ability to absorb future waste emissions is not compromised.

Even though scholars proffer that a human rights approach can be used to protect the Nigerian environment, there is an absence of literature which examines what this concept connotes within the Nigerian context. Thus, it was necessary to analyse the HRAEP concept from a broader perspective and use the results to understand HRAEP within the Nigerian context. The discussion engaged in Chapter Two illustrates that the HRAEP concept seeks to achieve a specific purpose and function, and that is, the maintenance or restoration of the abiotic components by preventing or reducing the emissions released into the environmental media. There is presently no UN adopted instrument which guarantees human rights to the environment. However, this right is provided for in regional instruments like the Banjul Charter. Additionally, this right is provided for by the national constitutions of over 180 nation states, Nigeria included.

Chapter Three examined the ES concept and proferred an operational definition relevant to this research. Defined as the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative capacity of the environment in which they operate, without degrading its future waste absorptive capacity. The chapter finds that there is an intricate nexus between HRAEP and ES, such that the attainment of one simultaneously produces the execution of the other.

Using the basic features of the HRAEP concept identified in Chapter Two, Chapter Four proffers the HRAEP definition within the Nigerian context, as enforcement of the Nigerian citizens' right to a clean, safe and secure, healthy

3 Ibid.
4 Chapter One – Section 2: Purpose of the Research and Section 3: Significance of the Research.

environment. Taking cognisance of the specific function and purpose of the HRAEP, it is suggested that the objective in enforcing the rights provided for in section 20 of the 1999 Constitution and article 24 of the ACHPR Act 1983 is to maintain or restore the quality of land, water, air, animal resources, plant resources, or other natural resources. The enforcement of these provisions will result in preventing the emission of pollutants or reducing the presence of polluting substances in these elements.

Furthermore, Chapter Four examined the justiciability of section 20 of the 1999 Constitution and article 24 of the ACHPR Act 1983 and found that contrary to the existing court jurisprudence and literature, section 20 of the 1999 Constitution is explicitly justiciable. The Nigerian courts hold that the rights provided in the ACHPR Act 1983 are enforceable in the Nigerian courts. It is further suggested that the FREP Rules 2009[5] as the current human rights enforcement mechanism might provide a viable platform for Nigerian citizens to protect the environment. Notwithstanding, the majority of Nigerian cases favour the common law tort approach, which has delivered minimal success as applicants grapple with issues such as locus standi and having to extensively prove that the extractive industry company behaved negligently or has strict liability.[6]

Needless to state that the seeming inadequacy of the Nigerian courts to resolve the cases brought through common law tort, propelled NEIHCs to approach foreign jurisdictions such as the USA, UK, and the Netherlands. Given the current judgements of the USA and UK – namely, *Kiobel*[7] and *Okpabi*,[8] – it is suggested that these hitherto favourable routes are rapidly becoming inaccessible. The research posits that this might further increase traffic at the continental and regional human rights enforcement mechanisms. Thus, Chapter Five examined the AHREIs and EHREI to ascertain whether they might provide adequate routes for Nigerian citizens to enforce their right to a clean, safe and secure, healthy environment. As such, providing an

5 Constitution of the Federal Republic of Nigeria, Fundamental Rights (Enforcement Procedure) Rules 2009 under Chapter IV of the Constitution, B1365. Hereafter referred to as the FREP Rules 2009.

6 See JG Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (LITVM 2000).

7 *Kiobel v Royal Dutch Petroleum Co*. 133 S Ct 1659 (2013).

8 *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC) para 89.

African solution to the Nigerian challenge of an environmentally unsustainable extractive industry.

The chapter finds that although the AHREIs and EHREI have the potential to improve human rights conditions in Africa, based on the challenges identified, they might not provide that adequate route for Nigerian citizens. The indicated challenges include the consistently low rate of enforcement of the ACHPR and AfCHPR decisions by states parties; the limited access granted to individuals and NGOs, and the seven concurrent conditions individuals and NGOs must fulfil to access the ACHPR or AfCHPR. Thus, the AHREIs and EHREI may not provide the desired African solution to the Nigerian challenge. Notwithstanding, the shortcomings of these human rights enforcement institutions illuminate the need to strengthen what is available at the national level.

Having examined the first assumption posed by this research, using the adapted ESI components, Chapter Six investigated the hypothesis that the operations of the Nigerian extractive industry entities are environmentally unsustainable. The chapter finds that the Nigerian extractive industry entities have neglected to maintain the environmental sink consequently eroding its capacity to absorb future waste emissions. Also, despite the existence of a human rights enforcement mechanism which might provide a viable platform to protect the environment, nonetheless, this mechanism is barely utilised by Nigerian citizens. It is argued that the active use of the FREP Rules 2009 might ensure that the Nigerian extractive industry entities adopt environmentally sustainable approaches in carrying out their operations.

3 CONTRIBUTION TO EXISTING LITERATURE

In addition to finding an appropriate solution to an identified problem,[9] seeking the production of new knowledge forms part of the outcomes of the research process.[10] Thus, it is expected that this present research should contribute to

9 VLP Clark and NV Ivankova, *Mixed Methods Research: A Guide to the Field* (SPI 2016) 35; NW Lawrence, *Social Research Methods: Qualitative and Quantitative Approaches* (6th edn, Pearson 2011) 2; K Vibhute and F Aynalem, 'Legal Research Methods' [2011] 2 <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> accessed 1 October 2018; B Matthews and L Ross, Research Methods: A Practical Guide for the Social Sciences (PEL 2010) 7.

10 J Mende, 'The Poverty of Empiricism' (2005) 8 ISJ 189, 190.

existing knowledge.[11] It is necessary to reiterate explicitly that the objective of this study is not to recommend or advocate that Nigeria adopt the HRAEP, instead the aim has been to critically examine whether the HRAEP provides a viable tool through which the operations of the Nigerian extractive industry can be environmentally sustainable. Given the absence of literature explicitly focussed on achieving this purpose, the research's principal question forms part of the study's contribution existing literature. The following include this study's contribution to existing research:

3.1 The formulated operational definition of HRAEP

As stated in Chapter Two, although scholars have sought to define what a human rights approach to environmental protection means, it is argued that what has been proffered does not take into consideration the 'environmental protection' aspect and is therefore not comprehensive. The definition formulated in this research demonstrates that HRAEP has a specific function and purpose, which is to (i) maintain or restore the quality of environmental media, and (ii) ensure the prevention of pollutant emissions or reduce the presence of these pollutants in the abiotic components. It is argued that this definition goes further than identifying that HRAEP is the use of a human rights mechanism to protect the environment, it shows how this protection is implemented. Hence, for the approach to be categorised as HRAEP, it is argued that this must fulfil the specific function and purpose identified above. This aspect of HRAEP is not covered in the existing literature. Therefore, it is suggested that this definition provides further illumination on the scope of this concept. The benefit of this definition is that it provides a precise framework for Nigerian citizens, non-governmental organisations (NGOS), and civil societies to adequately pursue the protection of the environment.

3.2 Examining HRAEP within the Nigerian context

There is the paucity of literature which examines the HRAEP concept within the Nigerian context. In addition to engaging in this, the research proffers what

11 These contributions are discussed below.

the HRAEP concept from the Nigerian perspective connotes. To be described as the use of a human rights approach to protecting the environment, it is argued that the approach refers to the process of enforcing the citizens' right to a clean, safe and secure, healthy environment with the aim to maintain or restore the abiotic components, and again by reducing or preventing emissions into the environmental media. Although the human being is the beneficiary, by enforcing this right, this approach explicitly focuses on protecting the environment. The use of HRAEP is unambiguously different from using the common law torts, having two distinctively expected outcomes. The HRAEP provides a framework that can be utilised by any Nigerian citizen – whether a member of the immediate host community or not – to ensure environmental protection in the extractive industry. It also means that where members of the NEIHCs are seen to be responsible for the environmental degradation and pollution, individuals (or the community members) can enforce HRAEP against the members involved in such activities. Examples include militants who bomb oil pipelines and facilities, entities or individuals who operate illegal refineries, people vandalising oil pipelines, and artisanal miners who engage in operations which result in environmental degradation and pollution.

3.3 The explicit justiciability of section 20 of the 1999 Constitution

In contrast with existing Nigerian jurisprudence and literature, this research argues that section 20 of the 1999 Constitution is unequivocally justiciable and creates a positive duty on the state which Nigerian citizens can enforce. This research arrives at this conclusion by its systematic analyses of section 20 of the 1999 Constitution. The process shows that an application of the canons of constitutional interpretation as stipulated by the Nigerian Supreme Court – that is, the proper constitutional interpretation of Chapter II – would indicate that Chapter II is explicitly justiciable, in that manner, making section 20 justiciable. It is necessary to note that there is the absence of literature which investigates section 20 in any systematic way. Thus, the detailed examination of section 20 of the 1999 Constitution and article 24 ACHPR Act 1983 and their enforcement, form part of this research's contribution to existing literature. Also, by questioning and systematically debunking the 'accepted' position that

section 20 of the 1999 Constitution is non-justiciable, the research aims to engineer further discussions as to the enforcement of this right; perhaps from a 'law in action' approach.

3.4 The formulated operational definition of ES within the context of this research

The ES concept within this research is defined as the indefinite maintenance of the environmental sink service such that the waste emissions of the Nigerian extractive industry are kept within the assimilative capacity of the environment in which they operate, without degrading its future waste absorptive capacity. It is suggested that this definition is an addition to existing literature as there is the absence of literature which describes ES from the Nigerian context.

3.5 Adapting the ESI components as a framework to ascertain whether the activities of the Nigerian extractive industry entities are environmentally unsustainable

Another contribution to existing literature is adapting the ESI components as a framework to investigate the extent to which operations in the Nigerian extractive industry are environmentally unsustainable. The benefit of this evaluation is that it helps policymakers to explicitly identify areas which can be addressed rather than broadly stating that the environmental sustainability level of the Nigerian extractive industry will be improved. Also, citizens can use the identified areas to hold the government accountable for improving environmental sustainability levels. Similarly, this framework can be applied to other industries in Nigeria to ascertain the extent to which their operations maintain the environmental sink and not compromise its capacity to absorb future waste emissions.

4 RECOMMENDATIONS

Although the research finds that the HRAEP might provide a viable mechanism through which environmental sustainability can be achieved in the Nigerian

extractive industry, there are however critical issues the Nigerian courts would have to resolve. These issues include:

I. The re-examination of the courts' position on the non-justiciability of Chapter II of the 1999 Constitution. Given Tobi JSC decision in *FRN v Anache*[12] where he held that the provisions "could be justiciable;"[13] it is argued that the position that section 6(6)(c) explicitly ousts the jurisdiction of the court on matters in Chapter II might soon be a thing of the past.

II. Defining what 'peoples' means within the context of article 24 of the ACHPR Act 1983; and

III. Whether the citizens' right to a clean, safe and secure, healthy environment is a right that is only accessible to people or both individuals and peoples.

Furthermore, the under-utilisation of the HRAEP enforcement mechanism emphasises the need to orientate both the legal community and NEIHCs of this avenue which has the potential to ensure that the Nigerian extractive industry operations start maintaining the environmental sink and stop degrading its ability to absorb future waste emissions. Therefore, it is suggested that the input of critical stakeholders is essential in ensuring that HRAEP provides that viable mechanism with which environmental sustainability is achieved in Nigerian extractive industry. These crucial stakeholders are: (1) the NHRC; (2) the Nigerian Legal Aid Council; (3) the legal research training institutions; and (4) the Nigerian Bar Association.

4.1 The NHRC

Created as a body to enable

> [E]xtra-judicial recognition, promotion and enforcement of all rights recognised and enshrined in the Constitution of the Federal Republic of Nigeria 1999, International and Regional Instruments and under any other existing

12 *Federal Republic of Nigeria v Alhaji Mika Anache & Ors* (2004) 206-207 NSCQR Vol 17. Hereafter referred to as FRN v Anache.

13 Ibid, 201 NSCQR Vol 17.

> legislation…provide a forum for public enlightenment and dialogue on…human and other fundamental rights.[14]

The NHRC plays a crucial role in promoting and informing the Nigerian citizens of their justiciable right to a clean, safe and secure, healthy environment and the existing HRAEP enforcement mechanism.[15] As indicated in Chapter Four of this research, the NHRC provides an avenue Nigerian citizens can use to circumvent the challenge of waiting for Nigeria to deposit the declaration allowing the AfCHPR and ACJHR/ACJHPR to accept applications from individuals against Nigeria. Also, the NHRC through civil litigation can influence the Attorney General of the Federation to implement the decisions of the ECCJ.

Given the NHRC's mandate to "promote an understanding of public discussions of human rights issues in Nigeria,"[16] it is suggested that the NHRC should utilise this provision to promote awareness and understanding of the Nigerian citizens' right to a clean, safe and secure, healthy environment and its enforcement mechanism – that is, the FREP Rules 2009. Also, taking cognisance of NHRC powers to "institute any civil action on any matter it deems fit in relation to the exercise of its functions,"[17] the NHRC can institute public interest litigation on behalf of NEIHCs against the federal and state governments, their agents, extractive industry entities, or individuals.[18]

More so, given that part of the functions of the NHRC include receiving and investigating complaints on violations of human rights with the discretion to make the appropriate determination.[19]Also, such award or recommendation is binding and enforceable by either the federal high court (FHC), state high court (SHC), or high court of the federal capital territory Abuja (HC of the FCT).[20] It is suggested that the NHRC can receive and investigate violations of any Nigerian citizen's right to a clean, safe and secure, healthy environment and

14 Preamble para 3 National Human Rights Act 1995 CAP N46 LFN 2004; Preamble paras 3-4 National Human Rights Commission (Amendment) Act 2010. Hereafter referred to as NHRC Act 2010.

15 ACHPR, 'Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialised human rights institutions in Africa' ACHPR/Res.370 (LX) 2017 (Sixth Ordinary Session, 8-22 May 2017) preamble para 9.

16 S 5(m) NHRC Act 2010 (n 14).

17 Ibid, s 6(1)(b).

18 Preamble para 3(e) of the FREP Rules 2009 (n 5).

19 S 5(j) NHRC Act 2010 (n 14).

20 Ibid, s 22(1).

make an appropriate determination on the issue. One of the benefits is that the victims do not have to pay for the service as it is free of charge.[21]

Taking cognisance of the ACHPR's acknowledgement that "education in human and peoples' rights is a prerequisite for the effective implementation"[22] of these rights; and the recommendation that human and peoples' rights should be included in the core curriculum of all levels of private and public education.[23] It is suggested that the NHRC can collaborate with the Federal Ministry of Education[24] to ensure that the teaching of human and peoples' rights is included in the education programme from primary to tertiary level.[25]

4.2 The Nigerian Legal Aid Council

Pursuant to Section 8(7) of the Legal Aid Act 2011, the Legal Aid Council is mandated to establish community legal service. Part of this service includes providing individuals with general information about the Nigerian law and legal system.[26] In addition, the Legal Aid Council is mandated to provide civil litigation service

> [F]or the purpose of assisting indigent persons to access such advice, assistance, and representation in court where the interest of justice demands, to secure, defend, enforce, protect or otherwise exercise any right, obligation, duty, privilege interest or service to which that person is ordinarily entitled under the Nigerian legal system.[27]

This research recommends that the Legal Aid Council should use its community legal service as a vehicle to inform Nigerian citizens - especially the NEIHCs – of their recognised and guaranteed citizens' right to a clean, safe and secure, healthy environment and the HRAEP enforcement mechanism. Furthermore, through the civil litigation service, this research recommends that

21 National Human Rights Commission, 'Activities of the Commission' <www.nigeriarights.gov.ng/Activities.php> accessed 1 October 2018.

22 ACHPR, 'Resolution on Human Rights Education' ACHPR/Res.6 (XIV) 93 (Fourteenth Ordinary Session, 1-10 December 1993) preamble para 1.

23 ACHPR/Res.6 (XIV) 93 (n 22) para 1; ACHPR, 'Recommendation on modalities for promoting human and peoples' rights' ACHPR/Recom.4(V) 89 (Fifth Ordinary Session, 3-14 April 1989) para i.

24 Federal Ministry of Education <www.education.gov.ng/#?Itemid=496> accessed 1 October 2018.

25 ACHPR/Recom.4(V) 89 (n 23) para i.

26 S 8(7)(a) Legal Aid Act 2011.

27 Ibid, s 8(3).

the Legal Aid Council should assist indigent Nigerian citizens to access the enforcement of this right.

4.3 Legal research training institutions

Within the context of this research, the legal research training institutions refer to the National Judicial Institute (NJI) and the Nigerian Institute of Advanced Legal Studies (NIALS).

Taking cognisance of the "importance of specialised and continuing training in human and peoples' rights for legal practitioners, judges, magistrates and commissioners," [28] the ACHPR urged "Judges and magistrates to play a greater role in incorporating the Banjul Charter and future jurisprudence of the ACHPR in their judgements."[29] Further calling on lawyers to "place greater reliance on the Charter and other international and regional human rights instruments in their various legal advocacy roles."[30]The ACHPR urged that specialised and comprehensive training on human and peoples' rights be conducted for judicial officers and lawyers.[31]

Given the above, it is important to note that section 3(2) of the NJI Act 1991, empowers the NJI to:

> [P]rovide continuing education for all categories of judicial officers by undertaking, organising, conducting, and facilitating study course, lectures, seminars, workshops, conferences, and other programmes related to judicial education[32]

It is suggested that the NJI can take advantage of this provision to train the Nigerian judiciary on the HRAEP and its enforcement mechanism. Furthermore, the seminars and workshops might provide the necessary

28 ACHPR, 'Resolution on the Role of Lawyers and Judges in the Integration of the Charter and the Enhancement of the Commission's Work in National and Sub-regional Systems' ACHPR/Res.22 (XIX) 96 (Nineteenth Ordinary Session, 26 March - 4 April 1996) preamble para 3.

29 Ibid, para 1.

30 Ibid, para 2.

31 Ibid, para 3.

32 S 3(2)(b) National Judicial Institute Act 1991, CAP N55, LFN, 2004. Hereafter referred to as NJI Act 1991.

environment for the Nigerian judicial officers[33] to discuss ways through which they might proactively develop jurisprudence on article 24 ACHPR Act 1983.

Similar to the NJI, the NIALS is mandated to "organise, host, arrange and conduct national or international seminars, symposia, conferences, workshops, lectures on any branch of law or related subject."[34] Thus, given that NIALS has a broader scope in comparison to NJI, it is suggested that NIALS can organise workshops and seminars for both judicial officers and legal practitioners. Also, these workshops and seminars might provide the favourable atmosphere for both judicial officers and legal practitioners to discuss the HRAEP and its enforcement mechanisms. Also, the NIALS through its publicly held roundtables[35] which include a wider audience than legal practitioners and judicial officers can ensure that the Nigerian populace is made aware of their right to a clean, safe and secure, healthy environment and the HRAEP enforcement mechanism.[36]

Also, taking cognisance of NIALS' mandate:

> [T]o conduct research into any branch of the law or related subjects with a view to the application of the results thereof in the interest of Nigeria…to prepare and publish books, records, reports, journals as may seem desirable for the dissemination of research findings, seminars, symposia, conferences, findings of workshops and lectures as aforesaid.[37]

It is suggested that NIALS can collaborate with the ACHPR to conduct studies and research in human and peoples' rights and disseminate the collated knowledge and information.[38]

4.4 Nigerian Bar Association

The Nigerian Bar Association (NBA) is a non-profit, umbrella association for all the lawyers that have been called to the Nigerian Bar.[39] The NBA's objective

33 For definition of judicial officers see – ibid, s 17.

34 S 4(d) Nigerian Institute of Advanced Legal Studies Act 1984, CAP N112, LFN 2004. Hereafter referred to as NIALS Act 1984.

35 Nigerian Institute of Advanced Legal Studies, 'Roundtables' <http://nials.edu.ng/index.php/2015-12-10-16-05-04/roundtables> accessed 1 October 2018.

36 J Uyanga, 'The Environment and Environmental Education in Nigeria' (1985) 9 HI 45, 47.

37 S 4(b)(e) NIALS Act 1984 (n 34).

38 ACHPR/Recom.4(V) 89 (n 23) para iii.

includes the protection and promotion of "respect for enforcement of fundamental rights, human rights and people's rights,"[40] and "the promotion and advancement of legal education, continuing legal education, advocacy, and jurisprudence."[41] It is suggested that the NBA should use this platform to actively promote the respect of the right to a clean, safe and secure, healthy environment by engaging in public interest litigation[42] on behalf of NEIHCs. Also, by engaging in this process, members of the NBA can act as activists for a change in the current Nigerian courts' jurisprudence on section 20 of the 1999 Constitution.

Although this research finds that section 20 is unequivocally justiciable, however, the fact remains that the courts would "apply the law as it is now and not the law as it might develop at some indeterminate stage in the future."[43] Until the Supreme Court decides that section 20 be explicitly justiciable,

> [I]t is the law that a decision of a court of competent jurisdiction, no matter that it seems palpably null and void, unattractive or insupportable, remains good law and uncompromisingly binding until set aside by a superior court of competent jurisdiction.[44]

Therefore, it is suggested that the NBA through public litigation,[45] should proactively take matters on HRAEP before the Nigerian courts and in that manner advance the courts' jurisprudence on both section 20 of the 1999 Constitution and article 24 ACHPR Act 1983.

In 2017, the NBA inaugurated a Niger Delta Task Force Committee aimed at addressing the challenges in the Niger Delta – which forms part of the NEIHCs. Part of the terms of reference of this committee includes "to advise on the general challenges in the region with a view to enhancing environmental

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39 Nigerian Bar Association, 'About Us' <www.nigerianbar.org.ng/index.php/aboutus> accessed 1 October 2018.

40 S 3(1)(k) Nigerian Bar Association, 'Nigerian Bar Association Constitution 2015' <www.nigerianbar.org.ng/index.php/aboutus#Constitution> accessed 1 October 2018. Hereafter referred to as NBA Constitution 2015.

41 Ibid, s 3(1)(b).

42 See Preamble para 3(e) of the FREP Rules 2009 (n 5).

43 *Okpabi* (n 8) para 89.

44 *General Sani Abacha & ors v Chief Gani Fawehinmi* (2002) LPELR-14(SC) 98.

45 Preamble para 3(e) of the FREP Rules 2009 (n 5).

protection and the quality of life in the region."[46] It is suggested that this Task Force provides an avenue through which the NBA can promote and protect the NEIHCs right to a clean, safe and secure, healthy environment. The Task Committee should inform NBA members of the existing HRAEP enforcement mechanisms and the fact that is being under-utilised. Also, on its own, the Task Force can institute HRAEP public interest litigation before the Nigerian courts.

Additionally, given that a representative of the NBA is indicated as one of the members of the National Orientation Agency (NOA) board and part of the functions of the includes informing Nigerian citizens of their rights.[47] It is suggested that the NBA should collaborate with the NOA to promote respect for the enforcement of the right to a clean, safe and secure, healthy environment.

Further, in achieving the objective to advance advocacy, the NBA can collaborate with the Network of University Legal Aid Institutions (NULAI)[48] through the established live clinics,[49] to enlighten law students on the right to a clean, safe and secure, healthy environment and its enforcement mechanism. Also, encourage the development of practical skills in advocating for the enforcement of this right; for example, through moot trials and pro bono client counselling.[50]

5 FUTURE RESEARCH

This research has sought to examine the HRAEP to determine whether it provides a viable mechanism to achieve ES in the Nigerian extractive industry;

46 Nigerian Bar Association, 'The Inauguration of the NBA North East Task Force and NBA Niger Delta Task Force' <www.nigerianbar.org.ng/index.php/news1/225-the-inauguration-of-the-nba-north-east-task-force-and-nba-niger-delta-task-force> accessed 1 October 2018.

47 S 3 National Orientation Agency Act 1993.

48 Network of University Legal Aid Institutions (NULAI) Nigeria, 'The Development of Legal Education' <www.nulai.org/index.php/blog/83-cle> accessed 1 October 2018.

49 CO Adekoya, 'Meeting the Required Reforms in Legal Education in Nigeria: Clinical Legal Education –Ten Years After' (2014) 20 IJCLE 603, 605; S Erugo, 'Legal Assistance by Clinical Law Students: A Nigerian Experience in Increasing Access to Justice for the Unrepresented' (2016) 3 AJLE 160, 173.

50 See Network of University Legal Aid Institutions (NULAI) Nigeria, 'Compendium of Campus Based Law Clinics in Nigeria' (Complied by E Ojukwu, O Lagi and M Yusuf, NULAI Nigeria 2014) 10-12, 31 <www.nulai.org/index.php/media1/downloads-resources/file/45-compendium-of-campus-based-law-clinics-in-nigeria> accessed 1 October 2018; Adekoya (n 49) 607-609; F Gibson, 'Community Engagement in Action: Creating Successful University Clinical Legal Internship' [2012] AJCLEAJ 1, 27.

and finds that although there is an existing HRAEP enforcement mechanism, however, there is minimal utilisation. Thus, it is suggested that future research might seek to investigate the basis for the seeming lack of awareness and the minimal utilisation of the FREP Rules 2009 to protect the environment. Also, it is suggested that a socio-legal method might provide the relevant approach in examining this social phenomenon.

It is necessary to note that what is meant by socio-legal studies lacks an agreed definition.[51] According to Tamanaha, it refers to

> [A] group of disciplines that apply a social scientific perspective to the study of law, including the sociology of law, legal anthropology, legal history, psychology and the law, political science studies of courts, and science-oriented comparatives[52]

Harris defines socio-legal studies as the "study of law and legal institutions from the perspectives of social sciences."[53] According to Little, socio-legal studies is research which embraces "disciplines and subjects concerned with the law, the social effects of law and legal systems, the influences of social, political, and economic factors on them, and a wide range of research methods." [54] Dawson argues that socio-legal knowledge goes beyond combining social science knowledge from social data and legal knowledge from law data.[55]

From the definitions above, it can be argued that the essential feature of socio-legal studies is the use of methodologies and methods applicable in social science research to understand the legal procedure, legal processes, and the legal system; in simple terms, the 'law in action'.[56] These methods can either be qualitative, quantitative, or mixed. While qualitative is focused on "exploring individual's experiences with a phenomenon by collecting and analysing

51 DR Harris, 'The development of socio-legal studies in the United Kingdom' (1983) 3 LS 315, 315; D Jabbari, 'Is There a Proper Subject Matter for 'Socio-Legal Studies'?' (1998) 18 OJLS 707, 707; D Feenan, 'Forward: Socio-legal studies and the humanities' (2009) 5 IJLC 235, 235.

52 BZ Tamanaha, *Realistic Socio-Legal Theory* (OUP 1997) 2.

53 Harris (n 51).

54 G Little, 'Developing environmental law scholarship: going beyond the legal space' (2016) 36 LS 48, 52 fn16.

55 TB Dawson, 'Legal Research in a Social Science Setting: The Problem of Method' (1991-1992) 14 DLJ 445, 450.

56 CARI Nolasco, MS Vaughn and RV del Carmen, 'Toward a New Methodology for Legal Research in Criminal Justice' (2010) 21 J CJE 1,10.

narrative or text data expressed in words and images;" [57] quantitative "examines the relationships between variable by collecting and analysing numeric data expressed in numbers or scores."[58] On the other hand, mixed, is an integration of both quantitative and qualitative methods to collect and analyse data.

Also, unlike doctrinal research where the question is 'what is the law', socio-legal research aims to investigate the what, who, where, when, how, and why of a social phenomenon.[59] Matthew and Ross define social phenomenon as "anything that influences or is influenced by human beings who interact with and are responsive to each other."[60]

Thus, by applying these methods, the future research might be able to ascertain 'the why' question concerning the minimal utilisation of the FREP Rules 2009 by Nigerian citizens – specifically, the NHEIC – to protect the environment. This future research might also investigate whether there is a difference between the law in books – that is the FREP Rules 2009 – and the law in action.

57 Clark and Ivankova (n 9) 4.
58 Ibid.
59 Matthews and Ross (n 9) 57; F Coomans, F Grünfeld, and MT Kamminga, 'Methods of Human Rights Research: A Primer' (2010) 32 HRQ 179, 181.
60 Matthews and Ross (n 9) 20.

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