

IMPEDIMENTS TO ENFORCEMENT OF ENVIRONMENTAL TREATIES AGAINST OIL POLLUTION*

Abstract

Indisputably, at various fora, the hopeless picture of the condition of the global environment vis-à-vis the linkage of environmental degradation with growth and human welfare has been painted. 'Safe water is increasingly limited, hindering economic activity. Land degradation endangers the lives of millions of people. This is the world today.' Unfortunately, despite oil's significance to the world's economy, pollution arising from it has constituted one of the major sources of the global environments' degradation. To address the threat posed by oil pollution to the global environment, some international and regional instruments have increasingly emerged. This article examines some of these instruments along with some of the challenges confronting their effectiveness. The article concludes that relevant steps should be taken to address the challenges in order to ensure that the various instruments and treaties are effectively implemented by States to safeguard a healthy global environment.

Key words: *Convention, Enforcement, Global Environment, International Environmental Law, Oil Pollution*

1. Introduction

It is an acknowledged fact that in the past few years, the world has witnessed countless accidental and deliberate occurrences of serious environmental pollution such as the *Torrey Canyon* incident in 1967,¹ the *Amoco Cadiz* tanker oil spill of 1978² and the *Exxon Valdez* oil spill of 1989 which resulted in the dumping of approximately 11 million US gallons of crude oil (i.e. about 41.8 million litres) into the environmentally susceptible coastline in Alaska.³ Similarly, there was the incident of the *Greek Aegean* sea vessel oil spill of December 1992 which collided with rocks outside a fog-shrouded harbour entrance culminating in the discharging of millions of gallons of crude oil off the northwest of Spain.⁴ It cannot also be easily forgotten in a hurry the environmental assault occasioned by late Iraqi strongman, President Saddam Hussein, which turned the Kuwaiti oil fields into a scorched wasteland.⁵ In 2010, there was equally the Gulf of Mexico oil spill⁶ which reportedly has been acknowledged as

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¹ 6 ILM, 1967, p. 480.

² See '1978: Tanker Amoco Cadiz splits in two,' *BBC on This Day*, March 24, 1978. Available at: <<http://news.bbc.co.uk/onthisday/hi/dates/stories/march/24/newsid2531000/2531211.stm>>. Accessed on 7 May, 2014.

³ See '1989: Exxon Valdez Creates Oil slick Disaster,' *BBC on This Day*, March 24, 1989. Available at <<http://news.bbc.co.uk/onthisday/hi/dates/stories/march/24/newsid4231000/4231971.stm>>. Accessed on March 19, 2014.

⁴ See W. D. Montalbano, 'Tanker's Fire Burns out of Spain,' *Los Angeles Times*, December 5, 1992, p. A-18. Available at <<http://articles.latimes.com/1992-12-05/news/mn-13911harbor-pilot>>. Accessed on March 19, 2014.

⁵ In the course of the Persian Gulf War in 1991, as Iraqi forces withdrew to Baghdad, Saddam Hussein sent a team of engineers into Kuwait's oil fields and blew up several hundreds of oil wells. For several months more than a billion barrels of oil (some estimates it at 4 million barrels daily) went up in flames. According to a CNN report, 'the oil that did not burn in the fires travelled on the wind in the form of nearly invisible droplets resulting in an oil mist or fog that poisoned trees and grazing sheep, contaminated fresh water supplies, and found refuge in the lungs of people and animals throughout the Gulf.' As a result of this, there was a serious environmental and economic catastrophe which stretched from Baghdad across United Arab Emirates to Iran and went as far as Turkey, Syria and Afghanistan. See R. Chilcote, 'Kuwait still recovering from Gulf War fires,' *CNN World News*, January 3, 2003.

Available at: <<http://edition.cnn.com/2003/WORLD/meast/01/03/sproject.irq.kuwait.oil.fires/>>. Accessed on March 18, 2014.

⁶ See generally, United Nations Environment Programme (2010, August). 'The Gulf of Mexico Oil Spill: The World's Largest Accidental Offshore Oil.' Available at: <<https://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?articleid=65>>. Accessed on March 21, 2014. See also Centre for Biological Diversity (2010). 'Gulf Disaster: End Offshore Drilling Now.' Available at: <http://www.biologicaldiversity.org/>. Accessed on March 21, 2014. See also Babatunde, I. O. (2010). *A Critical Analysis*

the worst world offshore oil spill in recent times.⁷ Recently too, an oil spill occurred after a vessel carrying an estimated 357,000 litres of oil crashed in the Sundarbans' Shela river in Bangladesh.⁸ This posed a serious threat to trees, plankton, vast populations of small fishes, rare dolphins and other marine lives in the area.⁹ The roll call for environmental contamination is unending. As a means of effectively combating oil and related environmental pollution, the global community have entered into various international, regional and multilateral agreements aimed at protecting the global environment from pollution. Some of these treaties and Conventions would be examined in this article. The article would also examine the enforcement mechanisms, the role of some global and regional bodies in the enforcement of international and regional conventions, treaties and agreements as well as some of the challenges confronting the successful implementation and compliance with these global and regional environmental agreements.

2. Some Global Regimes on the Protection of the Environment from Oil and Related Pollution

There are various international conventions, treaties, protocols and other forms of legal and non-binding instruments put in place to tackle environmental pollution at the global or regional levels. Notable among them are:

2.1. International Convention on the Prevention of Pollution of the Sea by Oil 1954 (OILPOL 1954)¹⁰

This was the earliest global covenant that made an effort at controlling pollution of the sea resulting from oil tankers' operations.¹¹ The Convention sought to address this problem in three principal ways. First, it created 'prohibited zones' which, except as otherwise stated in Annex A, extends to at least 50 miles from the nearest land in which the discharge of oil or its mixture containing more than 100 parts of oil per million was prohibited. Second, it regulated the magnitude of pollution by restricting the rate of discharge. Third, it regulated the necessity for discharge by establishing construction and equipment criteria calculated to reduce the quantity of waste oil or to separate oil from ballast water. Consequently, it obligated contracting governments to adopt all apposite measures to encourage the establishment of discharge facilities for the reception of oily water and residues at ports and oil-loading terminals.¹² The 1954 Convention went further to exonerate spillers from liability in the event that the release was necessitated by the need to secure the safety of the ship, save human life, prevent danger to the ship or the cargo or that the discharge was occasioned by unavoidable leakage as a result of which all reasonable measures have been taken either after the occurrence of the damage or discovery of the discharge.¹³ However, some significant obstacles accounted for the setback of the OILPOL Convention. One of them was that there was a poor enforcement record by contracting states. Many of the contracting governments lacked sufficient interests in dynamically pursuing enforcement outside their respective jurisdiction. The reason for this may conceivably be because of the challenges encountered in gathering evidence and commencing actions against violating ships which seldom entered their national ports. The second reason for the inherent flaw of the Convention was that not all flag states

of the Framework for the Protection of Marine Environment in International Law. (Unpublished doctoral dissertation). Obafemi Awolowo University, Ile-Ife, Nigeria, p.14.

⁷ See M. Chediak, 'BP's Gulf oil leak ranks as world's worst caused by an accident,' *Bloomberg Business and Financial News*, August 3, 2010. Available at: <www.bloomberg.com/news>. Accessed on August 23, 2010.

⁸ See 'Bangladesh oil spill threatens rare dolphin,' *The Punch*, December 12, 2014. Available at <<http://feedproxy.google.com/~r/punchng/NEWS/~3/rOzwAENLmhs/>>. Accessed on December 12, 2014.

⁹ *Ibid.*

¹⁰ The Convention was adopted in London on 12 May 1954 and entered into force on 26 July, 1958 and was amended a number of times, in 1962, 1969 and 1971, respectively until it was subsequently superseded by the 1973/78 MAPOL Convention. See 327 UNTS 3. Available at <<http://www.admiraltylawguide.com/conven/oilpol1954.html>>. Retrieved on 27 January, 2014.

¹¹ See A. Roman, 'Oil Pollution (OILPOL) Convention of 1954, United States.' *The Encyclopedia of Earth*, (2008). Available at <<http://www.eoearth.org/view/article/155005/>>. Retrieved on 28 January, 2014. As a matter of fact, Paragraph 2 of the Preamble to the Convention clearly portrays that it was the desires of the Contracting Parties to 'take action by common agreement to prevent pollution of the sea by oil discharged from ships' that initially motivated the adoption of the Convention.

¹² See Articles 3 and 8 of the Convention.

¹³ See Articles 4 and 9 of the Convention.

were contracting parties to the Convention.¹⁴ As a result, some flags of convenience were therefore able to circumvent the more stringent guidelines which coastal states, with minimal efforts, could enforce. These imperfections were specifically pointed out by the Stockholm Conference of 1972 in its recommendations on marine pollution, which enjoined states to accept and implement available instruments and to ensure compliance by their flag ships.¹⁵

2.2. Convention on the High Seas 1958 (Geneva Convention)¹⁶

Article 24 of the Convention obligates every state to draw up regulations to prevent the discharge of oil from vessels or pipelines. Article 25 goes further to require states to adopt measures to prevent pollution of the seas by the dumping of radioactive waste or other harmful agents. In addition, states are enjoined to co-operate with the competent international organisations in taking steps towards the prevention of the pollution of the seas from such activities. However, the above provisions of the Convention have been widely criticised for neither identifying a broader responsibility to stop marine pollution or safeguard the marine environment nor proffered definition of the term, ‘pollution.’¹⁷ Again, although the said provisions talk of ‘taking account of existing treaty’¹⁸ and to ‘any standards and regulations which may be formulated by the competent international organisations,’¹⁹ yet these, it has been noted, were not resilient enough to mandate the states to either become parties or comply with the standards enjoined by this international regulations.²⁰ The implication of this is that the Convention tacitly endorsed the pollution of the world’s oceans by states, qualified perhaps by the international law standard that the liberty of high seas must be exercised with rational respect for the rights of others.

2.3. International Convention on Civil Liability for Oil Pollution Damage 1969 (IMO CLC)²¹

The International Convention on Civil Liability for Oil Pollution Damage (IMO CLC) provides for a civil liability regime for compensation of loss or damage caused by oil pollution, under which the ship-owner at the time of an incident was liable for any pollution damage.²² In doing so, it laid out a corresponding right of those affected by oil pollution to recover, even in the absence of fault on the part of the owner. The IMO CLC was amended by the Protocol of 1992, which entered into force in 1996. The Protocol entirely replaces the Convention for those countries which have ratified it. The Protocol increased the limits on liability set by the Convention,²³ and expanded its latitude to include damage in a Party’s Exclusive Economic Zone or equivalent area, as well as in a Party’s territorial seas.²⁴ It also provides for loss or harm caused by pollution other than loss of profit, but provides that such compensation be restricted to the costs of reasonable measures of reinstatement.²⁵ The compensation

¹⁴ This was further complicated by the fact that the subsequent 1958 Geneva Convention on High Seas merely required its contracting parties to take ‘account of existing treaty provisions on the subject’ and to ‘any standards and regulations which may be formulated by the competent international organisations’ without necessarily compelling States to apply the OILPOL Convention. See Articles 24 and 25(1) of the 1958 Geneva Convention.

¹⁵ P. Birnie *et al.*, *International Law and the Environment* (3rd ed., New York: Oxford University Press, 2009). at p.403.

¹⁶ The Convention was adopted on 29 April 1958 at Geneva, Switzerland. It entered into force on 30 September 1962. See Article 30 thereof. Available at: <www.lawcommission.gov.np>. See also <<https://www.google.com/search?q=1958+Geneva+convention&rls=org.mozilla:en-GB:official&prmd=ivns&ei=VGDiUsKzNePv4gS2q4GACw&start=20&sa=N>>. Accessed on 23 January 2014. See also 450 UNTS 82. Nigeria ratified this Convention on 26 June 1961.

¹⁷ See generally P. Birnie *et al* (note 15) at p.386.

¹⁸ A formulation and reference to cover the 1954 London Convention for Prevention of Pollution by the Sea by Oil.

¹⁹ That is, the International Atomic Energy Agency’s guidelines on the dumping of radioactive substances.

²⁰ P. Birnie *et al* (note 15) at p.386.

²¹ Adopted at Brussels on 29 November, 1969. Entered into force on 19 June 1975. It was subsequently replaced by 1992 Protocol which was adopted on 27 November, 1992 and entered into force on 30 May 1996. Available at: <<http://www.admiraltylawguide.com/conven/civilpol1969.html>>. Accessed on 30 April, 2014. See also 973 UNTS 3 (November 27, 1969); 1956 UNTS 255 (November 27, 1992). This Convention, as amended by the 1976 and 1992 Protocols, has been domesticated in Nigeria. See International Convention on Civil Liability for Oil Pollution Damage (Ratification and Enforcement) Act No. 7, 2006.

²² See IMO CLC, Article III.

²³ See the Protocol, Article 6.

²⁴ See the Protocol, Article 3(a).

²⁵ See the Protocol, Article 2(3).

limit was subsequently raised by 50 per cent through a year 2000 amendments.²⁶ However, it is noteworthy that neither the 1969 IMO CLC nor the 1992 Protocol permits for compensation if the ship liable for the spill belonged to or was operated by a state and used only for non-commercial purposes.²⁷

2.4. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969²⁸

The Convention affirms the right of a coastal state to adopt such measures on the high sea as may be material for the prevention, mitigation or elimination of harm to its coastline or related interests from pollution by oil or the danger thereof following a maritime casualty.²⁹ Where however a coastal state adopts measures exceeding those allowed under the Convention, it is liable to pay compensation for any damage caused by such excessive measure.³⁰ The 1973 London Conference on Marine Pollution subsequently adopted the Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil expanded the regime of the 1969 Intervention Convention. This Protocol was later amended in 1996 and 2002 which updated the list of substances attached thereto.³¹

2.5. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (IMO FUND)³²

The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IMO FUND) was established to safeguard compensation for oil pollution damage in cases where the 1969 IMO CLC proved inadequate, and to shift some of the burden of liability from ship-owners themselves.³³ The owner of a ship may also be entitled to compensation for reasonable expenses or sacrifices to prevent or mitigate pollution.³⁴ The 1971 IMO FUND was also revised by a 1992 Protocol which expanded the amount of compensation available, and sets up the International Oil Pollution Compensation Fund as an independent entity, separate from the IMO. The amount of compensation was further increased by amendments introduced by the 2000 Protocol³⁵ and the 2003 Protocol³⁶ respectively.

²⁶ See generally, International Maritime Organisation. 'International Convention on Civil Liability for Oil Pollution Damage.' Available at: <[http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-\(CLC\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx)>. Accessed on 30 April, 2014.

²⁷ See the IMO CLC, Article XI. For detailed discussion on the ship operated for commercial purposes, see I. O. Babatunde, *A Critical Analysis of the Doctrine of Sovereign Immunity and State Involvement in Commercial Activities*. (Unpublished M. Phil. Thesis, 2007). Obafemi Awolowo University, Ile-Ife, Nigeria.

²⁸ Adopted at Brussels, Belgium on 29 November, 1969. Entered into force 6 May 1975; 9 ILM 25 (1970). Available at: <<http://treaties.un.org/doc/Publication/UNTS/Volume%20970/volume-970-I-14049-English.pdf>>. Accessed on 30 April, 2014.

²⁹ See Article 1 of the Convention.

³⁰ See Article 6 of the Convention. The Convention makes provision however, for settlement of dispute arising in relation to the application of the Convention

³¹ See generally International Maritime Organisation. 'International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.' Available at: <<http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-Relating-to-Intervention-on-the-High-Seas-in-Cases-of-Oil-Pollution-Casualties.aspx>>. Accessed on 30 April, 2014.

³² Adopted on 18 December 1971; entered into force on 16 October 1978; superseded by the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 which was adopted on 27 November 1992 and entered into force on 30 May 1996. Nigeria is a State Party to the 1992 Fund Convention. See 1110 UNTS 57 (December 18, 1971). See also 1953 UNTS 330 (November 27, 1992). This Convention has been domesticated in Nigeria. See International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 as Amended (Ratification and Enforcement) Act No. 8, 2006.

³³ See Article 4.

³⁴ See Article 4(1).

³⁵ Adopted 27 September, 2000; entered into force 27 June, 2001. See International Maritime Organisation. 'International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND).' Available at: <[http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-\(FUND\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-(FUND).aspx)>. Accessed on 30 April, 2014.

³⁶ Adopted 16 May, 2003; entered into force 3 March, 2005.

2.6. Declaration of the United Nations Conference on the Human Environment 1972³⁷

Prompted by a number of socio-economic and political factors including the occurrence of major ecological disaster such as the Torrey Canyon incident of 1967,³⁸ the global community for the first time gathered together at Stockholm from June 5 to 16, 1972 under the auspices of the United Nations Conference on the Human Environment (UNCHE) to deliberate on a plan aimed at addressing environmental contingencies.³⁹ The Conference adopted not only a basic Declaration⁴⁰ and a comprehensive resolution on international and financial arrangements, but also 109 recommendations containing a determined action plan.⁴¹ The 1972 Stockholm Declaration became the first international environmental instrument to highlight and recognise a relationship between environmental protection and human rights. It states that ‘man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights and the right to life itself.’⁴² The Declaration balances man’s right with his obligation and urges him to ‘protect and improve the environment for present and future generations,’⁴³ as such is necessary for guaranteeing a favourable living and working environment for man and for producing essential conditions on earth for the improvement of quality life.⁴⁴ States are further mandated to develop international law on liability and compensation for pollution and other forms of environmental damage to areas beyond their territorial jurisdiction.⁴⁵

2.7. International Convention for the Prevention of Marine Pollution from Ships, 1973 (MARPOL Convention 1973/78)⁴⁶

The aim of the 1973/78 MARPOL Convention is to achieve a complete elimination of intentional pollution of the marine environment by oil and other harmful substances⁴⁷ and the minimisation of accidental discharge of such substances.⁴⁸ A significant device under MARPOL is the use of standardised International Oil Pollution Prevention Certificate, the issuance of which is connected to regular surveying and inspection of vessels. This is complemented with a requirement for tankers and other ships to carry an Oil Record Book stipulating all activities relating to oil. In furtherance of the requirement that this record may be inspected by other party to MARPOL, it is these documents which in certain instances, coastal and port states are required to inspect under the 1982 UNCLOS, whether or not a party to MARPOL.⁴⁹

³⁷Also known as the ‘1972 Stockholm Declaration.’ See UN DOC. A/CONF/48/14/REV.I. See also 11 I.L.M. 1416 (June 16, 1972). Available also at: <<http://www.unep.org/Document.Multilingual/Default.asp?documentid=97&articleid=1503>>. Accessed on January 17, 2014.

³⁸ See 6 *International Legal Material* (1967), p.480.

³⁹ See *Report of the United Nations Conference on the Human Environment*, Stockholm, June 5-16, 1972, U.N.Doc. A/CONF 48/14/Rev. 1, U.N. Sales No.E.73.II.A.14, (1972).

⁴⁰Hereinafter called the 1972 Stockholm Declaration.

⁴¹L. B. Sohn, ‘The Stockholm Declaration on the Human Environment’ (1973) *The Harvard International Law Journal*, Vol. 14, No. 3, p. 423.

⁴² See Proclamation 1 of the Declaration.

⁴³ *Ibid*, Principle 1 thereof.

⁴⁴*Ibid*, Principles 8 and 11 thereof. See also S. P. Subedi, ‘Balancing International Trade with Environmental Protection’ (1999) 25 *Brooklyn Journal of International Law*, p.373. See T. Schoenbaum, ‘International Trade and the Protection of the Environment’ (1997) 91 *American Journal of International Law*, p.268.

⁴⁵ See Principle 22 thereof.

⁴⁶ The original MARPOL Convention was signed on 17 February 1973, but did not come into force as a result of want of ratifications. However, the current Convention is a combination of the 1973 MARPOL Convention and the 1978 Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships (1978 MARPOL Protocol), which was adopted at a Conference on Tanker Safety and Pollution Prevention in February 1978. It entered into force on 2 October 1983. As at May 2013, 152 States were parties to the Convention. See 12 ILM 1319 at 1434 (1973); 17 ILM 246 (1978). Nigeria has domesticated the Convention and the Protocol. See International Convention for the Prevention of Pollution from Ship, 1973 and 1978 Protocol (Ratification and Enforcement) Act No. 15 of 2007. An Act to enable effect to be given in the Federal Republic of Nigeria to the International Convention for the Prevention of Pollution from Ships, 1973, and the 1978 Protocol; and Other Related Matters.

⁴⁷ For the definition of the term ‘harmful substances’ see, Article 2(2).

⁴⁸ See the Preamble to the International Convention for the Prevention of Marine Pollution from Ships, 1973.

⁴⁹ See UNCLOS 1982, Articles 218 and 220. See also C. Redgwell, ‘International Environmental Law’ in M. D. Evans. (Ed.), *International Law* (1st ed., New York: Oxford University Press Inc., 2003), p.669. It is also necessary to point out that coastal States enforcement powers are also enhanced under the 1982 UNCLOS, including powers to investigate,

2.8. African Charter on Human and Peoples' Rights 1981⁵⁰

The 1981 African Charter on Human and Peoples' Rights, a regional human rights treaty, is perhaps one of the very few human rights' treaties that declare environmental rights in largely qualitative terms.⁵¹ The African Charter expressly guarantees the rights of peoples to the 'best attainable standard of health'⁵² and their rights to the 'general satisfactory environment favourable to their development.'⁵³ In this regard, the African Commission has held that the right to a healthy environment, as guaranteed under Article 24 of the African Charter foists clear obligations upon a state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.⁵⁴ The African Charter also requires each state party to make report regarding the environment in order to ascertain that the environment is protected and to ensure the creation of an operative waste monitoring system so as to prevent pollution. Countries are further enjoined to make report on associated matters such as the disposal of natural resources, suitable standards of living and the right to physical and mental health.⁵⁵

2.9. United Nations Convention on the Law of the Sea (UNCLOS) 1982

The 1982 United Nations Convention on the Law of the Sea⁵⁶ is one of the most comprehensive and significant global environmental agreements.⁵⁷ Although UNCLOS only entered into force in 1994, more than ten years after it was signed, it has influenced the growth of regional rules for the protection of the marine environment, as well as general international environmental law. Its main objective is the desirability of establishing through the Convention: 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the

inspect and in limited instances, to arrest vessels navigating in the Exclusive Economic Zone when a violation of applicable international rules and regulations for the prevention, reduction and control of pollution from ships occur which threatens or causes environmental damage.

⁵⁰ See 1520 U.N.T.S. 217 (June 26, 1981). The African Charter has been domesticated in Nigeria and has been judicially upheld to have a legal binding force in the country. See generally the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, Laws of the Federation of Nigeria, 2004. See also the Nigerian Supreme Court decision in *Abacha v. Fawehinmi* (2000) FWLR (Part 4) 533.

⁵¹ Similarly, another regional treaty, the 1988 San Salvador Protocol to the 1969 American Convention on Human Rights, provides in its Article 11 that 'everyone shall have the right to live in a healthy environment and to have access to basic public services' and that the 'State parties shall promote the protection, preservation and improvement of the environment.' See also P. Birnie, P.*et al.* (note 15) at p.273.

⁵² Article 16.

⁵³ Article 24. It is worthy of note that the African Charter contains certain positive attributes that should be commended. One of such worthy unique characteristics is the inclusion of second and third generation rights as legally enforceable rights. In this respect, the African Charter does not only make provisions for the traditional individual civil and political rights, but it also seeks to promote economic, social and cultural rights and the so-called third generation rights. Thus, it has obviously become the first global human right convention to protect all the categories of human rights in a single instrument. See J. C. Mubangizi, 'Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and the Gains' (2006) 6 *African Human Rights Law Journal*, 146 at p.148.

⁵⁴ *The Social and Economic Rights Action Centre and Anor v. Nigeria* Communication 155/96, See paragraphs 50 and 52 of the African Commission's decision in the case. See also S. Leckie, 'The Right to Housing' in: Eide, A. *et al.* (Eds.), *Economic, Social, and Cultural Right: A Textbook* (Martinus Nijhoff Publishers, 1995).

⁵⁵ See The Guidelines for National Periodic Reports under the African Charter, adopted by the African Commission at its 5th Ordinary Session held in April 1989, cited in M. Linde, & L. Louw, 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication.' (2003) 3 *African Human Rights Law Journal*, 167 at pp. 176-177. See also African Charter, Article 62.

⁵⁶United Nations Convention on the Law of the Sea [1982 UNCLOS] (Montego Bay) 10 December 1982. Entered into force on 16 November 1994. See 21 ILM 1261 (1982). The Convention is widely supported with 142 parties. Nigeria ratified the 1982 UNCLOS on 14 August 1986.

⁵⁷The first paragraph of the Preamble to the 1982 UNCLOS noted that this momentous Convention was prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and conscious of its historic prominence as an important contribution to the maintenance of peace, justice and progress for all peoples of the world. See generally A. Akinsanya, 'The 1982 Law of the Sea Convention and Marine Pollution,' in Simpson, S. and Fagbohun, O. (Eds.), *Environmental Law and Policy* (Lagos: Law Centre, Faculty of Law, Lagos State University, 1998). Pp.357-394. See also A. Popoola, 'International Law and the Protection of the Marine Environment: Problems and Challenges for Africa in the 21st Century.' In: Simpson, S. and Fagbohun, O. (Eds.), *Environmental Law and Policy*, *Ibid* at pp.314-433.

equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.⁵⁸ The Convention thus attempts for the first time to provide a universal framework for the rational exploitation and conservation of the sea's resources and the protection of the marine environment, while also recognising the continued significance of freedom of navigation.⁵⁹ Thus, under Article 194(1), the duty to protect the environment necessitates states to adopt all the methods consistent with UNCLOS which are necessary to prevent, reduce and control pollution of the marine environment from any source, using the best practicable means at their disposal and in accordance with their capabilities. This obligation introduces the element of differentiated responsibility based upon economic and other resources available which subsequently emerged as a foremost theme at United Nations Conference on Environment and Development (UNCED).⁶⁰

2.10. International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (the 1990 OPRC Convention)⁶¹

Parties to the Convention are enjoined to adopt all suitable measures in consonance with the Convention and the Annex thereto⁶² in dealing with oil pollution incidents, either nationally or in collaboration with other countries.⁶³ Ships are required to carry a shipboard oil pollution emergency plan.⁶⁴ Operators of offshore units under the jurisdiction of each contracting party are equally demanded to have oil pollution emergency plans or similar arrangements that are co-ordinated with national systems created in accordance with Article 6 of the Convention and approved in compliance with procedure established by competent national authority for responding punctually and effectively to oil pollution incidents.⁶⁵

2.11. Rio Declaration on Environment and Development 1992⁶⁶

The Rio Declaration reiterates the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and strives to build upon it with the objective of creating a new and equitable worldwide partnership through the establishment of new levels of co-operation among states, key sectors of societies and people, as well as working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system.⁶⁷ Principle 13 of the Rio Declaration requires states to develop national legislation regarding liability and compensation for the victims of pollution and other environmental

⁵⁸ United Nations Convention on the Law of the Sea 1982, Preamble. It is submitted that going by the wordings of this provision, UNCLOS requires States to pursue two main environmental objectives, namely, to prevent, reduce and control marine pollution; and to conserve and manage marine living resources. For both objectives, UNCLOS establishes rules on information, scientific research, monitoring, environmental assessment, enforcement (including developing rules in relation to enforcement by coastal states and port states) and liability. See generally for instance UNCLOS 1982, Articles 198, 200-206, 213-222 and 235.

⁵⁹ See generally United Nations Convention on the Law of the Sea 1982, Articles 21(1) (f), 42(1) (b), 54, 56, 58 and 211.

⁶⁰ P. Sands, *Principles of International Environmental Law* (2nd ed., Cambridge: Cambridge University Press, 2003), p.398.

⁶¹ United Nations Treaty Series (1995) vol. 1891, 77; 30 ILM 733 (1991). Adopted in London on 30 November 1990 following the *Exxon Valdez* disaster in Alaska. Entered into force on 13 May 1995. A text of the Convention is also available at: <<http://www.admiraltylawguide.com/conven/oilpolresponse1990.html>>. Accessed on 2 February 2014.

⁶² The Convention categorically states that the Annex to the Convention constitutes an integral part of the Convention and that a reference to the Convention constitutes at the same time a reference to the Annex. See Article 1(2) of the Convention.

⁶³ See Article 1(1) of the Convention. See also generally the introductory paragraphs of the Preamble to the Convention.

⁶⁴ See Article 3(1) of the Convention.

⁶⁵ See Article 3(2) and (3) of the Convention.

⁶⁶ 1992 Declaration of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26/Rev. I, *Report of the United Nations Conference on Environment and Development*, Vol.1, New York. See also Rio Declaration on Environment, United Nations Conference on Environment and Development, UN.Doc. A/CONF.151/6/Rev.1, (1992), reprinted in 31 *International Legal Material* 874 (1992). A text of the 1992 Rio Declaration is also available at <<http://habitat.igc.org/agenda21/rio-dec.html>>. Accessed on 27 December 2013.

⁶⁷ See 1992 Rio Declaration, Preamble.

damage. Two vital economic principles of polluter pays⁶⁸ and the precautionary approach⁶⁹ are likewise enshrined in the 1992 Rio Declaration.

2.12. The 1992 Agenda 21⁷⁰

Agenda 21 is a voluntarily, non-legal binding or action plan developed by the United Nations and national governments⁷¹ at the 'Earth Summit' held in 1992 at Rio de Janeiro, Brazil where governmental leaders agreed on the necessity to become more sustainable in order to meet the need of the present generation without necessarily compromising the need of the future generation.⁷² The Agenda consist of forty chapters and is sub-divided into four sections. Section IV, chapter 17 calls on countries acting individually, bilaterally, regionally or multi-nationally and within the framework of the IMO and other global, regional or sub-regional bodies to assess the necessity for additional measures aimed at addressing the pollution of the sea from the ship, dumping, offshore oil and gas platforms and ports. Accordingly, it encourages States to ratify the Convention on Oil Pollution Preparedness, Response and Co-operation as well as strengthen global support to reinforce or create where necessary, regional oil/chemical-spill response centres and mechanisms.⁷³

2.13. United Nations Framework Convention on Climate Change 1992⁷⁴

Although this Convention does not expressly mention oil pollution in its provisions, its relevance in this study stems from the fact that the continued gas flaring, petroleum and artisanal refinery activities carried out in various countries of the world, including Nigeria's Niger Delta region, contribute significantly to greenhouse gas concentration in the atmosphere which this Convention and its Protocol seek to address. The principal aim of the Convention is not necessarily to invalidate greenhouse gas discharge but to alleviate greenhouse gas concentration in the atmosphere 'at a level that would prevent dangerous anthropogenic interference with the climate system.'⁷⁵ In order to achieve the noble objectives of the UNFCCC, parties are required to be guided by the principles of inter-generational equity, common but differentiated responsibilities and respective capabilities, the precautionary measures, right of all parties to sustainable development as well as the need to cooperate and 'promote a supportive and open international economic system.'⁷⁶ Notwithstanding the worthy objectives of this Convention, there are some inherent weaknesses in it. First, the treaty is merely an agreement to make a voluntary attempt at stabilising emission of greenhouse gases with neither legally binding commitment nor penalties for countries that default in achieving their goals as the treaty does not contain any enforcement mechanism.⁷⁷ Second, regarding the provisions of Article 3, it is worth stating that its provisions are equally not necessarily binding rules which must be complied with.

⁶⁸ *Ibid*, Principle 16.

⁶⁹ *Ibid*, Principle 15.

⁷⁰ See U.N. Doc. A/Conf.151/26 (June 14, 1992). See also 'A Brief History & Description of Agenda 21.' Available at: <<http://www.canadafreepress.com/index.php/article/48412>>. Accessed on 4 February 2014

⁷¹ About 178 nations adopted the Agenda. It is not a treaty and does not therefore, infringe upon the sovereignty of any country.

⁷² See 'FAQ: ICLEI, the United Nations, and Agenda 21.' Available at: <<http://www.icleiusa.org/about-iclei/faqs/faq-iclei-the-united-nations-and-agenda-21#what-is-agenda-21>>. Accessed on 4 February, 2014.

⁷³ See generally chapter 17, paragraphs 17.30 to 17.34 of Agenda 21.

⁷⁴ See 31 ILM (1992) 851. See also 1771 U.N.T.S. 107 (June 5, 1992). Entered into force on 21 March 1994.

⁷⁵ See Article 2 of the Convention. However, this Article neither states what that level might be nor did it stipulate that it should be accomplished instantly. Rather, it only stated that it should be achieved 'within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.' It is submitted that the manner in which this provision is couched portrays that the Parties foresaw some element of climate change as unavoidable and consequently, were prepared to accommodate it provided that it occurs slowly enough to permit natural adaptation. See P. Birnie, *et al.* (note 15) at p. 358.

⁷⁶ See UNFCCC 1992, Article 3.

⁷⁷ See World Meteorological Organisation, 'United Nations Framework Convention on Climate Change' Available at: <http://www.wmo.int/pages/themes/climate/international_unfccc.php>. Accessed on 8 May 2014. See also 'What is the UNFCCC & the COP?' Available at: <<http://www.climate-leaders.org/climate-change-resources/india-at-cop-15/unfccc.cop>>. Accessed on 8 May 2014.

This is clearly shown in the use of the word, ‘should’ throughout the Article. The possible consolation however, is that the Article is material in the interpretation and implementation of the Convention as well as establishing prospects regarding matters which must be taken into consideration in the negotiation of further instruments like the non-compliance procedure.⁷⁸ Third, although Article 4(1) encourages all parties to deliberate on climate change and have policies on the subject, it does not however, obligate the parties to comply with any precise global standards for regulating it.⁷⁹

2.14. International Convention on Civil Liability for Bunker Oil Pollution Damage 2001⁸⁰

The Convention was adopted to ensure that adequate, prompt and effective compensation is available to victims of damage occasioned by oil spill when carried as fuel in ships’ bunkers. The Bunker Convention applies to damage caused on the territory, including the territorial sea, and in the exclusive economic zones of States Parties.⁸¹ The Convention goes further to provide a free-standing instrument covering pollution damage.⁸² It is worthy of note that the Bunker Convention is tailored on the International Convention on Civil Liability for Oil Pollution Damage, 1969. Like that Convention, a significant requirement in the Bunker Convention is the need for the registered owner of a vessel to maintain mandatory insurance cover.⁸³ Moreover, the Bunker Convention makes provision limiting the liability of a ship-owner.⁸⁴

3. The Roles of Some Global and Regional Bodies in Safeguarding International Environmental Protection

This sub-head intends to examine the roles of some global and regional bodies in the enforcement of international environmental protection governance and the possible challenges confronting effective global enforcements of environmental regimes.

3.1. The United Nations Environmental Programme (UNEP)

Its primary objective is the provision of leadership and promotion of cooperation in caring for the environment by inspiring, informing and enabling countries and people to improve their quality of life in a sustainable manner without compromising that of the future generations.⁸⁵ As a writer succinctly puts it, UNEP was created as the ‘[a]nchor institution’: ‘...for the global environment to serve as the world’s ecological conscience, to provide impartial monitoring and assessment, to serve as a global source of information on the environment, to ‘speed up international action on urgent environmental problems,’ and to ‘stimulate further international agreements of a regulatory character.’ Most importantly, the mission of the new environment Programme was to ensure coherent collective environmental efforts by providing central leadership, assuring a comprehensive and integrated overview of environmental problems and developing stronger linkages among environmental institutions and the constituencies they serve’.⁸⁶

⁷⁸ See the Preamble to the 1997 Kyoto Protocol. See also P. Birnie, *et al.* (note 15) at p. 359.

⁷⁹ P. Birnie, *et al.* (note 15), *ibid.*

⁸⁰ Adopted in London on 23 March 2001; entered into force on 21 November 2008. See 40 ILM 1493 (2001). Available at: www.tso.co.uk/bookshop. Accessed on 30 April, 2014.

⁸¹ See Bunker Convention, Article 2.

⁸² ‘Pollution damage’ in the context of the Bunker Convention means (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken and (b) the costs of preventive measures and further loss or damage caused by preventive measures. See Bunker Convention, Article 1(9) (a) and (b).

⁸³ See Bunker Convention, Article 7.

⁸⁴ See generally Bunker Convention, Articles 3(3) (a) (b) and (c) and 3(4).

⁸⁵ United Nations Environmental Programme, *The Use of Economic Instruments in Environmental Policy: Opportunities and Challenges*, UNEP/ETB/2003/9, (A United Nations Publication, 2004), p.5.

⁸⁶ M. Ivanova, ‘Moving Forward by Looking Back: Learning from UNEP’s History’ in L. Swart, and E. Perry, (Eds), *Global Environmental Governance: Perspectives on the Current Debate*. (New York: Center for UN Reform, 2007), pp.26-27. Also available at <<http://www.centerforun-reform.org/node/251>>. Accessed on 28 April, 2014. For a more comprehensive discussion of the ‘anchor institution’ phraseology, see M. Ivanova, *Can the Anchor Hold? Rethinking the United Nations Environment Programme for the 21st Century* (New Haven, CT, Yale School of Forestry & Environmental Studies 2005). See also U.S. Congress. Committee on Foreign Affairs, Subcommittee on International

Notwithstanding the worthy objectives or mandates of UNEP, its small size, comparative weakness within the UN system, peripheral location in Nairobi, and underfunding⁸⁷ have greatly hindered its operation and consequently, contributed to its lack of effectiveness in global environmental governance. Besides, UNEP's impact on the other agencies of UNO has been comparatively low and as a result, has slight effect on the environmental policies pursued by them.⁸⁸ Additionally, UNEP lacks the ability to establish binding global regime. Thus, it purely studies, recommends and adopts non-binding Resolutions and Charters with the anticipation that Member States will feel obligated to implement and enforce them at the national levels. Such reliance on Member States to implement and comply with its endeavours has proved to be a mirage.⁸⁹ An excellent example of such a false hope is the 2011 released UNEP Environmental Assessment of Ogoniland which for some years the Federal Government of Nigeria did not feel the obligation to implement the recommendations of the report since it was published in 2011.⁹⁰

3.2. The International Court of Justice⁹¹

Compared to other cases submitted to it for adjudication, environmental protection matters have rather been perhaps less apparent in the dockets of the Court.⁹² This, however, has not prevented the court from making significant contributions to the growth of international environmental law. For instance, in *Gabcikovo- Nagymaros Project (Hungary v. Slovakia)*,⁹³ the court pointed out the vital necessity of reconciling 'economic developments with the protection of the environment [which] is aptly expressed in the concept of sustainable development.'⁹⁴ Similarly, in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*⁹⁵ the court reiterated the significance of integrating sustainable development and environmental protection. It was observed by the court that: ...the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development...it is in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development...from this point of view, account must be taken of the need to safeguard the continued

Organizations and Movements. *Participation by the United States in the United Nations Environment Programme*. 93rd Congress. First Session. (April 5 and 10, 1973), p.4.

⁸⁷ See M. Ivanova, (note 86) at pp.38-43. See also W. M. Adams, *Green Development: Environment and Sustainability in a Developing World*, (3rd Edition, London/New York: Routledge Taylor and Francis group, 2009), p.64. See also the U.N. General Assembly, Resolution 2997 (XXVII): Institutional and Financial Arrangements for International Environmental Cooperation, 1972.

⁸⁸ See R. Clarke & L. Timberlake, *Stockholm Plus Ten: Promises? The Decade since the 1972 UN Environment Conference*, (London: Earthscan, 1982), p.49. See also H. K. Jacobson, & D. A. Kay, *A Framework for Analysis in Environmental Protection: The International Dimension*, (Allanheld, Osmun & Co., 1983). pp.7, 8. See also W. M. Adams, (note 87) at p.64.

⁸⁹ See A. W. Samaan, 'Enforcement of International Environmental Treaties: An Analysis' (2011) *Fordham Environmental Law Review*, Vol. 5, Issue 1, at p.264.

⁹⁰ However, the present Nigerian leadership under President Muhammadu Buhari has indicated interest to implement the 2011 UNEP report and has initiated a \$1 billion clean-up and restoration programme on the Ogoniland area in the Rivers State. It is hoped that such an aspiration would not end up being a mere political talk. See UNEP News Centre (2016, June 2). 'Nigeria Launches \$1 Billion Ogoniland Clean-up and Restoration Programme.' Available at <http://www.unep.org/newscentre/default.aspx?DocumentID=27076&ArticleID=36199>. Accessed on 2 October 2016. See also E. Alike, 'Implementing Cleanup of Ogoniland,' *ThisDay Live*, June 7, 2016. Available at <<http://www.thisdaylive.com/index.php/2016/06/07/implementing-cleanup-of-ogoniland/>>. Accessed on 2 October 2016.

⁹¹See 'The International Court of Justice.' Available at <<http://www.icj-cij.org/court/index.php?p1=1>>. Accessed on 30 April, 2014.

⁹² See E. Valencia-Ospina, 'The Use of Chambers of the International Court of Justice' in V. Lowe, & M. Fitzmaurice (Eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, (1996), p.503. On the contribution of the International Court of Justice, see also generally J. E. Vinuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) *Fordham International Law Journal*, Vol. 31, pp.232-258.

⁹³ ICJ Report (1997) 7.

⁹⁴ *Ibid*, para.140.

⁹⁵ See generally *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. ICJ Reports (2006). Also available at <<http://www.icj-cij.org/docket/135/10779.pdf>>. Accessed on 30 April 2014.

conservation of the river environment and the rights of economic development of the riparian States.⁹⁶ In yet another case, *Legality of the Threat or Use of Nuclear Weapons*,⁹⁷ the existence of the general responsibility of countries to ‘ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control’ was recognised by the ICJ as constituting part of the ‘corpus of international law relating to the environment.’⁹⁸ The court reasoned that ‘[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.’⁹⁹ Thus, it is not an understatement to assert that the ICJ has made fundamental contributions by means of its court decisions and progressive statements made through its Advisory Opinions which have broadly influenced the growth of global environmental protection law.¹⁰⁰

3.3. African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights (The African Commission) was established under Article 30 of the African Charter to promote human and peoples’ rights and to ensure their protection in Africa.¹⁰¹ Although the African Commission’s decision in *Social and Economic Rights Action Centre (SERAC) and another v. Nigeria*,¹⁰² represents a giant stride towards the protection and promotion of economic, social and cultural rights under the African Charter, it has nonetheless, been widely criticised on the ground that it failed to hold the oil company liable along with the government.¹⁰³ Arguably, there is no mechanism provided under the African Charter where private parties can be held accountable for human rights violations. It is submitted that although under international law it is the main obligation of the state to protect human rights, yet the African Commission should have been more proactive in considering the accountability of the non-state actor, like Shell Petroleum Development Corporation (SPDC), especially, as the available legal and regulatory framework in Nigeria combating petroleum pollution are rather too weak to address the problem.¹⁰⁴ Adopting such a judicial activism approach would, for instance, assist greatly in curbing the reckless conduct of the

⁹⁶*Ibid* at para.80. See also generally Press Release 2006/17, ‘International Court of Justice, Argentina Institutes Proceedings against Uruguay and Requests Court to Indicate Provisional Measures,’ para.5 of May 4, 2006. Available at <<http://www.icj-cij.org/presscom/index.php?i=1010&pt=1&p1=6&p2=1>>. Accessed on 30 April 2014.

⁹⁷ICJ Report (1996) 266. The Court was requested by the United Nations General Assembly and the World Health Organisation to issue an Advisory Opinion hypothetically raising issues relating to the scope of global environmental concepts with regard to the threat and use of nuclear weapons. See generally G. A. Res. 49/75[K], U.N. Doc. A/Res/49/75 (December 15, 1994); Press Release 94/24, ‘International Court of Justice, The General Assembly of the United Nations Requests an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons’ of December 23, 1994. Available at <<http://www.icj-cij.org/docket/files/95/10359.pdf>> .Accessed on 30 April, 2014. See also generally Health and Environmental Effects of Nuclear Weapons, WHA Res. 46.40, World Health Assembly, 46th Assembly, 13th plen. mtg., at 2 (May 14, 1993). See also Press Release 93/30, ‘International Court of Justice, Request by the WHO for an Advisory Opinion’ of September 13, 1993. Available at <<http://www.icj-cij.org/docket/files/93/10317.pdf>> .Accessed on 30 April, 2014.

⁹⁸See *Legality of the Threat or Use of Nuclear Weapons*, *op. cit* at p.241.

⁹⁹ *Ibid* at p.242.

¹⁰⁰ These contributions may seem comparatively unassertive in the light of the several and extensive treaties and Conventions that have fashioned the growth of global environmental law, mainly since the 1970s. Nonetheless, the undeniably central role of the ICJ with regard to the growth of international law is arguably not that of a revolutionary body but rather that of a ‘stock-taking institution or ... that of being the gate-keeper and guardian of general international law.’ See J. E. Vinuales, (note 92) at p.258.

¹⁰¹ See also Rules of Procedure of the African Commission on Human and Peoples’ Rights 2010, Rule 3 which describes the Commission as being ‘an autonomous treaty body working within the framework of the African Union to promote human and peoples’ rights and ensure their protection in Africa.’

¹⁰² Communication 155/96.

¹⁰³ O. Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria’s Oil Producing Communities*, (Cambridge, United Kingdom: Intersentia Publishing Ltd, 2014), p.451. See also T. Lambooy, & M. Rancourt, ‘Shell in Nigeria: From Human Rights Abuse to Corporate Social Responsibility’ (2008) *Human Rights and International Legal Discourse*, Vol. 2, No. 2, 229 at p.249. See also N. Jagers, *Corporate Human Rights Obligations: In Search of Accountability*, (Antwerpen: Intersentia, 2002), p. 219.

¹⁰⁴ J. Oloka-Onyango, ‘Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples’ Rights in Africa’ (2003) 18 *American University International Law Review*, pp. 851 – 913.

multinational oil companies, promote responsible conduct as well as enhance the protection of the guaranteed rights of the host communities in the Niger-Delta of Nigeria.

3.4. The Economic Community of West African States Community Court of Justice (ECOWAS Community Court of Justice)

The ECOWAS Court of Justice was established in 1991 pursuant to Articles 6 and 15 of the 1993 Revised Treaty of the ECOWAS. One of the significant environmental right cases instituted before the court regarding the need to protect the environment of the oil producing communities of the Niger Delta area of Nigeria is the case of *SERAP v. Federal Republic of Nigeria & others*.¹⁰⁵ In the case, SERAP, a non-governmental organisation registered in Nigeria maintained *inter alia* that while the Nigerian government regulations require prompt and effective clean-up of oil spills, this is never performed expeditiously or effectively. It was further contended that the lack of effective clean-up greatly aggravates the human rights and environmental impacts of such spills.¹⁰⁶ Consequently, the court ordered the Nigerian government to adopt all essential mechanisms to stop the occurrence of future damage to the environment, hold perpetrators accountable, and restore the environment of the host communities.¹⁰⁷ It is commendable that the court rightly noted the failure of the Nigerian government to hold any of the ‘perpetrators of the many acts of environmental degradation’ accountable. In this regard, the court observed thus: ‘From what emerges from the evidence produced before this Court, 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’.¹⁰⁸ The court stressed further that: ‘the adoption of legislation, no matter how advanced it might be, or the creation of agencies inspired by the world’s best models...may still fall short of compliance with international obligations in matters of environmental protection if these 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’.¹⁰⁹ With this landmark decision, the ECOWAS court has demonstrated that it would certainly hold a member state party accountable for her responsibility to her citizens in respect of the rights protected under the African Charter, including the enforcement of existing legislation, which some member states, like Nigeria, are hesitant to enforce against foreign oil companies operating within their domain.¹¹⁰

4. Challenges to Enforcement of International Environmental Instruments

Apart from the commonly associated enforcement problems like suspicion on encroachment of national sovereignty or doctrine of sovereign immunity,¹¹¹ fiscal starvation of some established global

¹⁰⁵ *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic Nigeria*. General List No. ECW/CCJ/APP/08/09; Judgment No. ECW/CCJ/JUD/18/12, decided on December 14, 2012 at ECOWAS Court of Justice, sitting at Ibadan, Nigeria.

¹⁰⁶ *Ibid*, para.15.

¹⁰⁷ *Ibid* at para.121.

¹⁰⁸ *Ibid*, paras. 108, 110.

¹⁰⁹ *Ibid*, paras. 103, 105

¹¹⁰ B. West, ‘ECOWAS Community Court of Justice Holds Nigerian Government Liable for Human Rights Violations by Oil Companies,’ *Human Rights Brief*, March 7, 2013. Available at <<http://hrbrief.org/2013/03/ecowas-community-court-of-justice-holds-nigerian-government-liable-for-human-rights-violations-by-oilcompanies/>>. Accessed on May 27, 2015.

¹¹¹ As a means of overcoming the challenges posed by state sovereignty, it is suggested that there should be an establishment of collaboration agreements requiring parties to co-operate in the area of environmental protection, which may include the need to study pollution and its adverse impact on the environment, exchange scientific and technical information, and the participation in bilateral conferences and other kinds of collaboration which the parties to such agreements may agree upon. Most global environmental governances recognise the need for such collaborative agreements. For example, see Articles 12 and 13 of the 1996 Protocol to the 1972 Convention on Prevention of Marine Pollution by Dumping of Wastes and other Matter. However, as Samaan cautions, collaboration treaties are not without their peculiar limitations. He posits that the less sovereignty an agreement is willing to forego, the more probable it is to secure assent, but the more likely the treaty will fail in accomplishing substantial environmental goals. See A. W. Samaan (note 89) at p.277. See also United Nations Organisation (1972). *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf/48/14 and Corr.1. See also T. Buergenthal, ‘International Human Rights Laws and Institutions: Accomplishments and Prospects.’ (1988) 63 *Wash L. Rev.*, p.18.

environmental bodies and inability to enforce some vital recommendations necessary for environmental protection, other problems encountered in enforcing global environmental governance shall be examined under this heading.

4.1. Establishment of Legal Standing

Generally speaking, global enforcement regarding a breach of an international agreement may be at the instance of one or more countries or at the instance of an international organisation or at the instance of non-state actors.¹¹² Concerning an enforcement of global environmental obligation by a state, the state must be able to establish a legal standing. To achieve this requirement, the state must show that it is an 'injured state'.¹¹³ With respect to the *locus standi* of a state to institute international environmental claim for the protection of an environment outside the area of its national control, although no harm may materially be occasioned to it, the position is that on the basis of a duty owed *erga omnes*,¹¹⁴ a contracting party to a global agreement who believes that another contracting party is in breach of its obligation under the treaty has a right under the treaty to seek for the enforcement of the duty of the party alleged to be in violation, although it has not personally suffered any significant damage.¹¹⁵ But whether states would likely seek the enforcements of obligations owed to the global commons, the breach of which may possibly results in an indirect or nominal harm to the states, is a different issue altogether. One outstanding example of such reluctance was the failure of any injured state to seek for the enforcement of compliance by the former Union of Soviet Socialist Republics (USSR) with its global legal obligations arising out of the consequences of the accidents at the Ukraine Chernobyl Nuclear Power Plant in 1986. This therefore, calls for an increased enforcement role for international organisations or other members of the international community.¹¹⁶

4.2. Non-Legal Binding Status of Instruments

Some of the global or regional environmental instruments are non-legally binding on state parties. Excellent examples of these, as seen above, are Declaration of the United Nations Conference on the Human Environment; Rio Declaration on Environment and Development as well as Agenda 21. The success of such agreements is dependent upon the willingness of countries to abide by its provisions and enforce compliance among their citizens.¹¹⁷ Thus, an aggrieved victim of environmental pollution

¹¹² P. Sands, (note 60), p.182.

¹¹³ See International Law Commission's (ILC's) 2001 Articles on State Responsibility, Article 42. Where several States are injured by the same wrongful act, each State may separately invoke responsibility and in the event that several States are responsible, the responsibility of each may be invoked. See also ILC Articles, Articles 46 and 47. See also ILC Articles Commentary 2001, pp.311, 313. See also ILC Articles on State Responsibility, Part 2, Article 5(1), *Report of the ILC to the United Nations General Assembly*, UN Doc. A/56/10 (2001). See also the commentary in J. Crawford, *The ILC's Articles on State Responsibility* (2002), pp. 255-260.

¹¹⁴ This is a Latin phrase literally meaning, 'towards all' or 'towards everyone' or 'in relation to all.' In legal parlance, it refers to rights and obligation that can be enforced against anyone, rather than against a specific person or party. It is often found in relation to laws that involve the public and international law. See generally E. A. Posner, 'Erga Omnes Norms, Institutionalisation, and Constitutionalism in International Law,' (2008). Available at: <<http://www.uchicago.edu/Lawecon/index.html>>. Also available at: <<http://www.law.uchicago.edu/academics/publiclaw/index.html>>. Accessed on 18 April, 2014.

¹¹⁵ *The Wimbledon* (1923) *Permanent Court of International Justice Report*, Series A, No.1. See also *Barcelona Traction Case*, ICJ Reports (1970) 3; 46 ILR 1. See also *The Nuclear Tests Cases*, ICJ Reports (1974) pp.253, 457, where New Zealand and Australia complained of interference with the high seas freedoms of all States. See also the 1987 Protocol on Substances that Deplete the Ozone Layer (the 1987 Montreal Protocol), which requires that a failure on the part of a party to the Protocol to meet its commitment under the treaty can entitle any other party to the Protocol to enforce the violated duty by invoking non-compliance or dispute settlement mechanisms under the Protocol without establishing that it had suffered any material damage as a consequence of the alleged failure.

¹¹⁶ P. Sands, (note 60) at 191. For instance, under the 1982 UNCLOS, some of its institutions are vested with various enforcement powers, see generally Articles 162 (2) (a) (h) (u) (v) (w) and (z) and 165 (2) (i) and (j) of UNCLOS 1982. Articles 176 and 177 of 1982 UNCLOS confer the Council of the International Sea-Bed Authority with international legal personality and such legal capacity as well as privileges and immunities necessary for the exercise of its functions and the fulfilment of its objectives.

¹¹⁷ O. Schachter, 'The Twilight Existence of Non-Binding Agreements' (1977) 77 *Am. J. Intl. L.* p. 296. See also M. E. O'Connell, 'Enforcement and the Success of International Environmental Law' (1995). *Indiana Journal of Global Legal Studies*, Vol. 3, p. 53.

who wishes to rely on such mere morally-binding documents may not successfully do so as they are not legally binding on the government.¹¹⁸

4.3. Failure to Lodge Relevant Reports

Safeguarding adherence to environmental treaties has been identified as a major challenge to effectiveness of international environmental regimes. Significantly, global environmental treaties rely greatly on transparency as an implementation instrument.¹¹⁹ This therefore, generally requires reporting of certain information to the international organisation designated by the respective treaties regarding measures adopted at the national level to put the treaties into practice.¹²⁰ However, most times, contracting parties fail to comply with the reporting requirements found in most global environmental regimes.¹²¹ The dearth of reporting may not be unconnected with paucity of fund and technical resources.¹²² The inability to monitor implementation by authenticating either the information reported or independently evaluating the various countries' compliance with environmental regimes constitute a serious hindrance to enforcement of the global environmental governance.

4.4. Not Being Signatories to Treaties

The general rule is that international agreements bind only the parties to them. The rationale for this rule of international law can be found in the fundamental principles of sovereignty and independence of states, which asserts that states must consent to rules before they can be bound by them.¹²³ This general rule is resonated by Article 34 of the Vienna Convention on the Law of Treaties 1969 which stipulates that 'a treaty does not create either obligations or rights for a third State without its consent.'¹²⁴ One vital exception to the rule is where the provisions of the treaty in question have been recognised as a customary rule of international law.¹²⁵ Secondly, Article 35 of the Vienna Convention

¹¹⁸ L. C. Caldwell, *International Environmental Policy: Emergence and Dimensions* (Duke University Press, 1984), p. 9.

¹¹⁹ French, H. 'The Role of the United Nations in Environmental Protection and Sustainable Development.' Available at <<http://www.eolss.net/Eolss-sampleAllChapter.aspx>>. Accessed on 28 April 2014.

¹²⁰ Such information may include information on the grant of permits or authorisation, information on emission, or discharges, information on implementation measures which have been adopted, scientific information as well as information regarding violation by persons under the jurisdiction or control of contracting state. Examples of provisions requiring reports by contracting parties can be found in such instruments like Article 22, 1992 Convention for the Protection of the Marine Environment North-East Atlantic which requires contracting parties to report certain information to the Commission on regular intervals; Articles 4 and 5 of the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation, which makes provisions for oil pollution reporting procedure and actions to be taken on receiving oil pollution report; Article 9, 1996 Protocol to the 1972 Convention on the Prevention of the Marine Pollution by Dumping of Waste and other Matter, requiring issuance of permits and reporting. Each contracting party is required, directly or through a secretariat established under a regional agreement to make relevant report to the Organisation (International Maritime Organisation) and where appropriate to other contracting parties.

¹²¹ See United States General Accounting Office (1992). 'International Environment: International Agreements Are Not Well Monitored.' A Report to Congressional Requesters. GAO/RCED-92-43. Available online at <http://gao.gov/products/RCED-92-43>. Accessed on 28 April 2014.

¹²² *Ibid.* Following a congressional request, the United States General Accounting Office assessed eight global environmental treaties focusing mainly on: (1) whether the agreements are specific enough to allow implementation to be measured; and (2) whether agreements' administrative bodies monitor implementation. The report discovered that: (a) six of the eight agreements reviewed stated how implementation is to be measured and require parties to supply information regularly; (b) not all the contracting parties report complete and timely information; (c) reporting for developing countries proved difficult due to lack of infrastructure and resources to report such information or even implement the agreement in the first place; (d) although secretariat personnel are aware of the significant implementation problems, yet they lack authority and resources to monitor implementation by verifying either the information reported or independently assessing the various countries' compliance; (e) some secretariats to the global agreements hampered by insufficient fund to either perform their assigned roles or assist contracting parties in complying with the environmental agreements; and (f) several global environmental experts have suggested measures to reinforce oversight and contracting parties' ability to abide by the provisions of the agreements.

¹²³ M. N. Shaw, *International Law* (5th ed., Edinburgh: Cambridge University Press, 2007), p.834.

¹²⁴ This is often epitomised in the Latin maxim, *pacta tertiis nec nocent nec prosunt*. See also *Yearbook of International Law Commission*, 1966, Vol. II, pp. 227, 230.

¹²⁵ See Article 38 of the Vienna Convention on the Law of Treaties 1969. See also *The North Sea Continental Shelf Cases*, ICJ Reports, 1969, 3 at p. 43; 41 ILR, 29 at p. 72. The case involved a dispute between Germany on the one

on the Law of Treaties 1969 further notes that an obligation may arise for a third state from a term of a treaty if the parties to the treaty so intend and if the third state expressly accepts that obligation in writing.¹²⁶ Moreover, although treaties are founded upon the pre-existing and indispensable norm of *pacta sunt servanda*¹²⁷ or ‘the acceptance of treaty commitments as binding,’¹²⁸ countries may also unilaterally denounce or withdraw from a regime to which they were hitherto parties.¹²⁹ Thus, the option to withdraw or denounce, which is recognised in many treaties, certainly weakens the very objective of any agreement. To avoid such defections therefore, monitoring is essential without which enforcement may be absolutely impossible.¹³⁰ Another serious associated problem confronting the enforcement of global environmental governance is that at times either a state responsible for environmental damage is not a party to a relevant Protocol to a Convention or the treaty imposes no enforceable duty on the state to prevent the harm. For instance, although the United States of America is a party to the 1979 Long Range Transboundary Air Pollution Convention, yet the treaty itself lacks a significant responsibility on the state parties. Rather, the obligations are contained in the various Protocols to that Convention, which require the reduction of sulphur dioxide discharge into the atmosphere. Ironically, the United States of America is not a party to the Protocols. Consequently, no matter how much coal the USA burns, it has not breached any treaty responsibility and no other country may institute an action to enforce the treaty against the United States of America.¹³¹

4.5. Non-domestication of Treaties

States view the collaboration between international and domestic law in two distinct perspectives. For states operating a monist system, the singular act of ratifying an international instrument directly incorporates that piece of international instrument into its domestic law and can be instantly applied and adjudicated upon by its domestic courts. But to states like Nigeria which operates a dualist system, the mere ratification of an international agreement without a corresponding domestication of that instrument will not enjoy the force of law at the national level.¹³²

5. Conclusion and Recommendations

The article has examined some international environmental treaties aimed at protecting the world’s environment from oil pollution. It has also highlighted some challenges hampering their efficiency. It has been identified, for instance, that non-domestication of international treaties in some countries operating dualist system may render such treaties unenforceable until its subsequent domestication as a national legislation. It is recommended that where necessary, member countries should take adequate

hand and Holland and Denmark on the other hand over the delimitation of the continental shelf. The ICJ remarked that state practice had to be ‘both extensive and virtually uniform in the sense of the provision invoked.’ This was held to be indispensable to the formation of a new rule of customary international law. See also, L. T. Lee, ‘The Law of the Sea Convention and Third States.’ (1983) 77 *American Journal of International Law*, p.541.

¹²⁶ Commenting on this, an author has posited that the requirement of Article 35 are so strict that when they are fulfilled ‘there is, in effect, a second collateral agreement between the parties to the treaty, on the one hand, and the third State on the other; and that the juridical basis of the latter’s obligation is not the treaty itself but the collateral agreement.’ See D. J. Harris, *Cases and Materials on International Law* (6th ed., London: Sweet & Maxwell, 2004), p.847.

¹²⁷ This principle of *pacta sunt servanda* demands that States obey obligations which they have committed themselves to in good faith.

¹²⁸ M. N. Shaw, (note 123), p.871.

¹²⁹ See for example, Article 15 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 which makes provision for renunciation by ‘any State Party at any time after the date on which this Convention comes into force for that State.’ See also Article 16 of the 1969 International Convention on Civil Liability for Oil Pollution Damage.

¹³⁰ A. W. Samaan, (note 89), p. 271.

¹³¹ Although it may be argued that the discharge of a sulphur dioxide into the atmosphere obviously endangers another country and accordingly is a grave violation of customary international law for which an injured State could seek enforcement measure on that platform, yet such a case would be more difficult to make than responding to a violated treaty. See M. E. O’Connell, ‘Using Trade to Enforce International Law: Implications for United States Law’ (1994) *Indiana Journal of Global Legal Studies*, Vol. 1, p. 303. See also M. E. O’Connell (note 117), p. 54.

¹³² See for instance section 12 of the 1999 *Constitution of the Federal Republic of Nigeria* (as amended) which mandates domestication of international treaties to ensure their enforceability in the country. See also I. O. Babatunde, ‘Treaty Making and its Application under Nigerian Law: The Journey So Far.’ (2014) *International Journal of Business and Management Invention*, Vol. 3, Issue 3, p.7.

steps towards relevant domestication of international treaties it has signified interest to be bound with.¹³³ It is also recommended that as a means of encouraging developing countries like Nigeria to implement and enforce regional or international treaties it has entered into towards oil pollution damage, relevant international bodies should render necessary assistance. Experience has shown that a way of assisting developing countries, such as Nigeria, to build strong capacity and to implement their responsibilities under international agreements is to integrate adequate financial and technical assistance provisions in the conventions themselves.¹³⁴ The implementation of the suggestions and recommendations made in this article will greatly safeguard that every sea-going vessel carry oil or oil companies operating in various countries of the world carry out their operations in accordance with globally recognised principles of sustainable development which includes the need to ensure that the rights of present and future generations to a healthy environment are protected.

¹³³ G. M. Wachira, and A. Ayinla, 'Twenty Years of Elusive Enforcement of Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy' (2006) 6 *African Human Right Law Journal* 465 at pp.468, 472. See also *Cameroon v. Nigeria* ICJ Report, 2002, paras. 265-266; *Cameroon v. Nigeria* (No. 2) (2002) FWLR (Pt. 133) 202 at p. 385-387, paras. E-D, which rejected Nigerian government's contention that the Maroua Declaration of 1975 executed between the two countries was invalid as a result of non-compliance with Nigerian constitutional provision. The International Court of Justice in rejecting the argument observed that 'there is no general legal obligation for states to keep themselves informed of legislative and constitutional developments in other states which are or may become important for the international relations of these states.'

¹³⁴ M. A. Bekhechi, and J. Mercier, *The Legal and Regulatory Framework for Environmental Impact Assessment: A Study of Selected Countries in Sub-Saharan Africa* (Washington, D.C.: The International Bank for Reconstruction and Development/ The World Bank, 2002), p.9.