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Proposing a legal framework for decommissioning of oil and gas installation in Nigeria

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Oil and Gas exploration and exploitations have been ongoing over the past fifty years in Nigeria from the first major discovery of oil in commercial quantity in Oloibiri, Bayelsa State in 1956. Decommissioning is a tedious and complicated process which needs strict laws and regulations to ensure environmental protection among other issues. When an oil and gas installation reaches the end of its productive life, the need to remove such installations from the environment becomes necessary, hence the importance for the existence of national laws and regulations. The paper therefore examines Nigeria's treaty obligations under the Geneva Convention on the Continental Shelf (GCS) 1958, The United Nations Convention on the Law of the Sea (UNCLOS) 1982 and the London Dumping Convention 1972 among others. The paper adopts the doctrinal method through the use of Statutes, Cases, Treaties and Conventions to buttress the argument. The paper finds that the absence of a national legislation on decommissioning in Nigeria has led to failure in provision of regulations in dealing with the complexities associated with decommissioning. It concludes by making recommendations for Nigeria to ensure the implementation of these international legal instruments through the process of domestication under the Constitution of the Federal Republic of Nigeria (as amended) 1999 to bring into existence a national legislation.

1. Background

In the quest for discovery of petroleum deposits, seismic surveys and operations are carried out by holders of oil exploration licences. Once petroleum deposits are found in commercial quantity, then an oil and gas installation is constructed on the site close to the deposits. These constructions are in form of dugged wells, pipelines onshore and oil platforms offshore. During the life span or the period of economic viability of the installation, these structures are maintained until they are no longer of any benefit to the operator of such installation. Once the installation has reached the end of its lifespan the operator is expected to cease or terminate activities on the site, clear the constructed structures and restore the environment to its previous state before the exploration activities commence. The winding phase of oil and gas operations on an installation is referred to as

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'decommissioning'. The objective of this paper is to examine the concept of decommissioning and issues associated with it. A further objective of this research is to examine the treaty obligations of Nigeria under the various Conventions to which Nigeria has signed and some local legislations with a view to proposing an implementation of these international legal instruments through the process laid down by the Constitution of the Federal Republic of Nigeria (as amended) 1999. This paper also further identifies the problem of the absence of a comprehensively codified piece of legislation in Nigeria on the subject, as well as the inadequacies inherent in some local Statutes which provide details on decommission in piecemeal, with a view to proposing a legal framework for its regulation. The paper adopts the doctrinal method of research through the use of Case, Statutes, Conventions and Protocols. The paper concludes by making recommendations on what the legal framework should contain prior to its enactment.

2. Definition of decommissioning

Decommissioning has different definitions, and has become a frequently used terminology in the sphere of international law. [1] The International Atomic Energy Agency (IAEA) defines decommissioning as the activities taken at the end of the useful life of a facility in retiring it from service with adequate regard for the health and safety of workers and members of the public.[2] It is important to note that petroleum exploration activities takes place over a certain period of time, therefore, as the end of such exploration approaches, the need to cease operations becomes mandatory and to restore the environment to its former state prior to the exploration operation. Also the UK Offshore Operators Association (UKOOA) defined decommissioning as 'the process which the operator of an offshore oil and gas installation goes through to plan, gain government approval and implement the removal, disposal or reuse of the structure when it is no longer needed for its current purpose.'[3] As suggested by the Decommissioning and Mine Closure Tool Kit of the World Bank Multi Stakeholder Initiative, 'decommissioning is a process which raises complex issues, including the impact this phase may cause on the environment, health and safety of the workers, the economic impact on communities, the costs involved and the technology required when removing large offshore structures.'[4] This paper defines decommissioning as the process of commencing the final removal of oil and gas installations used during operations whether onshore or offshore with the intention of restoring the environment to its previous state through a rehabilitation program contained in a

[1]BA Hamza, 'International Rules on decommissioning of Offshore Installations: Some Observations' [2003] (27) Marine Policy 339.

[2]Quoted in L. J. G. Thompson "How is the international nuclear community addressing the issue of nuclear decommissioning? Is there a need for regulation on an international basis?" http://www.gasandoil.com/ogel/> accessed 14 August 2017.

[3]<http://www.ukooa.co.uk/issues/decommissioning/background.htm#whatis>accessed 12 May 2018.

[4]Towards Sustainable Decommissioning of Oil Fields and Mines: A Toolkit to Assist Government Agencies. World Bank Multi stakeholder Initiative. Draft Version 1.0,15 (2009).

decommissioning plan. The essence of decommissioning is to ensure environmental health and safety due to its impactful nature. The impact is usually on host communities and human settlements located around the area of operations.[5] The celebrated case which brought the issue of decommissioning to the front burner on global environmental issues was the *Brent Spar Case*[6] where Brent Spar, a North Sea oil storage and tanker loading buoy in the Brent Oilfield was operated by Shell UK with the completion of a pipeline connection to Shetlands. The storage facility was considered to be of no value in 1991. It took Shell over three years to evaluate disposal options. Although the Brent Spar Installation was jointly owned by Shell UK and Esso, but Shell UK took responsibility for decommissioning. The installation (Brent Spar) was 147 m high and 29 m in diameter and displaced 66,000 tonnes of oil.

The operator Shell UK, came up with a plan to dispose the Brent Spar installation by sinking it into the sea. Thereafter, Shell UK claimed to have consulted with representatives of fishing and environmental organisations in the UK and had complied with both national and international regulations. The Operator claimed that disposal by sinking would have negligible environmental impact and subsequently chose the North Feni Ridge within UK waters, and the UK government gave licence for the disposal programme to commence. However, an environmental rights group, Greenpeace organised a worldwide campaign against the plan to dispose the Brent Spar by sinking. Greenpeace claimed that the installation contained about 5,500 tons of oil instead of the 50 tons Shell UK claimed. Greenpeace were of the view that disposing the Brent Spar by sinking would bring about an environmental catastrophe especially to the marine environment. Decommissioning as a concept involves the process of bringing to an end the life cycle of a facility. This occurs where the resources of a facility is depleted and therefore ceases to be of any economic value by reason of its reduced rate of hydrocarbon production, which is no longer of economic benefit to the operator. The activities that ignite the process of removal or abandonment of such facility whether it is onshore or offshore is referred to as decommissioning. Decommissioning as a concept is more comprehensive than abandonment.

Abandonment as its name implies involves the cessation of operations on the site, without more, while decommissioning involves the cessation of productions by the operator of the installation and its removal. Onshore decommissioning involves the removal of installations, structures, plugging of well heads and other ancillary activities necessary for the cessation of oil and gas operations on land. Decommissioning of Oil and Gas installations onshore presents a different technical challenge from those offshore. When the Brent Spar facility constructed by the operator remained in situ, the Operator, that is, to say, Shell UK decided to

[5]O Songi, '**Re**gime of Decommissioning Ghana's Offshore Hydrocarbon Facilities' [2014] (12) (1) Oil, Gas & Energy Law (OGEL) Journal 8.

[6]Brent Spar was a North Sea oil storage and tanker loading buoy in Brent oil field operated by Shell, Uk. In 1991, Shell decided to discontinue the use of the oil field and decided that the safest option for decommissioning the oilfield was to sink the installation in the deep waters of North Feni Ridge, West Coast of Scotland. However, the actions and protests from Greenpeace an environmental Rights group prevented Shell, UK from carrying out the decommissioning by sinking.

dispose the installation by sinking, this met stiff opposition by environmental rights group Greenpeace.[7] Where an installation ceases operation without more, it is believed that such installation has not been decommissioned. Non-decommissioning refers to the failure of removal, termination or cessation of operations on an installation by the operator in a manner laid down by the laws or regulations of the host state. It is important to note that Nigeria as signatory to these international legal instruments on decommissioning of installations, has a duty to adopt these instruments through the domestication process as provided by the Constitution of the Federal Republic of Nigeria 1999 (as amended). In Nigeria, decommissioning as a complex process of bringing to end the operational span of a facility by retiring it from active service has not been done. The first oil well discovered in Oloibiri, Bayelsa State in 1956, was abandoned in 1978 with some barrels of oil in situ (in place) with no decommissioning activity. Many oil wells within the Niger delta region of Nigeria share similar fate as it relates to bringing an oil and gas facility to an end. The United Nations Environment Programme (UNEP) Assessment on Ogoniland Report 2011 on the state of oil and gas installations, noted the absence of decommissioning of disused installations and recommended decommissioning. Furthermore, the report bemoaned the absence of legislation and environmental regulations on decommissioning.[8]

This highlights the state of reality in the Niger-delta region of Nigeria where oil and gas exploration and production take place, that there is no decommissioning exercise taking place. Rather what exists is a state of abandonment. The Petroleum Act and Regulation of 1969 is the legislation governing the search for, win and exploitation of oil and gas resources in Nigeria, but the Act did not provide for decommissioning. However, in the Petroleum Regulation under Regulation 46 (2), (3) and (4) one finds a sparsely worded mention on termination of operations, removal of installations being mentioned. This is not surprising due to the fact that at the time of enactment, most of Nigeria's oil fields were onshore, therefore the removal provision in the Petroleum Regulation of 1969 was meant for onshore installations.[9] The inability of the drafters of the Petroleum Act of 1969 to look beyond the present, taking recourse to the discovery of deep offshore oil field in Okan, Delta State in 1964, leaves much to be desired.[10] The offshore discovery of 1964 should have inspired the lawmakers into taking proactive measures about the final phase in the oil and gas operations (Decommissioning) prior to the enactment of the Petroleum Act in 1969.

According to Azaino,[11] there are lessons Nigeria can learn from the United Kingdom's legal framework on decommissioning. These lessons are salient due

[7]In situ simply means 'in place'.
[8]UNEP Assessment on Ogoniland Report 2011, 205.
[9]DE Omukoro, 'Decommissioning of Offshore Energy Installations: What Lessons Can Nigeria Learn from the United Kingdom?' [2018] (16) (2) Oil, Gas and Energy Law (OGEL) Journal 6.
[10]Y Omoregbe, 'Legal Framework for Production of Oil in Nigeria' [1987] (5) Journal of Energy and Natural Resources Law 274.
[11]EU Azaino, 'International Decommissioning Obligations: Are there Lessons Nigeria Can Acquire from the UK's Legal and Regulatory Framework? [2013] (16) Annual Law Review Centre for Energy, Petroleum, Mining Law and Policy.

to the established nature of the decommissioning regime of the UK. It is important to state that some international legal instruments such as the Oslo and Paris (OSPAR) Convention among others provided the guidelines for the enactment of UK legislation on decommissioning. Among other issues, the UK regime provides for a Regulator with responsibilities on guidelines for decommissioning. In the United Kingdom, there is the Offshore Petroleum Regulator for Environment and Decommissioning (OPRED) which serves as the Regulator on matters of decommissioning. The responsibility for ensuring that the requirements of the Petroleum Act 1998 and international obligations are complied with rests on OPRED. The process of decommissioning cannot be said to be complete without the existence of a Regulator. It is important to note that under the United Kingdom regime on decommissioning, the Regulator's role is very crucial to the success or otherwise of the process. OPRED is under the Department of Business, Energy and Industrial Strategy formerly Department of Energy and Climate Change. This body serves the purpose of regulating and addressing complex issues involved in decommissioning of offshore installation in the UK. One important function of OPRED is to hold those who have benefitted from the exploitation or production of hydrocarbons to bear the responsibility for decommissioning of such infrastructure.[12] The purpose is to shield the taxpayer from having to fund decommissioning. This is an infusion of the polluter pays principle of environmental protection which is contained in global treaties. In Nigeria, there is need for the establishment of an Agency charged by law with the duty to regulate the entire process of decommissioning. There must be a Regulatory Authority (RA) in charge of the decommissioning process; the RA represents the government of the Host State. The RA is usually an agency of the government with clearly defined obligations to regulate the process of decommissioning of oil and gas installations. The RA has the duty to ensure compliance with available regulations containing provisions on environmental health and safety during the process of decommissioning. Therefore, just as OPRED operates in the United Kingdom (UK) to ensure that provisions of the UK Petroleum Act 1998 and international obligations are complied with; the RA under the proposed Nigeria decommissioning legislation regime would have same responsibility to perform. There are laws and regulations which do not provide for decommissioning directly, but makes provisions for other aspects such as environmental rehabilitation. Such provisions need to be incorporated into the legislation on decommissioning for better enforcement by the Regulatory Authority (RA).

The Mineral and Mining Act 2007, lacks decommissioning provisions. Rather, what is obtainable under the Mining and Mineral regime is an environmental rehabilitation program which is fundamental in a decommissioning process. The program must contain specific rehabilitation action, cost of implementing the program among other issues.[13] The implementation of a rehabilitation program is an important ingredient for a successful decommissioning process. This is due to the impactful nature of the mining exploration exercise on the environment. Other fundamental ingredients include the cost of financing the rehabilitation program,

[12]United Kingdom (UK) Petroleum Act 1998, s29.
[13]Mining and Mineral Act 2007, s119(c) (ii).

which according to the Mining and Mineral Act should be sourced from a Rehabilitation Fund.[14] Furthermore, the Environmental Guideline and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002, revised in 2018 provides for decommissioning although from the technical point, not a legislative perspective.[15] The guideline stipulates the need for a decommissioning program which must be submitted to the Department of Petroleum Resources with a restoration and remediation implementation objective.[16] Prior to the commencement of decommissioning an installation, the guideline provides for a decommissioning plan report.[17]

The decommissioning plan report shall contain the following;[18]

a. Peculiarity of the project;
b. The degree of abandonment (whether it is partial or wholly);
c. Methods to be used for the removal of the structures. That is, explosives, mechanical cuttings, touches and others;
d. Verification of method(s) when used;
e. Disposal of removed structures, debris and associated wastes;
f. Environmental protection/monitoring (EIA, Restoration and remediation) plan.[19]

When the process of decommissioning is complete, the Director for Petroleum Resources shall issue a decommissioning certificate to the operator as evidence of satisfaction.[20] The guideline further provides for specifications in the procedure and strategies for the kind of installations that should be decommissioned in Nigeria's offshore/deep waters. These installations include all installations standing in less than 100 meters (depth) of water and weighing less than 4000 tonnes in air, placed in the sea bed, excluding the deck and the superstructure which shall be removed entirely. The process of removal should not affect navigation or the marine environment adversely.[21] No installation or structure is to be placed on the continental shelf or exclusive economic zone, except it is designed for complete removal upon cessation of operations after 1st January 2003. In dealing with decommissioning of wells located inland or near the shores, the guidelines provide conditions that the operator must meet. Some of the conditions include:[22]

I. Obtaining appropriate permit from the Department of Petroleum Resources;
II. Isolating well from surface;
III. Plugging and abandoning down hole according to permit criteria;

[14]Mining and Mineral Act 2007, s120.
[15]EGASPIN 2002, Part viii, G(a), 285.
[16]EGASPIN 2002, Part viii, G, 1.12.
[17]Ibid Part viii, G 1.13.
[18]Ibid, Part viii, G, 3.0.
[19]Ibid Part viii, G, 3.1(a-f).
[20]Ibid, Part viii, G, 3.2, 286.
[21]Ibid Part viii, G, 1.1–1.3.
[22]Ibid, Part viii, G(b) 2.1.1(i–vii).

IV. Placing surface cement plug below cellar to allow removal of surface components, the process of removal should avoid any significant adverse effect on the environment;
V. Closing pit appropriately; and
VI. Satisfying other conditions as in API RP 57.

The Operator must ensure that equipment and installations are decontaminated appropriately, and disposal of equipment done by recycling, selling, reuse etc, while the removal of structures and buildings are carried out through demolitions where necessary to reduce conflict with land use.[23] In the case of removing pipeline, the operator must decontaminate, plug and leave on site, if such measure is adequate, where it is not adequate, then the operator must excavate. The Operator must remove all installations relating to surface components of the installation to be decommissioned.[24] Approval from the Director of Petroleum Resources must be sought and obtained for the best strategy to adopt for decommissioning installations.[25] These measures deserve to be incorporated into legislation for enforcement and compliance and sanctions must be meted to defaulting operators or managers of such installations as duty.

The implication of the duty of Nigeria extends to the right to adopt, modify and implement these international legal instruments for the economic, environmental and financial well being of the country and its citizens who dwell within the locations of these installations. It is important to note that Nigeria, like most developing countries of the world who are oil producers lack a comprehensive legislation on decommissioning. Rather, what exists between these Host countries and Operators are Production Sharing Contracts (PSC), Risk Sharing Contract (RSC) and other contractual obligations.[26] The danger in having an absence of a decommissioning legislation is that Oil producing Countries like Nigeria, may suffer a similar fate like Malaysia which spent Billions of Malaysian Ringgit to finance the decommissioning of some offshore installations because of the absence of legislation.

Addressing issues of finance in respect to decommissioning, the need for a decommissioning fund is fundamental. In Nigeria's oil and gas industry, the method of financing projects is through the use of Production Sharing Contract (PSC), joint venture agreements and other forms of commercial partnerships.[27] The purpose of a decommissioning security is to ensure availability of funds for the implementation of the process. Looking at international legal instruments signed by Nigeria would give an idea of where financial obligations lie. To ensure the availability of funds for decommissioning, the use of Decommissioning

[23]Ibid, Part viii, G(b) 2.2.
[24]Ibid Part viii, G(b) 2.3(i–iii).
[25]Ibid Part viii, G(b) 2.4, 286.
[26]BA Hamza, "International Rules on Decommissioning of Offshore Installations: Some Observations''[2003] (27) Marine Policy 339.
[27]NC Ole, 'The Financial Securities for Decommissioning of Offshore Installations in Nigeria: A Review of The Legal and Contractual Regime' [2017] (15) (1) Oil, Gas and Energy Law (OGEL) Journal 5.

Security Agreement (DSA) by parties to the process is important.[28] In the United Kingdom, DSA is the activator for provision of funds for decommissioning. This could be achieved by Cash, Letters of Credit, Decommissioning Trust Fund (DTF) among others. At the global level there is the argument that there exists a need for a global decommissioning fund.[29] This is in line with the arguments of Komusiga and Ole on the issue of provision of decommissioning fund using the Ugandan Petroleum Act as an instance.[30] This position is strongly canvassed due to the huge oil and gas infrastructure littered around the regions involved in oil exploration such as Gulf of Mexico (GoM), Gulf of Guinea (GoG) and North Sea. Decommissioning of these infrastructure is capital intensive, it is estimated that decommissioning of installations globally will gulp about USD $340 Billion beyond 2022.[31] Furthermore, it is estimated that decommissioning of offshore installations by the oil and gas industry in the United Kingdom will cost about £15Billion over the next decade.[32] The position on the absence of legislation on decommissioning being the reason for a lot of problems is supported by Adedayo in his work, goes to the essence of this paper, that there exists a need for a legislation on decommissioning in Nigeria because the current regime is inadequate, incoherent and ineffective.[33] The provisions of Environmental Guidelines and Standards for the Petroleum Industry in Nigeria 2002 now 2018 (EGASPIN) does not satisfy the requirements of international treaties on decommissioning, however, it contains necessary measures aimed at ensuring a successful decommissioning process in line with global best practices. Therefore, the need for a legislation clearly to define the responsibility of the Regulator and Operator, in respect to finance, technical responsibility, environmental obligations and incorporation of the measures contained in EGASPIN 2018 among others, cannot be overemphasised. However, under the revised provisions of EGASPIN, certain pollutants are omitted and such omissions are detrimental to the health and safety of the environment during the process of decommissioning.[34] To ensure environmental safety, global best practices are demanded from operators. According to the Review by Olawuyi and Tubodenyefa, the guideline does not follow

[28]Damilola O Salawu, 'Bringing Down the House: Decommissioning Issues in Nigeria's Upstream Oil and Gas Sector' [2014] (12) (3) Oil, Gas & Energy Law (OGEL) Journal 13.

[29]NM Lomonco, 'How to Finance Decommissioning in the Offshore Petroleum Industry': The Role and Importance of Decommissioning Fund [2013] (16) Annual Law Review Centre for Energy, Petroleum, Mining Law and Policy.

[30]J Komusiga and NC Ole, 'Ugandan Legal Framework on Decommissioning Fund: Is There an Achilles Heel, and Can Lessons from the UK Help?' [2018] (16) (2) Oil, Gas Energy Law Journal (OGEL) 8.

[31]Jia Li and Y Peng and M Zhu and K Wang and J Yi, 'Decommissioning in Petroleum Industry: Current Status, Future Trends and Policy Advices' [2019] (237) (4) IOP Publishing, Conference Series: Earth and Environmental Sciences 1.

[32]Decommissioning Insights 2018, 4.

[33]AM Adedayo, 'Environmental Risks and Decommissioning of Offshore Oil Platforms in Nigeria' [2011] (1) I Journal of Environmental Law, Nigerian Institute of Advanced Legal Studies (NIALS) 2.

[34]DS Olawuyi and Z Tubodenyefa, 'Review of Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)' [2018] 4.

international practice.[35] Some weaknesses in EGASPIN include the legal status of the guideline as it is not an Act of Parliament, and therefore lacks the capacity for punitive measures on defaulters. Consequently, the paper argues that provisions of EGASPIN should be incorporated into the proposed legislation on decommissioning.[36] Furthermore, the guideline does not provide procedure for auditing the activities of the Department of Petroleum Resources (DPR) and National Oil Spill Detection and Response Agency (NOSDRA). During the review of the guideline, it is discovered that the roles of DPR and NOSDRA overlap. As a result, there is a conflict of interest which seems to favour operators by reason of the partnership agreements entered between DPR and Multinational.[37] The inability of the guideline to enforce compliance with the rule that oil spill must be reported within 24 hours of its occurrence further shows the inherent weakness in the guideline.

3. Nigeria's treaty obligations on decommissioning of oil and gas installations

Firstly, the Geneva Convention on the Continental Shelf (GCS) 1958,[38] provides the obligations which the coastal State such as Nigeria must implement. Under this convention, Nigeria, a coastal State has the exclusive rights over the continental shelf to the exclusion of any other State for the purpose of exploring and exploiting natural resources, which no other State can exploit except by the consent of Nigeria in relation to offshore installations. Furthermore, to facilitate the process of decommissioning, the GCS provides the type of removal regime which coastal States must adopt under Article 5(5). This measure must be maintained at all times, and any abandoned installation must be entirely removed.

'Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Thus, such installations which are abandoned or disused must be entirely removed.'

This Convention provides for complete or total removal regime for any abandoned or disused installation. However, under the United Nations Convention on the Law of the Sea (UNCLOS) 1982, the removal regime became a bit flexible or modified to include partial removal where complete or total removal becomes too costly or impossible under Article 60(3) of UNCLOS 1982.[39]

The Convention provides that;

Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure the safety of navigation, taking into account any generally accepted international standards established in this regard by the

[35]Ibid.
[36]Ibid.
[37] Eghosa Osa Ekhator, 'Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation' [2016] (21) (1) Annual Survey of International and Comparative Law 1.
[38]Nigeria signed and ratified the Geneva Convention on the Continental Shelf on 28 April 1971.
[39]Nigeria ratified the 1982 United Nations Convention on the Law of the Sea on 14 August 1986.

competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed.

The implication is that the 1982 Convention brought about a modification of the previous Convention on removal regime. The challenge here is that Nigeria is a signatory to both Conventions, therefore the question is, which of the regimes will Nigeria adopt under the given circumstance? To address this seeming contradiction, Nigeria can choose either of the two or adopt both through the process of treaty implementation or domestication provided under its Constitution. This is further possible because under the regime of UNCLOS, it is a coastal State that has the obligation to enact national laws and policies to ensure marine environmental safety among other issues.[40] Also, the obligation to remove installations both onshore and offshore lies within the purview of the State.[41] Furthermore, since decommissioning of installations located offshore falls within the territorial waters of littoral States, there is a need for a comparative examination of the available laws found in such States to discover lessons that could be learned.[42] However, this obligation can be effectively passed on to the operator(s) or managers of the installations wherever they are located. The operators are majorly International Oil Corporations (IOCs). It is in the course of implementing the provisions of the treaties that Nigeria can transfer, modify or remove certain responsibility from itself to the operator of these installations.

The London Dumping Convention 1972 provides a strict international legal instrument for the regulation and control of waste disposal at sea by national administrations. It is the law of the coastal States which defines and determines the liability. This law takes recourse to the scope of the applicability of the law geographically. Nigeria is a party to the London Dumping Convention to prevent any deliberate disposal of waste at sea.[43] Under this legal instrument 'dumping' means any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea; or any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea.[44] A coastal State Party to the Convention must prohibit dumping of wastes or any other matter in whatever form except with prior special permit granted after careful considerations.[45] Furthermore, the London Dumping Convention provides that parties shall apply the measures provided by the convention for implementation.[46] Also, the contracting party must take appropriate measures to prevent and sanction actions violating the provisions of the convention.[47] The Convention recognizes

[40]UNCLOS 1982, Article 208.
[41]MO Igiehon and P Park, 'Evolution of International Law on Decommissioning of Oil and Gas Installations' Society of Petroleum Engineers (SPEI) International (2001).
[42]Ibid.
[43]Nigeria acceded to the London Convention 1972 on the 30th date of October 2010.
[44]London Dumping Convention 1972, Article III (1) (a) (i) and (ii).
[45]Ibid, Article IV(1) (a) (b) (c) and (2).
[46]Ibid, Article VII(1) (a–c).
[47]London Dumping Convention, Article VII(2) and (3).

the interest of the contracting parties to enter into regional agreements consistent with the convention to prevent dumping of wastes.[48]

It is important to note that Nigeria as signatory to these international legal instruments has not domesticated them in the context of enacting a National legislation on decommissioning and need not domesticate them verbatim. The essence is to make veritable use of important provisions contained in these international legal instruments to create a national legislation. Rather, Nigeria, through the process of domestication can create a piece of legislation by incorporating different content provisions of these international legal instruments.

4. Implementing international treaties under Nigeria's constitution

Nigeria is a signatory to about three important treaties under international law in relation to decommissioning of oil and gas installations. The proposed implementation of these legal instruments therefore emanates from the need to adopt provisions of the international legal instruments in compliance with Constitutional requirements. Nigeria as a signatory to three (3) international legal instruments dealing with decommissioning of oil and gas installation has not adopted or domesticated provisions of these instruments.[49] Therefore, Nigeria at the moment lacks a national legislation on decommissioning of oil and gas installations. The absence of a legislation on decommissioning is not a problem peculiar to Nigeria, rather it is a similar experience with most developing countries who are major producers of petroleum.[50] National legislations relating to petroleum operations such as the Petroleum Act 1969 and its Regulation, Mining and Mineral Act 2007 among others did not take recourse to decommissioning of oil installations as fundamental component within the sphere of oil and gas hierarchy. The implementation of these treaty provisions must not be wholesale but important pieces and provisions must be brought together to form the nucleus of the proposed legislation as prescribed by the Constitution.

The Constitutional provisions that all objectives contained in its Chapter II are non justiciable items and cannot be enforced in any court of competent jurisdiction seems to bring about a conflict of purpose under the same grundnorm. This conflict brings us to the political question, how can the environmental objectives contained in our constitution be made enforceable? It is important to note that S.6(6)(c) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (As amended) provides that the Fundamental Objectives of Directive Principles of State Policy (FODPSP) which contains environmental objectives are not justiciable.

The purposive intention of this provision is that the environmental objectives contained in the constitution of Nigeria cannot be enforced or invoked for the benefit of all citizens. Rather, the environmental objectives as enshrined in the Constitution are elusive rather than being 'futuristic ideals' in the strict sense.

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[48]Ibid, Article VIII.

[49]1958 Geneva Convention on the Continental Shelf, 1972 London Dumping Convention and the United Nations Convention on Law of the Seas (UNCLOS) 1982.

[50]Hamza, BA, "International Rules on decommissioning of Offshore Installations: Some Observations'' [2003] (27) Marine Policy 339.

The full environmental potential of the country is buried in the non-justiciable environmental objectives as provided by the law, therefore, the country's aspirations to achieve sustainable environmental system will forever remain a pipe dream, except this legal, political and constitutional question is addressed.

For there to exist an effective, sound environmental management regime in the country, there is need for the National Assembly through its inherent powers as provided by the Constitution to do 'just violence' to this inhibiting provision of non-justiciability.[51] When this would have been done, then the environmental objectives and aspirations of the country could be achieved through holding administrators of environmental regulatory agencies to account over their competence or otherwise in regulating environmental activities. This could be achieved through order of mandamus or injunctions and other forms of environmentally conservative actions. This is one argument that suggests that the environmental goals under Chapter II of the Constitution cannot be litigated for enforcement. However, the political question extends further to a second argument that the provisions of S.6(6)(c) does not prevent the justiciability of the environmental provisions of Chapter II. The basis for this position is that the above named section provides a pathway thus '… shall not, except as otherwise provided by this constitution.' This proviso implies that if the Constitution makes available in another section for the justiciability of such goals, then the environmental objectives are justiciable through the instrumentality of legislation. However, the question is, would the government or the political class have the political will to address these issues?

Section 12 of the Constitution provides a pathway to justiciability under the Constitution.

Section 12 of the Constitution of Nigeria provides that:

12-(1) No treaty between the Federation and any other country shall have the Force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative list for the purpose of implementing a treaty.

A bill for an Act of the National Assembly passed pursuant to the provisions of subsection(2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.

The implication of this provision is that where a treaty signed by Nigeria has passed through the process of domestication, it forms part of Nigerian body of laws and thereby gains enforceability in our courts. In *Abacha v Fawehinmi,*[52] the respondent a legal practitioner, was arrested without warrant at his residence 9 A Ademola Close GRA Ikeja, Lagos, on Tuesday 30 January 1996, at about

[51]Constitution of the Federal Republic of Nigeria 1999 (As Amended) s4.
[52][2000] 6 NWLR (pt 660) 228.

6 am by six men who identified themselves as operatives of the State Security Services (SSS) and police men, and taken away to the office of the SSS at Shangisha where he was detained. At the time of arrest, the respondent was not informed of, nor charged with any offence.

He was later detained at Bauchi prison. In consequence, he applied ex-parte through his counsel, to the Federal High Court Lagos, pursuant to the Fundamental Rights (Enforcement Procedure) Rules 1979 for reliefs against the Appellant before the court. The respondent (Chief Gani Fawehinmi) sought inter alia a declaration that his arrest by the State Security Service (SSS) or officers, servants, agents, privies of the respondent and/or of the Federal Military Government constitutes a violation of his fundamental rights as guaranteed under S.31, 32 and 38 of the Constitution of the Federal Republic of Nigeria 1979 and Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples Rights Cap 10 Laws of the Federation of Nigeria 1990. One issue for contention was whether or not the Constitution (Suspension and Modification) Decree No 107 of 1993 ousting the jurisdiction of the courts to hear the matter of violation of human rights, also affects the Article provisions of the African Charter on Human and Peoples Rights which having passed through the process of domestication now forms part of the body of legislation.

The Supreme Court held amongst others that the status of the African Charter on Human and Peoples Rights having gone through the process of domestication by the National Assembly in 1983, is a legislation with international flavour but has become part of Nigerian municipal laws. Therefore the courts must accord it all respect and application like all other laws, and the Federal Military Government is not legally permitted to legislate out of its obligation. Furthermore, the court held that the Constitution (Suspension and Modification) Decree No 107 of 1993, did not affect the provisions of the African Charter on Human and Peoples Rights 1983, so the rights of the respondent are protected under the Charter.

The philosophy behind this position by the Supreme Court is that the Military Government through the above mentioned decree cannot arbitrarily suspend the Constitution especially Chapter IV dealing with human rights and ousting the jurisdiction of the courts to hear such matters. The court took the position that assuming but not conceding that Chapter IV of the Constitution was suspended, the Decree did not also suspend or affect other laws duly passed by the National Assembly providing Citizens with the right to seek redress when their rights are violated.

In *Jonah Gbemre v Shell Petroleum Development Company (SPDC),*[53] the applicant sued Shell Petroleum Development Company seeking a declaration that the constitutionally guaranteed rights to life and dignity of human persons under s33 (1) and 34 (1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Articles 4, 16, and 24 of the African Charter on Human Rights and People's Rights (Ratification and Enforcement) Act CAP A9, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean, poison-free and healthy environment. This application was brought as a result of the continued

[53][2005] HRLR 151.

gas flaring activities of the defendant company. The Court decided through an injunction restricting the defendant from further flaring of gas. The Court further ruled that the constitutionally guaranteed rights of the citizenry inevitably includes the right to clean poison-free, pollution free, healthy environment. This is because the African Charter on Human and Peoples Rights has become part of Nigerian body of laws after going through the process of adoption under Section 12 of the Constitution, albeit with international flavour.

This decision is very commendable because for the first time we see judicial environmental activism aimed at preserving the environment.[54] The court for the first time interpreted the provisions of the African Charter on Human and Peoples Rights as constituting part of Fundamental Rights. The import of this judicial decision is that until a treaty is passed into law by the National Assembly of the Federal Republic of Nigeria, such a treaty will not apply within the jurisdiction of Nigeria. The challenge with these Conventions on decommissioning in Nigeria is that the treaty has passed one stage of the process only, that is, to say, the signing stage. The second stage which is the process of adoption by the National Assembly has not taken place which is a common characteristic of dualist States in international law.

International Law which serves as the source of International Environmental Law is the law which governs the relationship between States, individuals, Multinational Corporations to have binding force within the municipal jurisdiction of a State. For International law to have effect within a municipal territory, it must pass through some process of transformation called incorporation.

The Permanent Court of International Justice, in the case of *Exchange of Greek and Turkish Populations*, stated that:

> [a] state [which] has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations taken.[55]

International law can find its application in national law when a state takes measures to implement its international obligations through enactment and enforcement of national legislation. National environmental law includes rules at the national level that protect the environment. International Environmental Law being an offshoot of international law needs to pass through similar process of domestication to be effective within municipal territory. It is important to note that different procedures are applied in different jurisdictions for the enforcement of international law within municipal territory. The procedures differ according to jurisdictions. The Commonwealth (common law) jurisdiction adopts the incorporation procedure, while the non-Commonwealth (Civil law) jurisdictions such as Mali, Guinea, Ivory Coast (Francophone Nations) adopt the ratification by the President.

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[54]MT Ladan, 'Critical Appraisal of Judicial Attitude towards Environmental Litigation and Access to Environmental Justice in Nigeria' (5th IUCN Academy Global Symposium, Rio de Janeiro, Brazil, 31st May–6th June 2007).

[55]Exchange of Greek and Turkish Populations, Advisory Opinion of 21 February 1925, P.C.I.J. (ser. B) No. 10, at 20–21.

The process of ratification as a means of implementing international law within the municipal jurisdiction is achieved by the President of the Non Commonwealth Country ratifying such treaty and it becomes automatically binding and forms part of the Country's body of laws. Furthermore, such laws could be gazetted by the government without the law going through the legislative process. The issue of implementation of international law in Nigeria is a matter of the relationship between international law and municipal law. There are various Schools of Thought on this subject such as the Dualist, Monists and Nihilists.[56] The political system of a country determines the procedural requirement for implementation of international environmental agreements in a Sovereign State. Furthermore, the United States of America is an example of a Nihilist State in the world which holds Municipal Law as being higher in supremacy to International Law.[57] Nigeria being part of the Dualist School of Thought where treaties do not become applicable within the municipal jurisdiction even after such treaty has been signed and ratified. Rather, to be applicable, such treaties are to be enacted by the Parliament as part of the municipal laws of the country.[58]

Under the incorporation procedure as adopted by the commonwealth countries like Nigeria, Ghana, Sierra Leone and the Gambia, international Law is implemented through the process of domestication. Domestication of international law occurs through the Acts of Parliament or National Assembly which proclaims or passes such treaty of international law as forming part of the body of laws of the country. This process of incorporation is usually provided for by the Constitution. Domestication of treaties is a matter of national law not International Law. The process by which international law becomes part of our local legislation is provided by s12 of the Constitution of Nigeria 1999 as amended.

The above section states how international law could be made to have the force of law in Nigeria. By virtue of the above provision, any treaty which Nigeria has signed and intends to domesticate would have to pass through the procedure under s12 of the Constitution of the Federal Republic of Nigeria. The moment Section 12 of the Constitution has been complied with such treaty becomes part of our legal system and acquires equal legal status in form, substance and effect as any other law enacted by the National Assembly.

[56]Schools of Thought on the Relationship between International Law and Municipal Law. Dualist Proponents assert that International Law and Municipal Law are two distinct systems of Law, therefore International law cannot apply directly to Municipal jurisdictions without undergoing certain transformation. The Monist Proponents hold the view that International Law is superior to municipal Law and must be applied within the scope of Municipal Law and in the event of a conflict between the two systems of law, International Law should prevail. The Nihilist Propound their belief in the supremacy of Municipal Law over international Law in the event of any conflict.

[57]The United States of America has refused to ratify the United Nations Convention on Rights of the Child because the Central Government in Washington DC cannot compel the Federating States to adopt the Convention, and each State has its own law protecting the Rights of the Child. This is a purely Nihilist philosophy which has its roots in the Presidential system of Government.

[58]EB Omoregbe, 'Implementation of Treaties in Nigeria: Constitutional Provisions, Federalism Imperative and the Subsidiary Principle' (International Conference, under the auspices of the International Public Policy Association (IPPA), Milan, Italy, 1–4 July).

"Compliance" means the fulfillment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement.[59]

The courts have further restated the position of the law in relation to the implementation of treaties under municipal jurisdictions. In *Registered Trustees of National Association of Community Health Practitioners of Nigeria (RTNACHPN) v Medical Health Workers Union of Nigeria (MHWUN)*[60] the Association instituted an action against the 2nd Appellant (Hon. Minister of Labour and Productivity) and 3rd Appellant (Registrar of Trade Unions) at the Federal High Court Illorin, by way of application for judicial review seeking, inter alia, an order of certiorari, mandamus and declaration against the 2nd and 3rd Appellants. The 2nd and 3rd Appellants, in response filed a preliminary objection challenging the competency of the action. Subsequently, the respondent applied to be joined in the suit and the application was granted.

The 1st Appellant (*RTNACHPN)*, an association registered with the Corporate Affairs Commission as an incorporated trustee under Part C of the Companies and Allied Matters Act Cap C20 Laws of the Federation 2004, resolved to be registered as a trade union. Consequently, 1st Appellant by letter of 8th March, 2002, applied to the 2nd Appellant for registration as a Senior Staff Professional Association. By a letter dated 24th April, 2002, the 2nd Appellant directed the 1st Appellant to the 3rd Appellant, which directive the 1st Appellant complied with. But by letter dated 19th February, 2003, the 3rd Appellant refused to register the 1st Appellant as a trade union.

The issues for determination before the Court of Appeal were as follows:

I. Whether the learned Justices of the Court of Appeal were right in setting aside the reliefs (i) (ii) and (v) granted in favour of the 1st Appellant by the Federal High Court on the ground that the 1st Appellant did not prove its entitlement to the same having regard to the alleged non denial of Paragraph 7 or the counter-affidavit of the respondent which was clearly not so on record.
II. Whether the learned Justices of the Court of Appeal correctly interpreted the provisions of sections 3 and 5 of the Trade Unions Act,Cap 437 Laws of the Federation of Nigeria 1990, viz a vis the provision of section 40 of the Constitution of Nigeria and the case of *Osawe v Registrar of Trade Unions,*[61] when the fact and circumstances of the case were totally different from the facts of the present case.
III. Whether the learned Justices of the Court of Appeal were wrong in the view they took that relief no (iii) was not properly granted in favour of the 1st Appellant by the trial court on the grounds that the provisions of clause 87 and 89 of the International Labour Organization (ILO) Convention had no legal force in Nigeria having not been ratified by the National Assembly even though signed by Nigeria,

[59]According to the United Nations Environment Programme (UNEP) Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements (Guideline 9 a, UNEP 2002), compliance is the fulfilment by the contracting parties to a multilateral agreement of their obligations under the agreement, any amendments to the agreement and decisions by the Parties to the agreement on its implementation.
[60][2008] 2 NWLR (Pt.1072) 573
[61][1985] 1 NWLR (Pt.4) 255.

when the decision of the trial court was based on other valid grounds not considered by the trial court below.

IV. Whether the Court of Appeal was right to have endorsed the ruling of the trial court that the respondent was a proper party to the case when it granted its application for joinder, when in fact, there was no relief claimed by the 1st Appellant against the respondent and no counter claim by the 1st Respondent.

V. Whether the ideals embodied in the ratified ILO Conventions Clauses 87 and 89 have not become incorporated into Nigerian Jurisprudence by virtue of similar rights preserved under cognate provisions in Municipal Trade Union Acts and legislation as to make its provisions justiciable in Nigerian Courts. If not so, whether recourse to the 1999 Constitution and the African Charter on Human and Peoples Rights (ratification and Enforcement) Act Cap C10 Laws of the Federation of Nigeria 2004 containing identical provisions preserve a litigant's right to negate the Court of Appeal's decision that the same had not been enacted into law and had no legal force of law in Nigeria.

The Supreme Court in dismissing the Appeal and upholding the decision of the lower court, decided issues 3 and 5 dealing with applicability of international treaty and convention in Nigeria through the provision of section 12 (1–3) of the Constitution of the Federal Republic of Nigeria. The apex court stated that, by virtue of section 12 (1) of the 1999 Constitution, no treaty between the federation and any country has the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. Thus, an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly.

In the instant case, as far as the International Labour Organization (ILO) Conventions have not been enacted into law by the National Assembly, they have no force of law in Nigeria, and they cannot possibly apply. The Supreme Court further held that the intention of the legislature is that for a treaty to be valid and enforceable, it must have the force of law behind it, although it must be supported by a law enacted in the National Assembly, not bits and pieces of provisions found here and there in other laws of the land, but to make it a part of our law. To interpret similar provisions as being part of the International Labour Organization Convention just because they form part of some other enactments like the African Charter on Human and Peoples Rights will not be tolerated.

From the decision of the Supreme Court, it is clear that for any international treaty or convention to have the force of law in Nigeria, such treaty must be enacted into law by the National Assembly not bits and pieces of provisions found here and there in other laws of the land. It is worthy of note that the requirement under s12 of the Constitution of Nigeria includes international treaties on the environment. These treaties address important but complicated issues surrounding the process of decommissioning of oil and gas installations. Some of these issues include the removal regime to adopt, financing decommissioning exercise and the environmental restoration efforts among others.

It is important to state that these treaties as most others under international law place obligation of treaty implementation on Parties to the treaty, that is, the State. However this burden could be transferred to the Operators who are most times the holders of the exploration licence or managers of the installations.

This paper is of the view that through the instrumentality of the adoption or domestication process, the burden of financing the process of decommissioning and environmental restoration measures can be transferred to the Operator. This position is based on the Polluter pays principle of environmental protection as provided under International Environmental Law treaties such as the United Nations Conference on Environment and Development among others.

5. Proposing a national legislation to decommission Nigeria's oil and gas installations

Proposing a national legislation to regulate decommissioning of oil and gas installations in Nigeria through the implementation of international legal instruments such as conventions, protocols and other guidelines involves the legislative organ of Government, that is, to say, the National Assembly. The national legislation needs to be sourced from the already signed and ratified Conventions, Protocols and Article provisions. These Multilateral Environmental Agreements are the raw materials for the production of a national legislation which would address and regulate the entire process of decommissioning oil and gas installation in Nigeria. To strongly propose a position for this legislation, the three global conventions to which Nigeria has signed must be examined to pick ample provisions to enhance the proposed national legislation. It is important to note that domestication of these international legal instruments and creating a new legislation for regulating the process of decommissioning are two different things. Domestication entails implementing the provisions of an international treaty within the municipal authority of a State, while a new legislation involves the use of legislative process to bring into existence a law. In proposing a national legislation to decommission Nigeria's oil and gas installations, some provisions from these international legal instruments are incorporated together with other local Statutes dealing with some aspects of decommissioning and codified to form a single piece of legislation.

For Nigeria to have a comprehensive legislation, the Country needs to adopt some parts of the already signed and ratified Conventions on the removal of offshore installations to address offshore decommissioning, while ensuring that onshore installations already abandoned are also decommissioned. It is the view of this paper that the proposed legislation need not emanate through a copious adoption of these international legal instruments. The proposed legislation for Nigeria's Decommissioning regime must contain the following essential ingredients:

a. There must be decommissioning plan or program;[62]
b. There must be legal procedures for the application for approval to decommission an installation;
c. There must be environmental restoration and remediation program to address adverse environmental impact which could possibly arise during the process of decommissioning which is borne out of an environmental impact assessment;

[62]UNEP Report (n 12).

d. There must be a decommissioning fund for the purpose of financing the process from commencement to end;
e. There must be a technical provision stipulating what type of approach to be adopted in the process. The approach must be on a step by step basis as well as installation based decommissioning among others;
f. The legislation should establish an agency charged with the responsibility to supervise and administer the control of activities involved in decommissioning; and
g. Furthermore, the legislation should provide a decommissioning database where all information (such as method of removal, timeline for decommissioning and financial costs of decommissioning) concerning the installation to be decommissioned as well as others which would be due for decommissioning in the future, would be stored. This would ensure the existence of a decommissioning platform necessary for adequate preparation and collaboration between the regulatory agency and Operator to achieve an environmentally sound decommissioning exercise.

6. Conclusion

Dealing with the complicated issues of decommissioning requires the enactment of laws and regulations with sanctions for non-compliance. The purpose of these laws is for the protection of the environment and for Operators to adhere to global best practices obtainable in the international oil and gas industry. Nigeria being the sixth largest producer of crude oil in the world deserves a national legislation on decommissioning of oil and gas installation. This responsibility rests squarely on the legislative organ of the Federal Government of Nigeria, that is to say, the National Assembly. It is the view of this paper that the recommended contents of what the national legislation should contain as mentioned in the preceding sub head must be treated with utmost urgency as many of Nigeria's onshore installations have since been abandoned especially from Oloibiri era up to the present.

It is important to note that Nigeria's discovery of more offshore petroleum deposits lends further impetus for the birth of a national legislation to avoid future environmental disaster on offshore installations which could endanger human life, marine life and plant life respectively. It is thus recommended that the various provisions of global Conventions, Protocols and Articles to which Nigeria has signed as a State Party be put into the process of domestication by the National Assembly to suit the practical realities of the Nigerian environment which bears the brunt of oil and gas exploration and exploitation activities. Finally, it is the view of this paper that developing countries who are major producers of oil and gas in the world must of necessity enact their respective legislations on Decommissioning to avoid the 'Malaysian' experience.

Disclosure statement

No potential conflict of interest was reported by the authors.

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