DELTA STATE MINISTRY OF JUSTICE LAW JOURNAL

Volume 1 (Maiden Edition) 2025

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Delta State Ministry of Justice Law Journal

This journal should be cited as (2025) DSMJLJ Vol. 1 (Maiden Edition)
Published in 2025 by
The Ministry of Justice, Asaba, Delta State,
Chike Edozie Secretariat, Mariam Babangida Road, Asaba.

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PREFACE

It is with a profound sense of pride and anticipation that I present the maiden edition of the Delta State Ministry of Justice Law Journal. This publication marks a historic milestone, being the first of its kind since the establishment of the Ministry of Justice, following the creation of Delta State in 1991. The Journal is birthed from the visionary aspiration to create a dynamic platform dedicated to the production and dissemination of robust scholarly content that engages with topical and contemporary legal issues affecting our society and legal profession.

The legal landscape is ever-evolving, demanding rigorous analysis, critical discourse, and innovative thought leadership. This Journal is conceived as a vital instrument to foster such intellectual engagement, providing legal practitioners, scholars, policymakers, and students with insightful, well-researched articles that address the challenges and opportunities within the law. It is my firm conviction that through sustained excellence and relevance, the Journal will not only fulfil its intended purpose but also become an invaluable resource for the entire legal fraternity.

As we embark on this scholarly journey, I commend all contributors, editors, and stakeholders whose dedication has made this initiative possible. It is my sincere hope that the Delta State Ministry of Justice Law Journal will grow in stature and influence, inspiring rigorous academic inquiry and facilitating the advancement of justice both within our State and beyond.

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Re-Appraising the Nature and History of Chemical Weapons Deployed in Armed Conflicts

Oreoluwa Omotayo Oduniyi*

Abstract

Conflicts, particularly violent armed conflicts, are a recurring component of human existence. It has a negative impact on both those directly participating and those not directly involved, particularly with the deployment of chemical weapons. Limiting the detrimental effects of this form of unconventional weapon in armed conflict is one of international humanitarian law's most important objectives. The history of any given concept, society, innovation is very important and should never be underplayed. This article examines the historical development of the deployment of chemical weapons in armed conflict. It highlights the nature of chemical weapons and the trajectory of its deployment. It sheds light on the effect of chemical weapons in armed conflicts. It finds that chemical weapons are being deployed in recent armed conflicts with devastating effect on people. This article also brings to the fore the need to address the continued deployment of chemical weapons in armed conflict. This article concludes that there in need to re-appraise the existing legal and institutional frameworks for combating the use of chemical weapons in armed conflict to create a safer world for all.

Keywords: chemical weapons, armed conflicts, international humanitarian law.

1. INTRODUCTION

The usage of chemical weapons in armed conflicts is a matter that caused perplexing discussions in the international stage.[1] This is due to the perniciousness attached to its effective usage. Chemical weapons are generally known to be extremely harmful and cause quantum change whenever it is being deployed.[2]This research will focus onthe nature of chemical weapons and its use in different armed conflicts.

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1 K Ganesan, S K Raza and R Vijayaraghavan, "Chemical warfare agents" (2010)2(3) *Journal of Pharmacy and Bioallied Sciences* 166–178

[2]Derrick Tin et. al. " A Descriptive Analysis of the Use of Chemical, Biological, Radiological, and Nuclear Weapons by Violent Non-State Actors and the Modern-Day Environment of Threat" (2023)38(3) *Prehosp Disaster Med* 395-400. See also, United Nations Office for Disarmament Affairs "Chemical Weapons"<https://disarmament.unoda.org/wmd/chemical/> accessed 28 August,2025

Chemical warfare is the use of the toxic properties of chemical substances to kill, injure or incapacitate an enemy in warfare and associated military operations.[3]According to the Organisation for the Prohibition of Chemical Weapons (OPCW), this chemical substance can be any chemical compound intended as a weapon "or its precursor that can cause death, injury, temporary incapacitation or sensory irritation through its chemical action. Munitions or other delivery devices designed to deliver chemical weapons, whether filled or unfilled, are also considered weapons themselves."[4] Defined by Tucker as "man-made, super toxic chemicals that can be dispersed as a gas, vapor, liquid, aerosol (a suspension of microscopic droplets), or adsorbed onto a fine talcum-like powder to create 'dusty' agents,"[5] these weapons were made to carry through the atmosphere.

The use of Chemical Weapons in Warfare has been long thought to be inhumane and is largely prohibited in historical and religious manuscripts including the Hindu Laws of Manu and laws derived from the Koran.[6] Ancient uses of chemical weapons have been deduced to include poisoning of arrows and wells and one of the earliest references to use of chemical agents in battle is the Byzantine Navy's use of Greek Fire, a mixture of sulphur and other chemicals, which had incendiary and toxic effects.[7] Meanwhile, the modern use of CW can be traced to the ideas proposed by scientists and nations during the several wars in Europe in the 19th century[8] and even the American Civil War.[9]

French forces were the first to employ chemical weapons in the first World War, by using tear gases in 1914,and the agent used was either xylyl bromide, which is described as smelling 'pleasant and aromatic', or ethyl bromoacetate, described as 'fruity and pungent.'[10] The first widespread use of Chemical Weapons was by German forces which occurred on the 22nd of April, 1915 in Ieper, Belgium during the first World War with an effect that shocked both sides of the conflict. By the end of World War I (WWI), the total casualty from Chemical Weapons was about 1.3 million persons while about 100,000 of them died shortly after exposure to chemical warfare

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3 Chauhan, S., D'Cruz, R., Faruqi, S., Singh, K., Varma, S., Singh, M., & Karthik, V. 'Chemical warfare agents.' *Environmental Toxicology and Pharmacology*, *26*(2), 113-122. (2008) <https://doi.org/10.1016/j.etap.2008.03.003<https://www.sciencedirect.com/science/article/pii/S1382668908000483> accessed 19 April 2025

4 OPCW. 'What is a Chemical Weapon? | OPCW.' <https://www.opcw.org/our-work/what-chemical-weapon>http://www.opcw.org/about-chemical-weapons/what-is-a-chemical-weapon/> accessed 18 April 2025

5 Jonathan B. Tucker, "Introduction," in *Toxic Terror: Assessing Terror Use of Chemical and Biological Weapons*, ed. Jonathan B. Tucker (Cambridge, MA: MIT Press, 2000), 3

6 OPCW, 'Practical Guide for the Medical Management of Chemical Warfare Casualties'. P.9 <https://www.opcw.org/sites/default/files/documents/2019/05/Full%20version%202019_Medical%20Guide_WEB.pdf.> accessed 19 April 2025.

7Gerald J. Fitzgerald, 'Chemical Warfare and Medical Response during WWI',(2008)*American Journal of Public Health* 98, < https://doi.org/10.2105/AJPH.2007.111930>; accessed 19, April, 2025.

8Sarah Everts, 'A Brief History of Chemical Weapons' Science History Institute. May 11, 2015 <https://www.sciencehistory.org/distillations/a-brief-history-of-chemical-war>Accessed 23 April 2025.

9Ibid.

10James Patton, 'Gas in the Great War' University of Kansas Medical School <https://www.kumc.edu/school-of-medicine/academics/departments/history-and-philosophy-of-medicine/archives/wwi/essays/medicine/gas-in-the-great-war.html> accessed 23 April 2024

agents and many other thousands of survivors suffer long term health defects over the rest of their lives.[11]

Before the World Wars, known uses of chemical weapons in armed conflict include the Athenian military's tainting of the water supply of the besieged city of Kirrha with poisonous hellebore plants as far back as 600 BCE.[12] The Strasbourg Agreement which was the first international agreement to outlaw a specific form of Chemical Weapons, poisoned weapons, was signed between France and Germany in 1675.[13]

To do justice to the topic under review, this paper is divided into six parts including the introduction. Part 2 discusses the nature and characteristics of chemical weapons. This is aimed giving a cursory view on the emergence and development of the use of chemical weapons and its horrific nature which necessitates the need for urgent global attention. Part 3 discusses the typology of chemical weapons. Part 4 examines the effects of the use chemical weapons. The 5th part focuses on the trajectory of the use of chemical weapons in armed conflicts over the years. While part makes useful recommendations by addressing the challenges of the use chemical weapons in armed conflicts and part 7 concludes the article.

2. THE NATURE AND CHARACTERISTICS OF CHEMICAL WEAPONS

The Chemical Weapons Convention (CWC) of 1993 prohibits the deployment of chemical weapons, and this goes further contrary to international law and treaties. The Chemical Weapons Convention (CWC) mandates that all member states wipe out their chemical weapons storage facilities and forbids the production, development, storage, and use of chemical weapons.

"Toxic chemicals and their precursors, except where it is intended for peaceful purposes and used in quantities consistent with such purposes" refers to the way the Chemical Weapons Convention (CWC) defines chemical weapons.[14]Chemical weapons comprise those known to cause harm to people, animals, or plants through the usage of chemicals that are toxic. They are strictly prohibited by international law and considered to be cruel weapons. Chemical weapons can be solids, liquids, or gaseous substances, amongst various other types. They are put to use in operations of terrorist attacks for the purpose of frightening citizens or target enemies in warfare.[15]

Chemical weapons are designed to be consumed, inhaled via the skin, or ingested in an attempt to cause harm to or kill.[16] With respect to the specific type and the

11OPCW (n 4)
12 Sarah Everts (n 6)
13 Ibid.
[14]Peter Mager, "Chemical Weapons Convention"<https://www.airuniversity.af.edu/Portals/10/ASPJ/journals/Chronicles/Mager.pdf> accessed 28 August, 2025
15 M. Crowley, in Preventing Chemical Weapons: Arms Control and Disarmament as the Sciences Converge, ed. M. Crowley, M. Dando, and L. Shang, The Royal Society of Chemistry, 2018, pp. 146-190.
[16]Vladimír Pitschmann, "Overall View of Chemical and Biochemical Weapons"<https://pmc.ncbi.nlm.nih.gov/articles/PMC4073128/> accessed 28 August, 2025

dosage of chemical used, the detrimental effects of chemical weapons might vary substantially. Chemical weapons are frequently employed as blister, choking, and nerve agents.[17]

Nerve agents are extraordinarily hazardous compounds that contribute to nervous system dysfunction. They are made up of VX, Soman, and Sarin.[18] The aforementioned substances interfere with an enzyme that is essential for neurological signals to function appropriately, contributing to mortality rates, breathing failure, and seizure disorders.[19] Sulphur mustard and lewisite are instances of blister agents which cause irritation to the skin, eyesight, and respiratory system adversely. They are capable of resulting in visual impairment if they come through direct contact with the eyes and lead to inflammation and burns on the skin.[20]

Chlorine and phosgene are instances of choking substances that are directed at the respiratory system, which can cause coughing in general, chest pain, and difficulties with breathing. They may be catastrophic, result in severe lung damage or lead to death.[21]

Chemical weapons can be deployed through a wide variety of techniques such as the implantation of weapons of mass destruction, explosives, rockets, missiles, and either food or water contaminants or the spraying process. Their implementation has a tendency to bring about widespread commotion and causing disruption, as well as potentially fatal consequences for military troops and civilians.[22]

According to the Chemical Weapons Convention, a chemical weapon is defined as any part of it, notwithstanding whether it is put together or not and whether it is stored with one another or independently. By way of example, a poisonous chemical and its means of delivery equipment might be safeguarded apart; however, they are nonetheless categorized as chemical weapons under the Convention despite the fact that they are not equally deadly as a fully developed weapon.[23]

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[17]Report of the World Health Organisation (WHO) on Health Aspects of Chemical and Biological Weapons < https://iris.who.int/bitstream/handle/10665/39444/24039.pdf> accessed 30 August, 2025

[18]Frederick R. Sidell, M.D., "NERVE AGENTS" <https://medcoeckapwstorprd01.blob.core.usgovcloudapi.net/pfw-images/borden/chembio/Ch5.pdf> accessed 30 August, 2025

[19]Ibid.

[20]Ibid.

[21]Gary W Hoyle and Erik R Svendsen, "Persistent effects of chlorine inhalation on respiratory health" <https://pmc.ncbi.nlm.nih.gov/articles/PMC5063681/> accessed 30 August, 2025

[22]Dr. Riccardo Cappelli and Prof. Nicola Labanca, "Proliferation and Disarmament of Chemical Weapons in the NATO Framework. Lessons from history" <https://www.nato.int/acad/fellow/99-01/labanca.pdf> accessed 30 August, 2025. See also Christine Gosden and Derek Gardener, "Weapons of mass destruction—threats and responses" <https://pmc.ncbi.nlm.nih.gov/articles/PMC1184257/> accessed 30 August, 2025.

[23]Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993 <https://ihl-databases.icrc.org/en/ihl-treaties/cwc-1993> accessed 30 August, 2025

Chemical weapons continue to be an imminent threat to global peace and security and are illegal according to international law.[24] The global community needs to persist in keeping a vigilant eye as well as undertake countermeasures to put an end to the creation, manufacturing, storage, and deployments of chemical weapons.

The utilization of poisonous compounds in chemical weapons gives them the capability to cause harmful destruction or even death. The aforementioned substances can be disseminated as liquids, gases, or aerosols, among other forms. Chemical weapons may have any of the following characteristics such as:

i) **Toxicity:** The use of poisonous compounds in chemical weapons has the objective of harming human beings, livestock, or the natural environment. Numerous negative reactions, such as burns, breathing problems, and nervous system damage, can be caused by these substances.[25]

ii) **Speedy onset:** upon exposure, chemical weapons are capable of having a detrimental effect on the well-being of an individual in only a matter of seconds to minutes. They become particularly hazardous in combat circumstances as a result of this.[26]

3. EXAMPLES OF CHEMICAL WEAPONS

It is important to note that there are various examples and classifications of chemical weapons. Depending on the proximity of a society to garner resources to manufacture chemicals, there are quite many kinds of these chemical weapons, many of which would be examined in subsequent paragraphs.

a) Nerve agents: Among the basically known arsenals of chemical agents, nerve agents are by far the most poisonous and possess the most rapid rate of implementation. They operate in a similar way to chemicals like pesticides or insecticides that are known as organophosphates, and they cause comparable adverse health consequences. Nevertheless, nerve agents are considerably more effective than insecticides with organophosphates. They comprise of (VX, tabun, cyclohexyls Arin, soman, and sarin).[27]

Sarin gas isan extremely dangerous, odour-free nerve agent that are capable of killing an individual within minutes upon exposure by interfering with their nervous system's regular operation.[28]

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[24]International laws such as the 1925 Geneva Protocol, 1993 Chemical Weapons Convention (CWC) and Customary International Law all prohibit the use of chemical weapons

[25]Brendan M. Doran, "The Human and Environmental Effects of CBRN Weapons"<https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1009&context=environ_2015> accessed 30 August, 2025

26 K. Ganesan, S. K. Raza, and R. Vijayaraghavan, "Chemical Warfare Agents" (2010)2(3) *Journal of Pharmacy and BioAllied Sciences* 4

[27]Brennan RJ, Waeckerle JF, Sharp TW, Lillibridge SR, 'Chemical warfare agents: emergency medical and emergency public health issues' (1991)34 *Annals of Emergency Medicine* 191.

[28] United Nations Office of Drugs and Crime Handbook on Chemical, Biological,Radiological, And Nuclear (Cbrn) In Vbss Training, <https://www.unodc.org/documents/Maritime_crime/CBRN_Handbook.pdf> accessed 18 October, 2024.

Soman a nerve agent that is a chemical warfare weapon designed by human beings. Soman is a clear colourless in nature, insipid fluid with a mild odour that could be comparable to decomposing fruit or camphor laced with mothballs. If heated up, it can transform directly into the form of a vapor.[29]

b) Vesicating or blistering agents (such as mustards, lewisite).
Mustard gas: A vesicant that causes severe blisters and skin burns upon contact, as well as lung damage in cases of inhalation.[30]

c) Choking agents or lung toxicants (such as chlorine, phosgene, diphosgene) Cyanides

d) Incapacitating agents (such as anticholinergic compounds)

e) Lacrimation or riot control agents (such as pepper gas, chloroacetophenone, CS)

f) Vomiting agents (such as adamite)[31]

4. EFFECTS OF THE USE OF CHEMICAL WEAPONS

Chemical warfare (CW) is undoubtedly the most terrifying of all the Weapons of Mass Destruction (WMD) that human beings has so far put together. CW agents are extremely hazardous synthetically produced substances that are capable of being emitted as an aerosol form, gas, or liquid, additionally they can be adsorbed to particles to turn into a powder. These CW agents negatively impact humans in an array of ways that turns out to be either fatal or paralyzing. [32]

i) Nerve Agents

An irrevocable inhibition of the metabolic process known as acetyl cholinesterase (AChE) is the mechanism by which nerve agents exert their biological effects.[33] The neurotransmitter acetylcholine (ACh), which is released into the air at the nerve synaptic junction, neuronmuscle (neuromuscular) junction, and nervegland junction, undergoes hydrolysis by this enzyme. A small fraction of ACh is continuously released and broken down by AChE in an individual that is fit. Overexcitation or paralysis arise from Ach accumulation brought on by AChE inhibition. The indicators of poisoning manifest up as soon as the poisonous nerve agents stretch the tissues of the human body.[34]

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[29]Ibid.
[30] Borak J, Sidell FR. 'Agents of chemical warfare: sulphur mustard' (1992)21(3)*Annals Emergency Medicine*303-308.
[31]Ibid.
[32] K, Raza, SK. Vijaya Raghavan R. "Chemical warfare agents." (2010) 2(3) *Journal of Pharmacy and Bioallied Science*
[33]ICRC Report on an effective killer: Five things you need to know about chemical weapons, <https://www.icrc.org/en/document/effective-killer-five-things-you-need-know-about-chemical-weapons> accessed 18 October, 2023.
[34]Ibid.

Meiosis, or constriction of the pupil, may result in increased salivation, a running nose, increased sweating, urination, and diarrhoea, and may also cause decreased blood pressure and heart rate, cramps, arrhythmias of the heart, seizures, and convulsions. The numbness of the muscles involved in respiration and suppression of the respiratory system are the most adverse reactions. Respiratory impairment ultimately leads to death. In the unlikely scenario where the nerve agent concentration is high, death follows instantaneously.

ii) Blistering Agents

For Blistering Agents, the kind of exposure, the agent's concentration, and the context of the exposure all affect the extent to which this latent phase persists for and just how quickly and intensely symptoms manifest. Mustard can be in form of gas or aerosol formation, which can cause harm to the skin, eyes, and respiratory system. After contact, harm from chemicals starts 1-2 minutes later, but onset discomfort is not felt for four to six hours. Conjunctivitis to corneal opacification, ulceration, and rupture are a few instances of eye damage.[35]

Skin injuries vary from erythema like a sunburn to vesicles that aggregate to become blisters. The dermis may develop necrosis from coagulation as a side effect of liquid penetration. The degree after being exposed additionally impacts how mustard gas affects the respiratory tract. There will be oedema and erythema in the vocal cords, bronchial tubes and the nasal passages if the amount of exposure is modest. Respiratory constriction can arise from laryngeal oedema and necrosis.[36]

There is a risk of a pulmonary infection with bacteria, which may give rise to bronchopneumonia. Death from mustard exposure may be brought about by the latter. Leucopoenia can result from severe mustard exposure resulting in damage to the bone marrow. consumption of poisoned food or water When liquid mustard contaminates food or drink, it can cause nausea, vomiting, discomfort, and diarrhoea. Heart irregularities, nausea, and malaise can all result from skin exposure alone.

iii) Choking agents

The respiratory tract, which includes the nasal cavity, mouth and throat, and most significantly the lung area, is the place where choking agents especially cause harm to those who are victims.[37] In cases of extreme severity, these substances can "choke" those who are exposed people by triggering membranes to expand, the lungs being flooded with fluids, and death from an insufficient supply of oxygen. These types of deaths are referred to as "dry-land drownings." Within this category, the most commonly identified substances are chlorine and phosgene, although other compounds in this category include diphosgene, nitric oxide, and perfluoro isobutylene (PFIB). In general, they weigh substantially more than air. Because both phosgene and chlorine are widely used throughout multiple chemical industrial

[35]A. P. Watson, G. D. Griffin, "Toxicity of Vesicant Agents Scheduled for Destruction by the Chemical Stockpile Disposal Program" (1992)98 *Environmental Health Perspectives* 260

[36]Ibid.

[37]United States Department of Defense Report on Chemical and Biological Defense Primer <https://www.hsdl.org/?view&did=1504> accessed 18 October, 2024.

processes, it is difficult to effectively control these chemical compounds, which can be catastrophic low-tech weapons in the hands of terrorists.[38]

iv) Riot control Agents

Riot control agents are chemicals that cause irritation to the upper part of the respiratory system, causing blepharospasm and tears in the eyes, which subsequently contributes to the pupils of the eyes to contract. They have been frequently referred to as bothersome agents, lachrymators, and irritating substances. Usually, the wider community refers to them as tear gas. A variety of chemicals that cause tears were studied as CW agents. When exposed, they irritate the skin, provoke tears, and cause discomfort the eyes. The intensity of the tear gas-induced sensations, such as inflammation of the skin and lachrymation, prevents people suffering from responding logically, thereby making it difficult for them to carry out their arranged actions.

5. TRAJECTORY OF THE DEPLOYMENT OF CHEMICAL WEAPONS IN ARMED CHEMICALS

5.1. Post-World War II Era and the Use of Chemical Weapons

World War II is recognized as the most extensive and catastrophic war in history, surpassing all others in terms of casualties, global participation, and financial costs. It involved 70 million military personnel and led to the death of 17 million soldiers. Civilian casualties were even more significant, with at least 19 million Soviet civilians, 10 million Chinese civilians, and 6 million European Jews perishing during this worldwide conflict.[39]

World War II had a global impact, involving around 70 nations across multiple continents and leading to societal contributions to war efforts and civilian suffering.[40] For the United States, the war had profound consequences, with a significant number of casualties and deaths. It marked the end of the Great Depression, transformed societal roles, and expanded the government's role.[41]

In 1945, the United States was markedly different from the post-war years. Poverty, lack of modern amenities, and racial segregation prevailed. However, the post-World War II era witnessed an economic boom, substantial societal changes, and the belief in America's capacity to shape global peace.

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[38]Ibid.

[39] Tony Judithin Postwar: A History of Europe Since 1945" This book provides a comprehensive overview of Europe's history in the aftermath of World War II

[40]Iris Kesternich, Bettina Siflinger, James P. Smith, and Joachim K. Winter, "The Effects of World War II on Economic and Health Outcomes Across Europe"(2014) 96(1) *Review of Economics and Statistics* 103-118.

41 Ibid.

After World War II, the United States entered into a conflict with the Soviet Union, resulting in global tensions, communist influence, and fears of espionage.[42] In the early 1970s, media depicted the 1950s as a carefree era, but it was characterized by societal changes.[43] African Americans fought for equality, a youth culture with rock 'n' roll emerged, and critics across the political spectrum offered insights on American society.

The aftermath of World War II reshaped the global landscape, with significant destruction and efforts to rebuild. The United States rose to a dominant economic and military position, experiencing dramatic societal changes.[44]

Between the two World Wars, chemical weapons were used despite international bans. While production increased during World War II, they were not used in Europe but were employed in concentration camps and Asia.[45] Post-war, the Chemical Corps focused on maintaining stockpiles and creating new agents. With the rise of atomic weapons, the emphasis shifted away from chemical arms.

To manage the aging stockpile, disposal methods like incineration and neutralization were developed. Chemical munitions were moved and safely destroyed. In the 1980s, binary chemical weapons were created, leading to arms reduction negotiations and the Chemical Weapons Convention (CWC).[46] The most significant post-World War II chemical weapon use occurred during the Iran-Iraq War (1980–88). Since then, chemical weapons have been used only in a few cases, like Iraq in the 1980s. Today, the U.S., a CWC signatory, is destroying its chemical munitions stockpile and no longer maintains offensive chemical warfare capability.[47]

5.2. Post-World War II and the Use of Chemical Weapons in Yemen

Between 1963 until 1967, chemical weapons were utilized in Yemen during the North Yemen Civil War. As part of a "scorched-earth policy designed to eliminate" the countryside, Egypt launched poison gas.[48] The use of chemical weapons was deemed acceptable by the world community regardless of how it violated against the

[42]McKenzie Powell, "The Influence of the Central Intelligence Agency in the Formation of the Cold War; 1946-1949" <https://cdn.wou.edu/history/files/2015/08/McKenzie-Powell.pdf> accessed 30 August, 2025

[43]Ibid.

[44]A.W. Purdue, "The Transformative Impact of World War II" <https://d-nb.info/1125540141/34> accessed 30 August, 2025

[45]Ibid.

[46]Paul F. Walker, "Three Decades of Chemical Weapons Elimination: More Challenges Ahead" <https://www.armscontrol.org/act/2019-12/features/three-decades-chemical-weapons-elimination-more-challenges-ahead> accessed 30 August, 2025

[47]Javed Ali, "Chemical Weapons and the Iran-Iraq War: A Case Study in Noncompliance" <https://www.nonproli feration.org/wp-content/uploads/npr/81ali.pdf> accessed 30 August,2025

[48]Orkaby, Asher, 'Chemical Warfare in Yemen', Beyond the Arab Cold War: The International History of the Yemen Civil War, 1962-68 (Oxford Studies in International History: New York, 2017), <https://doi.org/10.1093/acprof:oso/9780190618445.003.0007>accessed 9 January, 2025.

Geneva Protocols of 1925.[49] The conflict is mostly forgotten, but the international community's feeble reaction to Syria's repeated chemical weapons attacks nearly half a century ago still lurks large in the country's current narrative. There had been minimal international recognition of the chemical warfare campaign in Yemen, no public memorials, certainly no widespread repudiation of the culprits.[50]

The conversation about what to do in Syria today did not include the probable use of chemical weapons in Yemen. In response, the international community placed the Soviet Union under a number of sanctions and embargoes. While the mujahideen conducted guerrilla warfare in small groups throughout the 80% of Afghanistan that was not under uncontested Soviet control which almost exclusively consisted of the country's rugged, mountainous terrain, Soviet troops occupied the country's major cities and all major communication routes. Along with planting millions of landmines throughout Afghanistan, the Soviets also used air power to deal harshly with civilians and Afghan resistance, levelling villages to deny the mujahideen a location to hide, demolishing important irrigation ditches, and employing other scorched-earth tactics. The world's unwillingness to halt chemical assaulting on individuals throughout the Middle East is starkly demonstrated by the stalemate in Yemen.[51] Egypt was not one of the few nations to use chemical weapons in Yemen; during the Iran-Iraq War, Iran also employed sulphur mustard gas. Yemen is still immersed in strife, and although there is no record of the nation ever working toward a chemical weapons program, chemical weapons have been used there.

Shortly after World War II, Yemen saw complicated and wide-ranging conflicts. After World War II, several kinds of major factors contributed to the conflicts in Yemen encompassed poverty, unemployment, shortages in water, and corruption, each of which highlighted the country's deeply embedded conflict and lack of democracy.[52]

Conflict between the Ansar Allah group, formerly known as the Houthi movement, and members of the internationally recognized government. The Houthi movement is connected to a regional variety of Shia Islam.

The U.S. Navy started to get cognizant of the militarization of Yemen's waterways. Saudi Arabia's blockade aimed at halting Iran from supplying the Houthis and hinderingthe medical work done in North Yemen by the ICRC. In 1967, the main activity carried out by the ICRC in the region was providing medical help to the sick and injured in the portion of Yemen controlled by the Royalist party.[53]

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[49]Masahiko Asada, "A Path to a Comprehensive Prohibition of the Use of Chemical Weapons under International Law: From the Hague to Damascus"(2016)21(2)*Journal of Conflict Security and Law* 153-207

[50]Ibid.

[51]Orkaby, Asher, 'Chemical Warfare in Yemen', Beyond the Arab Cold War: The International History of the Yemen Civil War, 1962-68, Oxford Studies in International History (New York, 2017; online edn., Oxford Academic, 22 June 2017), <https://doi.org/10.1093/acprof:oso/9780190618445.003.0007>, accessed 26 October, 2024.

[52]Ginny Hill, Peter Salisbury, Léonie Northedge and Jane Kinninmont, "Yemen Corruption, Capital Flight and Global Drivers of Conflict" A Chatham House Report, <https://www.chathamhouse.org/sites/default/files/public/Reearch/Middle%20East/0913r_yemen.pdf> accessed 30 August, 2025.

[53]Martin D. Fink, "Naval Blockade and the Humanitarian Crisis in Yemen" (2017)64(2) *Netherlands International Law Review*

However, a number of incidents made the task of this mission extremely difficult. First, there was the January incident in Ketaf in the Jauf, during which an air raid on the village on January 5, 1967, resulted in the fatalities of roughly 120 individuals, many of them women and children.[54]

Given the suffering thus created, the International Committee of the Red Cross (ICRC) sincerely requests that all parties to this conflict maintain the widely recognized humanitarian norms of international law and morality under all conditions.[55] To ensure that its healthcare professionals and representatives in Yemen can continue providing unbiased aid to the victims of this conflict, the ICRC demands cooperation as well as comprehension of all the relevant parties.[56]

The ICRC uses this opportunity to reiterate that, as a general rule, it has decided not to make public any observations made by its participants while they are performing their duties, out of compassion for the people who are in need of its help. Nevertheless, these observations serve as support for the appropriate negotiations that it continually takes part in when needed.[57]

5.3. Post-World War II and the Use of Chemical Weapons in Afghan-Soviet War

The Soviet-Afghan War was a protracted war which flared up from 1979 to 1989 in the Democratic Republic of Afghanistan (DRA), which was administered by the Soviet Union.[58] The DRA, the Soviet Union, and associated paramilitary groups engaged in heavy combat with the Afghan mujahideen and their foreign allies, making it one of the most significant conflicts of the Cold War.[59] Although the mujahideen received support from a number of nations and groups, the majority of them came from Pakistan, the United States (that is, during Operation Cyclone), the United Kingdom, China, Iran, and the Persian Gulf Arab states.[60] The war turned a proxy conflict between the US and the USSR due to the involvement of other nations. Throughout the 1980s, there was fighting, especially in rural Afghanistan. Between 562,000 and 2,000,000 Afghans lost their lives in the battling and millions more left the nation as refugees; the majority of these individuals sought safety in Pakistan and Iran. It is estimated that between 6.5% and 11.5% of Afghanistan's 13.5 million earlier citizens (as of the 1979 census) have perished during the conflict.[61] In addition to causing severe havoc across Afghanistan, academics have pinpointed

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[54]Ibid.

[55]ICRC Report, "Yemen, Potential Existence and Effects of Naval Blockade" (2016) <https://casebook.icrc.org/case-study/yemen-potential-existence-and-effects-naval-blockade> accessed 30 August, 2025

[56]Ibid.

[57]Annual ICRC Report on Yemen, 1967, pp. 15-17

[58]Dr. Robert F. Baumann, *Russian-Soviet Unconventional Wars in the Caucasus, Central Asia, and Afghanistan*, leavenworth Papers Number 20,<https://history.army.mil/html/books/107/107-1/CMH_Pub_107-1.pdf> accessed 24 November, 2024.

[59]P. Stobdan, "The Afghan Conflict and Regional Security" (1999) 23(5) *Journal of Strategic Analysis*<https://ciaotest.cc.columbia.edu/olj/sa/sa_99stp02.html> accessed 24 November, 2024.

[60]Ibid.

[61]ICRC Country Report Afghanistan "ICRC worldwide consultation on the rules of war' <https://www.icrc.org/sites/ default/files/external/doc/en/assets/files/other/afghanistan.pdf> accessed 30 August,2025

the Soviet-Afghan War as a pivotal element in the Soviet Union's collapse and the official end of the Cold War.[62] Under Leonid Brezhnev's leadership, the Soviet Union invaded Afghanistan to back the pro-Soviet government that had been enforced there as a result of Operation Storm-333. This identified the start of the war.[63]

In response, the world community placed the Soviet Union under a number of sanctions and embargoes. While the mujahideen conducted guerrilla warfare in small groups throughout the 80% of Afghanistan that was not under uncontested Soviet control which almost exclusively consisted of the country's rugged, mountainous terrain Soviet troops occupied the country's major cities and all major communication routes.[64] Along with planting millions of landmines throughout Afghanistan, the Soviets also utilized air power to deal ruthlessly with people and Afghan opposition, levelling villages to deny the mujahideen a place to hide, demolishing important irrigation ditches, and employing other scorched-earth methods.

First, the Soviets intended to stabilize the administration of the People's Democratic Party of Afghanistan (PDPA), quickly secure the country's towns and road systems, and remove all of their armed personnel within six months to a year.[65] On the other hand, they encountered intense operational challenges due to the rough, hilly terrain and severe opposition from Afghan rebels. Fighting across the nation escalated by the mid-1980s, when the Soviet Union's military presence in Afghanistan had grown to about 115,000 soldiers.[66] The war effort's complexity eventually cost the Soviet Union dearly as its political, economic, and military resources were depleted. Reformist Soviet leader Mikhail Gorbachev declared in the middle of 1987 that the Soviet Union would start a full military withdrawal from Afghanistan.[67]

The last Soviet military column occupying Afghanistan passed into the Uzbek SSR on February 15, 1989, marking the beginning of the final wave of withdrawal.[68] The Afghan Civil War began when the PDPA government, continuing to have external Soviet support, launched a solo war effort against the mujahideen.[69] Nevertheless, all assistance to the Republic was withdrawn after the Soviet Union broke up in December 1991, which resulted in the Homeland Party's Isolated Republic being overthrown by the mujahideen in 1992 and the outbreak of a second Afghan Civil War.[70]

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[62]Ali Ahmad Jalali and Lester W. Grau, *The Other Side of The Mountain: Mujahideen Tactics in the Soviet-Afghan War* (The United States Marine Corps Studies and Analysis Division: Quantico, Virginia 1996)

[63]Ibid.

[64]William C. Green, "The Other Side of the Mountain: Mujahideen Tactics in the Soviet-Afghan War" (2003)56(3) *Naval War College Review.*

[65]Ibid.

[66]Ibid.

[67]Ibid.

[68]Ali Ahmad Jalali and Lester W. Grau (n 35)

[69]Ibid.

[70]Barnett R. Rubin, Afghanistan: The Forgotten Crisis, -, WRITENET, 1 December 1996, <https://www.refworld.org/reference/countryrep/writenet/1996/en/96430> accessed 30 August, 2025

The former US secretary of state, George Schultz, has written extensively on the topic of chemical warfare in Afghanistan.[71] The Soviet forces continued to deploy chemicals and poisons selectively against the Afghan resistance, according to reports of chemical strikes from February to October 1982, according to Schultz. Nerve gas and compounds in the colours yellow, black, red, and white were pumped from armoured vehicles and dropped from aircraft and assault helicopters across twelve regions. Kandahar Airport, a crucial staging ground for Soviet military operations, housed the chemicals.[72]

Until late 1982, suspicions arose about the Soviets using chemical agents in Afghanistan since 1979. George Shultz, former American Secretary of State, confirmed mycotoxin use in the country.[73] Reports from 1980 and 1981 described yellow-brown mist attacks causing blistering and vomiting, similar to "yellow rain" victims in Southeast Asia.[74] Shultz also mentioned new evidence in 1982 that reinforced the belief that lethal chemicals were deployed against the Afghan resistance by Soviet and Afghan Government forces from 1979 to 1981.[75]

5.4. Post-World II and the Use of Chemical Weapons in the Chadian-Libyan War

The conflict between Libya and Chad (1970s-1994) primarily revolved around the Aouzou Strip, a resource-rich region in northern Chad. Libya, under Colonel Muammar Gaddafi, claimed the Aouzou Strip based on an unratified treaty between France and Italy in 1935.[76] Chad, on the other hand, argued for its ownership of the strip with support from a 1955 treaty between Libya and France. In 1973, Libya effectively annexed the Aouzou Strip, leading to cross-border clashes and hostilities.[77] These hostilities escalated into a brief war known as the Toyota War, which took place from 1979 to 1987. During this war, Chadian government troops successfully repelled Libyan forces. A ceasefire was declared from 1987 to 1988, followed by unsuccessful negotiations. In 1994, the International Court of Justice ruled in favour of Chad, granting it sovereignty over the Aouzou Strip.[78]

Following the downfall of Colonel Muammar Gaddafi in the Libyan Civil War (2011-2012), Libya descended into a state of chaos. The country effectively split into three

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[71]George P. Schultz, “chemical Weapons in the Southeast Asia and Afghanistan: An Update” (1982) Report from the Secretary of State, Special Report No. 104, <https://www.cia.gov/readingroom/docs/CIA-RDP87R00029R000400 790001-9.pdf> accessed 27 November, 2024.

[72]Ibid.

[73]Ibid.

[74]Julian Robinson, Jeanne Guillemin and Matthew Meselson, "Yellow Rain in Southeast Asia: The Story Collapses (1990)<https://projects.iq.harvard.edu/files/meselsonarchive/files/1990_yellow_rain_in_southeast_asia.pdf> accessed 30 August, 2025.

[75]Ibid.

[76]Zachary Lynn, "Forgotten Conflicts: The Libyan-Chadian War" (2020) Sea Lion Press, <https://www.sealionpress.co.uk/post/forgotten-conflict-the-libyan-chadian-war> accessed 27 November, 2024.

[77]Ibid.

[78]Elias N. Stebek, "ICJ Judgment (1994) on the Libya/Chad Territorial Dispute: A Brief Overview and Observations" (2009)3(1) *Mizan Law Review* pp. 6

main entities: the National Army controlled the eastern region, including Benghazi; the New General National Congress and various militias, such as the Golden Dawn, controlled the northwest, including the capital Tripoli.[79]

The south-western regions of Libya were held by Tuareg forces. The civil war and chaos continued into 2014, with the General National Congress refusing to disband after its mandate expired, leading to mass protests. The United Nations made efforts to broker peace between the Libyan Army and Libya Dawn factions, resulting in a partial ceasefire declared in January 2015.[80]

In 2016, a new interim government called the 'Government of National Accord' was formed with the backing of the UN. However, other factions did not recognize its authority. Throughout this period, there were clashes between rival militias in Tripoli's southern suburbs, leading to a state of emergency declared by the UN-backed government.

Since April 2019, sustained fighting has been ongoing between the Libyan National Army and the UN-backed government in Tripoli, as the Libyan National Army aims to seize control of the capital.

The conflict in Chad against Libyan intervention can be summarized as a series of interventions by Libya, with the support of various Chadian factions, against Chadian groups that had the backing of France and other foreign countries. The conflict culminated in the Toyota War when Chadian forces united to oppose the Libyan occupation, leading to the expulsion of Libyan forces from Chad. Gaddafi's initial intention was to annex the Aouzou Strip, which was the northernmost part of Chad, based on historical claims.[81]

5.5. Iran and the Use of Chemical Weapons

Iran's encounter with chemical warfare during the Iran-Iraq War (1980-1988) has made it a strong opponent of chemical weapons. In 1997, Iran ratified the Chemical Weapons Convention (CWC). However, allegations have persisted, suggesting that Iran maintained its own chemical weapons arsenal.[82] These claims became less certain after 2003, with no efforts made to utilize the CWC's challenge inspection mechanisms to investigate alleged Iranian chemical facilities. Furthermore, the allegations regarding the stockpiling of chemical warfare agents have not been verifiable through unclassified information.

Assessing Iran's chemical warfare capabilities is challenging due to limited original material and a heavy reliance on repackaged information from a few sources. Much

[79]Zachary Kallenborn and Raymond A. Zilinskas, "Disarming Syria of Its Chemical Weapons: Lessons Learned from Iraq and Libya" <https://www.nti.org/analysis/articles/disarming-syria-its-chemical-weapons-lessons-learned-iraq-and-libya/> accessed 27 November, 2024.
[80]Ibid.
[81]Wright, John L., Libya, Chad and the Central Sahara in Perspective (Hurst Publishing Press, 1989)
[82]Randi HunshamarØygarden,"Chemical Weapons and the Iran--Iraq War" (2014) <https://bora.uib.no/bora-xmlui/bitstream/handle/1956/9153/128400983.pdf?sequence=1&isAllowed=y> accessed 30 August, 2025.

of the information about Iran's CW programmes is based on open-source reports of Iranian transactions involving dual-use materials, which have been interpreted as supporting the existence of an offensive CW programme.[83] For example, Iran has imported chemicals like thiodiglycol and thionyl chloride, which can be used for legitimate purposes but could also be diverted for illicit CW activities.[84]

Iran's import of phosphorus pentasulfide in the mid-1990s, which can be used for various purposes, including the production of nerve agents, raised concerns. However, U.S. intelligence reports between 2003 and 2010 did not specify any CW agents possessed by Iran, and references to agent stockpiles or delivery systems were removed. This suggests that the U.S. intelligence community either lacks certainty about or is unwilling to publicly disclose the details of any Iranian offensive CW programme.[85]

The Iran-Iraq War from 1980 to 1988 led to Iran's exposure to chemical weapons. Starting in 1983, Iraq conducted more effective chemical attacks against Iran, initially using blister agents like mustard gas and later incorporating nerve agents such as tabun and possibly sarin. While the exact number of Iranian casualties from these attacks is uncertain, Iran estimates around 60,000 casualties.[86]

The Iran-Iraq War, which lasted from 1980 to 1988, led to Iran's growing interest in chemical weapons. This interest was fuelled by what Iran saw as a lack lustre international response, particularly from the United Nations, to Iraqi chemical attacks against Iranian forces. Many Iranian officials believed that they needed to develop a chemical warfare capability as a deterrent against future chemical attacks.

In 1987, Iran's representative to the United Nations issued a warning that if the Iraqi regime did not cease its chemical attacks, Iran would retaliate in kind. However, within Iran, some officials publicly criticized the use of chemical weapons on moral grounds, considering them un-Islamic.[87]

It is known that Iran pursued an offensive chemical weapons program at one point. In 1998, Iran officially acknowledged that it had previously possessed chemical weapons, but claimed to have abandoned the programme after a ceasefire was established.[88]

Reports have suggested that Iran may have used chemical weapons on a small scale during the 1980s war with Iraq, but conclusive evidence is lacking. During the 2003 invasion of Iraq, U.S. forces discovered internal Iraqi intelligence reports that

[83]Iran Watch, "A History of Iran's Chemical Weapon-Related Efforts" (Iran, 26 November 2019) <https://www.iranwatch.org/our-publications/weapon-program-background-report/history-irans-chemical-weapon-related-efforts> accessed 20 November, 2024.
[84]Ibid.
[85]Nuclear Treaty Initiative Fact Sheet "Iran Chemical Overview"(2020) <https://www.nti.org/analysis/articles/iran-chemical/> accessed 20 November, 2024.
[86]Javed Ali, "Chemical Weapons and the Iran-Iraq War: A Case Study in Noncompliance," The Non-proliferation Review, Spring 2001, <www.nonproliferation.org> accessed 10 September, 2024.
[87]Ray Takeyh, "The Iran-Iraq War: A Reassessment" (2010) 64(3) *Middle East Journal* 371
[88]Ibid.

mentioned Iranian use of chemical agents against Iraq.[89] Additionally, some allegations suggested that Iran sent chemical munitions to Libya in exchange for ballistic missiles.

Regarding Iran's chemical warfare capabilities, there has been limited public information. Some instances suggest that Iran imported bulk quantities of precursors for chemical warfare agents.[90] Several countries, including India, West Germany, and China, have been implicated in exporting dual-use materials and technology to Iran. The U.S. imposed sanctions on entities and individuals involved in such exports.[91]

In 2000, the CIA estimated that Iran possessed a stockpile of several thousand metric tons of weaponized and bulk chemical agents. A 2002 CIA report mentioned that Iran's stockpile likely included blister, blood, choking agents, and possibly nerve agents. Iran may have developed this capability with support from Western individuals, companies, and other nations like India and China.[92]

From 2003 onwards, U.S. intelligence assessments became less definitive regarding Iran's chemical weapons programme.[93] Earlier reports contained specific assessments of Iran's chemical weapons capabilities, including the types of agents it had allegedly stockpiled. Subsequent reports offered more general statements about Iran's capability to produce chemical weapons but lacked specificity.[94]

Iran also sought materials for chemical weapons defence, as permitted under the Chemical Weapons Convention (CWC). It acquired decontaminating agents and protective gear from various sources.[95] Iran's extensive weaponry could potentially be adapted to deliver chemical agents, including artillery shells, aerial bombs, mines, and missiles. Reports suggested that Iran had developed 155mm artillery shells, aerial bombs, and chemical warheads for Scud missiles.[96] Iran's Shahab missile and unmanned aerial vehicles could also be used for delivery. Cruise missiles like the Kh-55 Granat could carry chemical or biological warheads. Although there were claims of cooperation between Iran and Syria on chemical weapons during the Syrian Civil War, these allegations were disputed, and Iran denied sending weapons to Syria.[97]

Officially, Iran has consistently denied having chemical weapons, emphasizing its adherence to international agreements, such as the Chemical Weapons

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[89]Ibid.
[90]Matthew J. Ferretti, "The Iran-Iraq War: United Nations Resolution of Armed Conflict" (1990) 35(3) *Villanova Law Review* 197
[91]Ibid.
[92]Ibid.
[93]Takeyh, Ray. “Iran’s Nuclear Calculations.” (2003) 20(2) *World Policy Journal*, pp. 21–28
[94]Ibid.
[95]Javed Ali, Chemical weapons and the Iran Iraq war: A case study in noncompliance (2001)8(1) *TheNon-proliferation Review*,43-58,
[96]Ibid.
[97]Ibid.

Convention.[98] It has hosted training sessions on the medical aspects of chemical warfare and insists it does not possess such weapons.[99]

Iran continued to import potential chemical warfare agent precursors, but these chemicals have legitimate civilian applications.[100] The U.S. sanctioned various international companies in relation to Iran's weapons of mass destruction programs. However, CWC inspections of Iranian facilities have not uncovered evidence of an illicit chemical weapons programme.[101]

Despite concerns from Western states, the lack of concrete evidence, more recent intelligence assessments, and CWC inspections have not confirmed the existence of an illegal chemical weapons program in Iran. It is deemed unlikely that Iran would transfer chemical or biological weapons to non-state actors due to the fear of international consequences.

Iran officially denies possessing chemical weapons and consistently points to its adherence to international agreements.[102] As a State party to the Chemical Weapons Convention (CWC), Iran emphasizes that it does not possess such weapons and considers them inhumane and against its principles. Iran has also hosted training sessions on the medical aspects of chemical warfare under the CWC.[103]

Despite ongoing suspicions and past accusations, there is a lack of concrete evidence supporting Iran's involvement in chemical warfare-related activities. Many Western nations view Iran's efforts to expand its chemical industry with caution, but this should be weighed against the scarcity of reliable open-source information, less specific recent intelligence assessments, and the fact that inspections under the CWC have not uncovered signs of an illicit chemical weapons program in Iran.[104]

It's important to note that Iran's acquisition of chemicals with dual-use civilian applications is not conclusive evidence of a chemical weapons program, as such materials can serve legitimate civilian purposes.[105] The U.S. imposed sanctions on international companies, including some Chinese firms, due to their involvement in

[98]Nathan E. Busch, Joseph F. Pilat, "Disarming Libya? A reassessment after the Arab Spring" (2013) 89(2) *International Affairs (Royal Institute of International Affairs 1944-)*, 460.
[99]Ibid.
[100]Arms Control Association Report, "Arms Control and Proliferation Profile: Iran" (2025) <https://www.armscontrol
.org/factsheets/arms-control-and-proliferation-profile-iran> accessed 30 August, 2025.
[101]WISCONSIN Project on Nuclear Arms Control, "A History of Iran's Chemical Weapon-Related Efforts" (2005) <https://www.wisconsinproject.org/a-history-of-irans-chemical-weapon-related-efforts/> accessed 30 August, 2025
[102]John R. Bolton, "Iran's Continuing Pursuit of Weapons of Mass Destruction" (2004) U.S Department of State, <https://2001-2009.state.gov/t/us/rm/33909.html> accessed 27 November, 2024.
[103]Ibid.
[104]Ibid.
[105]Caritas Europa Report, "A People Sacrificed: Sanctions against Iraq" (2001) <https://reliefweb.int/report/iraq/
people-sacrificed-sanctions-against-iraq-report-caritas-europa> accessed 26 November, 2024.

activities related to weapons of mass destruction, but these sanctions were often linked to dual-use equipment that has civilian applications as well.[106]

5.6. Syria and the Use of Chemical Weapons

The Syrian Network for Human Rights has issued a statement marking the 10th anniversary of the largest chemical attack by the Syrian regime on Two Ghoutas.[107] In the statement, the organization highlights that despite a decade passing since this major chemical weapon attack, the regime responsible continues to evade accountability.[108] The statement outlines the events of August 21, 2013, emphasizing that the chemical attack on Two Ghoutas had a premeditated goal of killing as many residents, including women and children, as possible. The regime aimed to silently and lethally gas them in their sleep, taking advantage of calm weather conditions that would cause the poison gas to settle at ground level.

The attack resulted in the asphyxiation of 1,144 individuals, including 1,119 civilians (99 children and 194 women) and 25-armed opposition fighters. Additionally, 5,935 survivors suffered from severe respiratory issues and suffocation.[109] This attack accounted for 76 percent of all victims in chemical weapons attacks by the Syrian regime from December 2012 to the last documented attack in May 2019 in al-Kbeina, rural Latakia.[110]

According to the report of the Syrian Network for Human Right's database, there have been 222 documented chemical weapons attacks in Syria between December 23, 2012, and August 20, 2023. Approximately 98 percent of these attacks were carried out by Syrian regime forces, while the remaining two percent were attributed to ISIS.[111] Of these, the Syrian regime's 217 chemical attacks resulted in the deaths of 1,514 individuals and injuries to 11,080 people. ISIS conducted five chemical weapons attacks in Aleppo governorate, causing injuries to 132 individuals.[112]

The report categorizes the 222 chemical weapons attacks based on UN Security Council resolutions. The Syrian regime conducted 33 attacks before Security Council resolution 2118 and 184 after it.[113] Additionally, 115 chemical weapons attacks occurred after Security Council resolution 2209.[114] Furthermore, the Syrian regime carried out 59 attacks after the establishment of the Joint OPCW-UN Investigative

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[106]Ibid.

[107]The Report of the Syrian Network for Hunan Rights on the Deployment of Chemical Weapons in Syria (November, 2023) <https://snhr.org/blog/category/report/thematic-reports/weapons/chemical-weapons/> accessed 30 November, 2024.

[108]Ibid.

[109]Reports of the Human Rights Watch on the Use of Chemical Weapons in Syria (August, 2013) <https://www.hrw.org/report/2013/09/10/attacks-ghouta/analysis-alleged-use-chemical-weapons-syria> accessed 30 November, 2024.

[110]Ibid.

[111]The Report of the Syrian Network for Hunan Rights (n 79)

[112]Ibid.

[113]Ibid.

[114]Yasmin Naqvi, "Crossing the red line:The use of chemical weapons in Syria and what should happen now" (2017) 99(3) *International Review of the Red Cross* 964

Mechanism (JIM) and Security Council resolutions 2235. All five of ISIS's attacks violated Security Council resolutions 2118, 2209, and 2235.[115]

The report holds Syrian regime leader Bashar Assad responsible for the movement and use of chemical weapons, as it is seen as a calculated policy within the highly centralized Syrian regime structure. This policy implicates military and intelligence institutions, particularly the leaderships of the General Military Intelligence Directorate, Air Force Intelligence Directorate, the National Security Bureau, and the Syrian Scientific Studies and Research Centre (including Institute 1000 and Branch 450). Syrian Network for Human Right's data indicates the involvement of at least 387 high-ranking military officers, security officials, and civilian and military personnel in these attacks, leading to their inclusion on US and EU sanction lists.

It has been suggested that the Syrian case must be referred to the International Criminal Court (ICC), and that all those involved must be held accountable.[116] An alternative option would be to establish a special tribunal to try those involved in war crimes and crimes against humanity against the Syrian people, to help put an end to the shameful impunity that has now been going on for over a decade.[117]

As approved in the 20th session of the Conference of the States Parties to the Chemical Weapons Convention, held in 2015, November 30 of every year is known as the Day of Remembrance for All Victims of Chemical Warfare. This occasion is a token of recognition and memorialization by the Organization for the Prohibition of Chemical Weapons (OPCW) of the suffering of the survivors of chemical attacks and of their right to effective support and advocacy. On this day, the state parties to the OPCW reaffirm their commitment to bringing about a world truly free of the threat of chemical weapons.

On such an occasion, it is both appropriate and essential to remember the chemical attacks that Syria has seen in recent years, and more importantly to remember the victims and survivors of those attacks who are still awaiting justice and accountability to this day. Among the victims, a total of 1,510 individuals perished, including 1,409 civilians, 94armed opposition fighters, and 7 prisoners from Syrian regime forces. Of the civilian casualties, 205 were children, and 260 were women. The Syrian regime was responsible for all the fatalities. Additionally, 11,212 people were injured in chemical weapon attacks, with 11,080 injured in attacks by the Syrian regime and 132 in attacks by ISIS.

Investigations have revealed that both the Syrian government of Bashar al-Assad and ISIL militants used chemical weapons, with the majority of such attacks attributed to the Syrian government.[118] In 2014, the OPCW Fact-Finding Mission found systematic and widespread use of chlorine. The OPCW-UN Joint Investigative

[115]Ibid.

[116]Yasmin Naqvi, "Crossing the red line: The use of chemical weapons in Syria and what should happen now" (2017) 99(3) International Review of the Red Cross, 959–993

[117]Ibid.

[118]Brooks, J., Erickson, T.B., Kayden, S. et al. "Responding to chemical weapons violations in Syria: legal, health, and humanitarian recommendations" (2018)12(12) *Conflict and Health Journal* 13

Mechanism (OPCW-UN JIM) identified the Syrian government as responsible for sarin and chlorine attacks, while ISIL militants used sulphur mustard.[119]

According to various sources, the Syrian government conducted numerous chemical attacks, with Human Rights Watch reporting at least 85 such incidents between 2013 and 2018.[120] A Global Public Policy Institute study indicated over 300 attacks, primarily by Assad's forces. Although the international community pressured Syria to destroy its chemical weapons, post-disarmament, suspected chemical weapon use incidents continued, involving Syrian Ba'athist forces, ISIL, Syrian opposition, and Turkish Armed Forces. The Khan Shaykhun chemical attack in 2017 led to U.S. military action, and the Douma chemical attack in 2018 prompted responses from the United States, United Kingdom, and France. In April 2021, Syria was suspended from OPCW membership for failing to disclose its chemical weapon stockpiles and violating the Chemical Weapons Convention.[121]

6. RECOMMENDATIONS

The findings of this article provide important insights into the nature, characteristics and examples of Chemical Weapons. It also gives an historical perspective to the use of chemical weapons in various armed conflicts, while noting the interventions of the International Community in each conflict. It further presents a vivid account the devasting nature of chemical weapons and reiterates the need for an urgent global intervention to control its deployment in armed conflicts.

This article recommends that the member States that have acceded to the CWC should also propose an optional protocol to the treaty that would address the obvious deficiencies contained therein, particularly the use of CW in armed conflict and the need to distinguish between what constitutes a minor breach and a fundamental breach. It is also suggested that the UN establish a dedicated ad hoc international criminal tribunal to prosecute the use of CW in nations where it has been deployed. It would establish a collective punitive mechanism for the use of CW in armed conflict and serve as a deterrent.

Finally, this article recommends for more proactive measures to prevent the use of chemical weapons in armed conflicts, including a more comprehensive and effective legal and institutional framework that will minimise the use of lethal weapons to a bare minimum and hold offenders more accountable. It also advocates for more forceful global response against those who use chemical weapons in armed conflict.

7. CONCLUSION

The findings of this article provide important insights into the nature, characteristics and examples of Chemical Weapons. It also gives an historical perspective to the use of chemical weapons in various armed conflicts, while noting the interventions of

[119]Ibid.

[120]Reports of the Human Rights (n 71)

[121]Third report of the Organization for the Prohibition of Chemical Weapons United Nations Joint Investigative Mechanism. 24 August 2016, <https://press.un.org/en/2016/dc3651.doc.htm> accessed 29 June 2024.

the International Community in each conflict. This article further presents a vivid account the devasting nature of chemical weapons and reiterates the need for an urgent global intervention to control its deployment in armed conflicts.

Thinking (Legal Reasoning) and Writing: What Can Judges Learn from Cognitive Science?

Oghenemaro Festus Emiri*

1. INTRODUCTION

After a long period of thinking and acting law as an autonomous discipline, the legal community is beginning to recognize that other disciplines, particularly the social sciences and humanities can provide insights and approaches that can enrich our understanding of law and the legal system. One of the sciences particularly significant in this respect is cognitive science. This paper considers why a subset of the legal profession-judges, should be interested in cognitive science and the insight it can give them in opinion writing, the because opinion writing constitute theirprimary judicial function. Practice lawyers, who similarly, write briefs can benefit from the contribution of cognitive science to the art of writing, especially as it shows how the intersection between thinking and writing can aid them write better, brighter, and tighter briefs.This notwithstanding, this paper's main objective is targeted at how the recognition of cognitive science can help judges improve the writing of ethical opinions and perhaps help them to be more introspective in writing opinions.

No question about it. Judges, by their oath, are obligated to think (i.e., reason) and write well. It is a commitment that will not change. By nature of the work they do, they are expected to write opinions, whether in the form of rulings (including bench ruling), and judgments.

Judges writing matter. Judges' opinion command a degree of authority over both individual citizens and society in general.Their opinion influences the contours of laws and help shape citizens' freedoms and lives. Judges work as interpreters of law, fact-finders, policy and decision-makers. It is in this way that we can figuratively say they hold lives in their hands; becausetheir daily decisions affect people's livelihoods, liberties, and reputations.[1]For example, in a single day, a judge's decision in a sentencing case could see a person serve the rest of their life in prison; another judge's decision in a transaction case may end the livelihood of an individual or many others; while a third

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[1] Hanna Malloch, Beyond a Number Game: Developing a Nuanced Approach to Judicial Diversity for Aotearoa New Zealand (2022) 20 *NZJPIL* 113, 117-118.

judge's decision in a family law case could mean someone loses care of their children. In all situations just described, the three individuals' or entities lives can be dramatically altered by judges' decision. Thus, everyone, including judges must take seriously judicial writing.

Writing well is therefore a core skill for judges. Judges take seriously the judicial function by interrogating why they write and how writing is itself a function of thinking. Judges write for many reasons. They do not only to decree results in cases or to announce applicable law to controversies. They do for many other reasons that are ethical.[2]It is therefore, not sufficient for judges to write opinions that are correct—their opinion must also be seen as fair, reasonable (yes, the product of reason)—a value enhanced by language and style easy to understand.[3] This is what places an onerous burden on judges-to explain, as well as to persuade with their writing. The obligation to explain and persuade is heightened because a judge's opinion is to a large extent a good reflection of the judge's personality and it provides a window revealing the depth of a judge's thinking.

While no good judge will doubt that the call to duty demands deploying (critical) thinking to what they do, some could reason, 'I am a judge, not a lawyer who ought to persuade.' Such a thinking is fallacious to say the least. Why? Simply, because judges, like lawyers, are also obligated to persuade. Stevens states why: "[T]he purpose of the written opinion is not, after all, for the judge to arrive at a conclusion. He has already done that. Rather, it is for him to protect his conclusion and his reasons for holding it to those audiences who need to know about it. . . . The written opinion is not a set of notes written by a judge for his own use. Rather, it is a persuasive essay directed outwards towards specific audiences."[4]What this imply is that judges must think well and write well.

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[2] Patricia M. Wald, (extra-judicial), 'Rhetoric of Results and the Result of Rhetoric: Judicial Writing' (1995) 62 *U. Chi. L. Rev.* 1371 (exploring the rationale for judicial decision-making at appellate courts, and stating how judges and their words matter). For general reading on judicial writing, see Ruggero J. Aldisert, *Opinion Writing* (2nded. Author House 2009) (a four-part division book dealing with (i) theoretical concepts underlying judicial opinion, (ii) opinion anatomy, (iii) writing style, and (iv) opinion writing checklists); Joyce J. George, Judicial Opinion Writing Handbook (5thed. William S. Hein & Co. 2007); Ruggero J. Aldisert et al., 'Opinion Writing and Opinion Readers' (2009) 31 *Cardozo L. Rev*. 1; Symposium, 'Judicial Opinion Writing' (1995) 62 *U. Chi. L. Rev.* 1363; Richard A. Posner, 'Judges' Writing Styles (And Do They Matter?)' (1995) 62 *U. Chi. L. Rev.* 1421; Gerald Lebovits et al. 'Ethical Judicial Opinion Writing' (2008) 21 *Geo. J. Leg. Ethics* 237 (discussing style and substance of judicial opinion writing through the lens of judicial ethics; posit that opinion writing shapes the public's perception of the judiciary, and therefore, judges must follow the highest ethical standards in writing opinions).

[3] Jennifer Sheppard, 'The "Write" Way: A Judicial Clerk's Guide to Writing for the Court' (2008) 38 *U. Baltimore L. Rev*. 73, 108 (emphasizing that a judicial opinion should convey information to the reader in a manner understandable states "to that end, you should write the opinion so that a layperson with a high school education can understand it."). See also, Ruggero J. Aldisert, *Opinion Writing* (2nd ed. 2009) 22-23 (urging judges to recognize that opinions are intended to inform litigants and the general public why the court acted in the manner it does).

[4] D. W. Stevens, 'Writing Opinion,' Oct. 1975 *Judicature*, 135, cited in Michael R. Smith, *Advanced Legal Writing: Theories & Strategies in Persuasive Writing* (3rd ed. Wolters Kluwer 2013) 6.

Even though there is no general rule prescribing what good opinion is, there are recognized threshold standards for measuring good opinions. A well written opinion is expected to be a discursive narrative, consisting of clear, candid and reasoned explanation of the court's holding that meets the requirements of objectivity from the standpoint of the litigants, and the public. It should also provide some guide for future conduct or activity.[5]

Common lawyers consider an opinion as a valuable legal institution in its own right.[6] Common law treats an opinion as a vehicle for setting forth the judge's views of the substantive considerations bearing on the outcomes of cases, as well as the interplay between policy concerns and such formal constraints, such as precedent and rules. An opinion is more than just a text in writing by a judge. Independent of the holding in a case, an opinion represents more. Aside persuading the litigants about the rightness of the decision, it is an instrument for achieving professional and societal goals-providing guidance to lawyers and courts (particularly lower courts); constraining arbitrary action on the part of judges; legitimating judges' efforts; and many more.No wonder why the legal profession-lawyers, judges and scholars think that an opinion that does not meet these legitimate goals is valid ground for criticizing it, no matter the substantive merits of the opinion.[7]

Thus, judicial opinions serve to communicate a court's conclusions and the reasons for them to the parties and their lawyers; when published, to announce the law to other lawyers, judges, academics, and the interested public; its preparation imposes intellectual discipline on the author, requiring the judge to clarify her reasoning and assess the sufficiency of precedential support.[8] Every opinion should be written to persuade as to the correctness of a decision. Opinion writing is thus, an essay in persuasion. Judges persuade.

This paper has a simple thread line. It essentially explores how cognitive science plays a fundamental role in legal reasoning, particularly in the writing process harnessing the brain to work harder and smarter in reaching logical conclusions. The plot is divided into seven parts. Part II is a primer on what cognitive science is about. Part III examines why many judges are dismissive of its place in improving the art of adjudication, particularly opinion writing despite its useful insight. In Part IV the paper examines why writers should

[5] Michael Wells, 'French and American Judicial Opinions' (1994) 19 *Yale J. Int'l. L.* 18. See also, Festus Emiri, et. al. Overarching Precepts for the New (Not so New) Judge: A Primer in Festus Emiri & Chidi Lloyd, *Judges and Judging in Nigeria: Essays in Honor of Kate Abiri, J.* (Lagos: Malthouse Press, 2023) 224, 233-34.

[6] Moses Lasky, 'Observing Appellate Opinions from Below the Bench' (1961) 49 *Cal. L. Rev.* 831, 838. See also, Gerald Lebovitts, Alifya V. Curtin & Lisa Solomon, 'Ethical Judicial Opinion' (2008) 21 *Geo. J. L. Ethics* 237, 244 (positing that opinion writing constrain judges' arbitrariness).

[7] See Ruggero J. Aldisert, *Opinion Writing* (2nded. Author House 2009); but cf. Wells19 (challenging the common law conception of judicial opinion as an instrument for achieving guidance, persuasion, legitimacy, and constraint. The author argues that the evaluation of an opinion appraisal should focus more on the formal and substantive merits of the legal doctrine that they expound, and less on the sufficiency and quality of the reasoning they contain).

[8] Abner J. Mikva, 'For Whom Judges Write' (1988) 61 *S. Cal. L. Rev.* 1357.

embrace cognitive science input in craft better readable documents, particularly legal writers who must now face the reality that the profession cannot continue to pretend to be an autonomous discipline. Law must'borrow' to improve its majesty. Part V, examines the contribution of cognitive science to the art of writing, revealing the intersection between thinking and writing and how judicial style implicates substantive and form commitments in adjudication. Part VI encourages judges to take opinion writing seriously,using insight from cognitive science. The concluding Part VII is the normative suggestion encouraging judges, if possible, to infuse more doses of the 'impure style'in their opinions, because it is a style more amenable to modern communication style. The impure style also come more readily handy to deal with "hard" cases, some of which judges' will occasionally handle.

How can cognitive science contribute to the persuasive enterprise?

2. WHAT IS COGNITIVE SCIENCE?

Judging, a domain renowned for its decision-making process, is an interesting field of study for cognitive science. All who judge, whether as parents, superiors, official judges or administrators know that much of judging involves the use of intuitive reasoning, characterized as concise cognitive shortcuts, capable of facilitating both swift judgments and cognitive efficiency. For example, research shows that the way in which judges, a critical component of the legal system reach decisions, apply rules, or determine many questions in the legal process is influenced not only by the evidence and information presented during legal proceedings but also by underlying cognitive processes that play a significant role.[9] Cognitive science therefore finds attractive an analysis of the legal processin an attempt to offer insights to judges how they can better follow fairer procedures and achieve more favorable judicial outcomes.

Significantly, cognitive science reveals that decision-making process involves dual cognitive process. Humans, like judges, process and make decisions based on two systems of thought.[10]The first system is characterized by rapid, intuitive, or experiential decision-making with minimal cognitive effort. In contrast, to it, the second system involves analytical processing, cognitive demands, and longer duration of decision-making processes.System one would closely resemble the initial conclusions a judge forms reading pleadings

[9]Thomas Gilovich, D. Griffin & Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Camb: Camb. U. Press. 2002)

[10]Daniel Kahneman, Oliver Sibony& Cass R. Sunstein, (2021). Noise: AFlaw in Human Judgment (Little, Brown Spark, 2021) (showing how 'noise' considered as undesirable variability in judgment of the same problem affect judgment and decision-making); Win De Neys, *Dual Process Theory 2.0*. (London: Routledge, 2018) (noting that human thinking is often characterized as an interplay of intuition and deliberation); Jonathan St. B. T. Evans, In Two-Minds: Dual-Process Accounts of Reasoning, Judgment, and Social Cognition (2008) 59 *Annu. Rev. Psychol*. 255; William H. Gravett, The Myth of Rationality: Cognitive Biases and Heuristics in Judicial Decision-Making (2017) 134 *S. Afr. Law J.* 53 (documenting systemic errors in the thinking of normal people, showing how relying on cognitive shortcuts generate relying on limited cues; how judges, like all human beings, even without conscious prejudice, even understanding the facts and law in cases, might still make systematic error decisions).

or listening to witnesses or counsel's argument. It is a conclusion that readily comes up to the mind. The intuitive reasoning is typically linked to prior knowledge and new experiences based on shared features. As a result, the judge'sworking memory does not fully process the new information, but she reaches conclusion based on heuristic thinking. It is usually the case where the decision-making process is continuous, leaving insufficient time to thoroughly consider all aspects before reaching a verdict, as where judges deliver bench rulings. They are situations where heuristics readily serve are cognitive shortcuts. The judge simply considers prior experiences and the common features of the decisions at hand to reach quick conclusion.[11]

In contrast, system two thinking, characterized by analytical processing, cognitive demands, and longer duration of decision-making processes, closely resembles the process of writing the opinion—a process that interrogates some use of the 'alphabet' soup styles of say, IRAC, CRAC, CRRPAC, or CREAC, thinking through whether the reader will understand what the judge is saying, rationalizing the facts, law, policy and all the many components of ethical opinion writing. This type of thinking takes a longer time for decision-making, much of which translates to putting thoughts in writing.This paper therefore centralizes how recognizing the two systems of thinking can better inform and reform ethical opinion writing.

Cognitive science is an interdisciplinary field that studies the mind and its processes. It therefore pigeonholes a wide variety of questions like perception, reasoning, memory, and even language. It is primarily concerned with how the brain works in diverse fields, such as in thinking, analyzing, learning, and many more. It is a research discipline that has yielded profound insights into how humans think, learn, behave and communicate. Some of its findings support long-held notions, but many contradict our most cherished assumptions and practices. For example, it has uncovered promising new approaches for enhancing comprehension, critical thinking, and communication in ways hitherto before unknown.

As a diverse science, it studies thinking: how we gather information and how we communicate.In particular, it studies the processes involved in thinking—the thought process, recalling information, and how we link both by way of writing or speaking. It is a science that shows how problem-solving involves a process of recognizing patterns and retrieving solutions from a stored repertoire acquired by encountering similar problems in the past. It unveils how problem-solving involves understanding of patterns from matching new information to schema (knowledge structures), scripts, or models that embody prototypical expectations about the world, and how these cognitive structures help us make decisions without some form of complete information.

[11]Rudiger F. Pohl, Cognitive illusions," in Pohl, ed. *Cognitive Illusions: Intriguing Phenomena in Thinking, Judgment and Memory* (NY: Routledge, 2017) 3 (noting that the use of heuristics cognitive shortcuts can impair validity and increase the likelihood of cognitive errors, introducing cognitive biases in the decision-making process); but cf. Win De Neys, Advancing Theorizing about Fast-and-Slow Thinking (2022) 46 *Behav. Brain Sci.* 111 (heuristics could prove to be effective as an adaptive toolbox in high workload situations, facilitating cognitive processing and decision-making to operate efficiently and economically).

But as a science it goes further. It also provides insight into how human after processing information, justify their conclusions in writing. It is in this respect, that it reveals the covert nature of how justification (writing) disciplines us to deeper reflection on consequence. Cognitive theory can therefore help lawyers re-focus on the interaction between thinking and writing; what can be termed in fundamentalist cognitivist studies, as the division between creation of categories and interpretation of rules respectively.[12]

Contextualized in legal setting, the former (categories) can be likened to what we refer to as intuition. It logically arises the moment when the judge weighs the justice of the claim of the plaintiff and refutation by the defendant. At that point, the judge forms an opinion about where the pendulum of justice ought to swing. The formed opinion, can be likened to categories in the sense that it is formed from the common properties with which the legal mind classifies things. In this respect, intuition is simply descriptive and definitional summation of the parties' legal problem.

In contrast, interpretation of rules can reveal that category formation is much more imaginative and so should be treated as flexible, first shorthand solution that ought to yield to more and deeper introspection and reflection of the legal problem. Thus, the writing process, likened to the rule interpretation, could just reveal to the judge that it may not be possible to bring the instant case within the central model of the formed category, and that, though the case may be related to the category in some way, it nevertheless cannot be justified by rule. This may be because the instant case though derived from the category is itself different. In that case, the rule extensionhas little or nothing in common with it beyond their shared connection to the central category. This is how writing though related to intuitive thinking, goes beyond it, to intricately implicate critical (reasoned) thinking.

Recognizing the importance of cognitive science in law, some legal scholars have begun deploying the science to reassess legal assumptions about human decision-making. For example, cognitive science has been deployed to contract, criminal law, evidence, intellectual property, jurisprudence, legal education and many other areas of law to ground better understanding of many assumptions in law.[13]

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[12] Fundamentalism is rooted in the thinking that rational thought and truth is different from emotion, expression, and subjective truth. See H Mark Johnson, 'Law Incarnate' (2002) 67 *Brook. L. Rev.* 949, 952-63 (stating "[B]y fundamentalism I mean the view that all meaning is specifiable in sets of literal concepts and propositions that can apply directly to our given experience and that reasoning is a rule-like activity that operates logically and linearly with these concepts."). See also, George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* (U. Chi. Press 1987) xii (referring to fundamentalism as objectivism because "[m]odern attempts to make it work assume that rational thought consists of the manipulation of abstract symbols and that these symbols get their meaning via a correspondence with the world, objectively construed, that is, independent of the understanding of any organism.") cited in Linda L. Berger , 'What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law' (2004) 2 *J. ALWD* 169, 172.

[13] For a review of literature deploying cognitive science to law, see especially Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (U. Chi. Press 2001) (applying cognitive

Since thinking and writing are primary to judges' function, it is significant to assess the place of cognitive science, in the intersection between how judges think and write, particularly interrogating the thinking and writing process. This is important because, like many areas of intellectual inquiry, writing is interdisciplinary. It draws insights from a host of other fields. It is therefore welcoming for legal writing scholars to explore the relationships between legal writing and cognitive sciences.[14]

3. WHY ARE SOME JUDGES DISMISSIVE OF COGNITIVE SCIENCE PLACE IN ADJUDICATION?

Despite the benefits cognitive science can bring to the thinking and writing process, the legal community remains largely dismissive of its place in law. Legal (judicial) writing is largely introspective. Judges for example, have ever doubted that opinion writing can benefit from advances from other discipline. This is understandable. Lawyers for decades have striven to protect the majesty of law from all invading 'army of knowledge.' 'Talk like law is an autonomous, self-container discipline;' 'law is the only learned profession,' and the like, are common in lawyers' conversation.[15]

The thinking that law is autonomous is conventionalism.[16] It is rooted in certain assumptions. One, that law is apolitical. It is neutral, dispassionate, the product of reason and not politics. In insisting that it is complete, self-contained system, lawyers claim that legal disputes generate the correct set of legal issues, reasoning applied by lawyers to generate correct answers.[17]

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science to jurisprudence). See also, Deborah W. Denno, 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 *Minn. L. Rev*. 269; Cass R. Sunstein, 'Behavioral Analysis of Law' (1997) 64 *U. Chi. L. Rev*. 1175 (countering argument against the rational man assumption in economic analysis of law); Jedediah Purdy, 'The Promise (and Limit) of Neuroeconomics' (2006) 58 *Ala. L. Rev*. 1; Linda H. Krieger, 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity' (2007) 47 *Stan. L. Rev*. 1161.

[14] See Winter(providing the basis for symposium subject in 'Cognitive Legal Studies: Categorization and Imagination in the Mind of Law' (2002) 67 (4) *Brooklyn L. Rev*. See also, Berger, n. 8 (applying metaphoric theory to analyze the US Supreme Court brief in a case raising First Amendment corporate speech issues); Paula Lustbader, 'Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students' (1997) 33 *Willamette L. Rev.* 315, 321 (recommending that teachers use "a cognitive theory that explains the evolutionary learning process of law students"); Linda Flower & John R. Hayes, 'A Cognitive Process Theory of Writing' (1981) 32 *College Composition & Commun*. 365, 366–367.

[15]Richard A. Posner, 'Legal Scholarship Today' (2002) 115 *Harv. L. Rev.* 1314. See generally, 'Harvard Symposium on Law, Knowledge and the Academy' (2002) 115 *Harv. L. Rev.* 1278; Charles W. Collier, 'The Use and Abuse of Humanistic Theory in Law: Reasoning the Assumptions of Interdisciplinary Legal Scholarship' (1991) 41 *Duke L.J*. 191, 192 (suggesting the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution); Richard Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) 38 U. Toronto L. J. 333.

[16] See Donald H. Gjerdingen, 'The Future of Legal Scholarship and the Search for a Modern Theory of Law' (1986) 35 *Buffalo L. Rev.* 381(defining the concept of law, "conventionalism," as rooted in the presumption that law was an autonomous, apolitical discipline dominated by the study of adjudication and classical common law categories.)

[17] See for example the reply of Chief Justice Edward Coke in response to King James' claim to exercise jurisdiction personally. "[T]hen the King said, that he thought the law was founded

For lawyers, it is generally the thinking that though the art of adjudication may draw on other disciplines like economics, ethics, psychology and others to inform the legal mind, they do not largely influence it, because legal concepts are sufficient to supply the necessary framework to arrive at correct conclusions. So, if a conflict arises between law and the other disciplines, law trumps. It controls. Simple.[18]

Two, given that conventionalism is the dominant conception about law, coupled with its solidification promoted by scientific thinking, it would not be surprising that most judges are dismissive of any useful lessons cognitive science can contribute to opinion writing. Remember that judges were students of law in the faculties of law and probably must have encountered the subject of legal ontology as unquestionable from their study of legal methods. That subject has as one of its objectives, the building of "faith" in institution of law as a given ontological system. It is all strategy for securing the laws' empire.[19] Students therefore assume that law is some kind of ancient craft devoted to the study of rules and right answers. They come to see law as neutral, and that once they have learnt the special techniques of lawyers that they too can generate right answers.[20]

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upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life ... or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience ..." *Prohibitions delRoy*, 12 Co. 63, 64-65, 77 Eng. Rep. 1342, 1343 (K.B. x655), cited in Robert M. Cover, 'Nomos and Narrative' (1983-84) 97 *Harv. L. Rev*. 4, 42.

[18]See Fried, 'The Artificial Reason of the Law or: What Lawyers Know' (1981) 60 *Tex. L. Rev*. 35 (stating "[I]f judges are neither economists nor philosophers, what is it that they are good at; what is it that they know? What is their special competence? What judges know, what judges are expert at, is, not surprisingly, the law. My thesis holds that the law is a distinct subject, a branch neither of economics nor of moral philosophy, and that it is in that subject that judges and lawyers are expert; it is that subject which law professors should expound and law student's study. Of course, I do not suggest the absurd proposition that the law does not have economic consequences, or that legal rules are without a history. And in the end, the law, like every other branch of human endeavor, must submit to moral judgment. My thesis is merely that law is a relatively autonomous subject, and that rights will be best and most reasonably respected if reasoning about them goes forward within its special discipline".).

[19] Pierre Schlag, Hiding the Ball (1996) 71 *N.Y.U. L. Rev.* 1681 (stating that the evidence of ontology and epistemic inquiry into the nature of law is a characteristic pattern of legal education, because teaching is organized in a rhetorical hierarchy that channels inquiry from ontological and epistemic questions. Reinforcing the majestic unquestionableness of law follows this pattern: (i) do not confront an ontological question if it can be handled as an epistemic question, (ii) do not confront an epistemic question if it can be handles as a normative question, (iii) do not confront a normative question if it can be handled as a technical question. By such reasoning technique the position of law as an autonomous system is reified.

[20] See for example, A. Smith, *Cognitive Styles in Law School* (1977) 29-31 (discussing legalism as a cognitive style in legal education); Schlegel, 'Searching for Archimedes-Legal Education, Legal Scholarship and Liberal Ideology' (1984) 34 *J. Legal Educ.* 103, 107 (discussing dominance of notion of "law as rue" in legal education).

What is more, much of legal writing is formal, written in stilted prose.[21] Composition theorists tag the style used by the majority as the traditional model or the formalist approach in writing. Formal legal writing emphasizes the product (in contrast with process). It places high premium on the formal features of legal documents that the legal community (judges and lawyers) write—emphasizing clarity and accuracy.[22]Formalists sees writing as starting with an analysis of the legal problem. It starts with thinking about it. Thereafter the writer begins writing when the thoughts are complete formed. Thus, writing is simply the expression of thoughts completely formed (complete and well developed).[23]This is how the majority of judges write their opinion. It is therefore not surprising that the majority write as traditionalist, what Judge Posner will describe as the 'pure style.'[24] Formalism is the dominant writing style of lawyers and judges.[25]

It all starts for the legal system or legal method classes. There teachers, centralizes the formalist approach to legal writing. Law students are taught that social complexities and controversies in society find legal solution through the legal schemata of an analytical organization structure called IRAC. From there they learn to focuses on the formal aspects of law, which invariably makes them conceive every legal document in the formal structure—issue statements, brief answers, discussion sections, and conclusions. The result is that students graduate to become lawyers (some become judges) ultimately writing formulaic and so, produce uninspired writings.[26]

All of this is however changing as cognitivists are revealing a deeper understanding of writing as a recursive activity that involves the use of language as a medium through which our experience is organized; that writing is not simply the transparent medium for conveying objective truth.[27]Cognitive scholarship challenges the inadequacy of formalism in grossly failing to explain the dynamic nature of the writing process. It reveals that writing is a process involving a series of transactions between reader and writer; reality and language; prior texts and present text; the individual and the context. By

[21]Bryan A. Garner, *Legal Writing in Plain English* (U. Chi. Press, 2001) xvii (stating "you're in law, you're already swimming in a sea of bad writing.").
[22] J. Christopher Rideout & Jill J. Ramsfield, 'Legal Writing: A Revised View' (1994) 69 *Wash. L. Rev*. 35.
[23] Philip Kissam, Thinking (By Writing) About Legal Writing (1987) 40 *Vand. L. Rev.* 135, 138 (stating that the formalist approach is "instrumental writing" because it is a model that sees writing as simply a tool for expressing thoughts). The formalist model assumed that thinking preceded writing and that writing was simply the expression of preformed thoughts. See, Rideout & Ramsfield, n. 22, 49; Terrill Pollman, 'Building a Tower of Babel or Building a Discipline? Talking About Legal Writing' (2002) 85 *Marq. L. Rev.* 887, 894-96.
[24] Richard A. Posner, 'Judges' Writing Styles (And Do They Matter?)' (1995) 62 *U. Chi. L. Rev.* 1421.
[25] Bryan, n. 21.
[26] Festus Emiri, Ayuba Giwa & Jonathan Ehisani, 'Revisiting the Traditional IRAC Organizational Structure for Legal Analysis: Towards a Multidisciplinary Approach' [2016] *NLJ* 23 (stating that IRAC and other schemata such as '(QfrFR)+IRAC,' IGPAC, CREAC, TREAT, CREXAC, CRAC, CRuPAC, and other similar formulations are rooted in the philosophy that it is best to teach students to reason as syllogistically as possible, and that a rule-based approach enables law to remain an autonomous discipline, divorced from mundane bias).
[27] Teresa Godwin Phelps & Jenny Ann Pitts, 'Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation' (1985) 29 *St. Louis U. L.J.* 353.

so doing it showed why formalism is unrepresentative of the writing process, and why writing should be taken more seriously. The"new rhetoric" cognitive movement views writing as a cognitive process negotiating meaning.[28]

Because the majority of lawyers come to know law as prescribing formal writing, it is natural for judges to engage judicial writing without considering perspective of rhetoric and those of writing experts. No wonder why much of opinion writing has not benefited from the cognitive science. For many judges and lawyers, it is not easily conceivable for them to recognize how cognitive science interacts with writing and law, talk more of specialized judicial writing, in ways that can improve the quality and persuasiveness of opinions.[29] In fact, many judges have remained oblivious of the cognitive science and its usefulness in unveiling emerging techniques to writing.[30]

4. COGNITIVE SCIENCE PLACE IN LEGAL WRITING

As a heuristic activity, writing is the process of creating knowledge. Through writing, the writer experiences the reciprocal nature of the process—the reading of what is written, the negotiation of meaning between writer and text, the negotiation of meaning between the reader and text, the negotiation of meaning between writer and reader, and ultimately, the creation of meaning. It is in this way that we can say that writing is actually a different mode of thinking. Writing is constitutive of thought.[31]During the writing process, the writer learns more than what the writer does speaking, thinking, listening, or reading. Writing engages all of these activities and more.[32]

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[28] Linda L. Berger, 'A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer' (2000) 6 *J. Legal Writing* 58 (characterizing writing as "the weaving of thought and knowledge through language, not merely the clothing of thought and knowledge in language); Linda L. Berger, 'Studying and Teaching "Law as Rhetoric:" A Place to Stand' (2010) 16 *J. Legal Writing* 3 (explaining the various rhetorical theories and approaches).

[29] George Lakoff, *Cognitive Science and the Law* (1989) (positing that because law is committed to the use of human reason and human language it cannot afford to dispense with development of the cognitive science, where language and thought are empirically studied. For legal analysis see, Steven Winter, 'The Metaphor of Standing and the Problem of Self-Governance' (1988) 10 (6) *Stanford L. Rev*. 1371; Steven L. Winter, 'Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes in Law' (1989) 137 *U. Pa. L. Rev.* 1105 (discuss the process of legal reasoning, and offering an experientialist analysis that focuses on the importance of metaphor in the construction of law); Steven L. Winter, 'The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning' (1989) 87 *Mich. L. Rev.* 2225.

[30] For example, see Maureen F. Fitzgerald, 'What's Wrong with Legal Research and Writing? Problems and Solution' (1996) 88 *Law Lib. J.* 247, 259 (noting of American law schools that "the use of theories about teaching and learning is seriously lacking in law school . . .. Law faculty tends to gravitate toward the case-method and large-group forum, only rarely introducing innovative teaching methods. Although several universities acknowledge that different teaching methodologies should be used, in practice, the introduction of new teaching methodologies has been extremely slow.").

[31] J. Christopher Rideout & Jill J. Ramsfield, 'Legal Writing: A Revised View' (1994) 69 *Wash. L. Rev.* 35, 55.

[32] Laurel Currie Oates, 'Beyond Communication: Writing as a Means of Learning' (2000) 6 *J. Legal Writing* 1.

It is natural to ask, should judges really care about this new understanding of writing as thinking and more? You will say yes, if judges should in their writing persuade. Make no mistake about it. Judges must persuade. Rhetoric ought to influence judicial writing. The classical rhetorical focus on an appeal to logic, emotion, and the speaker/writer credibility (logos, pathos, and ethos, respectively) should inform opinion writing.

Whether it is admitted or not, it can no longer be seriously argued that law cannot now remain autonomous.[33] By arguing that an intellectual structure exists that influences legal argument, the legal community can no longer locate legal analysis within the narrow confines of legal artifacts, to cases. In fact, legal meaning can no longer be derived merely from the application of an autonomous system of analysis. Materials outside law is beginning to have significant bearing on what shapes the law. For instance, a lawyer who desires to persuade effectively is now obliged to master the skill of using non-legal resources in the business of lawyering. The special language and tools of the profession now demands that law can no longer remain impervious of other disciplines.

Think for once, jurisprudence in the 1960s was dominated by debates between H.L.A. Hart positivism and Lord Patrick Devlin natural law disputation and the relationship between law and morals.[34] Some still understand the subject through that (false) dichotomy.[35] That trend is now on the decline. The publication of Judge Richard Posner's seminal text, "Economic Analysis of Law" in 1973 introduced a new lexicon to law.[36] Some scholars are even of the view that the ecological re-arrangement economics brings to law heeds the 1897 Holmes' occupational-call.[37]The Brandies 1908 brief described as

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[33] Richard A. Posner, 'The Decline of Law as an Autonomous Discipline, 1962–1987' (1987) 100 *Harv. L. Rev.* 761.

[34] H.L.A. Hart, *Law, Liberty, and Morality* (OUP, Oxford, 1963); Patrick Devlin, *The Enforcement of Morals*(OUP, Oxford, 1965).

[35] Festus Emiri & Felicia Eimunjeze, 'Law, Objectivity and Truth: A Cathedral View' (2011) 10 *NLPJ* 1 (positing that the logical objectivity of law has nothing to do with the "separateness thesis" of law and moral, but more with the philosophical analysis of objectivity, truth and meaning).

[36]Anthony T. Kronman, 'Remarks at the Second Driker Forum for Excellence in the Law' (1995) 42 *Wayne L. Rev.* 115, 160 (a critic describing the book as "an enormous enlivening force in American legal thought" saying that it "continues and remains the single most influential jurisprudence school in the country); Jon Hanson & David Yosifson, 'The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture' (2003) 152 *U. Pa. L. Rev*. 129, 142. See also, Jules L. Coleman, *Markets, Morals and the Law* (Camb. U. Press 1988) 67 (describing law-and-economics as the dominant theoretical paradigm for understanding and assessing law and policy; that its emergence as a trend in legal scholarship (at least in the United States of America) constitute the main discourse about law in our time, strong enough to abysses (if for nothing, at least temporarily), analytical and all other philosophical thoughts promoted by great minds like Rawls and Nozick type of legal scholarship, as it introduces and welcome scholars like Ronald Coase, Pigou, Calabresi and Richard Posner).

[37] Oliver Wendell Holmes, stated in 1897 that: 'for the rational study of law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.' The Louis Brandies brief is an example of the normative power of economics and statistic in the legal process. See Robert D. Cooter, Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and Review of the Major Books (1981-2) 29 *UCLA L. Rev.* 1260 (an article describing the extension of economics

one of the greatest litigation brief ever filed, contained over 90 percent of non-legal materials.[38] Virtually all of the named sources were men telling stories about women they had known. It had only a few pages of legal analysis. The time to think interdisciplinary is here.

Anyone who has read the seminal work of Judge Richard Posner will not need tutorial about the immerse place of economics in solving concrete legal problems. [39] For example, emphasizing the benefit of interdisciplinary approach to law from economics, Robert Cooter and Thomas Ulen states: "[E]conomists and lawyers can also learn techniques from each other. From economists, lawyers can learn quantitative reasoning for making theories and doing empirical research. From lawyers, economists can learn to persuade ordinary people—an art that lawyers continually practice and refine. Lawyers can describe facts and give them names with moral resonance, whereas economists are obtuse to language too often. If economists will listen to what the law has to teach them, they will find their models being drawn closer to what people really care about." [40] There is no question that legal conventionalism and the assumption that law is an autonomous system skews the nature of the legal dialogue away from the kinds of questions that the law must ask and solve if it is to be effective.

5. CONTRIBUTION OF COGNITIVE SCIENCE TO WRITING

Writing is a very complex and effortful cognitive work. It is a cognitive task that draws on the full resources of our nervous system and it actively influences our nervous system as well. It is the study of how the mind works, functions, and behaves, applying multiple existing disciplines, such as philosophy, neuroscience, or artificial intelligence to understand how the brain makes decision or performs task. How the writing process works through the writer's thought processes is thus of its concern.

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beyond its traditional precincts of the market to law, sociology, philosophy and political science as economic imperialism.)

[38] The Brandies brief was submitted by Louis D. Brandies in *Muller v Oregon*, 208 U.S. 412 (1908). In it he defended the constitutionality of an Oregon statute limiting the number of hours women could work in a day, relied on existing social science research about the detrimental effect of long working hours on women. The 101 pages consisted almost entirely of non-legal information, such as statements by doctors, academics, anonymous government employees, and co-workers relating observations of and opinions about the lives of women workers and just a few pages of legal analysis. See also, Ellie Margolis, 'Beyond Brandies: Exploring the Use of Non-Legal Materials in Appellate Briefs' (2000) 34 *U. San Francesco L. Rev.* 197 (an article examining the scope of social science and empiricism in law); Amy J. Griffin, 'Dethroning The Hierarchy of Authority' (2018) 87 *Oregon L. Rev.* (describing the conventional view of legal authority centered on the judicial hierarchy, while proposing a re-orienting view of authority as a pluralistic practice rather than a fixed hierarchical list, accounting for a more nuanced and holistic account of legal authority); Frederick Schauer & Virginia J. Wise, 'Non-legal Information and the Delegalization of Law' (2000) 29 *J. Leg. Stud*. 495 (tracking and analyzed the increase in use of "non-legal" authority,and questioning whether the distinction between legal and non-legal authority is itself breaking down).

[39] Richard Posner, *Economic Analysis of Law* (8th ed. 2015).

[40] Robert Cooter & Thomas Ulen, *Law and Economics* (6th ed. 2016) 10-11.

5.1 **Writing as a Recursive Process**

It tells us why writing is a deep recursive process of thinking, not just the putting of words on paper.[41] This being so, the writer (judge) must be conscious, recognizing that every opinion is dynamic, comprising a series of transactions between the writer and reader, negotiated in the realities of language used (both substance and form), prior texts and present text, the individual and the context. This is because writing is a communicative act—a process whereby one person "moves" ideas from his or her mind into the mind of another (the "transportation metaphor"). It is a process composed of many sub-processes.

Generally, judges write rulings and judgments. Judgments are complete-dress opinions delivered at the end of litigation. They require structured discussion of the facts, legal principles, and governing authorities and conclusion. The significance or number of the issues presented, the novelty of the question, and the complexity of the facts are among the factors that determine whether an opinion requires full-dress treatment or not.[42]

Rulings on the other hand are judicial opinions declared on preliminary matters pending the final disposition of a case. They include court decision on motions and applications filed either before or during or after hearing of a case. Usually, they are in the form of summary orders that simply state the disposition of an application, sometimes with a brief statement of findings and conclusions, but often with little or no in-depth explanation. Depending on its complexity, most judges would dispose of them during bench hearing. In other instances, the court may deem it necessary to elaborate if the ruling is dispositive of the case in its entirety or would substantially affect the materiality of the litigation.

Summary orders are uncommon for courts of record. They are often a type of opinion reserved for 'inferior' courts and tribunals, such as magistrates and area courts. They simply dispose of the case, sometimes with a brief

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[41] See, Linda Flower et al., *Reading to Write: Exploring a Cognitive and Social Process* (OUP 1990) (exploring social and cognitive processes in writing and expanding literary knowledge as an active constructive process); Patricia Portanova, J. Michael Rifenburg & Duane Roen, eds. *Contemporary Perspectives on Cognition and Writing* (U. Press Colorado 2017) (exploring the historical context of cognitive studies, the importance to our field of studies in neuroscience, the applicability of habits of mind, and the role of cognition in literate development and transfer).

[42] Benjamin N. Cardozo, *The Nature of the Judicial Process* (1949) 164-166 (stating the three categories of opinion writing as: (i) first category, comprised of those cases where the law and its application alike are plain, these cases do not merit even a non-precedential opinion; (ii) the rule of law is certain, and the application alone doubtful, such fact-oriented opinions do not add to our jurisprudence and thus do not require publication; (iii) where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law, in this case a full-length, written opinion is necessary). See also, Ruggero J. Aldisert et al., Opinion Writing and Opinion Readers (2009) 31 *Cardozo L. Rev.* 1, 8 (suggesting four categories of cases: where the facts and law are both clear; where the facts are clear but the law is not; where the law is clear but the facts are not; and where the law and facts are both disputed); S. I. Strong, Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges (2015) *J. Disp. Resol.* 93 (providing a structured and content-based method of writing fully reasoned decisions and opinions for both experienced and novice judges).

statement of findings and conclusions, but often with little or no explanation. Summary orders are usually unpublished.

Because of the centrality of opinion writing, a judge saddled with the responsibility of writing an opinion should first identify the type of opinion the case deserves. Next, she should consider the complexity of the facts and nature of the issues, the intended audience, and whether the opinion will be published. After considering the type and purpose of the opinion, it will be proper for the judge to begin to marshal the material facts, identify the issues and the applicable rules of law, and determine the appropriate form of judicial relief. This requires a judge to break the case down into its components.

At the stage of preparation to write, a judge certainly reaches some tentative conclusion. But here is the danger! It is advisable that the judge at this stage should go further, take pain to set out the reason in writing for the tentative conclusion. The reason should be what justifies the decision. As Judge Ruggero Aldisert wrote, "[I]f a judge wants to write clearly and cogently, with words parading before the reader in logical order, the judge must first think clearly and cogently, with thoughts laid out in neat rows."[43]

Whatever reasons the judge thinks justifies the conclusion must be treated as mere intuitive starting point. This is how to see writing. It is an art. The very process of writing imposes intellectual power on intuitive reasoning. A judge may well discover that once the writing process begins, theinitial tentative, intuitive conclusion, can hardly be justified by writing. This should not surprise the writer. The very process of writing creates rediscovery that could change the tentative conclusion. When it happens, the judge should be willing to change.If the logic of writing dictates a conclusion not initially held, judges should change their legal conclusions.

Justice Roger Traynor aptly describes the feeling this way: "[that he] found [no] better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day."[44]

Writing teachers know from cognitive studies that writing is thinking, and thinking more corrective. Judges should, if possible, therefore resist the temptation of issuing as a matter of course, bench ruling without deep reasoning. Intuition can be disciplined by deep reflection and the writing process.

[43] Ruggero J. Aldisert, *Opinion Writing* (2nd ed, 2009) 11.
[44] Roger Traynor, 'Some Open Questions on the Work of State Appellate Courts' (1957) 24 *U. Chi. L. Rev*. 211.

5.2. **The Speluncean Case Example**

The *Speluncean* case is one such example. [45] Judge Handy states how his initial intuition changed through the discipline of writing. He initially will support criminal liability for murder against the four defendants, but it will appear that the intellectual force of the writing suddenly dawned on him, making Handy to change to a common-sense approach. He narrates the experience: "When we came to the trial, the case at first seemed very complicated to me. The attorneys raised a host of legal issues. There were nice questions on the admissibility of evidence, and, in connection with the suit against the association, some difficult problems turning on the question whether the minister was a trespasser or a licensee. As a novice on the bench, I was eager to apply my law school learning and I began studying these questions closely, reading all the authorities and preparing well-documented rulings. As I studied the case, I became more and more involved in its legal intricacies and I began to get into a state approaching that of my brother Tatting in this case. *Suddenly, however, it dawned on me that all these perplexing issues really had nothing to do with the case, and I began examining it in the light of common sense.* The case at once gained a new perspective, and I saw that the only thing for me todo was to direct a verdict for the defendants for lack of evidence."[46]

Judge Handy certainly changed his mind because the writing process brings frontally to him what dawned on him the perplexity of the case. It is therefore important for judges to see writing as a process that disciplines thinking. If anything, writing is not simply putting the writer's thoughts on paper, but it is a "conversation" between the writer and reader. [47] One thing the legal community can borrow from composition scholars is to see writing as a process that creates and shapes thinking, not simply the expression of already-formed thought. The writing process does not simply reveal thought, it makes thought. In other words, writing isthinking-a different way of thinking.[48]

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[45] *Speluncean Explorers Case* (1949) 62 *Harv. L. Rev*. 1 (fictional judgment created by the legal philosopher Lon L. Fuller to puzzle reader of five possible solutions in the form of judicial opinion attributed to judges sitting on the fictional "Supreme Court of Newgarth" in 4300).

[46] Id. 26, per Judge Handy. See also, Richard A. Posner, *How Judges Think* (Camb: Mass. Harv. U. Press 2008) 63(stating "[A] judge often has a strong sense of which way a case should be decided, but when he tries to explain the decision in a judicial opinion the explanation will often turn out to be a rationalization of a result reached on inarticulable grounds, though sometimes the effort to explain will operate to refine and perhaps reverse the intuition that drove his vote."); Gerald Lebovitts, Alifyav. Curtin & Lisa Solomon, 'Ethical Judicial Opinion' (2008) 21 *Geo J. L. Ethics* 237, 245 (stating "[M]any "[m]isconceptions and oversights of fact and law are discovered in the process of writing."); Reed Dickerson, 'Legal Drafting: Writing as Thinking, or, Talk-Back from Your Draft and How to Exploit It' (1978) 29 *J. Legal Educ*. 373 .

[47] Teresa Godwin Phelps, 'The New Legal Rhetoric' (1986) 40 *Sw. L. J*. 1089 (applying principles of New Rhetoric to legal writing it urges the writer to view writing as a "conversation" with the reader).

[48] For example, James Boyd White says that law is "most useful and completely seen as a branch of rhetoric, defined as the art by which culture and community are established, maintained and transformed. See, James Boyd White, *Heracles Bow: Essays on the Rhetoric and Poetics of the Law*, (U. Wisconsin Press 1985) 28 (discussing the relationship between law, rhetoric and culture).

Formalism does not capture the essence of writing because the writer begins writing only when thoughts are complete, using writing merely to express thoughts.[49] The traditional view that writing is simply a tool for *expressing* thought, rather than one for *forming* thought is what composition theorists disagree with.[50] Composition scholars posit that the process of writing is the process of creating knowledge.Writing is constitutive of thought. It is a dialectical relationship between thought, language and writing. In fact, writing and then reading what is written, is a negotiating process of meaning between writer and text, reader and text, writer and reader, and so it creates meaning. Writing is thus a different mode of thinking-a dialogue between thought and language, between writing and thought, and between reading and writing. Writing generates thoughts.[51]

5.3. **Substantive Implications for Judicial Writing**

What substantive lesson can this teach judges? Judge Posner says: “The difference between what is merely thought in silence and what is written down is a reason for having judicial opinions rather than blind announcements of results.”[52]He accordingly, cautions against both the unrestrained use of bench ruling and against allowing law clerks to draft judicial opinions.

Why is writing reflective of thinking? Posner offers this answer: “In thinking about a case, a judge might come to a definite conclusion yet find the conclusion indefensible when he tries to write an opinion explaining and justifying it. The reason is that we do not think entirely in words, and certainly not entirely in sentences and paragraphs. Inarticulable or even unconscious feelings and impressions fill in around the sentence fragments that form in our minds as we think about a problem. Reasoning that seemed sound when "in the head" may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he has written will be wondering how an audience would react. Many writers have the experience of not knowing except in a general sense what they are going to write until they start writing.

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[49] J. Christopher Rideout & Jill J. Ramsfield, ‘Legal Writing: A Revised View’ (1994) 69 *Wash. L. Rev*. 35, 41-42 (referring to the traditional view of legal writing as primarily emphasizing clarity and accuracy).

[50] Linda Flower & John R. Hayes, ‘A Cognitive Process Theory of Writing’ (1981) 32 *C. Composition &Comm*. 365, 365-87 (stating how the writing process works positing that readers do not simply relay or even discover meaning in a text, rather they "construct" meaning); Linda L. Berger, ‘A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer’ (2000) 6 *J. Legal Writing Inst.* 58 (characterizing writing as "the weaving of thought and knowledge through language, not merely the clothing of thought and knowledge in language).

[51] Linda L. Berger, ‘Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context’ (1999) 49 *J. Legal Educ*. 155. See generally, Terrill Pollman, Building a Tower of Babel or Building a Discipline? Talking About Legal Writing (2002) 85 *Marq. L. Rev*. 887 (analyzing how theories of modem rhetoric and composition influences legal writing).

[52] Richard A. Posner, ‘Judges’ Writing Styles (And Do They Matter?)’ (1995) 62 *U. Chi. L. Rev.* 1421, 1448.

A link is somehow forged between the unconscious and the pen."[53] Certainly, writing disciplines thought.

5.4. 'Form' Implications for Judicial Writing

There is also "form" interrogated in writing. Though categorized as "form" or "style," it can carry with it substantive commitment. For can reveals the adjudicating philosophy of a judge. For example, Posner identifies two main judicial styles of writing-the pure and the impure styles. The pure stylist writes for the readers "eye" only, while the impure stylist writes more for the "ear."

The pure style is lofty, formal, imperious, impersonal, refined, ostentatiously correct even hieratic.[54] It is marked by detailed factual narratives, extended discussions of background propositions of law, rote recitations of undisputed legal principles. It is often solemn, highly polished and artifactual-far removed from the tone of conversation. The pure opinion style is characteristically a structured opinion, far removed from conversation, is solemn, impersonal, masks the judge's voice with details, numerous and lengthy quotations from previous judicial opinions, is useful for efficiency and readability. Judges that follow the style are in the majority.

On the other hand, is the "impure" style. It is often directed at the public. Impure opinions tend to be simple, candid, fact-based and uses almost no legalese. The impure style is best for the lay reader. The candor and simplicity that characterize the style make it easier to understand. Impure stylists tend to be more direct, forthright, 'man to man,' colloquial, informal, frank, even racy, even demotic."[55] Characteristically, it is more exploratory than it is declaratory, concrete, frequently using analogies, examples, hypotheticals, and illustrations, so as to bring abstract concepts home.[56] Impure stylists tend to eschew unimportant details. They elevate judges' personal voice; instead of quoting from prior authority. For example, they speak with personal signature, in a conversational tone. They are writers who write engagingly, for the ear, not the eye.

The impure approach is not superior to the pure style, but as an approach to legal writing it is bolder than the pure style because it runs counter to the expectations of its audience.[57] Posner himself acknowledged that both styles are not watertight as few judges' square in one camp or another.[58]

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[53] Id. 1447-48.
[54] Id. 1426.
[55] Id.
[56] It more is like a style heeding Holmes' admonition to "strike the jugular and let the rest go," *Oliver Wendell Holmes, Jr. Speeches* (1934) 77.
[57] See Posner, n. 52, 1431. (Cardozo, Brandeis, Frankfurter, Brennan, and the second Harlan, were all pure writers, yet they were some of the finest legal writers of the last century). See also, Bryan Garner, *Of Legal Style* (2nd ed. 2002) 11 (stating those of us less talented than a Cardozo, Brandeis, Frankfurter, Brennan, or Harlan are more likely to "stumble—or plunge—when we try it.").
[58] Posner, n. 52, 1431-32.

Notwithstanding, style reveal something deeper-the judges thought, thinking process and how the judge connects with the social controversies before her court. This is because though many think that words enable thought, in reality, words can also substitute for thought. The pure style is an anodyne for thought. The impure style forces-well, invites-the writer to dig below the verbal surface of the doctrines that the judge is interpreting and applying.[59] This being so, there appears good basis to prefer the impure judicial style of writing as it is more congruent with judicial pragmatism.

The way a judge writes undoubtedly has a bearing on the judge's perception and philosophy. While there is really no clear-cut dichotomy between the pure and impure stylists, it can with a modest degree of confidence be said that judges who fall more in the class of impure stylist have a keener sense of justice.

The impure judicial stylists generally take more pains over style than the pure stylists do. In fact, unless a writer is a particularly gifted one, it takes much effort to write in the impure style.[60] This is to be expected. The pure style is what comes naturally to the pen of a person who is legally trained. This invariably means that impure writers are more concerned about the business of adjudication because the style reveals to the audience what the judge aims at. Pure writers aim primarily at the legal community (judge or judges of the lower court whose decision is being reviewed and the lawyers for the parties). To use the very words of Judge Posner, "anyone else is an (authorized) eavesdropper."[61] But that is not the case with impure writers. Impure judicial stylists are conversational. They write as if it were for the "ear" rather than for the "eye." They choose their audience. A larger one! Not just the legal community. They write for the lay audience, explaining why a case is decided in the way it is.

Studies in psychology (cognitive science) show that the audience sought to be addressed by any writing carries with it social and moral commitments.[62] So, while we are not in a position to state as categorical truth that impure judicial writers are superior to their pure stylist counterparts, "any more than all impure poetry is superior to all pure poetry,"[63] there is no question that Wole Soyinka's impure poetry is sure deeper than many pure poetry or other pure narrative literary writings. And who says, that Soyinka's impure style isn't reflective of his philosophy, particularly in advancing social justice.

In like manner, the writing style of a judge shades to a large extent with the judge's judicial stance. Judge Posner for example acknowledges that the pure style fits naturally with judicial formalism.[64] The formalist believes in right and

[59] Id. 1447
[60] Posner, n. 52, 1430.
[61] Id. 1431.
[62] Steven Pinker, *The Stuff of Thought: Language as A Window into Human Nature* (2007) (trilogies exploring the nature of language, the mind and human nature).
[63] Posner, n. 52, 1432.
[64] Posner, n. 52, 1433 (stating "Either way, the pure style fits naturally with formalist content. Yet there are exceptions."). Even though Justice Cardozo was a formalist he wrote pragmatic,

wrong, truth and falsehood, and so believes that the function of a judicial opinion is to demonstrate to the legal community that the decision is logical right. But pragmatists are different. Impure stylists, largely pragmatic judges, while observing the integrity of law, subscribe to deciding non-routine cases in ways that produce the most reasonable result, with due regard for systemic constraints on freewheel "reason."[65]

Impure pragmatic judges-connect law to the very concerns of social life, giving life to law in "reason" steeped in justice and pragmatism.[66] With no fear of contradiction we can say that exceptional judges like Justice(s) Oputa, Ayoola, Kayode Eso, Niki Tobi,[67] to mention only a few, made concrete in Nigeria, Justice Holmes pragmatic approach to law: "the life of the law has not been logic; it has been experience," an approach he later elaborated in his article, "The Path of the Law."[68] Following this philosophy of pragmatic adjudication, centered on judicial concern for consequences, impure stylists write opinion disposing cases based more on policy rather than on conceptualisms and generalities; considering not only consequences to the parties, but also for systemic and including institutional consequences.

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a rare feat acknowledges by Posner, saying "when discussing Cardozo that it is possible to be a pragmatic judge yet write one's opinions in the conventional pure style, but it is difficult. If you are the kind of judge who thinks that the considerations that bear on a judicial decision range far beyond the canonical materials of formalist legal thought—if you think that values (not just feelings), history, and policy are legitimate considerations-you will find the pure style confining because it is not designed for the expression of those considerations."). Id. 1448.

[65] Posner, *How Judges Think* (Camb: Mass. Harv. U. Press 2008) 13 (stating "[T]he pragmatic judge is a constrained pragmatist. He is boxed in, as other judges are, by norms that require of judges' impartiality, awareness of the importance of the law's being predictable enough to guide the behavior of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes. The box is not so small that it precludes his being a political judge, at least in a nonpartisan sense. But he need not be one unless "political" is given the broadest of its possible meanings that I reviewed earlier, in which the "political" is anything that has the slightest whiff of concern for policy. A pragmatic judge assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it.").

[66] Id. 41 (stating that pragmatism refers to basing judgments on consequences, rather than on deduction from premises in the manner of a syllogism, thus belonging to a family resembling utilitarianism); Richard A. Posner, *Law, Pragmatism, and Democracy* (2003), ch. 2 (stating that good pragmatic judges balance two types of consequence, the case-specific and the systemic. It is suggested that most American judges are pragmatists. See, Brian Z. Tamanaha, 'How an Instrumental View of Law Corrodes the Rule of Law' (2007) 56 *DePaul L. Rev*. 469 @ 490 ("It is fair to surmise that a greater proportion of contemporary judges are judicial pragmatists . . . Judicial decisions today routinely cite policy considerations, consider the purposes behind the law, and pay attention to law's social consequences"); Nelson Lund, 'The Rehnquist Court's Pragmatic Approach to Civil Rights' (2004) 99 *Northwestern U. L. Rev*. 249. For a discussion of the pros and cons of pragmatic interpretation, see John F. Manning, 'Statutory Pragmatism and Constitutional Structure' (2007) 120 *Harv. L. Rev*. 1161.

[67] See Festus Emiri, 'Judicial Application of Language and Philosophy in the Judicial Policy-Making Process' [2021] Biennial Symposium on Niki Tobi of 2nd December, 2021, Abuja (stating that the concreteness and cadence nature of Justice Niki Tobi, JSC judgments reveals his deep pragmatic stance, rendering them proper candidates of "legal opinion-museum" worthy). See Symposium on Niki Tobi of 2nd December, 2021, Abuja.

[68] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harv. L. Rev*. 457.

6. WHAT JUDGES CAN LEARN FROM COGNITIVE SCIENCE

By revealing the connection between thinking and writing as a recursive process and further showing that style matters, cognitivists invite judges to introspectively interrogate both the substance and form of judicial opinion writing. Further lessons can be learnt. While the prevailing the traditional "pure" style will hardly disappear, cognitive science encourages judges to see the need to slant writing in the "impure" direction; because it is largely an antidote to our (legal) traditional unproductive writing conventions rooted in abstraction, excessive formality, and stilted prose.

Judges should lead the legal community in the new path of conversational writing—writing concretely-without muting the speaking voice.After all, much of law is constituted as stories. Judges should therefore centralize good prose writing, eschewing formulaic writing. Lawyers are storytellers. There's no reason why judges writing shouldn't evoke good storyteller's response, recognizing that their writing constitutes general benchmark for how lawyers and law students view what is good writing.[69]

7. CONCLUSION

Cognitivists reveal to us that writing and thinking are partners. They go hand in hand. Judges writing matters. And it must be taken seriously. Judges, especially when faced with hard, interrogating reasoning beyond the conventional categories need a writing style beyond conventionalism. Since hard cases call into question a range of considerations beyond the normal, they may need the uncommon style that interrogate considerations that bear on judicial decision beyond canonical materials of formalist legal thought. Judges desirous of being "change-makers" are therefore encouraged to write more impure and pragmatic. This will be so because a judge who thinks that the considerations that bear on a judicial decision range beyond canonical legal materials will find the pure style confining. The style is not designed for the expression of those considerations. For example, Judge Handy, would have found it conscripting to express his pragmatic reasoning in the pure style. He therefore chose the impure style to drive home the common-sense conclusion.[70]

Cognitive science by showing the intricate difference between what we think and what we write is a reason for judges to take seriously judicial writing as serious business. It discourages the practice of blind announcements of outcome, and then, judges thereafter taking responsibility for their opinion, without consciously disciplining the thinking through the writing process.

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[69] Lebovitts, et. al. n. 6, 254 (noting "[J]udicial opinions are the building blocks on which future lawyers model their legal-writing skills. If judges write in a particular way, then students will take their cues from that style in crafting their own writing: . .Appellate opinions are the main source of educational material in casebooks that law professors use to teach the next generation of lawyers."). See also, David Mellinkoff, *Legal Writing: Sense and Nonsense* (West Group, 1982) 70 (book-length brief in favor of plain-English legal writing, urging legal writers to eschew traditional legalese, states that judges' opinion writing affects the basic writing pattern of the profession).

[70] *Speluncean Explorers Case* (1949) 62 *Harv. L. Rev*. 1.

There is something further fundamental that judges may need to reflect on about cognitive science insight in writing and thinking. Since judges are selected from a pool of experienced lawyers who have not been given instruction in judicial opinion writing and other functional judicial skills, writing and thinking as a judge can be challenging. Judicial writing and work interrogate significantly different skills from those associated with advocacy.

While a measure of judicial education opportunities abounds, teaching judges writing should be an ongoing concern. Unfortunately, many seminars and workshop for teaching judges writing suffer from structural challenges. Some judicial education centers would only use judges as faculty, based on the fact that judges prefer to be taught only by other judges.But the practice can result in a number of self-reinforcing behaviors. For example, judges as faculty are known to emphasize writing that they consider important, with little input from external or empirical sources.This can be the problem.[71] Judges are not necessarily experts qualified to teach writing and thinking skills, despite their experience on the bench.Because judges alone are used as faculty in many judicial writing seminars, the 'teachers' end up focusing on personal anecdotes or reinforcing traditional writing techniques that may not address the deeper challenges of current best-practices in producing well-reasoned opinions. Unquestionably, reforming judges writing training to reflect "outsider" insight from the cognitive science and writing scholarship can help improve judicial writing style and language. Judges therefore should not shy away from unashamedly borrowing from cognitive science to improve the art of adjudication.

[71] See, Strong, n. 42, 96 (noting judges' aversion for use of non-judges faculty, based on the fact that most judges prefer to be taught by other judges, but stating why the practice of self-reinforcing behaviors does not help the judiciary to address deeper challenge of producing well-reasoned judgments, requiring interrogating anew judicial writing techniques).

FOREIGN DIRECT INVESTMENT REGULATIONS IN COMPARATIVE PERSPECTIVE: AN ANALYSIS OF SELECTED JURISDICTIONS.

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Abstract

This paper entails an analysis of the legal regulations of FDI in Canada, the United States of America and the United Kingdom in comparison with Nigeria. Foreign direct investment in these countries is subject to strict regulatory oversight to ensure national security, especially when foreign entities seek to acquire or gain control over businesses. This research adopts a qualitative method, analyzing legislation, such as Foreign Investment and National Security Act of 2007 (FINSA), Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018,Investment Canada Act alongside the oversight functions of the Committee on Foreign Investment in the United States (CFIUS) which aim to strike a balance between encouraging economic growth and safeguarding national interests. These statutes examine the procedures, review processes and criteria for national security threats, and the mitigation mechanisms available and comparative references are made to other jurisdictions, such as Nigeria. This study found out that despite the existence of legal regulations protecting FDI in some selected jurisdictions, Nigeria as a country can take a leap to improve on her FDI Regulations. The study recommends that a committee should be set up by the president that should look into foreign entities coming into Nigeria that might be a threat to National Security. The study further recommends that an investor's history of corruption should be considered a valid factor in determining potential threats to national security. In conclusion, the paper delves into the future directions for Nigeria's FDI legal framework. It considers ongoing efforts and potential reforms aimed at enhancing the investment climate.

Keywords: Multi-National Companies, Foreign Direct Investment, Investors, legal Regime, National security,

1. INTRODUCTION

Foreign Direct Investment (FDI) regulations are integral to understanding the mechanisms governing foreign direct investment. These regulations are important for potential foreign investors to study to understand how their investments may be managed and to ensure compliance with the local laws and regulations.[1] With the UK, Canada and the United States being Africa's most populous nation, it continues to attract an increasing number of FDI. Foreign Direct investment (FDI) therefore plays a very important role in the economic development of a nation and it is important for potential investors to understand the regulatory framework and landscape that are applicable.

This study entails an analysis of foreign direct investment regulations in Canada, the United States of America and the United Kingdom in comparison with that of Nigeria. These countries were chosen due to the fact that they are developed countries whose legal regulations of Foreign Direct Investment share similarities with that of Nigeria thereby making them suitable for this comparative analysis.

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2. LEGAL REGULATIONS OF FDI IN THE UNITED STATES OF AMERICA

Foreign investors who attempt to enter the United States market, or increase their current market position by acquiring an existing United States business, must comply with the laws regulating foreign direct Investment. Laws considered include the Foreign Investment and National Security Act of 2007[2] (FINSA),Committee on Foreign Investment in the United States, an intergovernmental entity known as CFIUS (or the Committee) and the Foreign Investment RiskReview Modernization Act (FIRRMA)2018.[3]These laws prohibit unfair aggregation of economic power which might weaken or destroy competition and also restrict foreign participation in some industry that has to do with national interest, such as The United States defence industry and other critical sector of the economy. The dangers of giving foreign investors access to national security information as well as the ability to control the production of defense materials outweigh the benefits of unrestricted investment in the defense industry.

2.1 The Foreign Investment and National Security Act of 2007

Section 721 of the Defense Production Act, also known as the Exon-Florio Amendment Act established a statutory framework for the United States Government to analyze foreign acquisitions, mergers, and takeovers transactions of privately-owned entities within the United States to determine whether such transactions affect the national security of the United States. The Foreign Investment and National Security Act of 2007[4] amends Section 721 for the purpose of strengthening the process by which such transactions are reviewed and investigated for national security concerns. In addition, the Act provides for a system of congressional notification so that congress is able to conduct proper oversight of the national security implications of foreign direct investment in the United States to ensure that it is beneficial and has no adverse impact on U.S. national security.[5]

The Act was enacted to ensure national security while promoting foreign investment, creation and maintenance of jobs, to reform the process by which such investments are examined for any effect they may have on national security, to establish the Committee on Foreign Investment in the United States, and for other purposes.[6] The President, or a presidential designee is authorized to conduct an investigation of a proposed acquisition of an American entity by a foreign person.[7] During this investigation, the President must determine whether there is credible evidence to support a finding that the change in control may result in actions that threaten national security and the President has the appropriate authority to protect national security.

The Act provides for guidance on certain transactions with national security implications including transactions that would result in control of critical infrastructure relating to United States national security by a foreign government or an entity

[2] 5 U.S.C 5315 and 552bss
[3]Pub. L. No. 115-232 1703(a)(4)(B)(iii)
[4]5 U.S.C 5315 and 552b
[5] http://www.ustreas.gov accessed 10 March 2025
[6]*Ibid*
[7] Section 2(1)bThe Foreign Investment and National Security Act of 2007

controlled by or acting on behalf of a foreign government. The federal government retains the right to place 'safeguards' on foreign investments when U.S. security is at risk.[8]

2.2 The Committee on Foreign Investment in the United States (CFIUS)

The United States has a longstanding commitment to welcoming foreign investment. President Bush's statement on open economies reaffirmed that commitment, recognizing that prosperity and security are founded on a country's openness.[9] CFIUS carries out its responsibilities within the context of this open investment policy. In the preamble to FINSA,[10] Congress states that the purpose of the Act is to ensure national security while promoting foreign investment and the creation and maintenance of jobs and to reform the process by which such investments are examined for any effect they may have on national security.[11]

The President and CFIUS has the authority to review any 'covered transaction,' defined in the regulations as any transaction that is proposed or pending after August 23, 1988, by or with any foreign person, which could result in control of a U.S. business by a foreign person.[12] The purpose of the national security reviews conducted by CFIUS is to allow CFIUS to identify and address any national security risk that arises as a result of a covered transaction, and, to request that the President determine whether to suspend or prohibit a covered transaction or take other action.[13]

CFIUS focuses solely on any genuine national security concerns raised by a covered transaction, not on other national interests. Section 721(b)(2)(E) of the Defense Production Act of 1950[14] as amended by the Foreign Investment and National Security Act of 2007[15] requires CFIUS to complete a review of a covered transaction within a 30-day period. In limited cases, following a review, CFIUS may initiate an investigation, which it must complete within a subsequent 45-day period. An investigation can be initiated only where: (a) CFIUS or a member of CFIUS believes that the transaction threatens to impair the national security of the United States and that threat has not been mitigated; (b) an agency designated by the Department of the Treasury as a lead agency recommends, and CFIUS concurs, that an investigation be undertaken; (c) the transaction is a foreign government-controlled transaction; or (d) the transaction would result in foreign control of any critical infrastructure of or within the United States, if CFIUS determines that the transaction could impair national security and that risk has not been mitigated.[16] With respect to

[8]American Bankers Association 'Risk and Compliance Conference'(June 102025) https://www.aba.com accessed 10 March 2025

[9]President Bush's Statement on Open Economies in Focus: Jobs & Economy 'Open Economies Policy Statement'<https://georgewbush-whitehouse>

[10]*Ibid*

[11] See the CFIUS website at https://www.treasury.gov accessed 10 march 2025.

[12] Federal Register Vol. 73, No. 236 Monday, December 8, 2008 / Notices

[13] Treasury Releases Final Regulations to Reform National Security Reviews for Certain Foreign Investments and Other Transactions in the United States, January 13, 2020, https://home.treasury.gov accessed 11 March 2025

[14]50 U.S.C. App. 2170

[15]50 USC 4565

[16]ChristopherTipler 'Defining National Security: Resolving Ambiguity in The CFIUS Regulations' (2014) Penn Carey Law: Legal Scholarship Repository

A primary focus of FIRRMA is to prevent the theft of trade secrets and intellectual property of U.S. companies as well as to keep foreign companies from investing in or purchasing assets near U.S. military bases. FIRRMA expands the CFIUS review process and will likely make it more difficult for foreign companies to successfully invest in the U.S. if national security interests are potentially at risk.[32]

Parties now face a more challenging and complex analysis when deciding whether they need to file for clearance under the new FIRRMA regulations. The underlying issue is that transactions are no longer limited to those that result in the foreign control of a business. CFIUS can now look at transactions where there is less foreign control by the investor.

2.4 Federal Restriction on Foreign Ownerships

There are certain sectors that are often protected by restrictions on foreign control of certain types of businesses due to military and political interests. Since 'foreign control' is not defined, foreign investors must carefully investigate the scope of these provisions when examining possible U.S. acquisitions in areas such as natural resource excavation, communications, and national defense. For example, the Mineral Lands Leasing Act of 1920 contains a provision that prohibits the Secretary of the Interior from granting excavation leases to aliens whose nation does not allow similar or like privileges to U.S. citizens or corporations.[33]

Federal restrictions on foreign ownership also protect industries vital to the national defense when the industry provides materials required by current defense contracts, or the industry is crucial to the maintenance of a healthy economy and the operation of the national government. For example, the Atomic Energy Act of 1954 provides that while a foreign entity may not obtain a controlling interest in a nuclear facility, the Nuclear Regulatory Commission may allow a foreign enterprise to maintain substantial interests in such facilities.[34] For political and national security reasons, the United States Congress has historically shielded key industrial sectors within the U.S. economy so as to restrict, or in some cases block foreign direct investment (FDI) from non-U.S. investors and governments.

Examples are: Airlines where the U.S. Department of transportation has established limits on foreign ownership in U.S.-based air carriers.[35], transportation in title 46 of the United States Code outlines certain barriers to FDI in the U.S. maritime industry. Mining, the Mineral Leasing Act of 1920[36] (as amended) governs the disposition of certain U.S. natural resources and defines what opportunities are open to foreign investors. The Deep-Water Ports Act of 1974[37] as amended restricts FDI to certain defined levels in deep water oil and liquid natural gas ports. On Defense, Executive Order No. 12829, the National Industrial Security Program, defines which contractors

[32] Section 9(1)Foreign Investment Risk Review Modernization Act of 2018.
[33]Jonathan Bonnitcha Suzy Nikiéma 'Rethinking National Investment Laws A study of past and present laws to inform future policy-making' (2023) 4 International Institute for Sustainable Development 4
[34]ibid
[35]Jon Bateman 'U.S China Technological Decoupling: A Strategy and Policy Framework' (Endowment for International Peace 2023) <https://carnegieendowment.org > accessed 10 March 2025
[36]30 U.S.C. § 181
[37]33 U.S.C. 1501

may access U.S. government classified information and which companies are barred under 'foreign ownership, control or influence' (FOCI). On Communications & Media, the Communications Act of 1934[38] (as amended) restricts the percentage of ownership which is permitted for a foreign corporation or investor seeking U.S. communications licenses, including broadcast, wireless personal computer systems, cellular and aeronautical.

On Nuclear Energy, this is a highly complex and regulated area, and FDI in the nuclear energy field is significantly limited. On Agriculture, the Agricultural Foreign Investment Disclosure Act of 1978[39] outlines the requirements when a foreign person desires to acquire an interest in 10 or more acres of agricultural land in the United States. On Banking, the banking sector of the U.S economy is highly regulated with respect to foreign financial institutions. See the International Banking Act as amended by the Foreign Bank Supervision Enhancement Act of 1991.[40]

On Real Estate, a foreign investor needs to understand that the U.S. maintains a comprehensive set of laws designed to protect the environment. Any domestic or foreign investor who purchases title to U.S. real estate may be legally obligated to remediate or clean-up any existing environmental problems on or within the property, even if those problems were caused by prior owners. For example, sites where former industrial plants once operated or older buildings which contain asbestos or other hazardous materials will pose significant and often costly risks of remediation to the purchaser. This is why before foreign investors decide to purchase real estate in the U.S. comprehensive due diligence needs to be conducted in order to confirm whether any environmental problems exist on the targeted property.

3 LEGAL REGULATIONS OF FDI IN CANADA

3.1 Investment Canada Act (ICA)

The Minister of Innovation, Science and Economic Development is primarily responsible for the administration and enforcement of the ICA. The Minister of Canadian Heritage is responsible for the administration and enforcement of the ICA where the investment or proposed investment involves a cultural business.

The Foreign Investment Review and Economic Security (FIRES), which is part of the Ministry of Innovation, Science and Economic Development Canada (ISED), is the government department responsible for the administration of the Investment Canada Act (ICA), The Investment Canada Act (ICA)[41] regulates FDI and indirect foreign investments in Canadian businesses by non-Canadians. The ICA is a statute of general application that applies to any acquisition of control of a Canadian business by a foreign investor.

Section 5 of the Act provides that the Invest in Canada hub's mandate is for the purpose of supporting economic prosperity and stimulating innovation in Canada, to promote foreign direct investment in Canada, attract and facilitate investment and coordinate the efforts of the government, the private sector and other

[38] SEC. 147 U.S.C. 15
[39] 7 USC Ch. 66:
[40] P.L. 102-242, 105 Stat. 2236, 2303-04 (Dec. 19, 1991).
[41] S.C. 2017, c. 20, s. 442

stakeholders with respect to foreign direct investment in Canada. The Act makes provision for the creation of an Investment Hub which has the function of(a) develop and implement a national strategy to attract foreign direct investment to Canada (b**)** create and maintain partnerships with any department, board or agency of any government in Canada, the private sector in Canada or any other Canadian stakeholder with an interest in foreign direct investment in order to optimize the benefits of any programs, resources and services that are offered with respect to foreign direct investment (c**)** plan, direct, manage and implement activities, events, conferences and programs to promote Canada as an investment destination (d**)** collect, prepare and disseminate information to support the decisions of foreign investors with respect to foreign direct investment in Canada; and provide services in a coordinated manner to foreign investors with respect to their actual or potential investments in Canada.

On 22 March 2024, the Investment Canada Act was amended, following royal assent, this amendment ushered in a modernization package aimed at enhancing the Foreign Direct Investment (FDI) screening mechanism.[42] Key modifications introduced by the Bill include: The implementation of a pre-closing filing requirement in specific sectors deemed sensitive to national security or economic stability and an increase in penalties for non-compliance with the Act's provisions.

The Minister of Innovation, Science, and Industry is vested with expanded powers concerning foreign investments. These powers include the authority to: a) Impose interim conditions on an investment during the national security review process. b) Accept binding commitments from investors aimed at mitigating potential national security risks associated with the investment. The new legislation facilitates greater international cooperation and information exchange related to foreign investment reviews and national security assessments.[43]

The criteria for FDI review have been updated to consider intellectual property rights developed with governmental support and the use and protection of personal information of Canadians. An investor's history of corruption is now considered a valid factor in determining potential threats to national security. The amendment clarifies that the scope of FDI screening also covers asset sales.

If the relevant financial threshold under the ICA is exceeded (subject to certain exceptions), the statute provides for a process of pre-merger review and approval of foreign investments to determine if they are of net benefit to Canada, also referred to as net benefit review. The indirect acquisition of a Canadian business through the acquisition of a foreign non-Canadian parent is typically exempt from having to obtain approval.[44]

Where approval is required, the investor must file an application for review and the transaction must be approved by the relevant minister. A key element in the

[42] UN Trade and Development Investment Policy Hub 'Tightens the FDI screening regime' (03 Sep 2024) <https://investmentpolicy.unctad.org> accessed 10March 2025.
[43]Baker and Mackenzie'Canada: Key Insights and Outlook Foreign Investment 2024 Year in Review' (January 13, 2025) https://foreigninvestment.bakermckenzie.com accessed 10 March 2025
[44]White and Case 'Foreign direct investment reviews 2023: Canada' (20 March 2023) https://www.whitecase.com accesses 10 March 2025

application for review is the requirement to set out the investor's plans for the Canadian business, including plans related to employment, participation of Canadians in the business and capital investment. An application for review is a much more detailed document than a notification.

Where approval is not required, the investor has an obligation only to file a simple administrative notification form, which can be filed up to 30 days after closing. In either case, filing of an application for review or just a notification, the Canadian government has jurisdiction for 45 days after receipt of such a filing to order a national security review if there are concerns.[45]

The Canadian government has the power to review any transaction, including minority investments, in which there are reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security. Unlike the net benefit review process under the ICA, there is no financial threshold for investments under the ICA's national security review regime.

In assessing whether an investment poses a national security risk, the Canadian government considers factors that focus on the potential effects of the investment on defense, intelligence, sensitive technology, sensitive personal data, critical minerals and critical infrastructure and supply. The Canadian government also focus on transactions related to public health or involved in the supply of critical goods and services to Canadians or to the Government of Canada.

Transactions that run the risk of raising national security concerns can seek clearance by making any ICA filings well before the proposed time of closing at least 45 days, although giving the officials more time to review would be prudent.[46] Under section 25(3) of the ICA, the government has to notify the investor of an order for a national security review without delay after the order has been made. When considering filing and closing timelines, it is recommended that the investor allow for at least one additional business day following the expiry of the 45-day waiting period.[47]

Where a transaction gives rise to national security risks, non-Canadian investors should consider filing notice of the transaction with the minister at least 45 days plus one business day prior to closing to obtain pre-clearance (assuming the minister does not seek further time under the national security review regulations). For an investment that does not require notification, such as a minority investment, the Canadian government encourages non-Canadian investors to contact FIRES at the earliest stage of the development of their investment projects to discuss their investment.

As in other jurisdictions, it is therefore critical for foreign investors to consider Canadian national security review issues in planning and negotiating transactions. In particular, an investor should ensure that it secures a closing condition predicated on

[45] SusanHutton and Megan Macdonald ‘Stocking Canada's Foreign Investment Review Toolbox: The Future of The Investment Canada Act’ (2012) Vol 25(1) Canadian Competition Law Review3
[46]Aird &Berlis LLP ‘Doing Business in Canada: Regulation of Foreign Investment and Merger Regulation’ (2023)<https://www.airdberlis.com> accessed 10March 2025
[47]*Ibid*

pursuant to the recently enacted voluntary filing mechanism under the ICA, which came into force in August 2022.[52] A national security review of an investment may be ordered if the Minister of Innovation, Science and Industry believes the investment could be injurious to Canada's national security which is not defined in the ICA.

3.2 The Foreign Investment Protection and Promotion Agreements (FIPA)

Canada has entered into various Foreign Investment Protection and Promotion Agreements with six European Union (EU) Member States (the Czech Republic, Hungary, Latvia, Poland, Romania and Slovakia).[53] In 2003, the European Commission requested that acceding member states bring their FIPAs with Canada into conformity with EU law. The Czech Republic, Hungary, Latvia, Poland and Slovakia became EU members in 2004, while Romania joined in 2007.[54] These agreements provide protections for foreign investors by ensuring they are treated fairly and equitably, protecting their investments from discriminatory or unfair treatment, and providing access to dispute resolution mechanisms. FIPAs aim to: guarantee fair and equitable treatment for foreign investors, ensure protection against expropriation without compensation, provide dispute resolution mechanisms (such as international arbitration in case of conflicts.[55]

3.3 Sector-Specific Regulations

Certain industries in Canada are subject to specific regulations regarding foreign investment. These sectors include: telecommunications where foreign ownership in telecommunications companies is subject to specific limits under the Telecommunications Act.[56]

In transportation foreign ownership in Canadian airlines and air carriers is limited under the Canada Transportation Act.[57]Under banking and financial services, foreign investment in the banking and financial services sector is regulated by the Bank Act, which sets limits on the percentage of control that can be held by foreign entities.[58]In Energy and Natural Resources, some provinces have specific regulations regarding foreign investment in natural resource industries, particularly oil, gas, and mining.[59]

4. LEGAL REGULATIONS OF FDI IN THE UNITED KINGDOM

The UK encourages foreign direct investment with the department of International Trade actively promotes direct foreign investment, and prepares market information for a variety of industries. The regulatory landscape of Foreign Direct Investment in the UK involves a balance of promoting investment while safeguarding national security,

[52]*Ibid*
[53]Global Affairs Canada 'Canada EU6 Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations (November 2024) https://www.international.gc.ca accessed 10March 2025
[54]*Ibid*
[55]Gilbert Gargine 'The Canadian Policy on the Protection of Foreign Investment and the Canada-China Bilateral Investment Treaty' (2019) Vol 25 (1) Beljin law review 3
[56]*Ibid*
[57]*Ibid*
[58]*Ibid*
[59]*Ibid*

competition, and the economy. The National Security and Investment Act 2021[60] and the oversight of regulatory bodies like the Competition and Markets Authority (CMA) and the Financial Conduct Authority (FCA) are crucial in maintaining that balance. Additionally, sector-specific laws ensure that sensitive industries, such as defense, telecommunications, and energy, remain under close scrutiny for foreign involvement.

4.1 The National Security and Investment Act 2021

The National Security and Investment Act 2021 (NSI Act)[61] is a significant piece of legislation allowing the UK Government to scrutinize and potentially block acquisitions and investments in sensitive sectors or locations which could impact upon national security. The NSI Act came into force on 4 January 2022. The NSI Act gives the UK Government the ability to block or apply conditions to certain transactions. Although the Government will not usually use its powers under the NSI Act to block transactions, the impact on deal timelines could be significant, with the NSI Act requiring notification of relevant transactions prior to completion.[62]

The NSI Act defines 17 high risk sectors. The 17 sectors are advanced materials, advanced robotics, artificial intelligence, nuclear communications, computing hardware, critical suppliers to government, cryptographic authentication, data infrastructure, defence, energy, military and dual-use technologies, quantum technologies, satellite and space technologies, critical suppliers to the emergency services, synthetic biology, and transport.[63] Where target businesses operate in any of the identified high risk sectors, a mandatory notification may be required.

Notifications under the NSI Act must be made to the Investment Security Unit (ISU) which sits within the Cabinet Office. After a notification has been submitted, the ISU will confirm whether the notification has been accepted or rejected. Once a notification form has been accepted, the ISU will decide within an initial 30 working day review period starting on the date the notification is accepted either to: (a) clear the transaction; If the ISU decides to clear the transaction at this stage, notice will be given to the parties before the end of the review period, confirming that no further action will be taken under the NSI Act. During this period, the ISU will carry out a detailed assessment of the potential national security risks and decide what, if any, action it considers necessary and proportionate to address any of these risks. The ISU may extend the assessment period for an additional period of 45 working days. This means that the statutory timetable for review is potentially up to 105 working days, although the overall assessment period could also be longer. Requests for further information are issued (which will have the effect of pausing the statutory timetable), or if the ISU and the parties agree a voluntary period for further scrutiny after the additional 45 working day period ends.

Failure to submit a mandatory notification when required will render the relevant transaction void, as well as providing grounds for civil and criminal penalties.

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[60] National Security and Investment Act 2021 (c. 25)
[61] *Ibid*
[62] Simon Ward 'Could the UK's National Security and Investment Act affect your business?' (25th September 2024)https://www.farrer.co.uk accessed 10 March 2025
[63] Section 8 NSI Act

Transactions falling within the mandatory regime therefore require clearance prior to completion. At present, the mandatory notification regime only applies to acquisitions of control over qualifying entities and does not apply to acquisitions of qualifying assets.

The UK government has powers to call in for review any in-scope transaction whether or not there is a reasonable suspicion that it could give rise to a risk to national security.[64] A call-in notice may be issued at any time while the transaction is in progress or contemplation, or within a specified period following its completion. If a national security risk has been found, the UK government can make a final order to block a transaction (or require a transaction to be unwound). Although the NSI Act applies in principle to domestic as well as foreign bidders, the focus of the regime is clearly foreign investment.[65]

4.2 Competition and Markets Authority (CMA)

The UK Competition and Markets Authority reviews large mergers and acquisitions to ensure that they do not substantially reduce competition in the UK market.[66] If a foreign acquisition is large enough, the CMA can intervene if it believes the transaction would result in less competition in the UK market, potentially harming consumers. Subject to Specific Regulation, certain sectors in the UK are subject to specific regulatory frameworks, especially where foreign investments may be deemed more sensitive. Examples of these include telecommunications, energy and utilities, defense and financial Services[67]

4.3 The Companies Act 2006

The Companies Act governs how businesses, including foreign-owned companies, operate in the UK. This includes the registration of companies[68], the duties of directors, and the rights of shareholders. While this law is not specifically designed for FDI, it provides a framework within which all companies, including those owned or controlled by foreign investors, must operate. Section 76E of the Companies Acta prevents the registration of a company under this Act by a name if the Secretary of State is satisfied that the registration of the company by that name is necessary (a)in the interests of national security, or (b)for the purposes of preventing or detecting serious crime.

4.4 Investment Incentives in The United Kingdom

The UK offers a range of incentives for companies of any nationality locating in depressed regions of the country, as long as the investment generates employment. The UK government has a general policy of encouraging FDI, as foreign investment is seen as vital for economic growth, creating jobs, and supporting innovation.[69]

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[64] Section 1(1) NSI Act 2021
[65] *Ibid*
[66] https://www.gov.uk accessed 10 March 2025
[67] *Ibid*
[68] Section 7 (2) Companies Act 2006
[69] Department for Business and Trade 'Invest 2035: the UK's modern industrial strategy' (November 2024)

Various incentives, including tax breaks and funding opportunities, may be available depending on the region and sector. UK Trade and Investment (UKTI**)** department promotes FDI and supports foreign businesses setting up or expanding in the UK. UKTI provides advice, incentives, and support services for investors.[70] UKTI works with its partner organizations in the devolved administrations Scottish Development International, the Welsh Government and Invest Northern Ireland and with London and Partners and Local Enterprise Partnerships (LEPs) throughout England, to promote each region's particular strengths and expertise to overseas investors.

Separate legislation, granting similar powers to local authorities, applies to Scotland and Northern Ireland. Where available, Local authorities in England and Wales also have power under the Local Government and Housing Act of 1989[71] to promote the economic development of their areas through a variety of assistance schemes, including the provision of grants, loan capital, property or other financial benefit.

5. COMPARATIVE ANALYSIS OF THE LEGAL REGULATIONS OF FDI OF SELECTED JURISDICTION

The legal regulations of Nigeria, UK, USA, and Canada are compared, highlighting areas of similarities and differences. A comparison is also made between Nigeria, USA and UK because they all have regulators regulating FDI in Nigeria.

All four nations generally welcome foreign investment and recognize its potential to contribute to economic growth, job creation, and technological advancement. While specific sectors might have restrictions, the overall policy is one of encouragement. All four countries provide some level of protection against the arbitrary nationalization or expropriation of foreign investments. While the specifics of compensation and due process may vary, the principle of protecting foreign property rights is generally upheld.

Each country has established agencies or mechanisms to facilitate foreign investment such as the Nigerian Investment Promotion Commission in Nigeria, while the US has the Committee on Foreign Direct Investment United States and Cana has its own ministry of science and Innovation. Foreign investors are subject to the same general laws and regulations governing business operations within each country, including company law, tax law, labor law, environmental regulations, and intellectual property rights. All four countries have established legal systems and procedures for resolving commercial disputes, which are accessible to foreign investors. They are also signatories to international conventions on dispute resolution, such as the International Centre for Settlement of Investment Disputes (ICSID) Convention.

< https://www.gov.uk> accessed 10 March 2025

[70] *Ibid*

[71] Local Government and Housing Act 1989 C42

5.1 Differences in FDI Regulations of selected Jurisdictions in Comparison with Nigeria

Significant differences exist in the specific legal frameworks and approaches to FDI in these countries. In Nigeria there's a 'negative list' prohibiting investment in specific sectors. The oil and gas sector, while allowing 100% foreign ownership, often operates through joint ventures or production-sharing agreements with the government. In the UK**,** Certain sectors, such as defense, telecommunications, and energy, may be subject to stricter scrutiny under the National Security and Investment Act. USA also hasrestrictions exist in sectors deemed critical to national security, such as defense, aviation, and critical infrastructure. Canadahas specific restrictions and ownership limitations in sectors like telecommunications, broadcasting, financial services, and transportation.

Registration with the NIPC is mandatory for companies with foreign investment. However, The UK has a relatively open investment regime. The National Security and Investment Act 2021 allows the government to scrutinize and intervene in investments that could pose a national security risk. This is a more recent development, giving the government broader powers than before. In the United States of America**,** The Committee on Foreign Investment in the United States (CFIUS) reviews foreign investments for potential national securityconcerns. CFIUS has broad authority to investigate and recommend actions to the President, including the suspension or prohibition of transactions. The scope of CFIUS review has expanded in recent years to include non-controlling investments and real estate transactions near sensitive locations.Furthermore, Canada has the Investment Canada Act, which requires notification or review of certain foreign investments based on transaction size and the nature of the business. Investments that could be injurious to national security are also subject to review. The thresholds for review vary depending on the investor's country of origin and the industry.

As regards Investment Incentives, Nigeria offers various investment incentives, including tax holidays for pioneer industries, allowances for capital investments, and deductions for interest on loans in specific sectors like gas. UKOffers incentives primarily through tax policies, research and development credits, and regional development grants. Specific incentives may be available for investments in designated areas or sectors. USA also offersInvestment incentives including tax credits, abatements, and grants for specific industries, job creation, and research and development. CanadaOffers a range of incentives, including tax credits for research and development, regional development programs, and sector-specific support for industries like clean technology and manufacturing..

5.2 Lessons to be Learnt from the Comparative Analysis of Selected Jurisdictions

Having analyzed the relevant laws on FDI in Canada, the USA and UK, a number of grey areas can be identified in the Nigerian legal framework. Firstly, jurisdiction such as Canada, an investor's history of corruption is now considered a valid factor in determining potential threats to national security and before such an investor can invest in that country.

The United States of America has a Committee on Foreign Direct Investment which looks at a proposed transaction to ensure that while promoting foreign investment such investment is examined for any effect they may have on national security. Before any foreign entity comes into Nigeria to invest, the Nigerian Government under the Ministry of Trade and Investment should look at the proposed transaction and see if there's any threat against National Security and a foreign transaction should be analyzed to determine if it has a threat to National Security. A committee should be set up by the president or the ministry of trade and Investment that should look into foreign entities coming into Nigeria to do business, as such investment might be a threat to National Security.

The United Kingdom scrutinizes and potentially blocks acquisitions and investments in sensitive sectors or locations which could impact upon national security, Nigeria should also do same by blocking any foreign investment that has impact on National Security. Also, the Nigerian Investment Promotion Commission Act has some sectors that are termed prohibited, whereby foreign investors are prohibited from investing in such sectors such as Production of arms and ammunition, Production of and dealing in narcotic drugs and psychotropic substances, production of military and paramilitary wears including those of the police, customs, immigration and prison. Furthermore, in the United States of America, some sectors are restricted from foreign investment such as Airlines, Transportation. Mining. Ports Defense. Communications & Media, nuclear energy, agriculture, banking and real estate.

Similar institutions can be replicated in Nigeria in order to promote national security in the area of Foreign Investment. Care should, however, be taken to ensure that the regulatory powers distribution among these institutions is structured in such a way as to prevent overlapping powers and functions which can lead to confusion. A committee should be set up by the president or the ministry of trade and Investment that should look into foreign entities coming into Nigeria to do business, and such investment that might be a threat to national security. This should be done with strict regards to ethical standards and international best practices. These committees must be comprised of independent professionals with proven integrity. The policies and guidelines created by these committees should be strictly adhered to by foreign investors and amended periodically as the need arises.

6.**CONCLUSION**

In conclusion, while Nigeria, the UK, the USA, and Canada all aim to attract FDI, their legal regimes differ significantly in terms of screening processes, sector restrictions, incentives, and the practical application of laws. Ambiguities exist in each system, which foreign investors need to carefully navigate through thorough due diligence and legal counsel. Understanding these nuances is crucial for successful investment and risk management in these diverse economic landscapes

Combating Oil Theft and Pipeline Vandalism in Nigeria: Legal Instruments for Sustainable Sector Reform

Vanessa Vivian Uzu-Okonta*

Abstract

Oil theft and pipeline vandalism represent critical threats to Nigeria's economic stability, environmental integrity and national security. These criminal activities undermine the productivity of the oil and gas sector, the sector which remains the backbone of the country's revenue base. Despite numerous interventions and judicial remedies, persistent weaknesses in legal enforcement and regulatory oversight continue to impede meaningful progress. This article critically examines the legal instruments available for combating oil theft and pipeline sabotage in Nigeria, highlighting the roles of statutory frameworks, institutional mandates and the justice system in enforcing accountability and safeguarding national resources. Through primary research methods, consulting academic texts, judicial decisions, policy documents and authoritative verified online sources, this work critically assesses the adequacy of current laws such as the Petroleum Industry Act, Criminal Code, Environmental Impact Assessment Act amongst others. It identifies institutional shortcomings and enforcement lapses that contribute to systemic inefficiency, while interrogating the interface between legal mechanisms and the broader reform agenda. It further considers the wider implications of unchecked oil theft and incidences of vandalism, particularly their impact on energy security, environmental degradation and foreign investment. In doing so, it underscores the urgent need for comprehensive legal and institutional innovation to ensure effective deterrence, community engagement and inter-agency collaboration. By placing justice at the heart of reform, this study advances a rights-driven and development-oriented framework for restoring transparency, accountability and sustainability in Nigeria's oil sector.

Keywords: Accountability, Energy security, Legal instruments, Oil and gas, Oil theft, Pipeline vandalism, Regulatory enforcement.

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1. INTRODUCTION

Nigeria's continued economic dependence on petroleum resources remains both significant and precarious. The oil and gas sector accounts for approximately 9% of Nigeria's Gross Domestic Product (GDP), over 60% of government revenue and nearly 90% of foreign exchange earnings[1]. Despite governmental projections to raise crude oil production to 3 million barrels per day by 2025, actual output has stagnated between 1.5 and 1.8 million barrels daily, this is largely attributed to endemic oil theft and sabotage of critical energy infrastructure. The term 'Oil Theft' although not expressly defined by legislations in Nigeria criminalising the act, having been described by these laws, can be inferred to mean the unlawful appropriation, diversion or siphoning of crude oil or refined petroleum products from official production, transportation and storage systems. This includes illegal bunkering, unauthorised tapping of pipelines and fraudulent manipulation of metering devices, all of such acts that contribute to economic sabotage. 'Pipelines' have been expressed to mean 'all parts of any tubular infrastructure through which petroleum is conveyed, including pipes, valves, pumping and compressor stations and other equipment appurtenant to pipes'[2]. 'Pipeline Vandalism' is also not expressly defined, however, a joint reading of the legislations that described the act suffices to show that it means the intentional, unauthorised tampering with or destruction of petroleum pipeline infrastructure, the acts include drilling, rupturing, burning or otherwise damaging pipelines for the purpose of theft or sabotage. 'Sabotage' has expressly been defined as any wilful act intended to obstruct or prevent the production, procurement, distribution of petroleum products in Nigeria[3].

Oil theft and pipeline vandalism have evolved into systematic threats to Nigeria's fiscal integrity, national security and energy sustainability. According to official data, over 7,000 pipeline breaches were recorded between 2017 and 2021[4], resulting in extensive financial losses and widespread environmental degradation. Recent findings by the Nigerian National Petroleum Company Limited (NNPCL) revealed numerous illegal refineries and clandestine tapping points across the Niger Delta, in states such as Rivers, Bayelsa, Delta and Abia. These crimes, often facilitated by organised networks and gaps in enforcement, significantly undermine the constitutional duty of the state to safeguard its national assets and ensure equitable resource distribution[5].

This article adopts a legal and institutional lens to analyse the dynamics of oil theft and pipeline sabotage in Nigeria. It evaluates the adequacy of existing legal instruments as aforementioned while carefully exploring the challenges of enforcement, judicial redress and institutional reform. The primary focus of this

[1]Feyisayo Ajayi, The Nigerian Patriot, 'Oil Theft and Pipeline Vandalism: The Hidden Cost of Nigeria's Petroleum Industry' published on 9 January 2025 https://patriot.ng/2025/01/09/oil-theft-and-pipeline-vandalism-the-hidden-cost-of-nigerias-petroleum-industry accessed 10 July 2025

[2]Petroleum Industry Act 2021 s 318

[3]Petroleum Production and Distribution (Anti-Sabotage) Act 1975 s 1

[4]Daniel Onyango, Pipeline Technology Journal, 'Nigeria Loses $13 Million in Crude Oil Due to Rampant Pipeline Vandalism, NEITI Reports' published on11 October 2023 https://www.pipeline-journal.net/news/nigeria-loses-13-million-crude-oil-due-rampant-pipeline-vandalism-neiti-reports accessed 10 July2025

[5]Constitution of the Federal Republic of Nigeria 1999 (As amended) s 16 (1) (2)

article is aimed at emphasizing the imperative of legal innovation and the rule of law in advancing justice in the oil sector.

2. LEGAL FRAMEWORKS GOVERNING OIL OPERATIONS AND THEFT IN NIGERIA

The legal architecture governing oil operations and the criminalisation of oil theft in Nigeria is anchored on the principle of state ownership and control over natural resources. Section 44(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) read in conjunction with the Land Use Act 1978 vests all petroleum resources in the Federal Government, reinforcing a centralised legal mandate for exploration, production and distribution. This foundational principle underpins the broader regulatory regime aimed at ensuring national accountability and sustainable exploitation. At the heart of this regime is the Petroleum Industry Act 2021, which provides a comprehensive framework for governance, fiscal management and host community engagement within the oil and gas sector.

In addition to these core legislations are several statutes specifically tailored to prevent and punish acts of sabotage in the petroleum industry. The Oil Pipelines Act 1956 governs the licensing, construction and protection of pipeline infrastructure, while the Petroleum Production and Distribution (Anti-Sabotage) Act 1975 and the Miscellaneous Offences Act 2004 impose stringent criminal liabilities including life imprisonment for wilful acts of vandalism and theft. There are also environmental laws that provide regulatory backing to activities in the petroleum industry such as the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007, the Environmental Impact Assessment Act 1992 and the National Oil Spill Detection and Response Agency (Establishment) Act 2006, these laws address ecological consequences of oil-related activities.

Furthermore, these legal instruments not only establish state control over petroleum assets but also offer juridical basis for prosecuting offenders, safeguarding national infrastructure and reinforcing reform imperatives. By evaluating the effectiveness and enforcement of these laws, this article highlights how legal mechanisms can be recalibrated to enhance deterrence, accountability and a sustainable sectoral governance.

In order to understand the legal terrain surrounding all oil theft and pipeline sabotage in Nigeria, it is necessary to go beyond a mere catalogue of statutes, it is pertinent to understand the structural roles these legislations play within the wider resource governance ecosystem. Accordingly, this section undertakes a thematic analysis of the principal legal instruments underpinning petroleum operations, state control and criminal accountability in Nigeria. The frameworks will be grouped and examined under the core legal functions namely; the ownership and control of petroleum resources, the criminalisation of oil-related sabotage, the governance and institutional architecture of the petroleum sector and lastly, the environmental safeguards that intersect with energy infrastructure. This method of organisation ensures a purposive engagement with each law's operative value, its enforcement limitation and its relevance to the broader objective of securing justice in the embattled oil sector.

2.1 Ownership and Control of Petroleum Resources

One of the legal frameworks that lays the foundation for land ownership and control in Nigeria is the Land Use Act 1978. It shapes the legal understanding of ownership and access to land where petroleum resources are located. Firstly, it vests all lands in each state of the federation in the Governor to be held in trust for the common use and benefit of Nigerians[6]. This provision establishes that land is not privately owned in the absolute sense and access to land for petroleum operation is subject to the overriding authority of the state. Extensively, the Act further delegates control and management of land to State Governors and the Local Governments in urban and rural areas respectively[7]. These provisions strongly indicates that the legislation creates a layered authority structure in which oil operators must navigate, this structure can possibly lead to coordination challenges between Federal oil agencies and local land administrators often resulting in weak oversight and enforcement in host communities. These legal and administrative gaps are usually exploited by vandals and oil thieves. A noteworthy legislation that cannot be left uncovered is the ownership provisions of the principal petroleum legislation, the Petroleum Industry Act, it clearly vests all resources in Nigeria including those located offshore, on the Federal Government to be controlled. This same centralised ownership gives the Government constitutional backing to address issues like oil theft and pipeline vandalism, since it is the custodian of the resources, the government is therefore, responsible for protection and sustainable exploitation. A different perspective of ownership can also be seen in the Oil Pipelines Act 2004, a comprehensive framework regulating the lifecycle of pipelines from route survey and licensing to construction, compensation and penalties for non-compliance, it ensures adequate licensees have legal control over land access and supports enforcement through criminal sanctions, most importantly, the Oil Pipelines Act defined 'Oil Pipeline' to be a means of conveyance of mineral oils, natural gas and any of their derivatives and components or any substance used or intended to be used in the production, refining or conveyance of mineral oil[8], a broad definition which would be relevant to the theme of this work.

Criminalisation of Oil-Related Sabotage

While the state ownership establishes the legal foundation for Nigeria's claim over petroleum resources, it is the criminal law that defines and enforces the boundaries of permissible conduct. Activities such as oil theft, pipeline tampering and the unauthorized refining operations are not merely regulatory breaches, they constitute serious criminal offences with national economic and security implications. This section explores the statutory instruments that criminalizes oil-related sabotage emphasizing how these laws define the offences, assign culpability and prescribe sanctions. The laws relevant to this conversation to wit;

i. Petroleum Production and Distribution (Anti-Sabotage) Act:

In addressing legislative measures that criminalise sabotage in the petroleum industry, a key statute creating the offence of sabotage is the Petroleum

[6] Land Use Act 1978 s 1
[7] Ibid s 2
[8] Oil Pipelines Act 2004 s 11 (2),

Production and Distribution (Anti-Sabotage) Act broadly describing the offence of sabotage to include wilful acts intended to obstruct or prevent the production, procurement or the distribution of petroleum products, including acts that interfere with the use of vehicles and public highways essential for distribution[9]. The law generally criminalises aiding, inciting or counselling others to commit such act notwithstanding that no direct act of sabotage was ultimately carried out. It imposes severe penalties for the offence such as death upon conviction and imprisonment for up to 21 years[10].

ii. Miscellaneous Offences Act

Another key legislation although often overlooked in the fight against oil theft is the Miscellaneous Offences Act originally enacted to cover a wide range of criminal activities. In relation to this work, it specifically targets tampering with petroleum infrastructure (oil pipeline)[11] and the illegal dealing in crude oil and its by-products. It contains penalties that include life imprisonment for offenders.

iii. Criminal Code and Penal Code:

The Criminal Code and the Penal Code contain no specific provision dedicated to the offences of oil theft and vandalism, the offences can be interpreted alongside other offences in the act such as the offence of damaging public property[12] or the offence of stealing literally.

iv. Terrorism (Prevention and Prohibition) Act 2022:

This legislation inclusively covers activities that could be described as acts of terrorism and one of such is the destruction of government or public facility, a transport system or infrastructural facility likely to endanger human life or result in economic loss, it covers pipeline as a transportation facility by interpretation[13].

3. GOVERNANCE AND INSTITUTIONAL ARCHITECTURES

There are several institutional frameworks in Nigeria mandated directly and indirectly to combat oil theft and vandalism in the petroleum industry. These institutions function across regulatory, law enforcement, environmental and prosecutorial domains. A structured overview of these institutions will be outline however, group by their functions while highlighting their roles in relevance with the issue being tackled by this piece;

a) Regulatory and Oversight Institutions

- Nigerian Upstream Petroleum Regulatory Commission (NUPRC)

[9]Petroleum Production and Distribution (Anti-Sabotage) Act 1975 s 1
[10]Ibid s 2
[11]Miscellaneous Offences Act 2004 s 7
[12]Criminal Code Act Cap C38 Laws of the Federal Republic of Nigeria 2004, s 451; Penal Code Act, Cap P3 LFN 2004, s 326
[13]Terrorism (Prevention and Prohibition) Act2022 s 2(3) (g) (iii)

This body was established by the Petroleum Industry Act 2021, it regulates the technical and commercial operations in the Upstream segment of the Petroleum Sector. It is generally responsible for issuing licenses, monitoring production and enforcing standards, it plays a major role in detecting irregularities such as underreporting or illegal tapping[14].

- Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA):
  This authority equally plays a technical and commercial role but it is restricted to the Midstream and Downstream Sector. It oversees pipeline transport, storage, refining and distribution. It is also responsible for enforcing pipeline integrity regulations and the reporting of unauthorized connections or vandalism[15].

- The Nigerian National Petroleum Company Limited (NNPCL):
  It is an independent body by virtue of the Petroleum Industry Act, it is now a commercial entity playing a central role in surveillance and field operations, it is a national oil company, it collaborates with security agencies to uncover illegal refineries and pipeline breaches[16].

b) Security and Law Enforcement Bodies:

- Nigeria Security and Civil Defence Corps (NSCDC):

  This body is statutorily mandated to protect critical national infrastructure including oil pipelines. It operates field patrols; it works closely with the NNPCL and other regulators.

- Nigerian Police Force:

  It is responsible for primarily investigating and prosecuting offences under the criminal code and other applicable laws, the body usually engages in joint security operations against pipeline vandals.

- Armed Forces (Nigerian Navy and Joint Task Force)

  The Nigerian Military was deployed to protect offshore and onshore assets in the Niger Delta areas, it is the Operation Delta Safe. They are involved in intercepting illegal bunkering and in dismantling militant operations.

c) Environmental and Remediation Agencies

- National Oil Spill Detection and Response Agency (NOSDRA):

  This agency established by the National Oil Spill Detection and Response Agency (Establishment) Act[17] and it is charged with the

[14]Petroleum Industry Act 2021 Part III
[15]Ibid Part IV
[16]Ibid Part V
[17] National Oil Spill Detection and Response Agency (Establishment) Act 2006 s 1

general responsibilities of monitoring, investigating and responding to oil spills often resulting from sabotage. It plays a technical role in recommending remediation also.

- National Environmental Standards and Regulations Enforcement Agency (NESREA):

  This agency was duly established under the National Environmental Standards and Regulation Enforcement Agency (Establishment) Act[18] to enforce environmental compliance standards particularly concerning refinery operations and pollution control. Their investigative powers cover public investigation on pollution and he degradation of natural resources, it does not include oil spillage however[19].

d) Prosecutorial and Judicial Institutions

- Federal and State Ministry of Justice

  The ministry including the Department of Public Prosecutions has the power to prosecute oil theft cases under laws that penalize the offence.

- Federal and State High Court of Nigeria:

  The Federal High court possesses exclusive jurisdiction overmatters involving the federal government for oil-related offences including those under the Petroleum Industry Act that has implications of economic sabotage[20], however, the State High courts can hear matters relating to state-level offences.

  The Intelligence and Monitoring units like the Nigerian Financial Intelligence Unit, may also be included because they are responsible for the tracking of illicit financial flows and money laundering connected to oil theft.

4. THE NATIONAL IMPACT ASSESSMENT: ECONOMIC, ENVIRONMENTAL AND SOCIAL DIMENSIONS

It is no exaggeration to state that oil theft and pipeline vandalism have become some of Nigeria's most corrosive national challenges, undermining not just the petroleum industry but the country's broader economic, environmental and social foundations. While these acts are popularly framed as criminal offences, their consequences stretch far beyond statutory violations. They threaten the fiscal stability, compromise environmental justice and fracture community progress. In real terms, the costs are staggering, billions of dollars in oil revenue vanish each year, fragile ecosystems in the Nigeria Delta are pushed to the brink and livelihoods are rendered vulnerable with every spill and explosion.

[18] National Environmental Standards and Regulation Enforcement Agency (Establishment) Act 2007 s 1

[19] Ibid s 8(h)

[20] Constitution of the Federal Republic of Nigeria (as amended) 1999 s 251 (1) (n)

This section provides a structured impact assessment, carefully examining the economic, environmental and social toll of petroleum-related sabotage. With the use of recent developments and verified data, it highlights the deepening consequences for public finance, debt sustainability, ecological degradation, investor confidence and national cohesion. These realities are versed in providing a sharp relief through robust legal intervention not merely limited by punitive measure, but as a platform for institutional reform, environmental restoration and economic recovery. The following are multidimensional impacts necessary to weigh in on the gravity of the crisis being discussed and the legal urgency it demands;

a) Economic Erosion

It cannot be argued that incidences of oil theft and pipeline vandalism have not led to revenue losses. According to NNPCL, theft deprives the nation of an estimated sum of $3-5 billion annually, while the Nigeria Extractive Industries Transparency Initiative (NEITI) reports aggregate losses of $46 billion between 2009 and 2020 for 619.7 million barrels[21], the reports have shown that oil theft has become a national emergency as it largely contributes to divestments by International Oil Companies(IOCs)[22]. Pipeline vandalism and oil thefts are major contributors to the reduction of Nigeria's oil output by 27.4% calculated to have declined from 1.9 million barrels per day in 2014 to 1.4 million barrels per day as at July 2024[23]. Another given perspective of how deep these criminal activities have pervaded the industry can be seen in the budgetary strain, with oil contributing about 70% of Federal revenues and 90% of foreign exchange earnings[24], these losses erode fiscal capacity. Notably, in 2024, while the budget anticipated oil sales at $78 per barrel and a production level of at least 1.78 million barrels per day, oil theft was a perceived as a threat to achieving the targets and at the end of the year, the production level was averaged at 1.55 million barrels per day, falling short of the target[25].Lastly, the declining foreign exchange inflows impact exchange-rate instability, consequently, compelling borrowing which undermines monetary policy and debt sustainability.

b) Environmental Degradation

In addition to its economic implications, oil-related sabotage significantly disrupts Nigeria's environmental legal order, it dilutes regulatory protections

[21]Cynthia Egboboh, Business Day, 'Nigeria Lost Over N16trn to Crude Oil Theft, Pipeline Vandalism in 11 Years-NEITI' published on 7 November 2023 https://businessday.ng/energy/oilandgas/article/Nigeria-lost-over-n16trn-to-crude-oil-theft-pipeline-vandalism-in-11yrs-neiti accessed on 11 July 2025

[22]Bunmi Aduloju, TheCable, 'NEITI:Oil Theft, Pipeline Vandalism Have Become National Emergency' published on 10 November 2023https://www.thecable.ng/neiti-oil-theft-pipeline-vandalism-have-become-national-emergency accessed 11 July 2025

[23]Udeme Akpan, Vanguard, 'Pipeline Vandalism, Oil Theft, Others reduce Nigeria's Output by 27.4% to 1.4m Bpd in 10 yrs' published on 31 August 2024 https://www.vanguardngr.com/2024/08/pipeline-vandalism-oil-theft-others-reduce-nigeria-output-by-27-4-to-1-4m-bpd-in-10yrs accessed on 11 July2025

[24]Moses Tule and Danladi Osude, 'Oil Price Shocks and Real exchange Rate Movement in Nigeria' (2014) 52(1) *CBN Economic and Financial Review*https://dc.cbn.gov.ng/efr/vol52/iss1/3 accessed 11 July 2025

[25]CSL Research, Proshare, 'Nigeria's Crude Oil Production Averaged 1.55 Mbpd in 2024' published on 21 January 2025 https://proshare.co.articles/nigerias-crude-oil-production-averaged-1.55-mbpd-in-2024 accessed 11 July 2025

and exacerbating ecological decline across impacted areas. In 2024, more than 589 oil spills were predominantly linked to oil theft and vandalism, devasting water bodies and fertile soils. The environmental fallout from oil theft and pipeline vandalism is not only severe but also legally entangled. A recent judicial decision on preliminary issues relevant to environmental protection was passed[26], it underscored how acts of third-party interference such as illegal tapping and refining of stolen crude generate pollution that often escapes clear legal accountability. While the court recognized that Shell Petroleum Development Company Ltd (SPDC) could, in principle be liable for failing to secure its pipelines from third-party interference, it held that pollution resulting from illegal refining of stolen crude fell outside the operator's scope of legal duty of care. The implication of this judgment in the legal sense is that pollution may go legally unpunished when it stems from criminal third-party activity. The affected communities bear the brunt of the environmental harm without remedy while the broader system struggles to assign liability. It reinforces the urgent need for legal reform expanding the scope of environmental responsibility and to hold all parties involved, including those profiting from oil theft.

Furthermore, activities like oil theft and pipeline vandalism compounds chronic pollution, leading to the collapse of the ecosystem where there are little to no clean-up funding initiatives.

c) Social Dislocation and Insecurity

A major impact triggered by the oil theft and pipeline vandalism is the disruption of livelihood. Fishers and farmers report decimated fisheries and infertile farmland ultimately leading to rural joblessness, displacement and food insecurity. Numerous reports largely indicates that oil theft and pipeline vandalism impose significant negative consequences for both the agricultural and fishing communities[27]. Illegal bunkering and pipeline destruction frequently spark clashes involving militia groups, security agents and civilians, this gives the communities a violent outlook because it deepens insecurity in the Niger Delta.

d) Investment Deterioration

This flows from the general impacts that has been outlined in this work. The petroleum industry despite being an economic backbone, cannot be labelled as independent, it still depends on international forces such as investments from IOCs to thrive, a combined effect of these impacts undeniably results in the trend of investor retreat being witnessed recently. The persistent insecurity and infrastructure risk caused by these implications have prompted the withdrawal of major corporations like Shell, ExxonMobil and Eni from onshore operations. These companies have been divesting their onshore

[26]Alame and others v Shell Plc [2025] EWHC 1539 (KB)
[27]Tensaba Andes Akafa and others, Research Gate 'From Perception to Effect of Oil Spillage Among Fishermen in the Niger Delta Region of Bayelsa State, Nigeria' Published June 2025 2(2) 35-36 https://www.researchgate.net/publication/392319865 accessed 12 July 2025

assets in Nigeria, as aforementioned, a major cause of this move is the increase in operational loss effected by oil theft and pipeline vandalism, they are now prioritizing investments in deepwater and offshore oil and gas fields[28].

In summary, the impact of oil theft and pipeline vandalism is deeply unsettling, it covers a wide range from fiscal losses to reduction in investor confidence. These outcomes emphasize the need for a more enforceable actions as legal response to the tragedy. It has become increasingly clear at this point that without strengthening institutional and regulatory frameworks, any attempt to reverse this trajectory would remain blatantly vain.

5. ENFORCEMENT CHALLENGES AND SYSTEMIC WEAKNESSES

Nigeria has an extensive legal framework against oil theft and vandalism but these legislation have been argued to only exist in theory, the implementation is marked by a web of institutional failings. This segment will expose the core challenges beclouding effective enforcement, each of which represent a fracture in the system that allows oil sabotage to persist. They are;

a) Weak Inter-agency Collaboration

In December 2024, it was reported that the petroleum ministry and Navy launched the Operation Delta Sanity (OPDS) to recover lost production, following this launch were several aids to further the objective of the group, the operation by the group has been quite successful in recovering stolen products, arresting suspects and dismantling illegal refining sites[29], the group has however been met with the major challenges of how vast these oil thieves and pipeline destroyers operate. They have also been met with the challenges of limited resources and inter-agency collaboration to ensure seamless coordination and information sharing, the progress made by the group could be greater if other agencies fostered a shared need to collaborate to evenly curtail the widespread issue of oil theft and pipeline vandalism.

b) Political Protection and High-Level Complicity

Illegal oil bunkering and pipeline vandalism involve a network of individuals from various sectors including members of local communities, politicians, security forces and international actors, it creates a multi-layered system of complicity where these individuals protect themselves by impeding investigation.

[28]Faruk Shuaibu, Daily Trust 'After Onshore Divestment, ExxonMobil to Invest $1.5bn In Deepwater Exploration' Published 8 May 2025 https://dailytrust.com/after-onshore-divetsment-exxonmobil-to-invest-1-5bn-in-deepwater-exploration/ accessed 12 July 2025

[29]Ships & Ports, 'Nigeria Navy Launches Operation Delta Sanity 2 to Combat Marine Crimes, Boost Oil Production' Published on 31 December 2024 https://shipsandports.com.ng/nigerian-navy-launches-operation-delta-sanity-2-to-combat-maritime-crimes-boost-oil-production accessed 12 July 2025

c) Under-Resourced Security and Surveillance Infrastructure

A significant obstacle to curbing oil theft and pipeline vandalism in Nigeria lies in the chronic under-resourcing of the nation's security and surveillance infrastructure. Notwithstanding, the legal obligations imposed by the legislative frameworks requiring the protection and integrity of petroleum infrastructure installations, enforcement agencies lack manpower, technology and logistical support necessary to monitor and secure Nigeria's vast network of pipelines. Pipeline infrastructure in different conflict-prone areas remain highly vulnerable to sabotage. The gap between adequately protecting these transportation structures is hugely caused by inadequate funding, insufficient training and outdated monitoring systems. while initiatives like Operation Delta Safe and the deployment or real-time pipeline surveillance technologies have been introduced, these efforts remain fragmented, underfunded and unevenly implemented. Without substantial investment in surveillance capacity, existing laws will continue to falter at the point of enforcement rendering legal frameworks largely symbolic in the face of systemic vulnerability.

d) Delays in Prosecution and Low Conviction Rate

Prosecutorial delays and thin convictions have frustrated enforcement. Oil theft and pipeline vandalism are offences that undermine national security and result in economic loss, for crimes of such nature, it is expected that the harsh penalties imposed by legal frameworks are duly prosecuted to secure penalties on the offenders, what these offenders are being met with are low rates of convictions instead, it does not set an exemplary tone of deterrence, this is why the offence seems as though it heightens each year, it has become repetitive, the people who engage in such act have not faced the full wrath of the law, they perceive the laws as being weak and tolerant towards them. A major factor that contributes to this challenge is how the courts are overwhelmed, evidence gathering is weak due to poor monitoring infrastructure and it ends up stalling these cases. These gaps and other bureaucratic bottlenecks leave perpetrators unpunished, reinforcing a cycle of impunity.

e) Lack of Data-Sharing and Community Trust

A persistent barrier to the effective enforcement of anti-sabotage laws is the erosion of trust between host communities and regulatory authorities, a divide rooted in decades of exclusion, secrecy and environmental neglect. Many oil-producing communities, particularly in the Niger Delta remain marginalised in decision-making processes concerning surveillance, response to spills and benefit-sharing. Institutions such as the NOSDRA and NEITI have made some strides in data collection, yet, there is limited public dissemination of real-time spill data, enforcement outcomes or pipeline incidents, these unreported data increase local scepticism and disengagement.

Limited data-sharing continues to weaken environmental transparency and alienate host communities. Civil society groups like Nextier SPD (Security, Peace and Development) have advocated for community-based surveillance, such efforts remain poorly institutionalized. This neglect fuels local

disillusionment, it silences valuable intelligence, in some cases, enabling complicity driven by hardship.

It is commendable that in order to remedy this systemic trust deficit, the Petroleum Industry Act 2021 introduced the Host Communities Development Trust (HCDT); a mechanism intended to foster inclusion and balance, however, for the HCDT to fulfil its statutory promise, it must be backed by genuine implementation, transparent fund management and deliberate inclusion of grassroot actors in oversight processes. Without these, the trust it seeks to build may be further eroded, subsequently compounding the challenges it was designed to resolve.

6. LEGAL TOOLS TO COMBAT OIL THEFT AND INFRASTRUCTURE SABOTAGE

Despite the alarming scale of oil theft and pipeline sabotage in Nigeria, the legal system is not without recourse. A range of statutory instruments and reforms exist to deter, prosecute and remedy these offences. This section takes into detail these provisions while exploring feasible legal responses to curb incidences of oil theft and pipeline vandalism. The scope of these legal tools will cut across legislative reforms, judicial and prosecutorial enhancements, host-community legal empowerment and tech-supported legal surveillance.

6.1 Legislative Reforms

a) Oil Pipelines Act

This Act criminalizes unauthorised pipeline operations often associated with illegal oil tapping or bunkering. It gives the government the legal authority to dismantle illegal infrastructure used for theft, it ensures that only vetted and licensed operators can legally handle pipeline infrastructure serving as a regulatory safeguard against sabotage[30]. The act contains other stern provisions to prevent activities that could lead to vandalism or theft[31], it defines legitimate ownership and compensation rights to reduce local disputes that may incite sabotage[32] in providing legal tools to remove obstructors, the enabling of revocation of licences prevents the misuse or negligent operations that can possibly expose pipelines to vandalism[33].

Enforcement under this Act remains largely reactive, it lacks detailed deterrent sentencing. A noteworthy reform to remedy this, would be the introduction of strict liability offences for operators failing to secure pipelines and provisions that empower communities with legal status to report and sanction vandalism under this Act.

[30]Oil Pipelines Act 2004 s 7
[31]Ibid s 6
[32]Oil Pipelines Act 2004 s 25
[33]Oil Pipelines Act 2004 s 27

b) Miscellaneous Offences Act

The Miscellaneous Offences Act 2004 as aforementioned addresses and criminalises acts of pipeline vandalism and oil theft by reinforcing zero tolerance for sabotage of petroleum infrastructure, leaving strong deterrent measures with life imprisonment as the maximum penalty, ultimately aimed at protecting national energy assets, ensuring pipeline security and the prosecution of offenders[34]. Notwithstanding that this legislation offers strong punitive foundation for prosecuting oil theft networks, convictions remain rare resulting in inconsistent judicial outcomes.

An inclusive reform this piece proposes is the embedment of a mandatory minimum sentence for major theft operations, while preserving judicial discretion for mitigating circumstances.

c) Petroleum Production and Distribution (Anti-Sabotage) Act

This legislation is no different from previously highlighted frameworks, it is limited by prosecutorial success, it is hindered by jurisdictional overlap and poorly defined enforcement powers. A suggested reform is the assignment of prosecutorial authority to a designated agency, to streamline procedure codes to fast-track anti-sabotage trials thereby, reducing scope for political interference.

d) Terrorism (Prevention and Prohibition) Act

This Act is selectively used to classify organised bunkering activities and sabotage as terrorist acts. The concerns raised as regards this Act in this context is that it may invite national security overreach into largely financial crimes (oil theft), therefore, the reform proposed is the need to clarify circumstances in which sabotage qualifies for terrorism designation, for example, instances where it is linked to violence against civilians or critical infrastructure.

6.2 Recommendations on Legislative Reforms

Having dissected these major frameworks on oil theft and pipeline vandalism, a summary of these reforms to be recommended are as follows;

Firstly, the establishment of an independent statute or a special court division for petroleum-related offences harmonising it with existing legislation. This is relevant to this discourse as it provides and ensures consistent legal interpretation, it would foster hastened resolutions and legal clarity across oil sector offences.

Secondly, a mandatory sentencing guideline is necessary to tackle oil theft and pipeline vandalism as it will embed clear minimum penalties for oil theft, pipeline vandalism and associated crimes. This reform would totally enhance deterrence and prevent political or judicial leniency.

[34]Miscellaneous Offences Act 2007 s 7

Lastly, a strengthened asset forfeiture framework is needed, this largely hints on enhancing the provisions of the Petroleum Production and Distribution (Anti-Sabotage) Act and the Miscellaneous Offences Act with civil forfeiture powers targeting proceeds of oil-related crimes, it further improves inter-agency asset recovery cooperation. This reform becomes relevant in tackling the challenges stated in this work because it strikes at financial incentives behind oil theft syndicates and it recycles costs for environmental remediation.

The suggested reforms collectively aim to unify oil crime definitions and empower prosecutorial entities to ensure that penalties and asset recovery mechanisms align with the gravity of these offences, it redresses their effects.

6.3 **Judicial and Prosecutorial Enhancements**

Addressing oil theft and pipeline vandalism in Nigeria demands strategic improvements within the judiciary and prosecutors. The effectiveness of any legal framework rests not only on laws themselves but on how swiftly, fairly and decisively they are enforced. Certain legal tools must be employed and strengthened to close the enforcement gap and increase the credibility of the justice system in petroleum-related offences. To this end. The following mechanisms are relevant;

i. Fast-Track Court Processes

Delays in prosecuting oil-related crimes have consistently undermined deterrence, the prevailing attributes are the lengthy adjournments and jurisdictional conflicts leading to abandoned or overstretched cases. Establishing fast-track court procedures for oil theft and sabotage cases through designated judges would ensure timely adjudication, it will preserve evidence integrity and restore public confidence in justice delivery. It aligns with the provision of the Constitution[35] on fair hearing within a reasonable time and could be operationalised via the various court practice directions.

ii. Creation of Specialised Prosecution Teams

To remedy the issue of enforcement of oil crimes in Nigeria, the Federal and State Ministries of Justice should establish dedicated oil and environmental crimes department. These teams would be staffed by prosecutors trained in environmental law, petroleum legislation, forensic investigation and asset tracing. Where responsibilities are centralised, such departments would enhance prosecutorial efficiency particularly when cases cut across Federal and State jurisdictions. Both departments will collaborate with NOSDRA for effective prosecution.

iii. Witness Protection and Whistleblower Frameworks

Community members and insiders often possess firsthand knowledge of illegal bunkering routes, storage facilities or official complicity yet, the fear of reprisal discourages many from coming forward to give information. Strengthening Nigeria's existing whistleblower protection laws alongside practical implementation of witness protection mechanisms would help break

[35]Constitution of the Federal Republic of Nigeria (as amended) 1999 s 36

the silence surrounding oil theft. The provision of the Witness Protection Act[36] on applicability does not expressly include witnesses in vases relating to the investigation and prosecution of oil crimes such as pipeline vandalism. Where the law provides legal assurance or guaranty for anonymity, relocation or non-disclosure, it would positively encourage public participation in enforcement especially in host communities.

Together, these judicial and prosecutorial tools offer a pragmatic path towards overcoming procedural stagnation and enforcement deficits.

6.4 **Host Community and Legal Empowerment**

The Petroleum Industry Act introduced the Host Communities Development[37] introducing a landmark mechanism to promote peace, inclusion and environmental responsibility, to promote its objectives, it provides for the incorporation of the the Host Communities Development Trust (HCDT)[38] mandating host communities to establish a trust fund[39] in which operators must contribute 3% of their annual operating expenditure for upstream projects that affect the host communities[40].

The Act expressly provides an allocation formula for the trust funds where 75% of the capital fund is stated to be for projects determined by the management committee, 20% goes to reserve funds to be invested for future use and 5% of the funds is to be used for administrative cost and special projects. Interestingly, the Act provides for deduction of payment for petroleum host communities development stating that for taxation purposes, particularly hydrocarbon and income tax, for any year there are acts of vandalism and sabotage (other acts of civil unrest included), resulting in damage to designated petroleum facilities or where such act consequently disrupts production within the host communities, the community could possibly forfeit its entitlement to the extent of cost of repairs for the damage (except the damage was occasioned by technical or natural cause)[41].

Although these provisions have been placed to safeguard pipelines and deter sabotage, it is faced with some practical hurdles and community resistance, despite the regulatory backing, host communities have reported issues on non-remittance by oil companies of the mandatory 3% contribution up to two years post-enactment with debts summing up to ₦800 billion[42], the debts were as a result of non-implementation. The provision on deductions has also been met with several criticisms on the grounds that it disincentivises community cooperation because it places an unfairly burden on communities with cost of industrial sabotage.

The necessary legal tool to be employed to address these concerns must be such that sees communities not merely as beneficiaries but as legal stakeholders in the

[36]Witness Protection and Management Act 2022 s 2
[37]Petroleum Industry Act 2021 Chapter 3
[38]Ibid s 235 (1)
[39]Ibid s 240 (1)
[40]Ibid s 240 (2)
[41]Ibid s 257 (1) (2)
[42]Vanguard, 'Oil Companies Owe Communities N800bn-HOSCON' published on 22 June 2023 https://www.vanguardngr.com/2023/06/pia-oil-companies-owe-communities-n800bn-hoscon-2/ accessed 13 July 2025

protection of petroleum infrastructure. It must involve the strengthening of their rights under the law to monitor, report and seek redress for unlawful activities affecting their community, equally, there is a dire need to enforce remittance to build confidence of the host communities. There is a need to also train local groups and community representatives on legal reporting procedures, enabling them to interface effectively with enforcement agencies and regulatory institutions. By enhancing legal literacy and participatory implementation, the state can tap into community intelligence and reduce local complicity, it will ultimately transform host communities from passive observers into active custodians of national energy assets. Lastly, in order to fully address liability and to boost community involvement in tackling oil theft and vandalism, it is necessary to potentially revise section 257 of the Petroleum Industry Act 2021 to differentiate acts of sabotage from unavoidable incidents while maintaining local accountability.

6.5 Tech Supported Legal Surveillance

To effectively tackle oil theft and pipeline vandalism in Nigeria, Nigeria must supplement traditional enforcement with technologically enabled legal surveillance. This should begin by providing regulatory clarity for drone deployment, surveillance tools and block-chain based monitoring systems, ensuring that operators and authorities can use cutting-edge solutions without overstepping legal boundaries. It requires legal safeguards that balance privacy rights and public interest reflecting accountability into every technological advance. Recently, there have been practical key developments suggested and employed in curbing oil theft and pipeline vandalism, the Operation Delta Sanity expanded its tool by using armed drones and helicopters, more recently, the senate adopted AI-powered aerial monitoring and predictive analytics in its anti-oil theft strategy, advocating for formal protocols that govern drone use and management. Private sector innovation has also weighed in on surveillance, a tech firm White Waters Sentinel System[43] claims to soon deploy a live-reporting drone and water-based sensor network to tackle similar issue.

Although these steps are commendable, it is necessary to consider the legal implications in order to fully implement them as legal instruments, firstly, the legislators must specify licensing regimes, the no-fly zones and data retention rules to ensure that surveillance tools would not infringe on the privacy of individuals, this is relevant because the existing aviation and telecommunication laws do not adequately cover for drone use for oil-sector surveillance. There is need for legal frameworks to cover data ownership, cross-border jurisdiction and cybersecurity in employing real-time cargo tracking and supply-chain validation as introduced by the Upstream Regulation[44]. As technological surveillance expands, there is an urgent need to enshrine legal safeguards to prevent misuse of data, it will require judicial authorisations for drone deployment, mandatory data encryption, clear protocols that define data-sharing and establishing penalties for abuse. Such protections act as the fulcrum in ensuring that surveillance remains targeted, lawful and respectful of the citizens' rights.

[43]Emem Idio, Vanguard, 'Oil Theft: Tech Firm Set to Launch Masterpiece Oil and Gas Monitoring System' published on 27 June 2025 https://www.vanguardngr.com/2025/06/oil-theft-tech-firm-set-to-launch-masterpiece-oil-and-gas-monitoring-system accessed 13 July 2025

[44]Nigerian Upstream Petroleum Advance Cargo Declaration Regulation 2024

By considering regulatory clarity and privacy consciousness, Nigeria would be able to elevate its legal response to sabotage in the oil sector.

6.6 The Role of Ministries of Justice in Reform and Prosecution

The Ministry of Justice at Federal and State level serve as crucial engines for legal reform in the oil sector. These ministries are statutory custodians of the justice system, they are well positioned to review outdated sabotage laws, draft responsive legislation and promote harmonised prosecution strategies across jurisdictions. Through policy coordination with security agencies and legislators, they can ensure legal frameworks are aligned with evolving threats. Additionally, these ministries in collaboration with the petroleum and environmental ministries can drive impact through strategic litigation including amicus briefs in oil theft cases in order to clarify legal standards and expand prosecutorial reach. Their proactive engagement is essential in transforming policy intent into enforceable legal action.

7. CONCLUSION AND POLICY RECOMMENDATIONS

This piece has heavily emphasized that Nigeria's struggle with oil theft and pipeline vandalism is not merely an operational setback, it is a national emergency that continues to undercut economic sovereignty, environmental stability and the credibility of the legal system. With reported annual losses estimated between $3billion and $5billion, it reveals heinous forfeiture of revenue, critical infrastructure, public trust and investor confidence. A detailed analysis of these crimes suggests that they are entrenched, organised and often shielded by high-level complicity. To properly address these, it requires nothing short of a cohesive justice-led reform agenda. The legal instruments currently in place provide the necessary legislative framework but they are fragmented, unevenly enforced and in some respects, outdated. It has become imperative for Nigeria to adopt harmonised enforcement model that bridges the gap between federal and state justice systems. A dedicated Petroleum Crimes Act or judicial division would bring much needed coherence to prosecutions, to streamline jurisdiction and insulate oil-related offences from political interference.

Equally crucial is the strategic integration of technology-enabled legal surveillance backed by clear legal standards that balance national security with civil liberties, in the absence of this, there is a likelihood of enforcement risks resulting in inefficient prosecution.

Furthermore, legislation and surveillance tactics are not sufficient, Host communities must no longer be treated as fringe observers to crimes that devastate their environment. The implementation of the Host Community Development Trusts should be deepened with legal education, stakeholder training and guaranteed community inclusion in reporting and monitoring processes as aforementioned. The relevant sections of the Petroleum Industry Act while encouraging local accountability must not be misapplied in ways that criminalise vulnerable populations for state and corporate failures. The enforcement agencies particularly the Ministries of Justice at Federal and State levels must take lead in this reform process, not only as prosecutors but as policy hubs that crafts strategic legislation, coordinate with security agencies and champion judicial innovation. Tools such as strategic litigation,

amicus briefs and public-interest enforcement must be deployed proactively to establish cogent legal precedents that deter future sabotage.

In conclusion, if Nigeria is to preserve its natural wealth and energy future, the legal system must be fully equipped, structurally, institutionally and morally to confront oil theft as an offence and an existential threat. Anything less will perpetuate impunity and deepen national vulnerability.

continental shelf include diamonds, iron sands (rich in titanomagnetite and lime-soda feldspars for steel production), and phosphorites. The fundamental importance of oceans and seas for sustainable development is increasingly recognized.[20]

2.1 **Legal Framework of the ABJN**

The United Nations Convention on the Law of the Sea, 1982 (UNCLOS), [21] constitutes the principal legal framework governing the deep seabed and the high seas. The International Seabed Authority (ISA), established by the States Parties to UNCLOS, exercises regulatory oversight of mineral-related activities within the Areas Beyond National Jurisdiction (ABNJ). This includes the review of applications for exploration and exploitation submitted by contractors, the assessment of environmental impact assessments and the supervision of mining operations. Entities holding exploration contracts are authorized to prospect for minerals within a designated area of the seabed for a period of fifteen years, with the option of a single five-year extension. Notably, Articles 136, 137.2, and 145 of UNCLOS are of critical importance to deep-sea mining, addressing, respectively, the concept of the common heritage of mankind, the management of resources and the protection of the marine environment. These three articles provides as follows:

2.1.1 **Article 136 – Common Heritage of Mankind**

This provision declares that 'the Area (deep-sea bed) and its resources are the common heritage of mankind'.

2.1.2 **Article 137.2 – Legal Status of the Area and its Resources**

This article clarifies that 'all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.'

2.1.3 **Article 145 – Protection of the Marine Environment**

This article mandates that 'necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities.' To this end, it directs the International Seabed Authority (ISA) to adopt appropriate rules, regulations and procedures for, *inter alia*, the prevention, reduction and control of pollution and other hazards, the avoidance of interference with the ecological balance and the protection of flora and fauna, paying particular attention to activities such as drilling, dredging, excavation, waste disposal and the construction and operation of related infrastructure.

[20]NOAA Ocean Exploration, 'High Seas Governance' (NOAA, 2023) <https://www.oceanexplorer.noaa.gov /facts/high-seas-governance.html> accessed 14 May 2025.
[21] UNCLOS (n 4).

4.5 Registration Convention

The Convention on Registration of Objects Launched into Outer Space mandates the registration of space objects launched into orbit with a UN administered registry.

4.6 Moon Agreement

The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies addresses activities on the Moon and other celestial bodies, including resource exploitation. The Moon Treaty, although having fewer signatories and considered by some as outdated, explicitly declares the Moon and its natural resources (including asteroids) as the common heritage of all mankind potentially hindering private resource extraction.

4.7 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space

Complementing the above treaties are five declarations and legal principles adopted by the UN General Assembly namely: the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,[75] the Broadcasting Principles, [76] the Remote Sensing Principles, [77] the Nuclear Power Sources Principles,[78] and the Benefits Declaration principles.[79] These address areas such as broadcasting, remote sensing, the use of nuclear power sources in space, and the imperative of international cooperation for the benefit of all states, particularly developing nations. The United Nations Office for Outer Space Affairs (UNOOSA) has developed the Accessing Space Treaty Resources Online (ASTRO) database, which compiles these international space law instruments and their ratification statuses.[80]

Recognizing the regulatory uncertainties surrounding space resource development, the Hague International Space Resources Governance Working Group underscores the international community's recognition of the emerging need for a more comprehensive regulatory framework for space resource development.[81] Their draft 'building blocks' represent a significant step towards establishing principles for the responsible and equitable utilization of space resources.[82] These proposed principles, rooted in international law, emphasize include international responsibility, unrestricted access to space resources, sustainable utilization, due regard for the interests of all countries and humankind., monitoring and redress of harmful impacts, benefit-sharing mechanisms, liability for damage, and the establishment of appropriate institutional arrangements, including an international registry for priority

[75] General Assembly Resolution 1962 (XVIII) (13 December 1963).
[76] General Assembly Resolution 37/92 (10 December 1982).
[77] General Assembly Resolution 37/92 (10 December 1982).
[78]General Assembly Resolution 47/68 (14 December 1992).
[79] General Assembly Resolution 51/122 (13 December 1996).
[80] Francis Lyall and Paul B Larsen, *Space Law: A Treatise* (2nd edn, Routledge 2018).
[81] Lotta Viikari, 'Governing the Final Frontier: The Hague Working Group on Space Resources Governance' (2018) 28 Finnish Yearbook of International Law 185.
[82] Ram S Jakhu, 'The Need for a Multilateral Agreement on the Exploration, Exploitation and Utilization of Space Resources' (2019) 7(1) *New Space* 3.

commercial quantities of coal and hydrocarbons have also been located.[97] Further, geological and geophysical evidence suggests potential petroleum reserves offshore, particularly within the sedimentary basins of the Filchner, Ronne, and Amery Ice Shelves, the Ross Sea and Ice Shelf, and the Weddell Sea. Currently, the extraction of these minerals is economically and physically challenging due to the harsh climate, extensive ice cover, and remote locations.[98]

However, advancing technologies are gradually increasing the feasibility of such operations. Concurrently, growing global environmental awareness is shifting concerns towards the protection of Antarctica's pristine environment. The risk of resource extraction is also amplified by the increasing accessibility resulting from the shrinking Antarctic ice sheet. Under severe climate change scenarios, ice-free areas could expand significantly by the end of the century, particularly on the Antarctic Peninsula, potentially unlocking mineral resource availability and causing substantial environmental alterations.

6.1 **Legal Frameworks on the Antarctic Zones**

The regulation of potential mineral resource activities within the Antarctic Treaty System (ATS) began in 1970 when the United Kingdom and New Zealand were approached by mineral companies interested in commercial geophysical exploration in the Southern Ocean.[99] This inquiry initiated a prolonged and highly contentious debate, dominating Antarctic politics throughout the 1980s and early 1990s. Recognizing the potential for significant environmental and political repercussions, the Treaty nations adopted a precautionary stance in 1976, implementing a voluntary moratorium on the exploration and exploitation of Antarctic minerals.

Despite the complexities involved, this initial moratorium paved the way for negotiations aimed at establishing a comprehensive minerals regime. These discussions culminated in the adoption of the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) in 1988. CRAMRA's objective was to govern all phases of mineral activity, stipulating that mining could only proceed if all Parties unanimously agreed that no environmental risks were present. This period also witnessed a notable increase in global interest in Antarctica, with the number of signatories to the Antarctic Treaty expanding from 25 to 38.

However, CRAMRA faced significant opposition from a powerful international environmental campaign, spearheaded by organizations such as Greenpeace and the Worldwide Fund for Nature. These groups advocated strongly for a complete ban on mineral exploitation and the designation of Antarctica as a ‘World Park’. The pressure exerted by these campaigns proved decisive when, in 1989, Australia and France chose not to sign CRAMRA. This refusal effectively prevented the agreement from entering into force, as its ratification required unanimous consent from all Treaty

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[97] Ibid.

[98] Mongabay, ‘Melting Antarctic ice could weaken world's strongest ocean current, study warns’ (8 April 2025) https://news.mongabay.com/short-article/melting-antarctic-ice-could-weaken-worlds-strongest-ocean-current-study-warns/ accessed 15 May 2025.

[99] New Zealand Ministry of Foreign Affairs and Trade, ‘The Antarctic Treaty System’ https://www.mfat.govt.nz/en/environment/antarctica-and-the-southern-ocean/the-antarctic-treaty-system/ accessed 15 May 2025.

nations. By 1990, a shift in perspective saw several countries, including Australia, France, New Zealand, Italy, and Belgium, proposing a comprehensive environmental protection convention for Antarctica, while others, such as the UK, Japan, and the USA, initially resisted a permanent mining ban.

The failure of CRAMRA represented a critical juncture for the Antarctic Treaty System, marking its first major threat. In response to this impasse, the United Kingdom and Chile convened a special meeting to develop comprehensive environmental protection measures. This initiative led to the drafting and subsequent signing of the Protocol on Environmental Protection to the Antarctic Treaty in 1991. This Protocol incorporated several definitions and measures from CRAMRA but ultimately established a definitive ban on all mineral resource activities in Antarctica, with the sole exception of scientific research. The demise of CRAMRA underscores the delicate nature of the ATS consensus process.

7. SUMMARY

The principle governing the use of resources beyond national jurisdiction calls for cooperative management for the 'common heritage of humankind.' This is understood as creating a trusteeship dedicated to safeguarding the interests of humanity as a whole, rather than those of specific states or private entities. A core aspect of this principle is the active and equitable sharing of benefits including financial, technological, and scientific advancements derived from these resources. This aims to establish a just foundation for limiting public and private commercial advantages and prioritizing distribution, notably to developing nations, thereby fostering intragenerational equity.

Recognizing certain areas as the collective heritage of humanity implies that their resources should be accessible for the benefit and use of all, while also considering the needs of future generations and the development of less industrialized countries. The overarching objective is the sustainable development of these shared spaces and their resources, with its tenets potentially reaching beyond conventional applications. Nevertheless, significant legal concerns exist concerning all facets of these resources beyond national jurisdiction and these subjects the regimes governing globally significant resources, irrespective of location, to critical examination. Consequently, it challenges fundamental concepts of traditional international law, such as territorial acquisition, sovereignty, sovereign equality, and international personality, alongside the allocation of planetary resources and consent as a basis for international law. Notably, the established framework for ocean management has long been considered a potential blueprint for the future organization of an increasingly interdependent world.

The requirement for equitable utilization (or equitable benefit sharing), which necessitates the distribution of financial, technological, and scientific benefits from the use of resources beyond national jurisdiction, has generated significant division, particularly between developed and developing states and corporate entities. While developing states often consider this element of the global commons essential for achieving distributive justice, developed states may perceive it as a potential obstacle to investment and the utilization of market mechanisms, such as property rights, to realize economic and environmental gains.

8. CONCLUSION

Drawing upon the preceding doctrinal and comparative legal analysis of resource governance beyond national jurisdiction, encompassing the legal regimes applicable to the deep-sea bed, high seas, outer space, and the Antarctic zones, this conclusion synthesizes the key insights derived from examining the UNCLOS, the Outer Space Treaty, and the ATS. While these international legal instruments establish crucial normative and institutional frameworks for the management of these global commons, the study reveals that their efficacy in balancing competing state interests with the imperative of long-term sustainability and equitable access demonstrates considerable variance across these distinct legal and ecological environments.

Therefore, the findings underscore that while these foundational legal structures provide essential frameworks, their effectiveness in ensuring truly sustainable and equitable resource governance beyond national jurisdiction is contingent upon continuous adaptation, robust enforcement, and proactive measures to address emerging challenges and scientific uncertainties. The pursuit of resource driven development by nations must be carefully calibrated against the imperative of safeguarding the long-term health and integrity of these shared global environments, consistent with the principles of international law and for the benefit of humankind.

9. RECOMMENDATIONS

Building upon the identified strengths and limitations of the current legal landscape, the following recommendations are proposed:

(a) Bolster Adaptive International Cooperation: Elevate international collaboration beyond mere upholding of existing frameworks. This necessitates proactive engagement in negotiating and implementing adaptive mechanisms that can respond effectively to evolving scientific understanding, technological advancements, and geopolitical shifts within each global common. This includes establishing clear pathways for regular review and amendment of existing agreements.

(b) Strengthen and Universalize Specific Regulatory Regimes: While UNCLOS and the BBNJ Agreement represent significant steps for marine biodiversity, concerted global efforts are needed to ensure their universal ratification and effective implementation. Furthermore, drawing lessons from the Antarctic Treaty System, the international community should explore the feasibility of developing more specific and robust regulatory regimes for resource activities in outer space, addressing issues such as resource extraction, space debris mitigation, and equitable benefit-sharing.

(c) Advance Integrated Ecosystem-Based Management with Precautionary Principles: Move beyond simply considering cumulative impacts to implementing truly integrated ecosystem-based management frameworks. This requires the adoption of a strong precautionary principle, particularly in the face of scientific uncertainty, ensuring that the burden of proof lies with

those proposing resource exploitation to demonstrate environmental safety and long-term sustainability.

(d) Invest in Transparent and Independent Monitoring and Robust Enforcement: Enhance monitoring capabilities through the development and deployment of independent, transparent, and internationally verifiable technologies across all global commons. Simultaneously, strengthen enforcement mechanisms by establishing clear lines of responsibility, effective dispute resolution mechanisms, and proportionate penalties for non-compliance. This may involve the creation of dedicated international bodies or the empowerment of existing ones with greater authority and resources.

(e) Foster Interdisciplinary Research, Innovation, and Equitable Knowledge Sharing: Significantly increase investment in interdisciplinary research that integrates environmental, social, economic, and technological perspectives on resource governance. Encourage and facilitate international collaboration in the development and dissemination of sustainable technologies and best practices. Crucially, establish mechanisms for equitable sharing of knowledge, data, and benefits derived from resource utilization in these areas, ensuring that the interests of all humanity, particularly developing nations, are duly considered.

An Analysis of the Impact of Oil Pollution on Public Health: A Case the Nigeria's Niger DeltaRegion

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Abstract

Oil production in Nigeria's Niger Delta has produced prolonged ecological degradation and public health harms despite a dense legal framework. Utilizing the doctrinal approach, this article analyses the Petroleum Industry Act 2021, the NESREA Act, the Environmental Impact Assessment Act, and the NOSDRA regime, read with constitutional directives, the African Charter, UNCLOS, and UNEP's Ogoniland guidance. It synthesises empirical evidence on exposure pathways including contaminated drinking water, soil to crop and fish bioaccumulation, and air pollution from routine gas flaring, and links these to respiratory disease, hepatorenal injury, and adverse birth outcomes. The analysis reveals enforcement deficits, fragmented mandates, weak sanctions, methodological flaws in Joint Investigation Visits, and a pay to pollute equilibrium under pecuniary penalties. It concludes by proposing revenue-based penalties and strict liability triggers, codified parent company duties, an independently governed remediation fund, specialised environmental benches, mandatory Health Impact Assessments.

Keywords*: Environmental justice, Niger Delta; Petroleum Industry Act 2021; Public health.*

1. INTRODUCTION

Nigeria's discovery of oil in commercial quantity at Oloibiri in 1956 transformed the Niger Delta region into the nation's economic engine, but this boon came at a high cost.[1]Over six decades of oil exploration and production have left a legacy of environmental pollution consisting of oil spills on land and in rivers, gas flaring in the air that has devastated the fragile delta ecosystem and endangered the health and livelihoods of its inhabitants. The Niger Delta, a vast wetlands region spanning over 70,000 square kilometres and home to one of the world's most extensive mangrove forests, accounts for the bulk of Nigeria's crude oil reserves and production.[2] Oil

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[1]Theodore Okonkwo and UzuazoEtemire, '"Oil Injustice" in Nigeria's Niger Delta Region: A Call for Responsive Governance' (2017) 08 *Journal of Environmental Protection* 42.

[2]ibid.

wealth from this region provides about 75% of Nigeria's government revenue and 90% of foreign exchange earnings,[3] yet paradoxically the communities on whose lands this "black gold" is extracted have suffered gross neglect and environmental injustice. For decades, residents have faced polluted drinking water, oil-fouled farmlands, dying fish stocks, and a litany of health problems from respiratory illnesses to cancers all linked to hydrocarbon exposure.

The scale of oil pollution in the Niger Delta is staggering. Between 1976 and 1991, more than 2,976 oil spill incidents released over two million barrels of oil into the environment.[4] More recently, Nigeria's National Oil Spill Detection and Response Agency (NOSDRA) recorded 822 oil spills in 2020–2021 alone, amounting to 28,003 barrels of oil lost.[5] Chronic operational spills and occasional blowouts have become a "slow poison," gradually contaminating soil, water, and air. The region's emblematic case, Ogoniland, was the subject of a landmark UN Environment Programme report in 2011 that revealed "shocking levels of pollution" including benzene in drinking water at 900 times WHO guidelines and warned that some clean-up could take 25 to 30 years.[6] UNEP recommended an initial $1 billion for a comprehensive environmental restoration of Ogoniland.[7] Yet progress has been lethargic: as of 2020, only 11% of planned clean-up sites in Ogoniland had even commenced remediation, leaving vast swathes still contaminated.[8]

Oil pollution's impact on public health in the Niger Delta has been devastating. Multiple studies have found that crude oil constituents and their by-products permeate the air, water, and food chain in affected communities at levels that pose serious health risks. For example, carcinogenic polycyclic aromatic hydrocarbons (PAHs) and benzo(a)pyrene have been detected in surface waters and soils of spill sites at unsafe concentrations.[9] Soil and crops in polluted areas contain elevated heavy metals (like lead, cadmium, and nickel) far above permissible limits.[10] Residents exposed via drinking water, dermal contact, or inhalation suffer both acute and long-term effects: irritation and respiratory problems in the short term, and increased rates of cancer, organ damage (such as kidney failure), and other chronic illnesses over time. A medical survey in the Niger Delta found significantly higher prevalence of symptoms like skin lesions, gastrointestinal issues, and respiratory ailments in oil-impacted communities than in unaffected areas. Alarmingly, a 45% increase in background radiation levels was recorded after a major spill, suggesting

[3]ibid.
[4]Augusta C Nkem and others, '"Economic Exclusion and the Health and Wellbeing Impacts of the Oil Industry in the Niger Delta Region: A Qualitative Study of Ogoni Experiences"' (2024) 23 *International Journal for Equity in Health* 183.
[5]Omosehin Gbedi Godday and Anya Kingsley Anya, 'LEGAL AND INSTITUTIONAL ASPECTS OF THE CONTROL OF OIL POLLUTION IN NIGERIA' (2024) 1 *KB Law Scholars Journal UK* 72.
[6]'Cleaning up Nigerian Oil Pollution Could Take 30 Years, Cost Billions' (*UN News*, 4 August 2011) <https://news.un.org/en/story/2011/08/383512> accessed 2 September 2025.
[7]ibid.
[8]'The Ogoni People Are Sick of Dirty Drinking Water' (*Amnesty International*, 18 June 2020) <https://www.amnesty.org/en/latest/news/2020/06/no-clean-up-no-justice-shell-oil-pollution-in-the-niger-delta/> accessed 2 September 2025.
[9]Joana Teixeira and others, 'Environmental Contamination with Polycyclic Aromatic Hydrocarbons and Contribution from Biomonitoring Studies to the Surveillance of Global Health' (2024) 31 *Environmental Science and Pollution Research* 54339.
[10]Yousef Alhaj Hamoud and others, 'Cadmium and Lead Accumulation in Important Food Crops Due to Wastewater Irrigation: Pollution Index and Health Risks Assessment' (2024) 10 *Heliyon* e24712.

potential long-term cancer hazards.[11]Gas flaring which is the continual burning of associated gas from oil wells emits a toxic cocktail of pollutants (particulate matter, SO , NO_x, volatile organics) and acid rain, leading to respiratory diseases, acidified water sources, and corroded roofs in host communities. The Federal High Court of Nigeria in the *Gbemre v Shell Petroleum Development Company of Nigeria Ltd and others*[12] case poignantly noted that gas flaring has "gravely impaired health" and contributed to the "premature deaths" of community members, as well as undermining food security by diminishing crop yields.

Against this backdrop, this article analyses the legal and institutional frameworks governing oil pollution and public health in Nigeria, and assesses their effectiveness in addressing the Niger Delta crisis. Part II of the article reviews the domestic environmental laws and regulations that seek to prevent or mitigate oil-related pollution, as well as the key public health statutes and institutions. Part III examines relevant international legal instruments and standards that frame Nigeria's obligations, such as UNCLOS and UNEP guidelines, and how these interface with domestic law. Part IV provides the Niger Delta case study in detail, linking empirical findings on environmental contamination and health impacts to regulatory (in)action. Part V offers a critical legal analysis, exploring issues of enforcement, regulatory oversight, and corporate accountability through the lens of Nigerian case law and judicial decisions. Notable court cases and their implications for environmental justice are discussed, from early compensation claims against oil companies to recent judgments expanding the right to a healthy environment and allowing public interest litigation. Part VI concludes with recommendations for legal and policy reforms.

2. LEGAL AND INSTITUTIONAL FRAMEWORK IN NIGERIA

2.1 Petroleum Industry Act 2021 (PIA): The Petroleum Industry Act is Nigeria's newest and most comprehensive oil and gas sector law, overhauling a patchwork of older petroleum laws. Enacted after decades of debate, the PIA consolidates governance, fiscal, and regulatory provisions for the industry, including significant environmental management requirements. The Act establishes new regulatory bodies namely the Nigerian Upstream Petroleum Regulatory Commission (NUPRC) and the Nigerian Midstream and Downstream Petroleum Regulatory Authority with mandates to ensure safe and environmentally sustainable operations.[13] For instance, the NUPRC is tasked with "promoting healthy, safe, efficient and effective conduct of upstream petroleum operations in an environmentally acceptable and sustainable manner."[14] In line with this, the PIA expressly prohibits oil and gas operators from engaging in any practices harmful to the environment.[15] Violation of environmental obligations or failure to adhere to "good international petroleum industry practices" can theoretically trigger the revocation of oil licenses or leases by the Minister.[16]

[11]Best Ordinioha and Seiyefa Brisibe, 'The Human Health Implications of Crude Oil Spills in the Niger Delta, Nigeria: An Interpretation of Published Studies' (2013) 54 *Nigerian Medical Journal* 10.
[12] (2005) AHRLR 151 (NgHC).
[13]Uche Sam Okoro and Carol Arinze-Umobi, 'THE PETROLEUM INDUSTRY ACT 2021 AND QUEST FOR STRICTER ENVIRONMENTAL REGULATION IN NIGERIA'S ENERGY SECTOR' (2023) 3 *LAW AND SOCIAL JUSTICE REVIEW* 59.
[14]ibid.
[15]ibid.
[16] Petroleum Industry Act 2021 (Nigeria) ss. 96(1)(a), 96(1)(i), 120(1)(h) and s 104(1).

Notably, these provisions mirror similar clauses in the old Petroleum Act and regulations that required "good oil field practice," which were rarely enforced.

The PIA introduces some new mechanisms aimed at environmental protection. One innovation is the requirement that all oil companies must prepare and submit an Environmental Management Plan (EMP) for their operations.[17] Within one year of the Act's commencement (or within 6 months of receiving a new license), each operator in the upstream or midstream sector must present an EMP to the regulator, demonstrating its capacity to "rehabilitate and manage negative impacts on the environment."[18] This provision is intended to ensure operators take a proactive approach to environmental risks and have remediation strategies ready. However, the Act does not specify any fine or direct penalty for failure to submit or implement an EMP, other than the general threat of license revocation.[19] Given that license revocation is a drastic step rarely used in practice (governments have been reluctant to shut down major producers), experts have suggested that intermediate penalties, such as substantial fines for non-compliance, would strengthen this EMP requirement.[20]

Another major environmental aspect of the PIA is its treatment of gas flaring. Gas flaring is the burning off excess natural gas during oil production and has long plagued the Niger Delta with toxic air pollution and wasted energy resources. The Associated Gas Reinjection Act of 1979 nominally prohibited flaring except with ministerial permission, even threatening operators with forfeiture of concessions for violations, yet flaring continued unabated under successive one-year exemptions.[21] The PIA 2021 explicitly outlaws routine gas flaring, permitting it only in emergencies or if the regulator grants a temporary exemption for safety reasons.[22]Companies that flare gas in violation of the law are made "liable to a fine as prescribed by the Commission". This ostensibly signals a stricter stance, but in practice the PIA's approach may be more lenient than the old law.[23] Under the PIA, the punishment for illegal flaring is a monetary fine (the Act leaves it to the regulator to set the amount), whereas the 1979 law threatened loss of operating licenses. In effect, the PIA reduces the sanction to fines instead of license forfeiture, perhaps reflecting realism that government was never willing to revoke licenses for flaring. The concern, however, is that unless fines are made truly punitive (far higher than the economic benefit of flaring), companies may simply treat them as a cost of business. Indeed, Nigeria has had gas flare penalty fees for years, yet flaring remained rampant as in 2020 Nigeria still ranked among the top ten gas flaring countries globally.[24] The PIA does create a new funding scheme (the "Midstream Gas Infrastructure Fund") and encourages flare commercialization programs, which might in time reduce flaring by

[17]Okoro and Arinze-Umobi (n 13).
[18] Petroleum Industry Act 2021 (Nigeria) s 102(1)(a)–(b) and s 102(3)(b).
[19]Okoro and Arinze-Umobi (n 13).
[20]ibid.
[21] Associated Gas Re-Injection Act 1979 (Nigeria) (Cap A25, LFN 2004) ss 3(1), 3(2), 4(1); Associated Gas Re-Injection (Continued Flaring of Gas) Regulations 1985 (Nigeria).
[22] Petroleum Industry Act 2021 (Nigeria) ss 104(1)–(4), 107; see also s 105.
[23] ibid ss 106, 108.
[24] World Bank, Global Gas Flaring Tracker Report 2021 (World Bank 2021) 32–33.

directing gas to productive use.[25] Ultimately, the PIA's success in curbing flaring and pollution will depend on vigorous enforcement by NUPRC and willingness to impose meaningful fines or other consequences on errant operators areas where past regimes have fallen short.

2.2 National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007: This Act established NESREA as the federal agency charged with enforcing environmental laws and regulations across Nigeria. NESREA replaced the old Federal Environmental Protection Agency (FEPA) and was envisioned as a stronger watchdog for environmental compliance. Sections 7 and 8 of the NESREA Act grants the Agency broad powers to set and enforce standards for water and air quality, effluent limitations, and the control of harmful substances and pollution. For example, Section 27 of the NESREA Act prohibits, without lawful authority, the discharge of hazardous substances into the environment whether solid, liquid, or gaseous in quantities or concentrations harmful to humans or the ecosystem. A violation of Section 27 is a criminal offense: upon conviction, an individual is liable to a fine up to ₦1,000,000 or 5 years imprisonment, and a corporate entity can be fined up to ₦1,000,000 (with an additional fine for every day the offense continues). Thus, while NESREA has the legal authority to sanction polluters, the sanctions under its Act may lack deterrent force.

A significant limitation of NESREA's mandate is that the Agency's jurisdiction in the oil and gas sector is constrained. Section 7(c) and section 8(g) of the NESREA Act exempts oil and gas exploration and production activities from NESREA's purview, on the premise that those are to be regulated by the petroleum authorities.[26] This jurisdictional carve-out meant that for many years, NESREA could not fully oversee or penalize environmental infractions by oil companies, as the task fell to the petroleum ministry's inspectorate, which often prioritized oil production over strict environmental enforcement. Indeed, Section 7(c) of the Act enjoins NESREA to "enforce compliance with laws, guidelines, and regulations on sustainable management of the environment" generally, and harmful discharges from any industry would fall within this remit. In practice, however, a turf war long existed: the petroleum regulators issued their own environmental guidelines and were reluctant to cede authority. Only recently, with the PIA's reforms, is there potential for clearer collaboration.

2.3 Environmental Impact Assessment (EIA) Act 1992: Recognizing that prevention is better than cure, Nigeria enacted the EIA Act[27] to ensure that major projects undergo environmental scrutiny before commencement. The EIA Act requires that any proposed project or activity that may significantly affect the environment including oil and gas field development, pipelines, refineries, etc. must undergo an Environmental Impact Assessment and obtain approval. The assessment process involves evaluating the potential environmental (and health) impacts, consulting with affected communities, and devising mitigation measures. Under the Act, no industrial development in Nigeria should proceed without a

[25] Petroleum Industry Act 2021 (n 2) s 52(7)(d), (10)(c); see also Flare Gas (Prevention of Waste and Pollution) Regulations 2018 (Nigeria) regs 13–15; Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023 (Nigeria) regs 7, 13.
[26] Formerly the Department of Petroleum Resources, now NUPRC/NMDPRA under the PIA.
[27] Decree No. 86 of 1992.

completed EIA report that is reviewed and approved by the Federal Ministry of Environment (formerly FEPA).[28] For oil and gas operations in the Niger Delta, this means that things like seismic surveys, drilling new wells, laying pipelines, building flow stations or export terminals all legally require EIAs. In reality, compliance has been patchy. Many projects either conducted perfunctory EIAs or obtained belated approvals after projects were already underway. Enforcement was weak in the early decades, as some companies took advantage of regulatory laxity. However, there have been instances of legal challenge using the EIA Act.

One famous case is *Oronto Douglas v. Shell Petroleum Dev. Co.*,[29] where an environmental activist sued to halt a large natural gas project on the ground that no proper EIA was carried out. The initial trial court struck out the case, citing the activist's lack of *locus standi* (legal standing) since he was not personally affected. On appeal, the Nigerian Court of Appeal agreed that the suit should not have been thrown out so hastily and ordered a retrial. Although the substantive issue (enforcing the EIA Act) never reached final judgment in that case, it signalled that citizens could invoke the Act to hold projects accountable. Another instance was folded into the Gbemre case where the plaintiffs argued that continuous gas flaring without an EIA of its effects violated both the EIA Act and their fundamental rights.[30] The Federal High Court in 2005 agreed, declaring that failure to carry out an EIA for gas flaring operations was a breach of the communities' right to life and dignity. The court ordered the oil companies to comply with the EIA Act forthwith and for the government to amend any laws (like the Associated Gas Regulations) that permitted flaring without environmental assessment. These decisions underscore that the EIA Act is not a mere formality but a legal obligation, and non-compliance can have constitutional implications.

2.4 Other Relevant Laws and Agencies: In addition to the above, several other Nigerian laws touch on oil pollution and health, though they may not be as central. The National Oil Spill Detection and Response Agency (NOSDRA) Act 2006 established NOSDRA as the agency to coordinate oil-spill management and emergency response. NOSDRA is meant to ensure prompt containment and cleanup of spills, maintain a database of spill incidents, and impose administrative fines on operators for oil spills.[31] Another law, the Harmful Waste (Special Criminal Provisions etc.) Act 1988,[32] criminalizes the dumping of hazardous wastes in Nigeria (a law prompted by the infamous Koko toxic waste dump incident). While aimed more at imported waste, it has provisions broad enough to cover hazardous oil industry waste; indeed, the NESREA Act explicitly preserves the Harmful Waste Act's application to any "hazardous substance" defined as harmful waste.[33] Nigeria's public health statutes, such as the Public Health Act and state public health laws, generally empower authorities to address environmental health threats, but they have rarely been invoked in the context of oil pollution, perhaps due to the

[28]Altine Ofokansi & Professor Chi Johnny Okongwu, 'A Critical Review of Sustainable Environmental Impact Assessment Processes in Energy Projects in Nigeria' (2025) 5 *DE JURISCOPE LAW JOURNAL* 74.
[29] (1999) 2 NWLR (Pt 591) 466 (CA).
[30](2005) AHRLR 151 (NgHC).
[31] NOSDRA Act 2006, ss 6(1)(a)–(d), 6(2)–(3), 18(1)(a)–(c).
[32] Cap H1 LFN 2004.
[33] Ibid, ss 1, 6, 12; see generally DSG Ogbodo, 'Two Decades After the Koko Incident' (2009) 15 *Annual Survey of International & Comparative Law* 1.

expectation that specialized environmental agencies will handle such matters. Lastly, Nigeria's Constitution includes a Fundamental Objective directing the State to "protect and improve the environment" and safeguard water, air and land.[34] While this directive is not justiciable in court (being in the non-enforceable Chapter II), it signals the importance of environmental protection as a state policy goal.[35]

3. INTERNATIONAL AND COMPARATIVE LEGAL INSTRUMENTS

Nigeria's environmental obligations and approaches to oil pollution are also framed by various international legal instruments and guidelines. These provide both benchmarks for best practices and, in some cases, binding obligations that complement domestic law.

3.1 United Nations Convention on the Law of the Sea (UNCLOS) 1982: Nigeria is a party to UNCLOS,[36] which contains a comprehensive regime for protection of the marine environment. Part XII of UNCLOS obliges coastal states to prevent, reduce, and control pollution of the marine environment from various sources, including land-based sources and activities in the seabed under national jurisdiction. Article 192 of UNCLOS imposes a general obligation on states to "protect and preserve the marine environment." In the context of the Niger Delta, this means Nigeria must take measures to prevent oil spills and pollution that could affect its territorial waters, rivers, and the Gulf of Guinea. UNCLOS Article 194 further specifies that states must use "best practicable means" to minimize pollution from installations and devices used in exploration or exploitation of natural resources.[37] Notably, Article 235 of UNCLOS addresses responsibility and liability: it provides that States are responsible for fulfilling their international obligations to protect the marine environment and "shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation" for damage caused by pollution by persons under their jurisdiction.[38] This essentially mandates that Nigeria's legal system must offer remedies to victims of oil pollution which is a standard Nigeria arguably struggles to meet, given the protracted battles Niger Delta communities face to get compensation.

While UNCLOS does not directly enforce penalties on companies, it created impetus for national laws and regional cooperation. Under UNCLOS Article 208, Nigeria must enforce pollution standards for seabed activities (like offshore drilling) and cooperate regionally. Nigeria has indeed participated in regional agreements.[39] Domestically, Nigeria implemented some UNCLOS mandates through the now-repealed Oil in Navigable Waters Act[40] and through the NOSDRA Act for oil spill response. Despite these, the frequent occurrences of oil slicks and dead marine life after spills indicate

[34] Constitution of the Federal Republic of Nigeria 1999 (as amended) s 20.
[35] **ibid s 6(6)(c);** *Archbishop OlubunmiOkogie v Attorney-General of Lagos State* (1981) 2 NCLR 337; *Abacha v Fawehinmi* [2000] 6 NWLR (Pt 660) 228 (SC).
[36] Adopted 10 December 1982, entered into force 16 November 1994 1833 UNTS 3.
[37] This covers offshore oil platforms and even onshore facilities insofar as pollution reaches the sea.
[38] IT Grgić and Z Pepłowska-Dąbrowska, 'Article 235 of LOSC and the International Liability Regime for Oil Pollution Damage: Cracks in the System as Shown by Recent Case Law', *40 Years of the United Nations Convention on the Law of the Sea* (Routledge 2025).
[39] Within the West and Central African region under UNEP's Regional Seas Programme, there's the Abidjan Convention 1981 for marine pollution which Nigeria ratified.
[40] Inherited from British law, regulating ship-source pollution.

gaps in meeting UNCLOS commitments. It could be argued that Nigeria's failure to effectively prevent and respond to Niger Delta oil pollution is a breach of UNCLOS Article 192, and its lack of timely compensation for affected fishermen and coastal villages sits uneasily with Article 235's spirit. However, enforcement of UNCLOS obligations occurs through diplomatic and reputational channels, not direct court action by individuals.

3.2 UNEP Guidelines and Environmental Standards: The United Nations Environment Programme (UNEP) has been actively involved in assessing and guiding environmental management in the Niger Delta. The most significant contribution is the UNEP Environmental Assessment of Ogoniland (2011)which is a report that has effectively set guidelines for remediation in oil-polluted areas. The UNEP report documented extensive soil and groundwater contamination, some of it dating back decades, and made detailed recommendations: from emergency measures like providing clean drinking water to communities with benzene-contaminated wells, to longer-term steps like creating a specialized agency to oversee cleanup and establishing a $1 billion Environmental Restoration Fund for Ogoniland.[41] The Nigerian government accepted the report and in 2016 launched the Hydrocarbon Pollution Remediation Project (HYPREP) under the Federal Ministry of Environment to implement UNEP's recommendations. HYPREP's efforts have been slow, as noted, only a small fraction of contaminated sites have seen cleanup begin.[42] UNEP continues to issue guidelines and best practice documents globally on oil spill preparedness, environmental impact assessment, and cleanup techniques (such as bioremediation). While not legally binding, these guidelines influence Nigerian policy.

3.3 Lugano Convention 1993: In terms of international liability for environmental damage, one instrument often referenced is the draft (and regionally adopted, but not globally in force) Convention on Civil Liability for Environmental Damage.[43] This convention, though not ratified by Nigeria, illustrates the kind of regime that could hold polluters strictly liable for environmental harm. Notably, the 1993 Lugano Convention defines "environment" broadly to include natural resources both biotic and abiotic (living organisms, water, air, etc.).[44] It imposes strict liability on operators of dangerous activities (like oil operations) for damage caused, and requires them to have financial security (insurance) to cover potential claims. Nigeria has not acceded to this convention, but its principles influenced the development of Nigerian law.For example, the definition of "pollution" in Nigeria's now-repealed FEPA Act and current laws echoes international definitions. The FEPA Act (replaced by NESREA Act) defined pollution as any man-made alteration of the environment beyond acceptable limits, aligning with global concepts.[45] Additionally, Nigeria is a party to specific

[41] United Nations Environment Programme, *Environmental Assessment of Ogoniland* (UNEP 2011) Executive Summary 4, 8–9.

[42]Kabari Sam, Nenibarini Zabbey and Amarachi Paschaline Onyena, 'Implementing Contaminated Land Remediation in Nigeria: Insights from the Ogoni Remediation Project' (2022) 115 *Land Use Policy* 106051.

[43]Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (adopted 21 June 1993, not yet in force) ETS No 150 (also CETS No 150) *(Lugano Convention 1993)*.

[44] Lugano Convention 1993, art 2(10).

[45]Federal Environmental Protection Agency Act (Cap F10 LFN 2004) s 38 (definition of 'pollution') (repealed and replaced by National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007).

liability conventions in the oil realm, such as the International Convention on Civil Liability for Oil Pollution Damage 1969[46] and the Fund Convention 1971/1992,[47] but those apply to oil tanker spills (marine shipping incidents) rather than operational spills in oilfields. Under those conventions, Nigeria has legislation capping ship-owner liability and providing for compensation via an international fund for oil spills at sea.[48] This has limited relevance to Niger Delta onshore spills, but it shows Nigeria's acceptance of the principle that polluters should be financially liable for cleanup and damages.

3.4 African Charter on Human and Peoples' Rights: Nigeria has since incorporated the African Charter on Human and Peoples' Rights (ACHPR)[49] into its domestic law.[50] The African Charter, in Article 24, guarantees "the right of all peoples to a general satisfactory environment favorable to their development."[51] This right to a healthy environment has been given concrete meaning by the African Commission in the landmark case *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*,[52] which dealt with the Niger Delta situation. The African Commission found Nigeria in violation of Article 24 as well as the right to health under Article 16 for grievously failing to protect the Ogoni people from oil pollution and even directly contributing to environmental harm through its NNPC joint venture with Shell. The Commission held that governments must not only refrain from pollution themselves but have a duty to prevent pollution by private companies, inform communities of risks, and ensure participation in decisions. Nigeria was found to have "facilitated the destruction" of Ogoni environment, thereby violating the peoples' rights.[53] As Nigeria has domesticated the African Charter, Nigerian courts can (and do) directly apply its provisions. Indeed, the plaintiffs in *Gbemre v. Shell*[54] invoked the African Charter's Article 24 alongside constitutional rights, and the Federal High Court reaffirmed that a "clean, poison-free, pollution-free and healthy environment" is a fundamental right under the Charter and Constitution.[55] Thus, international human rights law reinforces Nigeria's legal framework by elevating environmental harm to a human rights violation when it jeopardizes health and life. This has provided a powerful advocacy and litigation tool for communities: framing their struggle as one of human rights and environmental justice, not just tort or regulatory violation.

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[46] (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3*(CLC 1969)*

[47]International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (adopted 18 December 1971, entered into force 16 October 1978) 1110 UNTS 57*(Fund Convention 1971)*; Protocol of 1992 to Amend the 1971 Fund Convention (adopted 27 November 1992, entered into force 30 May 1996) 1953 UNTS 330*(Fund Convention 1992)*.

[48]Merchant Shipping (Liability and Compensation) Regulations 2012 (Nigeria) S I No 29 of 2012, regs 1(a), 3, 16–20, 23–25 (giving effect in Nigeria to the 1992 Civil Liability and Fund Conventions; capping shipowner liability under the CLC and providing compensation via the International Oil Pollution Compensation Fund).

[49] (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

[50] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap A9 LFN 2004).

[51]Ufuoma Veronica Awhefeada, Patrick Chukwunonso Aloamaka and Ejiro T Kore-Okiti, 'A Realistic Approach Towards Attaining Sustainable Environment Through Improved Public Participation in Nigeria' (2023) 8 *International Journal of Professional Business Review* e0844.

[52] (2001) AHRLR 60 (ACHPR).

[53]Ibid.

[54] (2005) AHRLR 151 (NgHC).

[55]Ibid.

3.5 Other International Instruments: Nigeria is also party to various multilateral environmental agreements that indirectly relate to oil pollution. For instance, the Basel Convention on Transboundary Movement of Hazardous Wastes[56] might apply to the dumping of oily waste or contaminated soil if moved across borders (e.g., for treatment).[57] The Paris Agreement on Climate Change,[58] which Nigeria ratified,[59] puts pressure on Nigeria to reduce gas flaring as part of lowering greenhouse gas emissions.[60] The United Nations Sustainable Development Goals (SDGs) also include Goal 3 (Good Health and Well-being) and Goal 6 (Clean Water and Sanitation) and Goal 15 (Life on Land), all of which are relevant to tackling oil pollution impacts on health and environment.[61] While these are soft law or policy commitments, they influence national priorities and funding. Furthermore, Nigeria often looks to comparative law from other jurisdictions for guidance. For example, Nigeria has studied the United States' Oil Pollution Act 1990 (which created a robust liability and compensation scheme after the Exxon Valdez spill) and the Environmental Protection Agency's practices, as well as the approach of countries like Norway which has very strict offshore environmental regulation.[62]

4. CASE STUDY OF OIL POLLUTION AND PUBLIC HEALTH IN THE NIGER DELTA

The Niger Delta region exemplifies the catastrophic convergence of environmental devastation and public health crises resulting from oil pollution. This case study outlines the real-world impacts in the Delta, linking them to the regulatory lapses discussed above. It draws on empirical data from environmental assessments, epidemiological studies, and community reports to illustrate how law on the books often failed to translate into protection on the ground.

4.1 Extent and Nature of Oil Pollution: The Niger Delta has been described as one of the most oil-polluted places on earth.[63] Thousands of spills both large and small have occurred over the decades. Causes range from operational accidents (blowouts, equipment failure, corrosion of pipelines) to sabotage and oil theft (vandalism of pipelines, illegal bunkering, artisanal refining). According to Nigeria's NOSDRA, the majority of recent spills by volume are often attributed to third-party interference (sabotage), which oil companies cite to avoid liability.[64] However, even

[56] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57.
[57]Patrick Chukwunonso Aloamaka, 'Navigating the Climate Crisis: Exploring International Law's Evolution and Application' (2024) 6 *GLS Law Journal* 48.
[58] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) (UNFCCC).
[59] Federal Republic of Nigeria, Long-Term Low-Emissions Development Strategy (LT-LEDS) (2024) 1 ("The revised NDC commits to end flaring by 2030 and to reduce fugitive methane emissions…").
[60] Nigeria's nationally determined contribution pledges to end routine flaring by 2030.
[61] UNGA Res 70/1, 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1 (SDGs, including Goals 3, 6, 15).
[62]Jenigho Philip Esavwede and UG Oyibodoro, 'Gas Flaring in Nigeria's Niger Delta: Legal Challenges and Lessons from Norway's Regulatory Framework' (2025) 05 *Journal of Environmental Law & Policy* 148.
[63]Abonyi Nichodemus Nnaemeka, 'Environmental Pollution and Associated Health Hazards to Host Communities (Case Study: Niger Delta Region of Nigeria)' (2020) 1 *Central Asian Journal of Environmental Science and Technology Innovation* 30.
[64]ibid.

spills officially blamed on "sabotage" reveal underlying negligence by companies in securing their infrastructure and responding promptly to leaks. In the UK case brought by Bille and Ogale communities,[65] the High Court pointed out in 2025 that Shell could be liable for damage from pipeline bunkering or illegal refining if it failed to take reasonable steps to protect its pipelines and clean up promptly, rejecting Shell's attempt to entirely disavow responsibility for such spills. This mirrors the situation on the ground were villages are often caught in the blame game between oil firms and oil thieves, while the oil continues to gush into their creeks.

Major incidents underscore the scale: the Bomu Well 11 blowout of 1970 in Ogoniland coated the land with crude, rendering over 600 hectares uncultivable.[66] Decades later, families from K-Dere in Ogoni still pursued compensation, leading to the case *Shell v. Farah*[67] where evidence showed the well blowout caused near-permanent soil damage despite partial remediation. In 1998, a massive spill from a Shell pipeline into the Ebubu community's rivers and farmland sparked litigation that only concluded in 2021 with Shell agreeing to pay ₦45.9 billion (USD 111 million) in compensation.[68]Another infamous case was the Bodo oil spills of 2008-2009,[69] where tens of thousands of barrels spilled into mangroves; after protracted legal battles in UK courts, Shell settled with the community for £55 million in 2015 and agreed (separately) to participate in cleanup, which is ongoing.[70]Remediation and revegetation of roughly 1,000 ha of oiled mangroves has been underway since 2015, but remains ongoing.[71]These are but a few examples as there are countless smaller spills (of say 50–500 barrels) go unreported or barely noted, yet their cumulative impact is severe.[72] A review by Amnesty International found that even "minor" spills in sensitive environments can ruin fisheries and drinking water for years, and that Shell and other operators often under-report spill volumes and response effectiveness.[73] The "Joint Investigation Visit" reports (JIVs) meant to document spills

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[65]Alame&Ors v Shell plc and Renaissance Africa Energy Company Ltd [2025] EWHC 1539 (KB).

[66] Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta* (June 2009) AFR 44/017/2009, 76; FBG Tanee and E Albert, 'Post-Remediation Assessment of Crude Oil Polluted Site at Kegbara-Dere Community, Gokana LGA of Rivers State, Nigeria' 2 *Journal of Bioremediation & Biodegradation* 122; Uzoma Darlington Chima and Giobari Vure, 'Crude-Oil-Spill-Induced Spatial Variation in Woody Species Populations of an Oil-Rich Community in Rivers State, Nigeria' (2013) 4 *Journal of Environment and Ecology* 7.

[67] [1995] 3 NWLR (Pt 382) 148 (CA).

[68]William Clowes, 'Shell to Pay $111 Million to Resolve Long-Running Oil-Spill Dispute in Nigeria' (*Insurance Journal*, 17 August 2021) <https://www.insurancejournal.com/news/international/2021/08/17/627485.htm> accessed 3 September 2025.

[69]*The Bodo Community &Ors v Shell Petroleum Development Company of Nigeria Ltd*[2014] EWHC 1973 (TCC) (Akenhead J).

[70]John Vidal, 'Shell Announces £55m Payout for Nigeria Oil Spills' *The Guardian* (7 January 2015) <https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills> accessed 3 September 2025.

[71] 'UPDATE: Large-Scale Mangrove Cleanup and … Bodo Remediation and Revegetation Project' (International Oil Spill Conference, 2024); 'Multi-Constituent Management of the Largest Spill Clean-up in a Mangrove Habitat—Bodo' (International Oil Spill Conference, 2024).

[72]Amarachi Paschaline Onyena and Kabari Sam, 'A Review of the Threat of Oil Exploitation to Mangrove Ecosystem: Insights from Niger Delta, Nigeria' (2020) 22 *Global Ecology and Conservation* e00961.

[73]'Nigeria: Bad Information: Oil Spill Investigations in the Niger Delta' (*Amnesty International*, 7 November 2013) <https://www.amnesty.org/en/documents/afr44/028/2013/en/> accessed 3 September 2025; 'Nigeria: Clean It up: Shell's False Claims about Oil Spill Response in the Niger Delta' (*Amnesty International*, 3 November 2015)

have been criticized for inaccuracies and downplaying the extent of contamination.[74] The lack of transparency and community trust in these investigations often leads to disputes and sometimes violent protest.

4.2 Environmental Pathways to Public Health: Oil pollution affects health through multiple pathways. Contaminated water is a primary concern, many Niger Delta communities rely on shallow wells, streams, and rainwater. Oil spills frequently contaminate these sources with benzene and other hydrocarbons. UNEP's Ogoniland study famously found benzene (a known carcinogen) at levels 900 times above the World Health Organization guideline in a well, used for drinking in Nisisioken Ogale community.[75] Such chronic exposure dramatically raises risks of leukemia and other cancers. Likewise, the presence of heavy metals like lead and cadmium in water and soil can lead to neurological damage, especially in children, and kidney disease.[76] Crops grown in polluted soil can uptake toxins in cassava, yams, and vegetables from impacted farms in the Delta have been found with heavy metal concentrations above food safety limits.[77] This threatens food security and adds to malnutrition; Amnesty International noted that pollution has reduced the quantity and quality of crops and fish available, contributing to hunger and child malnutrition in some communities.[78] Fishing communities, once self-sufficient, have seen fish stocks decline or become unsafe to eat due to bioaccumulation of toxins. A dire feedback loop emerges as pollution destroys livelihoods (farming, fishing), leading to poverty and poorer nutrition, which in turn exacerbates health vulnerabilities. The African Commission in *SERAC v. Nigeria*[79] highlighted how oil pollution led to food insecurity and health crises, violating the Ogoni people's right to food, health, and life.

4.3 Air pollution from Gas Flaring and Soot: Beyond oil spills, gas flaring has been a constant assault on air quality in the Niger Delta. Flares burn 24/7 in some locations, producing sooty particulates and noxious gases. Communities living near flare sites (sometimes within a few hundred meters) have reported respiratory problems, asthma, blood pressure issues, and bad obstetric outcomes.[80] Acid rain from flares damages crops and acidifies water, compounding the contamination from spills. In Port Harcourt and its environs, a recent phenomenon of "black soot" blanketed the city starting around 2016, traced to incomplete combustion from illegal

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<https://www.amnesty.org/en/documents/afr44/2746/2015/en/> accessed 3 September 2025; 'Nigeria: Negligence in the Niger Delta: Decoding Shell and Eni's Poor Record on Oil Spills' (*Amnesty International*, 16 March 2018) <https://www.amnesty.org/en/documents/afr44/7970/2018/en/> accessed 3 September 2025.

[74]'Nigeria: Negligence in the Niger Delta: Decoding Shell and Eni's Poor Record on Oil Spills' (n 73).

[75] United Nations Environment Programme, *Environmental Assessment of Ogoniland* (UNEP 2011) Executive Summary 4.

[76]Hamoud and others (n 10).

[77]Irene Ogbogu and Ima Bright Nwoke, 'Distribution of Heavy Metals and Total Petroleum Hydrocarbons in Soil and Cassava (Manihot Esculenta) around Omoku, Rivers State, Nigeria' (2024) 1 *Faculty of Natural and Applied Sciences Journal of Applied Chemical Science Research* 14.

[78] Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta* (June 2009) AFR 44/017/2009.

[79] (2001) AHRLR 60 (ACHPR).

[80]Some studies linked flaring to higher incidence of preterm births and neonatal deaths.

refining of stolen oil and perhaps also burning of oil waste.[81] This black soot (essentially fine particulate matter) led to a spike in hospital visits for breathing difficulties. A 2017 health assessment concluded that the soot pollution "worsened the public health situation" in Port Harcourt, correlating with increases in bronchitis and other lung ailments.[82] The government's sluggish response to stop illegal refining and mitigate the soot problem again underscores governance gaps. It was only after public outcry that task forces were set up, which have only partly curbed the issue.

4.4 Health Outcomes and Statistics: While comprehensive health data in the Niger Delta is hard to obtain because health surveillance systems are weak, localized studies provide snapshots. A 2013 analysis by Ordinioha and Brisibe[83] reviewed published health surveys and found consistent evidence of elevated health risks in oil-polluted areas. For instance, they found higher prevalence of skin rashes, eye irritation, and neuro-toxic symptoms in communities after oil spills. Rates of certain cancers (such as gastrointestinal cancers) were reportedly higher in Delta communities with long-term exposure to oil contamination, although nationwide cancer registries are incomplete.[84] Kidney dysfunction and chronic liver conditions have also been reported at higher rates plausibly linked to heavy metal and hydrocarbon exposure.[85] Another study in 2020 examining birth outcomes in the Delta found that communities in proximity to frequent oil spills had higher rates of miscarriage and stillbirth, though more research is needed to establish causation.[86] In terms of mental health, the trauma of environmental loss and economic despair has led to psychosocial stresses. The Niger Delta has seen unrest, militancy, and community protests, partly fuelled by frustration over pollution and its unaddressed impacts, a term some scholars call the "psycho-social health" burden of environmental injustice.[87] The term "environmental genocide" has even been used by local activists to describe the slow death inflicted on communities by oil pollution.[88] While that is rhetoric, it underlines the perceived severity: people feel their entire way of life (fishing, farming, drinking from the river, living off the land) is being slowly wiped out, with consequent loss of physical and cultural health.

[81]Past Dr Abomaye-Nimenibo and Williams Aminadokiari Samuel, 'An Aerial View of a Black Man Suffering From the Menace of Crude Oil (The Black Gold) Soot' (2020) 20 *Global Journal of Management and Business Research* 1.
[82]Osazuwa Clinton Ekhator and others, 'Impact of Black Soot Emissions on Public Health in Niger Delta, Nigeria: Understanding the Severity of the Problem' (2024) 36 *Inhalation Toxicology* 314.
[83]Ordinioha and Brisibe (n 11).
[84]ibid.
[85]Caroline C Thomas and others, 'Hepato-Renal Toxicities Associated with Heavy Metal Contamination of Water Sources among Residents of an Oil Contaminated Area in Nigeria' (2021) 212 *Ecotoxicology and Environmental Safety* 111988.
[86]Onome B Oghenetega and others, 'Miscarriage, Stillbirth, and Infant Death in an Oil polluted Region of the Niger Delta, Nigeria: A Retrospective Cohort Study' (2020) 150 *International Journal of Gynecology & Obstetrics* 361.
[87]Nkem and others (n 4).
[88]Bayelsa State Oil & Environmental Commission, *An Environmental Genocide: Counting the Human and Environmental Cost of Oil in Bayelsa, Nigeria* (May 2023).

5. LEGAL ANALYSIS: Enforcement, Judicial Decisions, and Corporate Accountability

The Niger Delta's plight raises pressing questions about the effectiveness of Nigeria's environmental and public health laws. Three areas are examined namely: (i) regulatory enforcement, (ii) judicial responses, and (iii) corporate accountability, both domestic and transnational.

5.1 Regulatory Enforcement Gaps and Governance Challenges

Despite a wide array of laws and agencies, enforcement has been weak. The Department of Petroleum Resources (DPR), now replaced by the Nigerian Upstream Petroleum Regulatory Commission (NUPRC), historically prioritized revenue generation over compliance. Oil spills often went undetected for days, with companies left to lead cleanup efforts, creating conflicts of interest.

NOSDRA, established in 2006, introduced the Oil Spill Monitor and a national incident-reporting system, but chronic capacity constraints, limited manpower and equipment, and practical dependence on operators during Joint Investigation Visits sssshave blunted its effectiveness.[89] Although empowered under its Act to sanction non-compliance, fines and levies have been difficult to collect in practice.[90] For example, following the 2011 Bonga offshore spill, NOSDRA's sanctions totalling about US$3.6 billion (₦1.3 trillion) were upheld by the Federal High Court in 2018, yet Shell has continued to contest liability and no payment has been made, with affected communities still pressing for enforcement.[91]Regulatory effectiveness is hamstrung by corruption and political interference, while overlapping mandates among NUPRC, NOSDRA, NESREA and state ministries produce fragmentation and enable regulatory arbitrage/forum-shopping; excluded from credible enforcement, affected communities often turn to protest, litigation and other forms of self-help which further erodes trust in institutions.[92]

Gas flaring exemplifies chronic enforcement failure. Nigeria set and repeatedly missed deadlines to end flaring since 1984.[93] Although the Petroleum Industry Act 2021 formally prohibits routine flaring and requires Gas Flaring Elimination Plans, it replaced license revocation with monetary fines.[94] Unless fines are high enough to deter flaring, the "pay-to-pollute" cycle may continue.

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[89] Amnesty International, *Bad Information: Oil Spill Investigations in the Niger Delta* (2013) AFR 44/028/2013 (on systemic flaws and JIV weaknesses).

[90] See NOSDRA Act 2006, especially ss 6(2)–(3)

[91]'Shell Says Judgment On $3.6b Bonga Oil Spill Fine Not Binding' (*Majorwaves Energy Report*, 27 November 2018) <https://www.majorwavesenergyreport.com/shell-says-judgment-on-3-6b-bonga-oil-spill-fine-not-binding/> accessed 3 September 2025.

[92]Godwin O Aigbe, Lindsay C Stringer and Matthew Cotton, 'Gas Flaring in Nigeria: A Multi-Level Governance and Policy Coherence Analysis' (2023) 2 *Anthropocene Science* 31.

[93]Esavwede and Oyibodoro (n 62).

[94] Petroleum Industry Act 2021 (Nigeria) ss 104(1)–(4), 105–108 (fines; prohibition; metering; plan requirement)

5.2 Judicial Responses

Nigeria's courts have become a critical venue for communities seeking redress. Judicial responses have evolved from narrow compensation awards to recognition of environmental rights and public interest litigation.

Early cases pursued claims in tort, like negligence, nuisance, and trespass seeking damages for destroyed farmland and fisheries. In *Shell v. Farah*,[95] families successfully sued over a 1970 blowout, obtaining damages despite Shell's statute of limitation defense. Similarly, in *Shell Petroleum Development Company of Nigeria Ltd v Chief GBA Tiebo VII and others*,[96] the Supreme Court upheld a community's damages award for an oil spill, but only after 18 years of litigation. Such delays illustrate how "justice delayed is justice denied." Damages were often eroded by inflation and limited to economic losses, with little recognition of long-term health costs.

Recent cases, however, show a shift. In 2021, Shell agreed to pay ₦45.9 billion to the Ejama-Ebubu community in full and final settlement of long-running litigation over a 1970 spill, following a Federal High Court order.[97] The unprecedented payout suggests courts and companies are more willing to confront legacy pollution.

For decades, restrictive standing rules insulated major polluters from suit: Nigerian courts demanded proof of individualized injury, which frequently barred NGOs and activists from challenging environmental harm. *Oronto Douglas v Shell Petroleum Development Co Ltd and ors*[98]illustrates the point—an environmental advocate was denied standing for lack of "personal injury," despite alleging non-compliance with the EIA regime.

A decisive shift came with *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*.[99] The Supreme Court held that bona fide public-spirited litigants and NGOs **may** bring environmental public-interest actions without proving direct, personal injury, provided they demonstrate a genuine concern for the subject matter and a reasonable nexus to the alleged breach. This recalibration aligns Nigeria with progressive comparative jurisprudence (e.g., India and South Africa) and materially widens the courthouse door for systemic challenges such as suits targeting routine gas flaring, legacy contamination, and structural enforcement failures.[100]

5.3 Corporate Accountability and Transnational Litigation

Domestic courts are not the only battleground. Communities have increasingly pursued remedies abroad, particularly against parent companies, producing landmark rulings with global implications.

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[95] [1995] 3 NWLR (Pt 382) 148 (CA).
[96] (2005) 9 NWLR (Pt 931) 439 (SC).
[97]Agence-France Presse, 'Shell to Pay $111m over Decades-Old Oil Spills in Nigeria' *The Guardian* (11 August 2021) <https://www.theguardian.com/business/2021/aug/12/shell-to-pay-111m-over-decades-old-oil-spills-in-nigeria> accessed 3 September 2025.
[98] (1999) 2 NWLR (Pt 591) 466 (CA).
[99] [2019] 5 NWLR (Pt 1666) 518 (SC).
[100] See generally *Adesanya v President of the Federal Republic of Nigeria* (1981) 5 SC 112 (foundational locus standi doctrine, now read more liberally in environmental matters after *COPW*).

In *Okpabi v. Royal Dutch Shell*,[101]the UK Supreme Court confirmed that a parent company may owe a duty of care for environmental harm caused by its Nigerian subsidiary, paving the way for claims against Shell's UK parent to proceed. Building on that trajectory, the June 2025 High Court judgment in *Alame&Orsv Shell*[102] addressed preliminary issues and confirmed that claims concerning historic spills and continuing contamination can proceed under Nigerian law principles underscoring potential accountability for legacy pollution. Meanwhile in the Netherlands, Nigerian farmers supported by Milieudefensie won on appeal in January 2021, with orders for compensation and installation of leak-detection systems on the Oruma pipeline; Shell paid €15 million in December 2022, illustrating that foreign courts can deliver enforceable remedies when domestic avenues falter.[103]

These transnational victories heighten pressure on operators to improve environmental practice in Nigeria and demonstrate the utility of holding parent companies to account for subsidiary misconduct. Nigerian law could adapt by codifying parent-company duties for example, through targeted amendments to the Companies and Allied Matters Act or by regulations under the PIA and by entrenching a dedicated environmental remediation fund financed by industry. Proposals for stricter liability including a CERCLA-style "superfund" model and the criminal prosecution of corporate officers in egregious cases would align Nigeria with international best practice.[104] Notably, the NESREA Act[105] already permits imprisonment of company officials for certain environmental offences, but enforcement is rare; raising penalties in proportion to company revenues and activating criminal sanctions would materially change incentives.

6. CONCLUSION AND RECOMMENDATIONS

The Niger Delta exemplifies the paradox of vast oil wealth alongside grave environmental and public health crises, where decades of spills, gas flaring, and weak enforcement have poisoned ecosystems and communities despite a seemingly comprehensive legal framework. While Nigerian statutes and international obligations provide strong foundations, enforcement gaps, institutional weakness, and corporate impunity have allowed pollution to persist, leaving residents with contaminated water, ruined livelihoods, and heightened disease burdens. Recent judicial advances recognizing environmental rights and widening public interest standing together with transnational rulings holding parent companies accountable, show that change is possible, but litigation alone cannot suffice. Real progress requires strict enforcement of environmental laws, deterrent penalties, independent remediation and health funds, accelerated implementation of UNEP's cleanup recommendations, and integration of healthcare into remediation plans. Only by aligning legal commitments with decisive action and meaningful community

[101] [2021] UKSC 3, [2021] 1 WLR 1294.
[102][2025] EWHC 1539 (KB) (20 June 2025).
[103]Hague Court of Appeal (The Netherlands), 29 January 2021: ECLI:NL:GHDHA:2021:132 (Oruma); ECLI:NL:GHDHA:2021:133 (Goi); ECLI:NL:GHDHA:2021:134 (Ikot Ada Udo) (ordering compensation and leak-detection measures)
[104] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 USC §§ 9601–9675.
[105]Section 27(1)–(2) (criminal liability, including imprisonment, for unlawful discharge of hazardous substances).

participation can Nigeria transform the Niger Delta from a site of environmental injustice to one of restored health, dignity, and sustainable development.

The following recommendations are proposed to align Nigeria's legal framework with ground reality and ensure that the Niger Delta's people receive justice and restoration:

i. **Strengthen Enforcement of Environmental Laws:** The government must fund and empower regulators like NUPRC, NOSDRA, and NESREA to monitor compliance in real time (using satellite/drone surveillance), impose and collect meaningful fines, and publish enforcement actions. Clear accountability metrics such as annual targets for spill reduction and flare elimination should guide performance and enhance transparency.

ii. **Amend and Update Penalties to Deter Polluters:** Nigeria must update outdated fines under laws like the NESREA Act to match the scale of harm and oil companies' revenues. Penalties should be indexed per barrel spilled, accrue daily until cleanup, and rise to billions of naira for major incidents. Persistent offenders should also face license suspension or revocation, as provided under the PIA.

iii. **Enhance Corporate Accountability Mechanisms:** Nigeria should firmly apply the polluter-pays principle by creating an independent environmental remediation fund, financed through mandatory oil company levies, to ensure swift cleanup and victim compensation. Beyond the PIA's Host Communities Fund, laws should enable parent-company liability and impose clear environmental duties on corporations and directors, ensuring accountability for both ongoing and legacy pollution.

iv. **Fast-Track Environmental Adjudication and Strengthen the Judiciary:** Nigeria should establish special environmental courts or tribunals within the Federal High Court to resolve oil pollution cases swiftly, allow class actions, and apply innovative remedies like supervision orders or punitive damages. Judicial capacity should be strengthened through training in environmental law and science, while the Supreme Court's recognition of public interest standing in *COPW v. NNPC* should be codified to secure NGOs' and communities' right to sue.

v. **Implement UNEP Recommendations and Broaden Remediation Efforts:** Nigeria should fully operationalize the $1 billion Ogoniland Restoration Fund, strengthen HYPREP (or a reformed body) to accelerate cleanup, and establish independent oversight with civil society input. UNEP's approach should be extended across the Niger Delta through a regional environmental audit and master plan, prioritizing high-risk communities with contaminated water. Cleanup efforts must also include health interventions, such as medical screening and treatment for pollution-related illnesses.

vi **Address Public Health Needs and Healthcare Infrastructure:** Oil pollution must be treated as a public health crisis. Government should conduct Health Impact Assessments in affected communities and provide free medical care

through clinics or mobile units, funded by polluters where possible. Long-term monitoring (cancer registries, kidney tests) and improved infrastructure for safe drinking water and clean energy are essential. These measures uphold Nigeria's legal duty under the African Charter to protect the right to health.

So, politicians doeverything to win power, and even more to retain it. As President Obasanjo once described it, elections in Nigeria are a do or die affair. This struggle for power has often led to civil crisis, military coups, and even a civil war.[1]

Politicians, with the connivance of the Independent National Electoral Commission (INEC), have always failed to comply with the relevant electoral laws in their bid to win elections by all means. However, the courtsand tribunals do not only require proofof non-compliance, but also proof that the non-compliance complained ofsubstantially affected the results of the election, which is a difficult burden and sometimes an impossible task.

The 2022 Electoral Act sought to lighten the burden by bringing in technology for accreditation using the Bimodal Voter Accreditation System(BVAS) and introducing electronic transmission of results. It also tried to remove the need to call oral evidence where the non-compliance is manifest on the face of the document.

But the recent cases of *Oyetola v. INEC*,[2]*Atiku v. INEC*[3], and *Obi v. INEC*[4] made mincemeat of the whole reforms as the election tribunals again took refuge in the presumption of regularity, which placed an onerous burden of the proof of non-compliance on the petitioners.They also resorted to the substantiality rule, to dismiss most of the petitions. A study of these cases would reveal that the decks were stacked against the petitioners, and there was no way they could have got justice under the prevailingregime of the burden of proof.

For a proper discussion of the subject, this paper is divided into five parts including the introduction. Part two examines the burden of proof in election petitions in Nigeria with a view to show that while there is the general burden to prove a claim that the petitioner won the election, there is also a burden on the respondents to prove that an election actually took place by tendering the results. Part 3 deals with how to discharge the burden of non-compliance in Nigeria, and examines Section 137 of the Electoral Act 2022 which provides that it shall not be necessary for a party who alleges non-compliance with the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance. It also deals with what qualifies as non-compliance and shows that only a practice prohibited by the Act can be viewed as non-compliance. It examines the nature and function of the INEC Results Viewing portal (IReV), to clear the misunderstanding in that area, and concludes with a discussion of the application of the substantiality rule in proven cases of non-compliance. Part 4 examines the application of the substantiality rule in election contests in the United States of America, recounts, and the application of the doctrine of laches to deny

[1] The Nigerian civil war arose from the coup and counter coup of 1966 and 1967 which was a fallout of the disputed Western Nigeria elections of 1965 and the treasonable felony trial and imprisonment of Obafemi Awaolwo.
[2](2023) 11 NWLR 71
[3] (2023) 19 NWLR 711 - 760
[4] (2023) 19 NWLR 761 - 1652

remedy to a petitioner. Part 5 concludes the paper, and also provides recommendations.

2. BURDEN OF PROOF IN ELECTION PETITION IN NIGERIA

By virtue of section 131(1) of the Evidence Act 2011, whoever desires any court to give judgment as to any legal right or liability dependent on theexistence of facts which he asserts must prove thatthose facts exist. The burden of proof in election petition cases, just like in other civil cases is on the person questioning the results of an election to prove his claim.

In *Ngige v. INEC*[5], the court held that there is a rebuttable presumption that any election result declared by a returning officer is correct and that the burden of rebutting that presumption is on the person who denies its correctness.

However this burden shifts from side to side, and at each time in the case, rests on the party whose case would fail if no further evidence is led. See *Awuse vOdili*.[6]

2.1. Burden to Prove that Election Took Place

The person who asserts that anelection took placei.e. the respondent, has the onus placed on him to prove that fact. When a petitioner makes the usual submission and allegation of fact that elections did not in fact hold, and as such that the declaration of the respondent as winner was unconstitutional, the respondent usually responds with assertions of fact that elections actually held which he achieves by the presentation and tendering of the results, with the official seal and stamp of the electoral official. The burden thereforerests on the respondent to prove by evidence that elections actually held especially when the petitioner has made out a prima facie case.

2.2. Burden to Prove a Claim for a Declaration that the Petitioner Won the Election

In an election petition, where, by the pleadings of a party without more, he claims for a declaratory relief, it cannot be deemed to have been established even where it was admitted by the adverse party.

For example where in an election petition the petitioner alleged that the respondent, who was declared as the winner and returned elected in the questioned election, did not score a majority of the lawful votes cast at the said election but rather that it was the petitioner who scored the majority of the lawful votes cast and should be declared as the winner of the said election,he must prove that he polled the majority of the votes cast, and won the election.

[5](2015) 1 NWLR (Pt. 1440) 281
[6](2015) 1 NWLR (Pt. 1440) 281

3. THE BURDEN OF PROOF OF NON-COMPLIANCE IN NIGERIA

3.1 Section 134 (1) (b) of the Electoral Act 2022, provides that a petitioner may question the validity of an election on the ground of corrupt practices or non-compliance with the Electoral Act. This paper will however focus on the second limb of Section 134 (1) (b) of the Electoral Act, that is to say, the pleading that the election was invalid due to non-compliance with the Electoral Act.

Non-compliance is a term of very wide significance and embraces all violations of the Electoral Act or the regulations which affect the validity of an election or the return, but does not include corrupt practices.[7]

Where there is an interplay of facts which go to establish corrupt practices with other cases of non-compliance, an election tribunal or court reserves the power, at the trial, to separate the constituent offenses of corrupt practices from cases of non-compliance and consider either case separately, so as not to confuse the standard of proof for corrupt practices with the standard of proof required to establish cases of non-compliance. See*Omisore v Aragbesola*.[8]

Non-compliance with the Electoral Act covers such things as outright violation of the Act and regulations made under the Act, proven manipulation of the electoral process to confer on one or more candidates undue advantage to the detriment of others, and other forms of malpractices or irregularities, such as over-voting, or other material allegations such as that voters were disenfranchised through the use of illegal or manipulated voters' register, failure or neglect to provide voting materials, or absence of designated polling stations.[9]But it does not include non-compliance with directives or instructions of the Commission or its officials. See *INEC v Oshiomole.*[10]

3.2 Non-Compliance and the Burden of Proof in Nigeria

The onus is on a petitioner challenging the validity of an election on the ground of non-compliance with the Electoral Act and guidelines issued by the Commission for the conduct of the election, to establish his case by credible evidence.In discharging this onus, the petitioner is required to rebut the presumption in favour of the correctness of the result of the election declared by the Commission.[11]

In *Udom v Umana*[12]the Supreme Court held that this presumption is not rebuttable by mere presumptuous postulations or rhetorical questions but only by cogent, credible and acceptable evidence. In the absence of any credible evidence to rebut this presumption, an election petition predicated on this ground will surely fail.

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[7] See Goyol v INEC (2011) 2 LRECN 420; Buhari v Obasanjo (SC), [2005] All FWLR (Pt 273) 1.
[8][2015] 15 NWLR (Pt 1482) 205.
[9]See Fannami v Bukar [2004] FWLR (Pt 198) 1210; Imah v Malarina (1999) 3 NWLR (Pt 596) 545.
[10](2008) 3 LRECN 649 at 705
[11]Nwole v Iwuegbu (2005) 16 NWLR (Pt 952) 543; Onye v Kema (1999) 4 NWLR (Pt 598)198
[12][2016] 12 NWLR (Pt 1526) 179 at 227-228, paras. H-D.

In order to obtain the nullification of any election on this ground, the petitioner has to prove, first, the particular breaches or infractions of the Electoral Act, and second, that the non-compliance substantially affected the result of the election.[13] Section 135 (1) of the Electoral Act 2022, as amended provides that:

> An election shall not be liable to be invalidated if it appears to the tribunal that the election was conducted substantially in accordance with the principle of the Act and that non-compliance did not affect substantially the result of the election.

The burden on the petitioner to prove non-compliance is three-fold. In *Waziri v Geidam,*[14]the court held that for the petitioners to succeed in their allegation of non-compliance, they must first plead the kind of non-compliance alleged. Clear and precise pleading is necessary to sustain the evidence in proof of such allegations.Secondly, they must tender cogent and compelling evidence to prove that such non-compliance took place in the election.Thirdly, that the non-compliance substantially affected the result of the election, to the detriment of the petitioner.

In *Isiaka v Amosun,*[15]the alleged evidence of non-compliance affected only 12 polling units out of 1672 polling units that were contested. This was held to be insufficient to negatively affect the election and the return of the 1st respondent.

In *Lanto v Wiwo,*[16] it was found after a painstaking evaluation of the evidence, that the petitioner was only deprived, by a human error, of 2 (two) votes. It was accepted by the election tribunal and all the parties that if the two votes were added to the total votes scored by the petitioner, it would not change the result of the election. The Court of Appeal therefore held that the appellant had failed to satisfy it that the votes denied him, by mistake, prevented him from getting the majority of votes in his favour, and for that reason, the appeal must fail. However, the Court of Appeal stressed the point that if the two (2) votes would have changed the result of the election, certainly the election would have been vitiated on that score.

In order to overturn the result of an election, the petitioner has a duty to prove the non-compliance alleged,polling unit by polling unit, and this can only be done by calling direct eye witnesses at the affected polling units.

The Supreme Court held in*Ladoja v Ajimobi,*[17]that a petitioner, who complains of non-compliance with the electoral process in specific polling units, has the onus to present evidence from eye witnesses at the various polling units who can testify directly in proof of the alleged non-compliance.See also *Gundiri v Nyako.*[18]

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[13]Okechukwu v INEC [2014] 17 NWLR (Pt 1436) 255; Omisore v Aregbesola [2015] 15 NWLR (Pt 1482) 205.
[14][1999] 7 NWLR (Pt 630) 227 CA.
[15][2016] 9 NWLR (Pt 1518) 417 at 441 – 442, paras. F-A.
[16][1999] 7 NWLR (Pt 610) 227 CA
[17] [2016] 10 NWLR (Pt 1519) 87 at 136, paras. A-B
[18](2014) 2 NWLR (Pt. 1391) 211 at 252

To this writer however, the requirement to call eyewitnesses from each polling unit, is unreasonable, especially in presidential election cases.There are about 776, 000 polling units in Nigeria, and it is impossible to call eyewitnesses from each polling unit complained about. Also no election tribunal can take evidence fromhundreds of witnesses within the 180 days allowed.

A petitioner may call a polling agent, a ward supervisor assigned to the polling unit by his political party, or even the polling agent or ward supervisor of his opponents, where they have useful evidence that will assist his case.[19] He may even rely on police officers or officials of the Commission such as the Presiding Officers, and Polling Staff, where they have useful and direct evidence that will assist him in proving his case.[20]

In *INEC v Oshiomole*,[21] to establish his case, the petitioner subpoenaed two (2) officials of the Commission, one of whom was the Head of Operations in the State Office of the Commission. He testified as PW47 and tendered results of polling units, and all statutory forms for collation of the result of the governorship election in the twelve (12) Local Government Areas in contention. He also produced bags of ballots cast in the election which were counted on the orders of the election tribunal in open court.

The election tribunal believed the evidence of PW47, and the avalanche of documentary evidence tendered and other witnesses called by the petitioner. Consequently, it was held that the petitioners had proved their case on the preponderance of evidence before the tribunal.

Where the non-compliance comprises of mere infractions of the Electoral Act, which do not amount to electoral offences, the standard of proof shall be on the balance of probabilities, as in all civil cases.

It was held in *INEC v Oshiomhole*[22]that the standard required of a petitioner to prove non-compliance which does not involve any crime is on the preponderance of credible evidence before the election tribunal. All the petitioner needs to establish is that his story was more likely to be true than the respondent's.

3.3 Section 137 Electoral Act 2022: No need for oral evidence when non-compliance is manifest on the original or certified true copies of documents tendered

Section 137 of the Electoral Act 2022 provides that:

> It shall not be necessary for a party who alleges non-compliance with the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance.

[19] Okechukwu v INEC [2014] 17 NWLR (1436) 255; Sijuade v Oyewole [2012] 11 NWLR (Pt 1311) 280 at 299

[20]See Ibrahim v Ogunleye & Ors [2012] 1 NWLR (Pt 1282) 489.

[21] (n 11)

[22] ibid

It will however require legislative action by way of an amendment of the Electoral Act to make electronic transmission mandatory. Thankfully, many political parties and civil society groups are already advocating and proposing this amendment.

3.6 **Non-Compliance and the Substantiality Rule**

In addition to proving that the alleged acts or omissions of non-compliance occurred, the onus is also on the petitioner to prove that the alleged non-compliance affected the final result of the election to his detriment. He has a duty to prove to the election tribunal or court that the non-compliance affected substantially the result of the election.[27]

Where the court, based on the strength and quality of evidence from the petitioner, comes to the conclusion that there was non-compliance but finds that it was not substantial enough to nullify the election, the petition will be dismissed for want of proof.

But where the petitioner proves that the alleged acts of non-compliance affected the election result substantially, the onus shifts to the respondents to prove that the conduct of the election complied substantially with the Electoral Act,and other lawful guidelines issued to regulate the conduct of the election.

Unless the petitioner effectively discharges the onus on him to show how the breaches affected or could have affected the result of the election, the burden of proof will not shift to the respondents to show that the election substantially complied with the Electoral Act.[28] See*Abubakar v Yar' Adua.*[29]

Failure by a petitioner to prove such allegations and show how they affected the election negatively will defeat his case. He can only succeed where the non-compliance is of a degree which substantially affected the election result, and the respondent is unable to show that the non-compliance did not substantially affect the result.[30]

In *INEC v Oshiomole*[31] after evaluating the evidence, the election tribunal found that the petitioners had discharged the onus to establish their case. The Court of Appeal also found that the respondents failed to provide credible evidence to rebut the evidence of PW47, the Commission's Head of Operations in Edo State, who testified for the petitioners. The Court of Appeal, Therefore, confirmed the decision of the Tribunal that the petitioners proved the allegations of multiple voting and accreditation, which substantially affected the election result.

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[27]APGA v Uba (2012) 1 LRECN 358 at 404; CPC v INEC (2011) 4 LRECN 170 at 211; Fayemi v Oni (2011) 4 LRECN 455; Chime v Onyia [2009] All FWLR (Pt 480) 673; Ucha v Elechi (2012)1 LRECN 281 at 305.

[28]Buhari v Obasanjo [2005] All FWLR (Pt 273) 1 at 145; APGA v Uba (2012) 1 LRECN 358; Okechukwu v INEC [2014] 17 NWLR (Pt 1436) 255 at 308-309, paras. G-A.

[29][2009] All FWLR (Pt 457) 1 at 147, C-G; INEC & Ors v Oshiomole&Ors(2008) 3 LRECN 649 at 702,. F-G.

[30]Oke v Mimiko & Ors (No.2) [2014] 1 NWLR (Pt 1388) 332 at 391-392 paras, Per Onnoghen JSC.

[31] (2008) 3 LRECN at 702.

One thread established by case law is that it is the total effect of the non-compliance on the election result that determines the success of any election petition founded on this ground. No matter the magnitude of the alleged non-compliance, the burden is on the petitioner to tie same to the effect of such irregularity or non-compliance to the result of the election.

The law is that once the petitioner is unable to tie the non-compliance, even if proved, to the result of the election, the petition is bound to fail.

In *Buhari v Obasanjo*[32]the court held that the nullification of the result in Ogun State did not affect the overall result of the election in the whole federation.What is needed to sustain an election petition on this score is a substantial non-compliance which affected the result of the election, not just a trivial breach of the Electoral Act with little or no visible impact on the election result.

It wasalso held in *Buhari v Obasanjo*[33] that the failure of two officials of the Commission to take the oath of loyalty contrary to the Electoral Act 2002, *per se,* will not lead to the nullification of an election.

The oath referred to is as provided in section 18 of the Electoral Act of 2002, which is in pari material with section 26 of the Electoral Act of 2022, and which provides that all electoral officers, presiding officers, and returning officers shall affirm or swear an oath of loyalty and neutrality indicating that they would not accept bribe or gratification from any person, and shall perform their functions and duties impartially and in the interest of the Federal Republic of Nigeria, without fear or favour.

The court held that the said section 18 of the Electoral Act of 2002, fell short of spelling out the consequences of its breach, and also that by virtue of section 4(1) of the Oaths Act, the omission of a public officer to subscribe to affirmation or oath of loyalty and neutrality does not affect any official act done by him, but any penalty would attach to him personally. The court also found that the electoral officers in question did not refuse to affirm or to take the oath, rather it was INEC which failed to administer the oath.

The court also held in the same case that the non-certification of voting materials, *per se,* is not enough to set aside an election unless where it is shown that it substantially affected the result of the election.[34]

4. BURDEN OF PROOF IN THE UNITED STATES ELECTORAL CONTESTS

The burden of proof of non-compliance and the substantiality rule in electoral contests in the United States of America is also similar to the position in Nigeria, though with some peculiarities such as recounts, the application of the equal protection clause, and to the rule against laches.

[32](2005) 1 LRECN 235; [2005] 2 NWLR (Pt 910) 241.
[33](2005) 1 LRECN 235; [2005] 2 NWLR (Pt 910) 241.
[34]Ibid.

4.3 Where A Recount Cannot Be Accomplished In A Constitutionally Valid Way Within The Time Allowed for the Certification of Results

The substantiality rule however becomes irrelevant where even though a recount may lead to change in the result, such recount will either violate the equal protection clause in the constitution of the United States, or the recount itself may not be carried out in time to meet the deadline for certification of results.

In *Bush v. Gore*,[40] the celebrated 2000 election case between Republican candidate George W. Bush and Democrat candidate Al Gore, the state of Florida reported that Bush had won the state by 1,784 votes. Since this margin was less than one-half of one percent, Florida law required an automatic machine recount. Two days later, the machine recount showed that Bush's margin of victory had shrunk to 327 votes. In this situation, a candidate may request a manual recount under Florida state law. Gore requested a manual recount in the four traditionally Democrat-leaning counties of Volusia, Palm Beach, Broward, and Miami-Dade.

While the counties began to comply with this request, they became concerned that they could not meet the state deadline for certifying election returns to the Florida Secretary of State within seven days of the election. The Florida court upheld the deadline but allowed the counties to amend their returns and found that the Secretary of State could use the amended returns. Palm Beach, Broward, and Miami-Dade Counties missed the seven-day deadline.

The Florida Secretary of State required counties seeking to make a late filing to submit a written explanation for why it was necessary. She found that none of the explanations met the criteria that she had imposed on herself for determining whether late filings would be admitted. She thus certified Bush the winner of the election in Florida after receiving overseas absentee ballots.

A few weeks later, Gore's campaign obtained an order from the Florida Supreme Court for a statewide manual recount.

George Bush immediately appealed to the US Supreme Court. And the next day, the U.S. Supreme Court ordered a stay of the recount.

In its judgment, the Court by a majority of seven Justices, held that a manual statewide recount would violate the Equal Protection Clause of the Fourteenth Amendment. The Court emphasized that standards for manual recounts varied arbitrarily across counties and even precincts, so individual voters could not be sure that their participation in the democratic process would be given the proper weight.

It further held that since the state could not finish the recount within the deadline set by state law, the recount was ended.

[40] 531 U.S. 98 (2000) online report accessed 27 March 2025.

identification, illegal curing of ballots, it nevertheless dismissed his case on grounds of laches because his campaign was aware of these cases of non-compliance before the election, but did not challenge same.

Upon further appeal to theUS Supreme Court, the Court upheld the judgment of the Supreme Court of the state of Wisconsin which held that the challenge to the indefinitely confined voter ballots was without merit, and that laches barred the relief the Campaign sought on the three remaining categories of challenged ballots.

According to the court, the Trump Campaign's argument that all voters claiming indefinitely confined status since the date of the erroneous Facebook advice should have their votes invalidated, whether they are actually indefinitely confined or not was without merit because to apply this blanket invalidation of indefinitely confined voters as a class without regard to whether any individual voter was in fact indefinitely confined had no basis in reason or law.

On the issue of laches, the court held that the challenges failed under the doctrine of laches, which is founded on the notion that "equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party." It held that extreme diligence and promptness are required in election-related matters, particularly where actionable election practices are discovered prior to the election.

It held that the doctrine was applied because the efficient use of public resources demands that a court not allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process.

It held that if a party seeking relief in an election-related matter fails to exercise the requisite diligence, laches would bar the action, and that the Campaign's delay in raising these issues was unreasonable in the extreme, and that to some extent, this requirement focuses on the ability of the asserting party to mitigate any resulting prejudice when notice is provided.

It held when the "Democracy in the Park" events, wherein ballots were illegally harvested, were announced, the Trump Campaign could have challenged its legality. Instead, it waited until after the election, after municipal officials, the other candidates, and thousands of voters relied on the misrepresentations of their election officials that these events complied with the law.

It held that the time to challenge election policies such as these was not after all ballots have been cast and the votes tallied, and that election officials in Dane and Milwaukee Counties reasonably relied on the advice of Wisconsin's statewide elections agency and acted upon it, and voters reasonably conformed their conduct to the voting policies communicated by their election officials. But rather than raise its challenges in the

weeks, months, or even years prior, the Campaign waited until after the votes were cast, and that such delay in light of these specific challenges was unreasonable.

It held that the Campaign was challenging the rulebook adopted before the election season began, and that election claims of this type must be brought expeditiously, but the Campaign waited until after the election to raise selective challenges that could have been raised long before the election.

It opined that parties bringing election-related claims have a special duty to bring their claims in a timely manner, and that the issues raised in this case, had they been pressed earlier, could have been resolved long before the election, and that failure to do so was fatal.

It also held that the delay put courts in a difficult spot, as interpreting complicated election statutes in days was not consistent with best judicial practices. These issues could have been brought weeks, months, or even years earlier.

The US Supreme Court therefore dismissed the appeal.

Criticism of the Trump v Biden decision

This writer is however of the view that the US Supreme Court was wrong to have thrown the cloak of laches over the issue of whether the absentee ballots were lawfully cast, or could be legally counted. The court cowardly abdicated its responsibility to decide the issues presented in the case, because thesuit was a challenge of specific ballots that were cast in the election, contrary to the law, under a statute commanding that such ballots cannot be counted.

Also, the court's view that this lawsuit could have been brought years earlier, is unjustified, as only post-election ballots can be reviewed, and the "rules" the court claimed should have been challenged earlier, consisted merely of non-binding guidance by an unelected election commission, which cannot supplant statutory mandates.

As Justice Bradley observed in her dissenting opinion in the same case at the Supreme Court of Wisconsin,"When the state's highest court refuses to uphold the law, and stands by while an unelected body of six commissioners rewrites it,our system of representative government is subverted."

The petitioners' casewas that a sizable number of absentee ballots, more than enough to make the difference in the election, were cast in violation of mandatory Wisconsin statutes. When then could they have asked for the illegal ballots to be struck out if not after they had been cast? It is my view that the claim was proper and timely, yet the court opted to throw the cloak of laches over the case, and refused to resolve it on the merits.

This abdication has since that election caused a large section of the American public, and indeed the world, regardless of party sympathies, to harbour serious doubts about the integrity of the November 2020 US election. Such questions are only exacerbated

when judges lack the courage to resolve election disputes on the merits, thereby allowing serious questions to fester, unaddressed, as was permitted to occur in this case. The common-law doctrine of laches cannot be squared with legislation, or the Constitution,

The plain language of the applicable statutes required that all involved must apply the "mandatory" substantive requirements imposed by the Wisconsin statutes to guard against fraud and abuse in absentee balloting and, where those requirements are not met, must refuse to count the affected ballots. The court, by invoking the doctrine of laches to avoid a decision on the merits, failed in its duty to apply the law enacted by the Legislature to the facts of the case, and to rule on the merits.

Surely, the clearly expressed intent of the should have prevailed, and the court committed a grave error by according the Wisconsin Electoral Commission's guidance the force of law, albeit by default.

The court was wrong in my view to excuse proved violations of the election code on the ground that an administrative agency, the Wisconsin Elections Commission ("WEC") had issued guidance documents endorsing the practices, which petitioners supposedly could have challenged earlier.

The effect, of the court's reliance on laches, would be to impose a burden on presidential candidates, to monitor all election practices in numerous municipalities, and bring litigation before election day against any practice that might end up later impacting the vote count, or risk being told later that they waited too long to sue, and would not be permitted to challenge unlawful ballots in a post-election proceeding.

This is an added burden on the right ofa citizen to run for public office by seeking to persuade other citizens to cast their votes for him or her. To force a candidate, in the midst of the campaign, to continuously monitor ever-shifting election procedures and guess at which ones may impact the result, and expend scarce resources on preemptive litigation for fear of later being deemed barred from filing a petition based on laches, would create a cloud of confusion, uncertainty, and ambiguity.

It is our view that the judgment was an interference with the right of a citizen to run for public office without being forced to expend enormous resources on pre-election litigation, a burden which has been created by the court's reliance on the doctrine of laches to avoid a decision on the merits.It is therefore necessary for the US Supreme Court to review the application of this doctrine to avoid a negative impact on the outcome of the future presidential races.

In the opinion of this writer, the US Supreme Court should have in place oflaches, considered the rule in the case of*Thirty Voters of Kauai Cnty. v. Doi*,[42]where the court held that the general rule is that if there has been opportunity to correct any irregularities in the election process or in the ballot prior to the election itself, the

[42]599 P.2d 286, 288 (Haw. 1979) online report accessed on 26th September 2025

plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward.

In this case, the court having found that there was major misconduct by the Wisconsin Electoral Commission in issuing guidelines contrary to state legislation, ought to have brought the petitioners' case under the exception of fraud or misconduct, and heard the case on the merits.

5. THE SUBSTANTIALITY RULE AND VITIATING NON-COMPLIANCE

The rule that a petitioner must establish that the particular non-compliance proved was substantial enough to affect the result of the election, is called the substantiality rule.

It has however been strongly argued in *Buhari v INEC*,[43] though unsuccessfully, that it is not in all cases that a petitioner is expected to establish that the particular non-compliancewas substantial enough to affect the result of the election.

In the said case of*Buhari v INEC*[44] the petitioner challenged the 2007 presidential election on the ground that it was invalid by reason of non-compliance with the Electoral Act 2006, among other grounds. The non-compliance proved at the trial was that the election was conducted with ballot papers that were not serialized and also not bound in booklets as prescribed by section 45 of the Electoral Act 2006.

The Supreme Court after an exhaustive review of previous decisions on non-compliance, by a majority decision of four Justices against three, held that the petitioner had not proved non-compliance that was substantial enough to invalidate the result of the election.

Many jurists, including Oguntade JSC, are however of the opinion that where acts or omissions, which amount to non-compliance,are so fundamental that the alleged non-compliance vitiates the electoral process and its outcome, or the result,in such circumstances, there should be no burden on the petitioner to establish that the non-compliance substantially affected the election result, and that if the election suffers a vitiating vice which renders it null and void, in such circumstances, there should no obligation, anymore on the petitioner to prove that the non-compliance affected the result of the election.

This principle of a vitiating vice rendering an election null and void without proof by the petitioner that the vitiating vice affected the result of the election has however only elicited the approval of some Justices of the Supreme Court in either dissenting judgments, or as mere *obiter.*

[43][2008] 19 NWLR (Pt 1120) 246;
[44][2008] 19 NWLR (Pt 1120) 246; (2009) 3 LRECN 1 at 170

Oguntade JSC, himself, one of the three Justices which delivered a dissenting judgment in *Buhari v INEC*[45] (with Onnoghen and Muktar JJ.SC) held that the approach of the Supreme Court in such cases was wrong and therefore needed to be re-visited.

He preferred the approach of the Supreme Court, per Coker JSC in *Swem v Dzungwe,*[46] where it was held that if a court is satisfied that the petitioner had established an alleged non-compliance which might affect the result of an election but was unable to say whether the non-compliance, in fact, affected the result, the non-compliance would be held as proved, and the onus of proof would shift to the respondent to show that the said non-compliance did not affect the result of the election.

Oguntade JSC therefore concluded that the substantiality rule, as applied by courts of law presently, puts a heavy burden on the petitioner and was "unduly favourable to him and lenient to the respondent who is the perpetrator of the disobedience."

Concerning the non-compliance alleged in *Buhari's case,*[47]OguntadeJSC found that the respondents, by their traverse admitted that the election was conducted with ballots not bound in booklets and which did not have any serial numbers contrary to section 45 of the Electoral Act 2006. He therefore, held that the said non-compliance being of a fundamental character rendered the ballots invalid because as opined by him, the use of invalid ballots for the election constituted non-compliance that was so fundamental that it violated the principles of the Electoral Act.

He held further that the Court of Appeal should have nullified the said election for this reason without placing the burden on the petitioners to show how the non-serialization of the ballots papers and non-binding of the said ballots papers in booklets substantially affected the result of the election. According to him, the said act "was a condition precedent to the holding of the election" without which it was impossible to have a valid election. He reasoned that an invalid ballot paper cannot yield a valid vote. He said thus:

> An invalid ballot paper cannot yield a valid vote. Clearly, therefore, the petitioner/appellant in my view succeeded in making the case that non-compliance with section 45 (1) of the Election Act 2006 substantially affected the result of the election.

Both Muktar and Onnoghen JJ.SC concurred with Oguntade JSC on whether the case established by the petitioner required the application of the substantiality rule.

On whether the appellant had discharged the onus to prove that the alleged non-compliance substantially affected the election, Onnoghen JSC, held thus:

> I hold the view that it has. There are non-compliances that go straight to the fundamentals of an election thereby affecting the condition precedents to the holding of an election while others may just affect the result of the election where one had been validly held. In other words, some non-

[45][2008] 19 NWLR (Pt 1120) 246; (2009) 3 LRECN 1 at 170
[46](1966) NMLR 297 at 303, (1966) CLR 2(A) SC
[47] (n 46)

> compliance may render an election void in which case there is no result of the election to be substantially affected by the non-compliance while the others may substantially affect the result of an election validly conducted.

In essence, the purport of the dissenting judgments of the three (3) Justices of the Supreme Court was that where a petitioner has established a fundamental breach which negates the principles of the Electoral Act, it constitutes a substantial breach which does not place on the petitioners the onus to prove whether or not the breach substantially affected the result of the election.[48]The reason for the above reasoning of their Lordships is that the non-compliance rendered the election a nullity *ab initio*, and thus, obviated the necessity to further establish how it affected the election. In effect, no valid election was conducted *ab initio,*that could besubjected to the substantiality rule.

In *Oke v Mimiko* (No. 2),[49] a decision of the Supreme Court, Onnoghen JSC, in his concurring judgment, still stuck to his views, hitherto expressed in *Buhari's case,*[50]that there is a class of non-compliance that does not call for the application of the test of the substantiality rule, such as when an election is conducted with an invalid voters' register.

Nonetheless, he agreed with the lead judgment that, in the instant case, the injection of names in the voters' register, illegally, did not bring the case of the petitioners within that class of non-compliance which absolutely vitiates an election *ab initio.*

Until these weighty judicial opinions on the non-applicability of the substantiality rule to certain cases of non-compliance receive the affirmation of the majority opinion of the Supreme Court, applying thesubstantiality rule to petitions predicated on non-compliance with the Electoral Act still remains good law to be followed by all courts in Nigeria.

The US courts facing such situations, in which election officials, animated by partisan motives, have intentionally violated the law, but the impact of the wrongdoing is difficult to measure with exactitude, have resolved doubts against those officials in one of two ways. One way is to shift the burden of proof by holding that all the affected ballots must be excluded unless the election officials can prove that some of them were cast legitimately.[51] Another way is simply to void the election result.[52]

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[48] Na-Bature v Mahuta (1992) 9 NWLR (Pt 263) 85; (1992) 1 LRECN 1
[49] [2014] 1 NWLR (Pt 1388) 332 at 391-392 paras.. Per Onnoghen JSC.
[50] (n 48)
[51]See Warf v. Bd. of Elections, 619 F.3d 553, 561-62 (6th Cir. 2010) online report accessed on 10/9/2025
[52] See Marks v. Stinson, 19 F.3d 873, 886-87 (3d Cir. 1994) online report accessed on 10/9/2025

6. CONCLUSION

During the election crisis of 1876-77, US President Ulysses Grant observed that “either Party can afford to be disappointed in the result, but the country cannot afford to have the result tainted by suspicion of illegal or false returns.”

But from the foregoing, it is obvious that the presumption of regularity and the substantiality rule and generally the burden of proof of non-compliance under the Electoral Act of Nigeria, has made election results to be tainted by suspicion of illegal or false returns.

It is also unfortunate that INEC has taken an unfair advantage of the fact that the Act did not make electronic transmission of results mandatory to practice deception and even fraud on unsuspecting candidates and voters.

The litmus test of whether the result of an election is surely the perception of the reasonable man on the street as to whether it is a true reflection of the will of the voters, and it is the duty of the courts to review complaints and redress malfeasance wherever found.

The Supreme Court must therefore give judicial weight tothe viewthat where a petitioner has established non-compliance but was unable to say whether the non-compliance in fact, affected the result, the onus of proof should shift to the respondent to show that the said non-compliance did not affect the result of the election. It must also approve the view that fundamental non-compliance should vitiate the result of elections.

7. RECOMMENDATIONS

Based on the above, the following recommendations and suggestions are made for reform:

1. Video evidence of the signing of result sheets by polling agents:

   Under the electoral law the best proof that an election was conducted is the original result or the certified true copy thereof of form EC8A, etc. The said form EC8A,etc recorded by INEC and signed by the polling and collation agents of the parties are therefore admissions that the election took place and that the result is authentic. And it has been held that the said form EC8A signed by such agent binds the party. Thus signature of the party agent authenticates the result, and he cannot turn around to deny the contents of the result sheet. Therefore the said result sheet or form EC8A, etc. produced by INEC is an admission by the parties

of the genuineness of the result. For where the result tendered or certified by INEC does not bear the signature of the party agent, it is worthless and inadmissible, and even if admitted, it has no weight simply because it was not signed or made by the parties as their admission of the results.

Thus the signed EC8A, EC8Betc, are akin to confessional statements or acknowledgement by the party agents of the signatures as their own. And just as is the case with confessional statements in criminal trials, in an election petition, where the electoral official or INEC or the respondent tenders in evidence a result sheet or form EC8A etc, signed by the petitioner's agent, the respondent is simply relying on the signature as the petitioner's agent's acknowledgment or admission or confession of the result as being made by him.

It is therefore recommended that there be a requirement of tendering video evidence of the making and taking of the result sheet, and it's signing by the party agents to prove that it was indeed signed by them, and that it was signed voluntarily. Thus a respondent and INEC should produce video evidence of how the election result was made and signed before the result tendered or certified by INEC can be presumed as regular, and taken to be correct.

It should be noted that INEC and the declared winner already have a burden to prove that election was conducted, and that a winner emerged which burden can only be discharged by tendering the result sheet. This further requirement of tendering the video of the making and taking of the result sheet, showing the polling agents, and the INEC presiding officer, signing same will shift the burden of proof of compliance to INEC as the similar burden to prove the voluntariness of confessional statements, is presently placed on the police. No petitioner has the enormous powers of INEC which is similar to that of the police, so INEC should bear the burden to prove that the agents actually signed the result sheets without duress, since it is an admission by the agents that the result sheet is correct, which admission is binding on the petitioner, and therefore it should be treated as a confessional statement which in effect it is.

2. CCTV:

Another recommendation is that CCTV cameras should be mounted at polling stations, local government, senatorial, state and national collation centers, to monitor the movement of men and materials on election days. This CCTV recording should be tendered by the respondents where the petitioner alleges non-compliance, etc. The burden should also be on the respondents to tender the recordings, since they would be installed by INEC, and therefore would be their property, and in their possession.

3. Body Camera:
Another recommendation is that electoral officials should be made to wear body cameras or bodycams, throughout the day of the election, not just at the polling station but wherever they go, so that all their movements, actions and conversations would be monitored. This will show if they did anything wrong or conspired with politicians to subvert the election. It would show where they went, who they met, what they said and what they did. It would show them altering the results, if they attempt to do so.

4. Automatic electronic transfer or transmission of results:
Results should automatically and electronicallytransferred or transmitted to party offices, candidate campaign offices, High Courts, Courts of Appeal, Supreme Court, Police, Army, NBA and other observers, UN, EU, AU, ECOWAS, etc. emails or systems or websites, to create duplicate copies which can be retrieved to confirm the final result posted by INEC.

5. The Burden of proof should be on the slightest evidence:
It is also recommended that the burden of proof should be at the slightest evidence or allegation backed with a certified true copy of the result, video recording, bodycam, CCTV or affidavit. The burden should then shift on the production of these materials, which should be produced by INEC at the tribunal.

6. BVAS should be for both accreditation and voting:
BVAS should be reconfigured to not only accredit voters, but also to record their votes immediately. It should act as a voting machine.

7. Immediate certification of election results:
Forms EC8A, EC8B and EC8C, EC8E by the presiding officers at the polling unit, local government, state and national collation centers.

8. There is a need to review the authorities applying the substantiality rule to proved cases of fundamental non-compliance which should vitiate the results of the election in line with the will of the people, the intendment of the Electoral Act, and common sense.

An Appraisal of International and Regional Institutions Supporting Nigeria's Counter-Terrorism Efforts

Mimiko M.O

Abstract

This paper appraises the international and regional institutional framework established to combat terrorism and assesses their impact on Nigeria's domestic counter-terrorism architecture. The aim of this paper is to critically examine the role of international and regional institutions in supporting Nigeria's counter-terrorism framework. It seeks to appraise the effectiveness, extent and nature of the legal and institutional framework through which support are rendered. It adopts the doctrinal research method and draws upon both primary and secondary sources. Primary sources includes United Nations Resolution 1363 (2001). Secondary sources consists of textbooks, journal articles, and reputable online materials. It concludes that terrorism in Nigeria could only be meaningfully addressed if these frameworks were implemented diligently, with improved coordination and accountability from the relevant authorities.

Keywords: international, regional, institution, counter-terrorism, efforts

1. INTRODUCTION

Terrorism has become a global pandemic, eliciting serious international concern due to its far-reaching and devastating impact. The world witnessed a turning point following the September 11, 2001, attacks on the World Trade Center in the United States.[1] In the aftermath, many countries intensified efforts to strengthen their institutional frameworks to confront the evolving threat of terrorism. Today, terrorist groups such as Al-Qaeda, ISIS, ISIL, Al-Shabaab, Boko Haram, and Lukarawa continue to pose significant threats across multiple regions. Nigeria, in particular, has become one of the major theatres of terrorist activity in Sub-Saharan Africa.

At the international level, the United Nations Security Council has passed several resolutions and established specialized bodies to aid member States in combating terrorism. Regionally, institutions like the African Union (AU) and the Economic Community of West African States (ECOWAS) have initiated frameworks to support the fight against terrorism across the continent. Nationally, Nigeria has responded through the establishment of various institutions, including the Office of the National Security

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[1]Peter B, 'September 11 Attack' (*Encyclopaedia Britannica*, 11 September 2001) https://www.britannica.com/event/September-11-attacks accessed 2 January 2025.

Adviser (ONSA), the Department of State Services (DSS), the Counter-Terrorism Unit (CTU), the Joint Task Force (JTF), and the Civilian Joint Task Force (CJTF), among others. Despite these multi-level efforts, terrorism persists in Nigeria, exposing critical weaknesses in the institutional security framework.

2. INTERNATIONAL INSTITUTIONAL FRAMEWORKS FOR COMBATING TERRORISM IN NIGERIA

In response to the global call to combat terrorism, the international community has taken significant and coordinated steps to lead the charge against this growing threat. While these efforts are commendable, it is important to appraise and critically examine the institutional frameworks established at the international level for counter-terrorism, particularly in relation to their relevance and effectiveness within the Nigerian context. This section explores key international institutions involved in the fight against terrorism and evaluates the extent of their support, cooperation, and influence on Nigeria's counter-terrorism strategies.

2.1 The United Nations (UN)

The (UN) has played a significant role in the global fight against terrorism, operating through several key institutional mechanisms. Chief among these is the fifteen-member United Nations Security Council (UNSC), which is responsible for overseeing member states' adherence to international counter-terrorism measures. Through its resolutions, the Council has imposed travel bans, arms embargoes, and financial sanctions against terrorists and terrorist organisations.[2]

2.1.1 The Security Council

Following the end of the Cold War, the United Nations Security Council (UNSC) began to engage more actively with transnational threats, including terrorism. It imposed sanctions on States such as Sudan, Libya, and the Taliban regime in Afghanistan in response to state-sponsored acts of terror.[3] Terrorist attacks against United States interests such as the 1993 World Trade Center bombing, the 1998 attacks on US embassies in Nairobi and Dar es Salaam, and the 2000 attack on the USS Cole in Yemen highlighted the urgency of global cooperation.[4]

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[2]E Kaponyi, 'Upholding Human Rights in the Fight Against Terrorism' (2007) 29(1) *Society and Economy* 1–41

[3]U Isa, 'Examination of the United Nations Security Council and Global State Terrorism' (2025) 8(1) *African Journal of Social Sciences, Department of International Relations and Diplomacy Abuja* 421–452.

[4]The 1993 attack in the US, the 1998 attack on the US embassies in Nairobi and Dar es Salaam, and the 2000 attack in Yemen..In 1999, the UNSC adopted Resolution 1267, requiring the Taliban to impose aviation and financial sanctions for harbouring Osama bin Laden. A sanctions committee was established to monitor compliance. The measures were later extended to cover Al-Qaeda, the Taliban, and affiliated individuals and entities, including restrictions on arms, travel, and financial assets. A major task of the 1267 Sanctions Committee was to develop a consolidated list of sanctioned persons, based on information from UN member states. Once a name was added, all member States were obliged to report on measures taken to implement the resolution. Only current members of the Security Council could assess the justification for listings. Individuals who believe they were wrongly listed could request their home or resident State to file a delisting application on their behalf. Following the September 11, 2001

In addition, Resolution 1373 established the Counter-Terrorism Committee (CTC) to monitor compliance and offer technical assistance. Nigeria, like other UN member States, is bound by these obligations and has incorporated many of them through domestic legislation.

2.1.2 Counter - Terrorism Committee (CTC)

The Counter-Terrorism Committee (CTC) was established pursuant to United Nations Security Council Resolution 1373 (2001) and is composed of all fifteen members of the Security Council. Its primary responsibility is to monitor State compliance with the resolution and request periodic reports from member States on legislative, administrative, and operational measures taken to combat terrorism.

In the initial reporting phase, all 191 UN member States submitted reports to the Committee. The CTC conducts follow-up by issuing confidential questions to States, reviewing the responses, and conducting in-depth meetings and official visits to assess levels of compliance. These reports remain with the individual States unless voluntarily disclosed.[5] Both the 1267 Sanctions Committee and the 1373 Counter-Terrorism Committee share certain institutional similarities. Each is supported by expert groups with a degree of operational independence. These expert panels submit regular reports containing their findings and targeted recommendations. Furthermore, both Committees make decisions by consensus and are expected to operate transparently for instance, in listing and delisting individuals under Resolution 1267 or in approving state visits.[6]Initially, the two Committees functioned separately. However, over time, they began collaborating more frequently and eventually coordinated efforts with the 1540 Committee responsible for non-proliferation of weapons of mass destruction by sharing information and jointly reporting to the Security Council plenary.

Despite these overlaps, the Committees differ significantly in scope and method. While Resolution 1267 targets specific individuals or entities identified as terrorists and imposes coercive sanctions to change their behaviour, Resolution 1373 adopts a broader preventive approach. The CTC under Resolution 1373 focuses on developing international legal and institutional standards, encouraging States to criminalise terrorism, strengthen border controls, freeze terrorist assets, and cooperate in investigations and extraditions.[7] Unlike Resolution 1267, which is punitive in nature,

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terrorist attacks, the number of listed individuals increased dramatically. This led to criticism of the Committee's limited oversight capacity. In response, the UN established a Monitoring Team through Resolution 1363, replacing the earlier ad hoc panel and providing a more robust compliance mechanism. The turning point came with the adoption of Resolution 1373 in September 2001, which imposed broad obligations on all UN member states under Chapter VII of the UN Charter. The resolution launched a campaign of non-military, law enforcement-based approaches to counter terrorism.[3] States were required to: cooperate with other states in investigations and prosecutions; deny safe haven to terrorists; freeze assets of suspected terrorist; criminalise terrorist financing; strengthen border controls; and also prevent the movement of terrorists.

[5] R Foot, 'The United Nations, Counter-Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas' (2007) 29 *Human Rights Quarterly* 495.

[6] *Ibid.*

[7] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

Resolution 1373 is primarily regulatory and facilitative, designed to foster global legal harmonisation and rapid state action against terrorism.

The Terrorism (Prevention and Prohibition) Act 2022 and other anti-terrorism laws in Nigeria were enacted, in part, to conform to the international norms specified in Resolution 1373. To help Nigeria fulfill its international commitments, the CTC offered model legislation and technical advice. Nigeria has also improved coordination between agencies like the Department of State Services (DSS), the Office of the National Security Adviser (ONSA), and the Financial Intelligence Unit (NFIU) this can be credited to the CTC's reviews and expert assessments.

2.1.3 United Nations Office of Counter-Terrorism (UNOCT)

In response to member States' mounting concerns regarding the disjointed and redundant nature of the UN's counterterrorism framework, the United Nations Office of Counter-Terrorism (UNOCT) was founded in 2017. The Office's establishment signaled a structural change in the UN's counterterrorism initiatives, with the main goal being to increase efficiency, coherence, and coordination. The Office has operations and partnerships in all of the major UN member States, with its headquarters located in New York. Prior to its establishment, the Department of Political Affairs (DPA) had oversight of the Counter-Terrorism Implementation Task Force (CTITF) and the United Nations Counter-Terrorism Centre (UNCCT). However, following intergovernmental consultations, it was agreed that these functions would be transferred to the UNOCT, which would assume the role of lead coordinating body under the direct authority of the UN Secretary-General.[8]

The integration of various counter-terrorism bodies under the UNOCT was intended to streamline mandates and foster synergy among agencies. Today, the CTITF and UNCCT continue to operate under the strategic leadership of the UNOCT and serve as its operational arms, particularly in capacity building and international cooperation. Despite its intended coordination role, the UNOCT has attracted criticism for being largely ceremonial and lacking operational authority. Concerns have been raised about the Office's limited field engagement, bureaucratic complexity, and insufficient impact in high-risk regions such as West Africa, where Nigeria faces persistent terrorist threats.[9] Nonetheless, Nigeria has benefited from the Office's training programmes, particularly in the areas of counter-radicalisation, preventing violent extremism (PVE), and community-based resilience initiatives in the North-East.

2.2 The United Nation Development Programme

The United Nations Development Programme (UNDP), though not a security body in the strict sense, plays a critical supporting role in global counter-terrorism through development-focused, peace-building, and stabilisation efforts. UNDP's work targets the

[8]United Nations, 'Bureaucracy, Political Influence and Civil Liberties' <www.fidh.org> (accessed 10th February, 2025).
[9]*Ibid*

root causes of violent extremism, including poverty, social exclusion, and weak governance, thereby complementing the work of enforcement-driven institutions such as the Security Council and the Counter-Terrorism Committee. In Nigeria, UNDP has provided extensive support to counter-terrorism efforts, particularly in the conflict-affected North-East. One of its most notable contributions is its involvement in the De-radicalisation, Rehabilitation, and Reintegration (DRR) Programme, which is designed to disengage former Boko Haram fighters from violent extremism and reintegrate them into civilian life. This programme focuses not only on ideological rehabilitation but also on vocational training, psychosocial support, and community reconciliation. Significant challenge remain in convincing hostile communities to accept repentant members and managing expectations, indicating that effectiveness is limited by systemic issues and the scale of problem.

In order to improve Nigeria's preventive and responsive capabilities, UNDP has also partnered with important Nigerian organizations, such as the Nigeria Security and Civil Defence Corps (NSCDC) and the Office of the National Security Adviser (ONSA).[10] As part of these collaborations, law enforcement officers have received training on preventing violent extremism (PVE), community policing, and civil-security communication. Furthermore, UNDP has carried out gender-sensitive interventions, supporting terrorism victims, especially widows and internally displaced persons (IDPs), and empowering women as peace-builders. In line with the UN's 2030 Agenda for Sustainable Development, specifically Sustainable Development Goal 16 on peace, justice, and strong institutions, these programs support resilience and long-term peace-building. Although the UNDP does not impose legally binding counter terrorism obligations on States, its strategic interventions have been helpful in Nigeria's efforts to address the socioeconomic and structural factors that foster the growth of violent extremism and terrorism.[11]

3. REGIONAL INSTITUTIONAL FRAMEWORK ON TERRORISM IN NIGERIA

The paper further appraised the regional constitutional frameworks in combating terrorism. Below are the frameworks.

3.1 **African Union (AU)**

The African Union (AU) has developed a comprehensive normative framework to prevent and combat terrorism across the continent. Central to this framework is the 1999 OAU Convention on the Prevention and Combating of Terrorism, which was further strengthened by the 2004 Protocol. These legal instruments place primary

[10]UNDP 'UNDP,ONSA Partner to Activate Community Based Platforms for Preventing and Countering Violent Extremism'. Available online at:https://www.undp.org/nigeria/news/undp-onsa-partner-activate-community-based-platforms-preventing-and-countering-violent-extremism. (accessed 1oth, February,2025)
[11]*Ibid*

responsibility on the Peace and Security Council (PSC) of the AU to coordinate and harmonise continental counter-terrorism efforts.[12]

To enhance research, policy formulation, and strategic coordination, the AU established the African Centre for the Study and Research on Terrorism (ACSRT) in Algiers, Algeria. The ACSRT serves as a regional think tank and clearinghouse, providing technical assistance, intelligence support, and training to member States. It also maintains databases on terrorist activities and facilitates best practice exchange between African countries. In furtherance of its counter-terrorism objectives, the AU has taken steps to institutionalise its efforts through key mechanisms such as the appointment of a Special Representative for Counter-Terrorism and the adoption of the African Model Law on Counter-Terrorism in 2010 and 2011.[13] The Model Law provides guidance to member states such as Nigeria on structuring their domestic anti-terrorism laws in line with continental standards, including definitions of terrorism, due process guarantees, and frameworks for inter-agency cooperation. The AU's framework also emphasizes respect for human rights, the rule of law, and the need for regional solidarity in counter-terrorism. For Nigeria, these AU initiatives serve as both a benchmark and a support system in aligning its domestic legal and institutional responses to terrorism with continental best practices.

3.1.1 African Centre for the Study and Research on Terrorism (ACSRT)

Following the adoption of the 1999 OAU Convention on the Prevention and Combating of Terrorism, the African Union (AU) established the African Centre for the Study and Research on Terrorism (ACSRT) in Algiers, Algeria. The Centre was designed to serve as a focal point for cooperation among member States, promote coordination of counter-terrorism strategies, and serve as a repository for research and analysis on terrorism-related trends across the continent.[14] The ACSRT works in conjunction with 53 National Focal Points (NFPs) from AU member States and the Regional Economic Communities (RECs). Its establishment built upon earlier AU efforts such as Resolution 213, adopted in Dakar in 1992, which called for regional coordination to combat emerging signs of extremism.[15] This was in response to increasing incidents of terrorism particularly following the Afghan-Soviet conflict which had ripple effects in countries like Tunisia, Algeria, and Egypt. The 1998 bombings of the US embassies in Nairobi and Dar es Salaam significantly altered African states' perception of international terrorism. These attacks spurred the adoption of more comprehensive mechanisms, including the ACSRT, whose primary aim is to strengthen the AU's capacity to prevent and combat terrorism via the Peace and Security Council (PSC)[16].

[12]United Nations Office to the African Union (UNOAU), 'Counter Terrorism' <www.unoau.org> accessed 20 July 2024.
[13]African Union, *African Model Law on Counter Terrorism* (2011), available at:UNOAU, 'Counter Terrorism' <www.unoau.org> accessed 20 February 2025. https://www.peaceau.org accessed 20 January 2025.
[14]A Botha, 'African Union Initiatives to Counter Terrorism and Develop Deradicalisation Strategies' in Counter-Terrorism and State Responses,
[15] *Ibid*
[16]*Ibid.*

The ACSRT engages in activities such as: Hosting conferences; seminars; training workshops for counter-terrorism capacity building; gathering and centralizing data and intelligence on terrorist activities; publishing a regional counter-terrorism journal since 2009 to enhance awareness and policy discourse;[17]faces financial and human resource constraints that hinder its capacity to carry out thorough research and outreach. conducting technical programs on bomb disposal;infrastructure protection, and terrorist threat assessments. The centre frequently

Despite these initiatives, the Centre has been limited by persistent funding constraints and human resource shortages, which have impaired its ability to fulfill its mandate effectively.[18] The African Union's broader financial and political limitations have also undermined its commitment to sustained regional counter-terrorism operations. This was evident in the AU's unfulfilled pledge to deploy 7,500 troops to combat Boko Haram in Nigeria, a failure that has drawn criticism over the AU's lack of political will and operational capability.[19]Moreover, the AU's efforts have been challenged by concerns about poor governance among member states—a root cause of extremism across the continent. Socioeconomic inequality, political marginalisation, and state-led repression continue to create the enabling environment for radicalisation. The AU's inability to enforce good governance through the PSC or ACSRT remains a critical gap in Africa's counter-terrorism framework. In addition, the AU has struggled to strike a balance between counter-terrorism and human rights, as the Universal Declaration of Human Rights (UDHR) and other international human rights instruments are frequently sidelined in security-focused responses.[20]

4. Economic Community of West African States (ECOWAS)

The Economic Community of West African States (ECOWAS) has demonstrated a regional commitment to combating terrorism and transnational organised crime. As terrorism increasingly threatens regional peace and stability particularly in the Sahel and Lake Chad Basin ECOWAS has adopted both legal instruments and institutional mechanisms to support member states' counter-terrorism efforts. One of its key instruments is the ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, adopted in 2006. This treaty aims to control the proliferation of illicit arms, which significantly fuels terrorism in the region.[21] The Convention obliges member States, including Nigeria, to strengthen border controls, disarm non-state actors, and enhance arms monitoring frameworks.In response to the growing threat posed by Boko Haram and similar insurgent groups; ECOWAS

[17]C Okpala, *A Re-Assessment of the Effectiveness of OAU (AU) Conventions of Preventing and Combating Terrorism*, PhD Dissertation, Golden Gate University School of Law, San Francisco (2014) p.32
[18]Polaine et al., *Counter Terrorism: International Law and Practice* (Oxford University Press, 2009) p.1001
[19]S Ehiane, 'Strengthening the African Union (AU) Counterterrorism Strategy in Africa: A Re-Awakened Order' (2018) 17 *Journal of African Union Studies* 121.
[20]*Ibid*

[21]ECOWAS, *Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials* (2006) https://www.ecowas.int accessed January, 7 October 2024.

supported the establishment of the Multinational Joint Task Force (MNJTF) in collaboration with the Lake Chad Basin Commission (LCBC). The MNJTF comprises troops from Nigeria, Niger, Chad, Cameroon, and Benin and is tasked with conducting coordinated military operations against Boko Haram and other violent extremist groups operating across porous regional borders.[22] Further reinforcing its commitment, ECOWAS adopted the Political Declaration and Common Position against Terrorism in 2013, which culminated in the development of the ECOWAS Counter-Terrorism Strategy and Implementation Plan (2013–2020). This strategy outlines a three-pillar approach: preventive measures, law enforcement and prosecution, and institutional capacity building, and encourages intelligence sharing and cross-border collaboration among member states.[23]

Despite these achievements, ECOWAS continues to face serious operational and structural challenges. Chief among them are funding constraints, limited technical capacity, and inadequate intelligence infrastructure, which hamper the effectiveness of both its legal and military responses.[24] These deficiencies, compounded by overlapping mandates with other regional bodies such as the African Union and LCBC, have diluted the region's collective response to terrorism. Nevertheless, ECOWAS remains a key partner in Nigeria's counter-terrorism architecture, especially through the MNJTF's field operations and joint initiatives on intelligence and security sector reform.

5. MULTINATIONAL JOINT TASK FORCE (MNJTF)

The Multinational Joint Task Force (MNJTF) was formally established in 2012 by the Lake Chad Basin countries; Nigeria, Chad, Niger, and Cameroon as a regional military response to the intensifying threat posed by Boko Haram in North-East Nigeria.[25] The need for a coordinated military strategy became urgent when it became apparent that terrorism in the Lake Chad Basin was not just a Nigerian problem, but a regional security crisis with continental implications. The origins of regional military cooperation trace back to 1994, under the Sani Abacha administration, when Nigeria initiated border patrol operations to curb the influx of weapons and armed groups following the Chadian conflict. At the time, these efforts were limited to Nigerian territory and focused primarily on border security.[26] However, by 1998, the mission expanded, evolving into a collaborative security mechanism involving Nigeria, Chad, and Niger. By 2012, the MNJTF was restructured and officially given a counter-terrorism mandate, specifically targeting Boko Haram. The Force was placed under the leadership of a Nigerian Brigadier General, and its structure was integrated with the efforts of the Joint Task Force (JTF), which had been operating in North-East Nigeria since 2011.[27]

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[22]F Onuoha, 'A Danger Not to Nigeria Alone: Boko Haram's Transnational Reach and Regional Responses' https://www.academia.edu/9605960/A_Danger_not accessed 7 October 2024.
[23]ECOWAS, *Counter-Terrorism Strategy and Implementation Plan (2013–2020)*https://www.ecowas.int accessed 7 January, 2025.
[24]*Ibid*
[25]I Albert, 'Rethinking the Functionality of Multi-National Joint Task Force in Managing the Boko Haram Crisis in the Lake Chad Basin' <www.academia.edu.org> accessed 10 January 2025.
[26]*Ibid*
[27]*Ibid*

At a 2014 summit of the Armed Forces of Lake Chad Basin countries in Cameroon, it was agreed that a more unified and better-coordinated regional force was necessary to confront Boko Haram head-on. The summit designated Nigeria as the headquarters of the MNJTF. The task force was empowered to take decisive actions, including intercepting arms traffickers and conducting cross-border counter-terrorism operations.[28] While Boko Haram continues to pose a threat, the MNJTF has been credited with significantly degrading the group's operational capabilities. Boko Haram has lost access to major supply routes, and some of its fighters have reportedly sought surrender or negotiation. The MNJTF has also been involved in humanitarian actions, including facilitating the release of the Chibok girls and other captives through coordination with Chadian authorities.[29]

However, the MNJTF's operations have not been without controversy. Allegations of human rights violations have emerged, including claims that Chadian forces attacked non-combatants suspected of terrorist affiliations.[30] The Task Force has also faced accusations of extrajudicial killings during raids and offensives.

Structural and financial challenges further hinder the MNJTF's sustainability. Limited funding, poor logistics, and inconsistent political commitment among member states remain major obstacles.[31] For ECOWAS to maintain a robust counter-terrorism front, it must strengthen its commitment to financing regional initiatives and ensure greater institutional accountability and operational oversight.

6. LAKE CHAD BASIN COMMISSION (LCBC)

The Lake Chad Basin Commission (LCBC) was established on 22 May 1964 by four riparian states Cameroon, Niger, Nigeria, and Chad with Central African Republic joining in 1996 and Libya in 2008. The Commission, headquartered in N'Djamena, Chad, is mandated to manage the Lake Chad and its shared water resources, safeguard its ecosystems, and promote regional integration, peace, security, and development across the Lake Chad Basin. In recent years, the LCBC has become a key player in regional security efforts, particularly in the fight against Boko Haram and other violent extremist groups. Working in collaboration with the African Union (AU) and the Multinational Joint Task Force (MNJTF), the LCBC supports joint military operations, resource mobilisation, and coordination among Troop Contributing Countries (TCCs) namely Benin, Cameroon, Chad, Niger, and Nigeria.[32]

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[28] *Ibid*

[29] F Onuoha, 'A Danger Not to Nigeria Alone: Boko Haram's Transnational Reach and Regional Responses' (2014) p.11 https://www.academia.edu/9605960/A_Danger_not accessed 7 October 2021.

[30] Amnesty International, 'Nigeria: More than 1,500 Killed in Armed Conflict in North-Eastern Nigeria in Early 2014' <www.amnesty.org> accessed 21 September 2021.

[31] F Onuoha, op. cit. p.13

[32] African Union, 'Boko Haram and Other Terrorist Groups Activities in Lake Chad Basin Region Suppressed in Joint Forces Operations' https://au.int/en/pressreleases/20240808/boko-haram-and-other-terrorist-groups-activities-lake-chad-basin-region accessed 10 February 2025.

According to an African Union report, the collaborative efforts of the LCBC, AU, and MNJTF have significantly degraded the operational capacity of Boko Haram and similar insurgent groups in areas under MNJTF control.[33] Notably, the 14th Joint Steering Committee (JSC) Meeting, held from 6–7 August 2024 in N'Djamena, Chad, commended the success of Operation Lake Sanity II for its effective disruption of terrorist networks and compliance with the African Union Compliance and Accountability Framework (AUCAF). This framework ensures conformity with international humanitarian law and regional human rights standards.[34] While challenges persist particularly in terms of logistics, intelligence, and sustainable funding, the LCBC remains an indispensable platform for both coordinated military responses and post-conflict reconstruction across one of Africa's most volatile sub-regions.

7. RECOMMENDATIONS

In light of the findings in this paper, the following recommendations are proposed to enhance the effectiveness of international and regional frameworks in supporting Nigeria's counter-terrorism efforts:

7.1 Strengthen Cooperation between Nigeria and International/Regional Institutions

There is an urgent need for improved cooperation and strategic alignment between Nigeria and the international community. This collaboration should focus on intelligence gathering, data sharing, joint training exercises, and coordinated responses to emerging threats. In an increasingly interconnected world, no nation can effectively combat terrorism in isolation. A relevant case study is the October 2023 Hamas-Israel conflict. Reports indicate that the Israeli government was warned by the Egypt about a potential terrorist attack days before Hamas Struck. Failure to act on this intelligence reportedly contributed to the scale of the attack highlighting the importance of timely information exchange and intergovernmental trust.[35]

In the Nigerian context, the Multinational Joint Task Force (MNJTF) provides a positive example of how regional cooperation can yield practical results. The MNJTF has significantly contributed to reducing Boko Haram's operational capacity, limiting its reach, and easing the burden on Nigerian security forces. Through shared intelligence and joint operations, the task force has prevented Nigeria from fighting on multiple fronts alone. Accordingly, Nigeria must not relent in fostering strong bilateral and multilateral relationships, particularly with organisations such as the United Nations Office of Counterterrorism (UNOCT), the African Union's ACSRT, ECOWAS, and the Lake Chad Basin Commission. Continuous engagement, diplomatic commitment, and operational integration are crucial to sustaining momentum in the fight against terrorism.

7.2Increase Funding for Counter-Terrorism Institutions

[33] *Ibid*
[34] *Ibid*
[35] BBC. 'Egypt Warned Israel Days Before Hamas Struck, Us Committee Chairman Says'.(Accessed 10th, March, 2025).

Effective counter-terrorism efforts require substantial and sustained financial investment. As terrorist organisations become increasingly sophisticated—adopting new technologies such as drones, encrypted communication systems, and improvised explosive devices (IEDs), Nigeria must be equally agile in upgrading their own capacities. Combating terrorism is not only manpower-intensive but also resource-dependent, involving the acquisition of advanced equipment, surveillance tools, warplanes, and specialized vehicles. Equally important is the need for continuous training and capacity building for security operatives, including the police, military, and intelligence agencies. A major limitation confronting institutions such as the African Centre for the Study and Research on Terrorism (ACSRT), the Economic Community of West African States (ECOWAS), and the Multinational Joint Task Force (MNJTF) is inadequate funding. Poor financial support has severely hindered their operational effectiveness, research capacity, and deployment capabilities. This weakness not only undermines their credibility but also reduces the strategic impact of their interventions.

Therefore, this paper advocates for a significant increase in national defence budgets specifically earmarked for counter-terrorism. Additionally, member states of regional and sub-regional bodies must fulfill their financial obligations and explore sustainable funding models, including international partnerships, donor support, and the establishment of special anti-terrorism trust funds. Without adequate funding, institutional frameworks, no matter how well-designed, will remain ineffective in addressing the complex and evolving threat of terrorism.

7.3Upholding the values of Human Rights

The core value of human right is to ensure people legal rights are not been abused. There have been reports of human right violations by institutional frameworks set by both regional and international community set to protect and prevent the less venerable. For instance, the Nigeria military has been alleged to blatantly disregard the rules governing war. Many other African countries have also spoken out about it. Once the institution cannot be trusted, it then becomes a problem as terrorist might seize the opportunity to recruit citizens and to also perpetuate attack.

7.4 Upholding Human Rights and the Rule of Law

A core objective of any legitimate counter-terrorism framework is to safeguard national security while upholding fundamental human rights. However, there have been consistent reports of human rights violations by security forces, including those operating under frameworks intended to protect vulnerable populations. In the Nigerian context, the military has faced serious allegations of extrajudicial killings, torture, arbitrary detention, and other abuses, particularly in the North-East theatre of operations. Similar patterns have been reported across other African states involved in joint security operations. Such violations undermine the moral authority and credibility of state and regional institutions. More critically, they create a climate of mistrust between security forces and the civilian population. When institutions entrusted with public safety

are perceived as abusive or oppressive, extremist groups often exploit this gap to radicalize, recruit, and justify their actions. This dynamic erodes public support for counter-terrorism initiatives and hampers intelligence-gathering efforts, which are heavily dependent on local cooperation.

To reverse this trend, Nigeria and its partners must strengthen human rights oversight mechanisms and ensure that security forces comply with international humanitarian law and human rights obligations. This includes robust training on the rules of engagement, effective accountability systems for misconduct, independent monitoring, and increased transparency in military operations. The African Union and ECOWAS must also ensure that all troops operating under their mandates are vetted, trained, and held accountable for any breaches of international law. Ultimately, a counter-terrorism strategy that violates the rights of the people it seeks to protect is self-defeating. Upholding human rights is not merely a moral obligation it is a strategic necessity in the fight against terrorism.

8. CONCLUSION

This paper has appraised the international and regional institutional frameworks established to combat terrorism and assessed their relevance and effectiveness in supporting Nigeria's counter-terrorism efforts. It examined key initiatives such as the United Nations Security Council's counter-terrorism resolutions, the African Union's peace and security mechanisms, ECOWAS interventions, and the role of bodies like the Multinational Joint Task Force (MNJTF).

The study found that there is no shortage of frameworks on both international and regional that Nigeria can leverage in its anti-terrorism campaign. However, the core challenge lies not in the absence of such structures, but in the failure to effectively implement them. For instance, while Nigeria has ratified important instruments such as the ECOWAS Convention on Small Arms and Light Weapons (SALW), implementation remains weak due to factors such as limited technical and technological capacity, corruption within relevant agencies, and poor inter-agency coordination.

The paper concludes that for Nigeria to make meaningful progress in the war against terrorism, it must move beyond ratification and political rhetoric to actualise the institutional commitments it has made. Strengthening operational capacity, increase funding for counterterrorism, and ensuring the diligent application of international and regional obligations will be critical to building a sustainable and effective counter-terrorism strategy.

Proliferation of Internet Financial Frauds in the Face of the Nigerian Cybercrimes (Prohibition, Prevention, etc.) (Amendment) Act, 2024: Necessity for Review

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Abstract

In recent years, science and technology have left both positive and negative indelible marks on the banking sector of the Nigerian economy. On the positive side is the enlarged horizon of the banking sector by the rendition of many banking services at incredible speeds and convenience through the use of computer and internet services. This development was taken to greater heights in the banking sector when the cashless Nigeria project which aims at encouraging electronic based transactions and reduction of the physical cash in circulation in the Nigerian economy was implemented. The cashless policy received a boost in 2020 following the outbreak of the corona virus pandemic tagged, "COVID 19" which forced persons, organisations and the government to embrace the electronic modes of business transaction throughout the lockdown period and beyond. On the negative side, fraudsters were attracted to the "large market" created by the exponential increase in the number of bank customers and the volume of bank transactions. The inherent anonymity and convenience of the net permitting users operation from comfort zones have caused the manipulation of electronic transactions to the detriment of bank customers. Hacking of bank accounts and making of unauthorised withdrawals have resulted to weeping and wailing of victims who are inconsolable because law enforcement agents appear lost as regards taming the menace. This article sets out to examine the effect of the implementation of the cashless Nigeria project on electronic frauds amidst the difficulties in the investigation of cybercrimes even in the face of the Nigerian Cybercrime Act as amended.

Keywords: Banker; Cashless; Customer; Cybercrime; Electronic Fraud; Service Providers.

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1. INTRODUCTION

Cybercrimes refer to all crimes that came to be as a result of computer technology. They are crimes that are committed in the cyberspace through the use of the computer system[1] and internet service. It is to be noted that many societies including Nigeria had prohibited many conducts before the advent of the computer and internet. When such crimes are committed without the use of the computer and internet service, they are known as "crimes" simpliciter and can only be distinguished by the names given to them by law. However, when the commission of the crime is computer and internet dependent, such crimes are referred to as "cybercrimes". The crimes that are committed through the computer and internet are but not limited to computer related forgery, fraud, stealing, cheating, obtaining money by false pretence, blackmail / defamation through the social media or computers, cyber stalking, cyber-squatting and child pornography.

The use of computer has grown very fast and made almost routine in our societies such that it has become indispensible in our world. Its usage is convenient and brings speedy results in split seconds. These qualities are often manipulated by criminally minded persons and we are prone to some risks which we must learn to manage since it is not feasible for this world to be without computer and internet services anymore.

One of the areas where science and technology through the use of computer and internet service have created and left indelible marks in the Nigerian economy is the banking sector. A few decades ago, banking business was transacted manually in an analogue system. Under it, a customer is expected to approach a bank physically for the purpose of opening a bank account and he is expected to be there physically when making cash withdrawals for himself. In that system, a customer can only access his funds in the bank where he owns an account and also in the very branch of the bank where he opened the account. Credence is laid to this position by Lord Atkin in *Joachimson v. Swiss Bank Corporation*[2] when he highlighted the obligation in a banker – customer relationship as follows:

> The terms of the contract involve obligation on both sides. They appear upon consideration to include the following provisions: the bank undertakes to receive money and to collect bills for his customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. *The promise to repay is to repay at the branch of the bank where the account is kept and during banking hours*.[3] It includes a promise to repay any part of the amount due against the written order of the customer.

[1] Section 58 of the Cybercrime (Prohibition, Prevention, etc) (Amendment) Act, 2024 inter alia defines computer system as, "any device or group of interconnected or related devices, one or more of which, pursuant to a program performs automated or interactive processing of data. It covers any type of device with data processing capability including but not limited to computers and mobile phones". Thus, a computer includes smart phones, laptops and desktop.

[2] (1921) 3 K.B. 110.

[3] Italics mine for emphasis.

Thus, where a customer opened an account in First Bank Plc., market road, Sapele, he can only make withdrawal of his money from First Bank and in that particular branch of First Bank. In other words, it was not possible for that customer to make withdrawal of his money from First Bank Plc., in Warri. If withdrawal of money was not possible for a customer in a different branch of the same bank, then, it is needless we say that a customer cannot access his money in one bank when he has his money in another bank, for example, a customer of Union Bank Plc., cannot make withdrawal of his money from Access Back Plc or Zenith Bank Plc in Nigeria.

Under the above scenario, the volume of banking was not only very low but people were also encouraged and compelled by difficulties and bottlenecks in the banking system to keep their money at home or in their persons. This was one of the reasons why the crime of armed robber was rampant in many homes and victims of such crimes were parting with their hard earned cash that was kept at home. The volume and number of frauds in the banking system especially as they relate to money belonging to individual customers were respectively low and small.

2. DIGITAL BANKING IN NIGERIA

Today, the slow and burdensome system of operation in the banking industry described above is gone for good. The transition from analogue to digital system has occurred through science and technology that have revolutionised the communication and banking sectors. The results are: (i) bank accounts can be opened electronically without the physical presence of a customer in the bank; (ii) withdrawal of funds can be made through electronic transfers anytime, anywhere and any day without the physical presence of a customer in any bank; (iii) withdrawal of funds by customers from any bank through the automated teller machine[4] (ATM) provided they have funds in bank accounts to their credit.

Under the digital regime, all transactions take place at an incredible speed and convenience to the advantage of the customers in genuine transactions whereas they are to their detriment, agony and pain where the transactions are fraudulent, illegal and unauthorised. It is this revolution in the banking sector that paved way for the pursuit of the cashless economy by which physical possession of cash is discouraged while electronic transactions through debit cards, electronic transfer of funds etc are encouraged. The above has engendered large scale banking and a reduction in the cash in the informal sector. Ironically, these technological breakthroughs are being used by fraudsters to the disadvantage of many bank customers through the unauthorised withdrawal of their money amidst the difficulties in securing credible electronic evidence.

The number of the victims of electronic fraud especially involving the low income group is on the increase on daily basis and their situation appears hopeless. This is because when their monies are fraudulently removed from their accounts and a report is made to

[4] This is an electronic banking outlet that allows customers to complete basic transactions without the aid of a branch representative or teller. Anyone with a credit or debit card can access cash at most ATMs. Visit: www.investopedia.com>Personal Finance>Banking. Accessed on 24/12/2021 at 0030 hours.

the police, the police are not able to do much immediately because the identity of the fraudster(s) cannot be ascertained without relevant information from the bank where such account is domicile. On their part, the banks can neither release the information nor do a reversal of such transactions without the order of court whereas there are serious bottlenecks in the process of securing court orders to freeze or post a no debit status on an account while time is of essence in internet transactions.

3. CYBER AND NON-CYBER CRIMES IN NIGERIA

In view of the fact that this article essentially centres on "cybercrimes" and there is disparity in the way juvenile offenders are treated in contradistinction with adult offenders, we shall briefly examine how crimes are classified in Nigeria. It is however important to remark here that any attempt at cataloging injurious human conducts that have been regulated for the purpose of preserving law and order in the society will hit a brick wall.[5]

In Nigeria, some classifications are based on the seriousness of the crime or punishment hence we have classifications like felony, misdemeanour, and simple offences;[6] capital and non-capital offences;[7] while some others are based on whether the crimes can be compounded of not hence we have compoundable and non-compoundable offences.[8] Again, while some classifications are from the perspective of the place of trial such as summary and non-summary trials, some others are based on the process or method of trial hence we have indictable and non-indictable offences.[9] Similarly, crimes can be classified from the angle of the degree of force used hence we have violent and non-violent crimes just as they can be classified based on whether or not there is an identifiable victim of the crime hence we have "victimless crimes".

Furthermore, crimes can be classified based on the primary victim of the injury hence we have offences against persons and offences against property,[10] just as they can be classified based on whether the crime was committed through the cyberspace or not hence we have "cybercrimes and non-cybercrimes". It must be remarked that some other classifications exist in some statutes.

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[5] This is because the number is endless and the conduct or part of the conduct that constitutes one crime may in conjunction with other conducts constitute another kind of crime. The multiple nature of crime typology and the dual nature of the Nigerian legal system account for the non-uniform classification of crimes in Nigeria. While some classifications are just for administrative purposes, others are based on the pronouncement of the law.

[6] Criminal Code, Cap. C38, LFN, 2004 in section 3. Also, see section 2 of the CPA, Cap. "C41", LFN, 2004.

[7] *Ibid*., in section 53(1).

[8] *Ibid*., in section 127; and section 339(9) of the CPC, Cap. "C42", LFN, 2004.

[9] Criminal Procedure Act, Cap. "C41", Laws of the Federation of Nigeria, 2004. See section 2 thereof.

[10] See the annual report of the Nigeria Police Force, 2012 in pages 164-167 and year 2013 in pages 220-224.

4. THE CASHLESS NIGERIA PROJECT

The cashless Nigeria project is a policy introduced by the Central Bank of Nigeria whereby a limit was set for the daily amount of cash transactions (deposit and withdrawal) that can be made by individuals and corporate bodies without "handling charges" while cash transactions above that limit are to be subjected to "handling charges". By this policy, daily cash deposits or withdrawals in excess of N150, 000.00 for individuals and N1, 000,000.00 for corporate bodies attract "handling charges". The policy was aimed at encouraging electronic based transactions and the reduction of the amount of physical cash circulating in the Nigerian economy. Through the cashless policy, more people were encouraged and in some ways "forced" to keep their money in the bank and at the same time resorting to electronic means of transacting financial businesses. The policy has succeeded in this regard because no doubt, more persons in Nigeria have opened bank accounts and have embraced electronic means of paying and receiving money for their daily business transactions since January 1st, 2012 when it was first introduced in Lagos and June 1st, 2012 when it was rolled out to other states across the country.[11]

Besides the above, given the fact that there is a positive correlation between economic growth and development on the one hand and an efficient and modern payment system on the other hand, the cashless policy was deployed and intended to develop and modernise the payment system in Nigeria for the purpose of actualising the then "vision 2020" of Nigeria being among the top 20 economies in the world. Other aims of the cashless policy include:[12] (i) reduction of the cost of banking services (including cost of credit) and derivation of financial inclusion by providing more efficient transaction options and greater reach; (ii) improvement in the effectiveness of monetary policy in the management of inflation thus constituting a driving force on economic growth and development; (iii) curbing high cost of cash maintenance in the economy; (iv) checking the high risk of using cash since robberies, stealing and other cash related crimes will be discouraged; (v) preventing financial losses in case of fire and flooding incidents; (vi) encouraging more money to be in the formal sector thus enhancing the effectiveness of monetary policy in managing inflation and by extension economic growth and development; (vii) discouraging inefficiency, corruption, leakages and money laundry amongst other cash related activities.

4.1 Natural Boost to the Cashless Policy

As the saying goes, "man proposes but God disposes", the major reason why the Central Bank of Nigeria introduced the cashless policy was for the citizens to embrace more of electronic transactions than physical cash transactions. The introduction of the policy thus paved ways for the financial institution to introduce many advanced electronic payment options such as the mobile banking and internet banking. About seven years after the introduction of the cashless policy, the world was struck by the

[11]The cashless Nigeria project – Central Bank of Nigeria wwwcbngovng>cashless.Accessed on 15/12/2021 at 2.45 am.
[12]*Ibid.*

corona virus pandemic in 2019 (COVID 19) that compelled many countries including Nigeria to go on lockdown thereby forcing every person to be at home throughout the period(s) of the lockdown. Under this situation, business organisations, citizens and the government were compelled to be dependent on technology and to do their businesses and social connections online from their homes. This restriction on mobility unpremeditatedly acted as a serious boost to the cashless policy because almost everybody embraced the electronic system of transactions amidst the surge in financial frauds.

4.2 Benefits of the Cashless Policy

No doubt, the cashless policy expanded the horizon of the banking sector through increase in the number of banking outlets, customers and volumes of transactions. This cannot be contended because evidence of banking activities especially through the point of sale (PoS) is seen even in remote villages where there are signals for internet service[13] thus bringing banking closer to the people. Besides, the policy has compelled many people (including the young and the old, literate and illiterate etc) who were not interested in having bank accounts to have a rethink and embraced the transaction of one form of business or the other with the banks especially that of receiving or sending of money to loved ones both in the villages and cities. The policy has brought a great deal of transformation in the business and social lives of Nigerians with better service delivery, enhanced turn overs and robust communication and information sharing.

All stakeholders have derived a variety of benefits from the cashless policy which is based on the electronic payment system. In specific terms, while the individual customers enjoy increased convenience and proximity to banking services, more service options, reduced risks of cash related crimes, cheaper access to banking services especially the “out of branch” services, and access to credit; the corporate bodies enjoy faster access to capital, reduced revenue leakage and cash handling costs. Similarly, while the government enjoys increased tax collection, greater financial inclusion and increased economic growth and development, the banks make more money from charges for services to their numerous customers and on cash deposits and withdrawals that are above the limit set by the Central Bank of Nigeria. They also enjoy less human physical contact and traffic on their facilities especially their premises and personnel with the attendant health implications during the era of the corona virus pandemic.

5. PROBLEMS FROM THE ENHANCED ELECTRONIC MEANS OF TRANSACTIONS

One of the outcomes of the implementation of the cashless policy is the exponential increase in the number of internet users. This has left us with the daunting problems of fraud and hacking of accounts of internet users by fraudsters which have created untold hardship for individuals, organisations and society. Various methods are being used by

[13] The internet service in most interior villages is weak thus making financial and other electronic transactions to be slow.

the fraudsters in exploiting the cyberspace. Crimes are committed through the web channels as well as the mobile apps and the ATM. We shall consider some of the methods in use by fraudsters in the succeeding subsection but suffice to say that the Nigerian Inter-Bank Settlement System Plc has identified social engineering as the fraud technique that is mostly in use and which accounted for 56% of all financial frauds in 2020. Other techniques includes the lack of two-factor authentication (2FA), card / phone theft, compromise of pin, fake assistance, robbery and missing / loss cards.[14]

5.1 Modus Operandi of Fraudsters in Electronic Transactions

Cybercrimes are committed through attacks on the information of a potential cybercrime victim using the cyberspace. The followings are some of the methods being adopted by fraudsters in committing cybercrimes:

i. Friendly fraud through the use of the victim's PIN:[15] a fraudster who may be a close friend, relation or colleague (social engineering) may get to know his victim's PIN and without authorisation, gets hold of the victim's phone and withdraws money from the victim's account.

ii. Fraud through the use of USSD[16] codes: a fraudster (as in above) may get hold of the victim's phone and by using different USSD codes without authorisation, transfers the victim's money to a different account or pay bills and or buy air time.

iii. Fraud through the use of lost / stolen ATM cards: when an ATM card is in the hands of fraudster(s), spirited "trial by error" is made by him (them) and in the process; the fraudster(s) may stumble on the victim's PIN. The fraudster does this by approaching the social media where a load of information is available about the victim which is downloaded and patiently analysed with a view of getting his PIN.

iv. Fraud by the use of account number and transaction alert number: the fraudsters get hold of the victim's account number, the phone number for the receipt of transaction alert and the guarantee that the account had not been in use for at least one month which can be gotten from the service providers and bankers and quickly, the money is gone.

v. Fraud through the use of hacked e-mail: victim's e-mail is hacked and his financial transaction intercepted. His communication is then disrupted and

[14] Mobile frauds up by 330% in Nigeria, says NIBSS – Benjamin Dada www.benjamindada.com>nibss-financial-fraud-report. Accessed on 10/01/2022 at 5 pm.

[15] This is a numerical code used in the process of authenticating a user who is accessing a system and it is used in many electronic financial transactions. PIN stands for Personal Identification number. Visit: en.wikipedia.org>wiki>Personal identification number. Accessed on 23/12/2012 at 2300 hours.

[16] This is a communication protocol used by GSM cellular telephone to communicate with the mobile network operator's computer and it stands for Unstructured Supplementary Service Data (USSD). It is sometimes referred to as "quick code" or "feature code". Visit: en.wikipedia.org>wiki> Unstructured-Supplementary-Service-Data. Accessed on 24/12/2021 at 0027 hours.

concluded by a third party leading to the unlawful transfer of funds from the victim's account.

vi. Fraud through SIM[17] swap: victim's phone is lost and the fraudster lays hand on the sim-card before a welcome pack is done. Through active connivance with the service providers, the fraudster effects a sim swap which automatically transfers the SIM and all embedded data to the fraudster who then transfers and withdraws the victim's money.

6. OVERVIEW OF THE CYBERCRIMES (PROHIBITION, PREVENTION, ETC) (AMENDMENT) ACT, 2024

The Nigerian Cybercrime (Prohibition, Prevention etc) (Amendment) Act, 2024 which was signed into law on the 28th of February, 2024 and which amended Act, No. 17 of 2015 provides a comprehensive legal, regulatory and institutional framework for prohibiting, preventing, detecting, prosecuting and punishing cybercrime offenders in Nigeria. We shall briefly examine this subsection of this article under the following headings, existing legal framework for curbing cybercrimes in Nigeria, jurisdiction, law enforcement agencies and other critical stakeholders.

6.1 Existing Legal Framework for Curbing Cybercrimes in Nigeria

The need to curb cybercrimes in Nigeria received legislative nod in May, 2015 when the Cybercrimes (Prohibition, Prevention, etc) Act, 2015 was specifically enacted for cybercrimes. It was amended[18] in February, 2024. The Act provides a comprehensive regulatory and institutional framework for the prohibition, detection and prosecution of cybercrimes in Nigeria. It vested the relevant law enforcement agencies with prosecution power subject only to the power of the Attorney General of the Federation.[19] The relevant law enforcement agencies[20] shall however, obtain the approval[21] of the Attorney General of the Federation before prosecuting any case under sections 19 and 21 of the Act. The office of the National Security Adviser shall be the coordinating body[22] for all security and law enforcement agencies under the Act. The coordinating body shall establish a National Computer Emergency Response Team who is to manage cyber incidences,[23] the sectoral Computer Emergency Response Team, the

[17] A SIM card, also known as Subscriber Identity Module or Subscriber Identification Module is a microchip in a mobile phone that connects it to a cellular network or a particular phone network. Visit: www.collinsdictionary.com>dictionary>english>sim-card. Accessed on 3/2/2022 at 12.50 am.
[18] Cybercrimes (Prohibition, Prevention, Etc.) (Amendment) Act, 2024.
[19] *Ibid*. See section 47.
[20] Section 58 of the Cybercrimes (Prohibition, Prevention etc) Act, 2024 defines law enforcement agencies to include "any agency for the time being responsible for implementation and enforcement of the provisions of this Act". Although the Act did not identify the relevant law enforcement agencies in Nigeria, they include: the Nigeria Police Force, the Economic and Financial Crimes Commission and the Independent Corrupt Practices Commission.
[21] Cybercrimes (Prohibition, Prevention etc), Act, as amended in section 47.
[22] *Ibid*. See section 41(1).
[23] *Ibid*.See paragraph c.

sectoral Security Operation Centres[24] that shall feed into the national CERT., a National Computer Forensic Laboratory[25] and appropriate platforms for public private partnership.[26] The Act made it mandatory for cybercrimes to be reported as follow:

> Any person or institution, who operates a computer system or a network, whether public or private, must immediately inform the National Computer Emergency Response Team (CERT) Coordination Centre through their respective sectorial CERTs or sectorial Security Operation Centres (SOC) of any attacks, intrusions and other disruptions liable to hinder the functioning of another computer system or network so that the National CERT can take the necessary measures to tackle the issues.[27]

The coordinating body shall also coordinate Nigeria's involvement in international cyber security to ensure the integration of Nigeria into global framework on cyber security,[28] and do such other acts that can enhance effective performance of the relevant security and law enforcement agencies.The Act also empowers a law enforcement officer to apply *ex-parte* to a judge in chamber for issuance of a warrant for obtaining electronic evidence in related crime investigation. Such authority empowers any law enforcement officer to enter and search any premises and person, seize and detain anything which contains evidence of the commission of a crime under the Act.[29]

6.2 Law Enforcement Agencies

Although the Cybercrimes (Prohibition, Prevention, etc) Act, as amended did not specifically identify the relevant law enforcement agencies, the Nigeria Police Force is a major law enforcement agency in Nigeria and by statute[30] has the primary responsibility of prevention, detection[31]and prosecution[32] of criminal cases in Nigeria irrespective of their type and classifications. It is instructive to note that the law empowers the police to enforce all laws and consequently all criminal matters whether or not a specialised agency is established for them. The Act provides:

> The Police Force shall – (a) prevent and detect crime, and protect the right and freedom of every person in Nigeria as provided in the Constitution, the African Charter on human and peoples right and any other law; (b) maintain public safety, law and order; (c) protect the lives and property of all persons in Nigeria; (d) enforce all laws

[24] *Ibid*. See paragraph d.
[25] *Ibid*. See paragraph f.
[26] *Ibid*. See paragraph h.
[27] Cybercrimes (Prohibition, Prevention etc), Act, 2024. See section 21.
[28] *Ibid*. See section 41(1) (i).
[29] *Ibid*. See section 45.
[30] The Nigeria Police Act, 2020.
[31] *Ibid*. See section 4(a).
[32] *Ibid*. See section 66.

and regulations without any prejudice to the enabling Act of other security agencies.[33]

We shall therefore make reference to the Nigeria Police Force as a lead law enforcement agency to represent all other relevant law enforcement agencies in this article.

6.3 Jurisdiction

The Act vested jurisdiction on the Federal High Court. Consequently, any Division of the Federal High Court in Nigeria has jurisdiction of offences under this Act the venue of crime in Nigeria notwithstanding. The Federal High Court also has jurisdiction where the offence is committed in a ship or aircraft that is registered in Nigeria and where the offence is committed outside Nigeria if the victim of the offence is a citizen or resident in Nigeria or the alleged offender is resident in Nigeria and not extradited to any other country for prosecution.[34] Also, cases brought to court under this Act shall be given accelerated hearing[35] frivolous request for adjournment shall not be granted.[36]

6.4 Other Critical Stakeholders

The other critical stakeholders we shall mention here are financial institution and the service providers. Under the Act, while financial institution include any individual, body, association or group of person whether corporate or unincorporated that carries on the business of investment and securities etc; service provider means any public or private entity that provides to users of its services, the ability to communicate by means of a computer system, electronic communication devices, mobile network; and any other entity that processes or stores computer data on behalf of such communication service.[37] Financial institutions have not only the duty of verifying the identity of their customer before the issuance of ATM cards, credit cards, debit cards and other related electronic devices but also the duty of applying the principle of "know your customers" in their documentation preceding execution of customers' electronic transfer, payment and debit issuance order.[38] Similarly, it is the duty of the service providers to keep and protect specific traffic data and subscribers information in accordance with the provision of the Nigeria Data Protection Act for a period of two years and shall not only preserve, hold or retain any traffic data, non-content, content and subscriber information but also release any information required to be kept by law to an authorised officer[39] for his agency.

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[33]*Ibid*.See section 4(d). See also the case of *Inspector General of Police v. Daniel Andrew* (2014) All FWLR 729 at p. 1202.
[34]Cybercrimes (Prohibition, Prevention etc), Act, 2024. See section 50.
[35]*Ibid*. See section 50(3).
[36]*Ibid*. See section 50(4).
[37]*Ibid.* See section 58.
[38]*Ibid*. See section 37. In facilitating the known your customer policy, the banks are required to use the National Identification Number and other valid documents.
[39]*Ibid*. See section 38.

7. UPSURGE IN ELECTRONIC FINANCIAL FRAUDS

The recorded success from the implementation of the cashless policy is not without its fair share of problems. This is so because as the policy received a boost through much patronage so also did the nation's financial fraud rate received a "super boost" to the point of threatening the benefits derived from the policy in the face of the Nigerian Cybercrimes Act. It is germane to remark that although financial fraud has been recurring in Nigeria, it was on a "whole new level" in year 2020 accounting for a 186% increase against 2018 and 2019 where its growth rate was low and the mobile led fraud channel saw a 330% Year-on-Year growth in 2020 as revealed by the Nigerian Inter-Bank Settlement System Plc.[40]

Similarly, a former National Security Adviser under the late former President Muhammadu Buhari's administration,[41] Gen. Babagana Monguno (retd), while revealing that Nigeria, South Africa and Kenya recorded over two million phishing (cyber) attacks in the first half of 2021 going by the survey conducted by a Bucharest based (Kaspersky Laboratory) a Romania also stated that 86% of Nigerian companies fell prey to cyber-attacks in 2020 being only second to India while South Africa with 64% settled for the third position.[42]

While many cybercrimes are not reported in Nigeria, the victims of electronic financial fraud are often frustrated and helpless. This is because while the police are handicapped because the information that can reveal the identity and consequent arrest of the suspect is not domicile with them; the banks and service providers are handicapped in giving out information concerning their customers without their consent and or valid court processes / order because of their duty of care and protection to their customers.

Again, while meeting the standard set for obtaining court orders is not easy especially for the illiterates and low income group; it may happen that there is the connivance of some of the banks' staff with the fraudster such that the relevant information is revealed to the suspect by his internal collaborator(s) to enable him (them) evade arrest. The result is that many victims will only cry and abandon their cases after much frustration. We shall examine these problems in details in the succeeding subsections of this article but needless to say that many businesses have collapsed and many victims of cybercrimes have died painfully as a result of the activities of fraudsters.

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[40]Mobile frauds up by 330% in Nigeria, says NIBSS – Benjamin Dada www.benjamindada.com>nibss-financial-fraud-report. Accessed on 10/01/2022 at 5 pm.

[41] By section 41 of the Cybercrimes (Prohibition, Prevention etc) Act, 2024, the office of the National Security Adviser shall be the coordinating body for all relevant security, intelligence, law enforcement agencies and military services to prevent and combat cybercrimes in Nigeria.

[42] This was disclosed in a sensitisation workshop for the implementation of the "National Cyber Security Policy and Strategy 2021" for the private sector and professional bodies on Tuesday 16th November, 2021 in Lagos.

7.1 Factors Responsible for the Increase in Electronic Financial Fraud

There are many factors responsible for the fast growth in electronic financial fraud in Nigeria. We shall consider the factors that have encouraged the proliferation of electronic financial fraud in Nigeria under two subheads namely, general and specific causes.

7.2 General Factors: The general causes of the proliferation of cybercrimes include:
7.2.1 Anonymity: Exploration on the cyberspace through the internet is convenient, fast and anonymous. Users can operation from the comfort of their bedrooms anywhere provided there is network and internet service. A user can make a large volume of transactions in split seconds with incredible results and yet his identity may not be immediately known. In other words, cyber offenders are largely anonymous at least on the surface or at the point of a victim becoming aware of the commission of a cybercrime. For example, a fraudster in Ugep, Cross River State who has the correct and relevant information that are needed for making a bank transaction can conveniently make withdrawals / transfers from somebody's bank account that is domicile in Wudil, Kano State, the distance notwithstanding. All the data concerning the identity of cyber operators including cyber fraudsters may not be known to the owner of a bank account and even the bank. This is because some of the information is domicile with the internet owners and telecommunication service providers.

It must be noted that none of the bodies having these information is statutorily saddle with the primary responsibility of crime prevention and detection. Thus, when a report of cybercrime is made to the relevant law enforcement agencies saddled with such responsibilities, getting to the root of the crime requires the identity of the erstwhile unknown offender being laid bare. This of course necessitates a synergy between all the bodies concerned for the achievement of the desired result while time is of essence in internet transactions.

7.2.2 Illiteracy: Arising from the fact that the cashless policy is based on the electronic system of payment which is computer and internet service based, there exists a problem for persons who cannot operate a computer especially the illiterates. This will of necessity compel them to employ the services of other persons for the purpose of assisting them to input their data into the computer system to enable them complete their transactions. These data in the hands of another person can be used to the detriment of the customer through unauthorised withdrawals and other fraudulent practices. Regrettably, about 90% of bank[43] customers belong to the low income group whose daily transactions are always below the N150,000.00 which is the ceiling for "free handling charge" as fixed by the Central Bank of Nigeria for individuals.

7.2.3 Poverty: It is no news that majority of the population of Nigeria is poor and given the monetary policy of the government as encapsulated in the cashless policy, the poor populace has been driven to embrace the electronic system of transactions. Where the

[43] See CBN Further Classifications on Cashless. Available: www.cbngovng>gud>cashlesslagos. Accessed on 15/12/2021 at 2.00 am.

poor become victims of electronic fraud and the wherewithal to pursue the case is lacking, they resign to fate.

7.2.4 Ignorance: Very often, when poor and uneducated persons are victims of electronic financial fraud, they may not know what to do and will rather bear the loss without complaining or reporting to any person.

7.2.5 Lack of Cyber Security: Cyber security is also known as information technology or computer security. It is the protection of computer systems and networks from theft, disruption and disclosure of information as well as damage to the systems' hardware, software and electronic data. Many users of the cyberspace have no cyber security in their systems. It is important to remark here that all bank customers are potential victims of fraudsters if they did not protect their information very well since the banking system operates through electronic means and the internet service.

7.2.6 Bottlenecks in the System: It is always very difficult for the victims of electronic financial fraud especially the poor to seek redress and recover their monies in good time given the bottlenecks in the system and the means of tracing / tracking of the suspect through the police, banks, communication and service providers as well as the court.

7.2.7 Non Reporting of Cyber Attacks: It must be remarked here that many crimes including cybercrimes are not reported in Nigeria. Some organisations and rich individuals fail to report their cases when they consider the impact such report may have on their goodwill and investment as well as the effect of such fraud on the organisation. Many other companies and individuals especially the poor or the low income class fail to report their cases in Nigeria for reasons ranging from not knowing what to do; cost of sponsoring investigation; frustration of the victims of crime in the investigation process; possibility of easy identification and arrest of cybercrimes suspects; possibility of recovering the defrauded property especially money; time taken to dispose off the case in court; and lack of automatic compensation for the victims of such crimes since there is no State funded compensation scheme in Nigeria.

7.3 Specific Causes: We shall examine the specific caused of the proliferation of cybercrimes under the following headings: investigation and prosecution of cybercrimes, clogs on the wheel of investigation of cybercrimes, conflict between bankers' duty of care to their customers and the need from speedy investigation of cybercrimes, the skewed nature of the Cybercrimes Act of Nigeria and judicial technicalities and the resultant delay in cybercrimes investigation.

7.3.1 Investigation and Prosecution of Cybercrimes:
Having considered some of the salient provisions of the Nigerian Cybercrimes Act, it is pertinent to observe generally that detection of crime starts with the awareness by the body saddled with the responsibility of crime detection of the commission of a crime. It is this awareness which may be through a verbal or written report that propels the investigation body into the taking of necessary steps. This may be the reason why the Cybercrimes Act made it mandatory for a victim of cybercrime to immediately inform the

National Computer Emergency Response Team for necessary action.[44] Being armed with such report, the investigating body attempts to confirm the veracity of the report which may involve intelligence gathering to know whether or not an offence has been committed. In the course of doing this and before the conclusion of the investigation, arrest is expected to be made to pave way for prosecution because criminal cases are not charged to court without a suspect or the person alleged to have committed the crime.

It is however unfortunate to observe that in recent times, when a victim of cybercrime especially of electronic money transfer reports to the police, he would be referred to his bank and his bank that has plenty of information about what has happened will in turn refer the victim back to the police and or the court. The result is that many victims of such crimes are frustrated and give up further pursuit of their cases especially when the amount of money involved in the fraud is small. As more of our people fall victims, the Nigeria Police and indeed all the other law enforcement agencies appear to be at a loss as to what should be done to end, or at least curtail this menace.

7.3.2 Clogs on the Wheel of Investigation of Cybercrimes

The reasons for the apparent inability of the police and other law enforcement agencies to tackle this menace headlong are not far-fetched. Apart from the anonymity of the fraudster occasioned by the fact that cybercrimes are based on attacks[45] on the information of an entity which may be an individual, organisation or even the government, the attacks are not coordinated physically rather, the coordination is by electronic devices through the internet. Other causes of the seeming inability of the police and other law enforcement agencies to crack the menace of cybercrimes are but not limited to the fact that the data that are necessary for the successful investigation of cybercrimes are domiciled with third parties as follows:

(a) Telecom Service Providers:[46] It is the telecom service providers that have the necessary information for the generation of (a) Call Data Record (CDR) for voice mails; (b) the Short Message Service (sms) for the content of messages; (c) records to determine the owner of IP address of mails; (d) identity to determine the user of some phone numbers and other connected numbers.

[44]Cybercrimes (Prohibition, Prevention etc), Act, 2024. See section 21.

[45] Cyber-attacks can be carried out in various ways including: (i) malware; (ii) phishing; (iii) denial-of-service (DOS); (iv) password attack or cracking; (v) SQL injection; (vi) man-in-the-middle variously known as monster-in-the-middle; machine-in–the-middle, monkey-in-the-middle, meddler-in-the-middle or person-in-the-middle; and (vii) emotet. Visit: 7 types of cyber security threat – Online Degree Programs onlinedegrees.und.edu>Blog. Accessed on 23/12/2021 at 12.45 am.

[46] Telecommunication Service Providers operating in Nigeria include: the Mobile Telecommunication Network (MTN) or the MTN Group Limited which is a South African Multinational Mobile Telecommunications Company, operating in many African and Asian countries with headquarters in Johannesburg; the Global Communications Limited (GLOBACOM) which is a Nigerian Multinational Telecommunications; and the BhartiAirtel Limited with headquarters in New Delhi, India.

(b) Commercial Banks and Other Money Deposit Institutions: It is the financial institutions that have information concerning the identities and addresses of their customers. They can also generate data on (a) the movement of cash between accounts within same bank and or (b) between accounts in different banks; (c) authentication of different e-channels-Mobile-Money-Apps, ATM, PoS[47] and USSD transfers.

(c) Courts: It is the courts that grant court orders to enable the police elicit necessary information from the relevant service providers and the banks.

Very unfortunately, none of the above organisations is responsible to the police or any security agency for that matter, and they seem to have no way of holding them accountable. It must be noted that because of the duty of the banker to conduct the account of his customer in a condition of secrecy, subject to some exceptions, the breach of which can be a subject of litigation, the banks rely on the order of court to act otherwise. Telecom service providers have followed suit by demanding for court orders before divulging information at their disposal thus, even when there is a situation that requires urgency, the banks and service providers rely on such technicalities and unwittingly give room for the escape of the suspected perpetrator of the cybercrime since time is of essence. It is to be noted that obtaining the necessary court orders to elicit information and cooperation of the service providers and banks is not easy at least to the common man or the low income earners due to the prevailing judicial standards.

7.3.3 Conflict between Bankers' Practices and Speedy Investigation of Cybercrimes

The banker – customer relationship is a contractual relationship that imposes rights and duties on both parties whose violation can be subject of litigation. Chief among the duties of the banker to its customer aside acceptance of deposits is the conduction of the account of the customer in secrecy subject to some exceptions[48] such as the order of court. It must be realised that bankers need and will always like to retain many customers so as to remain in business and since a customer would not want his account to be conducted in the open without their consent, the banks naturally key into this and deploy all tactics[49] aimed at refusing to divulge information concerning their

[47] Point of Sale (PoS) refers to the place where customers execute payments for goods or services. The PoS systems provide retailers or companies with sales and marketing data. Available: www.invetopedia.com>small business> how to start a business.

[48] The duty of secrecy of the banker to the customer is not absolute but qualified. The circumstances under which the banker may disclose information concerning the customer and his account are: (i) when disclosure is under the compulsion of law such as when a bank is served a summons to attend court and disclose the customer's affairs; (ii) disclose under duty to the public such as disclosure to prevent crime or protect the public and bank against crime or fraud; (iii) disclosure under customer's consent which may be express or implied; and (iv) disclosure under banker's interest such as when the customer is indebted to the bank and all effort to pay fails, the bank may put the matter in other "hand". See Afolabi, L., *Law and Practice of Banking*, (Heinenmann Educational Books (Nig.) Plc., 2005), pp. 39-45.

[49] This appears to have received judicial backing in the case of *GTB Plc v. Adedamola* (2019) 5 NLWLR (Pt. 1664) 30 at 43 when Abubakar JCA, admonished financial institutions as follows, "our financial

customers unless the courts give order to that effect. Since releasing certain information about their customers may conflict with the bankers' objectives and duties to their customers, the bankers take advantage of these technicalities and in the process unwittingly hamper the needed cooperation in good time whereas time is of great essence in internet transactions. It is unfortunate to remark here that some fraudsters transact their fraudulent businesses in their bank accounts with the knowledge and unethical connivance of some bank workers. The arrest of such fraudsters is always very difficult because as soon as issues bordering on investigation come up, the fraudsters are quickly alerted by their "insider collaborator(s)" to enable them take all precautions to evade arrest. This is essentially because the arrest of the fraudster may ultimately lead to the arrest of such bank staff and the consequent risks of losing his employment and eventual prosecution in the court of law. This inadvertently makes the banks to insist on "due process" and in the process of insisting on technicalities which are about small details in a law or set of rules especially those that seem to be unfair, time passes by without arrest of the suspect. These practices amount to a kind of tacit encouragement of cybercrimes by the bankers through delays in investigation and very often, the victims of such fraudulent transactions are thus frustrated and compelled to abandon their case.

7.3.4 The Skewed Nature of the Cybercrime Act of Nigeria

Let us try and proffer solution to this basic question: Is the Cybercrimes (Prohibition, Prevention, etc) Act, 2024 meant for all cybercrimes in Nigeria? Going by section 21 of the Act which mandated any person or institution who operates a computer system or network to immediately report the occurrence of a cyber-attack, it may seem obvious that the Act is for all cybercrimes. It is however germane to note that although cybercrimes include pornography, computer related forgery, phishing, defamation etc, it is unarguably true that cyber fraud through electronic money transfer is perhaps more common. This is so because the underlying purpose for most internet users is the intention of transacting one form of business or the other. Given the fact that ignorance and illiteracy are on the high side in Nigeria and computer education is low, many users of the cyberspace in every corner of Nigeria especially individual account holders of the lower class often fall victims of electronic fraud. This notwithstanding, the Act in sections 50 and 47 respectively conferred jurisdiction only on the Federal High Court and also made the prosecution of offences under sections 19 and 21 of the Act only possible with the approval of the Attorney General. It is important to remark here that these two section dealing with offences for which the approval of the Attorney General must be sought before prosecution essentially deal with where the financial institutions fail in their duties to customers to put in place adequate counter-fraud measures to safe guide their sensitive information and person or institution who fail to report cyber-attack incident(s). The following fundamental questions come to mind. How many private individuals in Nigeria will pursue their cases in the Federal High Court especially when the amount of money involved is small? Can it be convenient for a person whose only

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institution must not be complacent, reticent and toothless in the face of brazen and reckless violence to the rights of their customers. Whenever there is a specific provision regulating the procedure of doing a particular act, that procedure must be followed."

N20,000 or N50,000 is fraudulently transferred from his account to follow the investigation process to the prosecution stage in the Federal High Court? How compatible is seeking and obtaining the approval of the Attorney General with speedy investigation and prosecution of violators of the Act? These are some of the mind budging questions why some persons are of the view that the Cybercrimes Act is skewed in favour of corporate bodies and wealthy individuals in Nigeria.

7.3.5 Judicial Standards and Delays in Cybercrimes Investigation

By judicial standard we mean the level or quality that is normal and acceptable in judicial processes. Since the judiciary is the hope of the common man, the judicial process must have a minimum standard below which its affairs must not be conducted for the purpose of guaranteeing fairness, consistency, efficiency and reliability. It is however observed that the judicial standard in place in Nigeria whereby court orders are needed in relation to eliciting information from bankers and telecom service providers in the course of investigation impedes speedy investigation in no small measure. This is against the backdrop that the courts have in recent times insisted on full scale legal processes / procedures before the issuance of order(s).[50] This is in consonance with the declaration of Abubakar, JCA, in the case of *GTB Plc v. Adedamola*[51] in the following words, "Whenever there is a specific provision regulating the procedure of doing a particular act, that procedure must be followed."

The implication of this is that investigators have the burden of initiating legal processes if they are legal practitioners or seek to employ the services of legal practitioners where they are non-lawyers and waiting for days or weeks if there are factors that can inhibit speedy attention in the courts such as weekends and public holidays to get a banker's order to be served on the bank / service providers who will also bid their own time for as long as they desire, even if the order is to be acted upon. This is worrisome in that unlike conventional crimes, electronic frauds require only split seconds or at best, minutes to be accomplished. So, even if the culprits were arrested owing to these unending delays, the money involved would have been frittered away thereby making the eventual arrest and or prosecution of the culprit virtually meaningless. Hardship is created in this regard in two ways as follows:

[50] By section 45(1) of the Cybercrimes Act of Nigeria, a law enforcement officer may apply to a judge *ex parte* for the issuance of a warrant for the purpose of obtaining electronic evidence in related crime investigation. It must be realised that judges are not in every nook and cranny of the society where cybercrimes can be committed and reported to the police. The "local police" may therefore not be able to handle such matter and so such cases may be transferred to the State Criminal Investigation Department in the State capital where there may be better facilities. Taking the case to a higher authority outside the locality of the victim imposes extra cost for instance, cost of transportation on the victim of crime. The consequence is that the victim who may not be having money will weigh the cost and the inconveniences he is likely to face and the benefits he is likely to derive at the end of investigation and prosecution of the case which may make him to consider the dropping of the case a worthwhile venture.

[51] *Supra.*

(a) Magistrate's Courts Lacked Power to Issue Order Freezing Bank Account: Following the declaration by the Federal High Court in Abuja that the Magistrate's Courts lacked the power to issue an order freezing bank accounts or placing a "post-no-debit" order on personal account, it follows that where there are information to be obtained from the banker in respect of a customer's account, necessary proceedings must commence in the High Court.[52] The question that comes to mind is, given the fact that instituting proceedings for the purpose of obtaining court order is not free, how many victims of fraudulent transactions will pursue the investigation of their cases? Certainly, most of the victims of the low income group will be frustrated to abandon their case.

(b) Court Orders Must be Obtained Through Court Processes: Where investigation is to be carried out touching the bank account of a customer, due process must be followed. In the case of *GTB Plc v. Adedamola*[53], Abubakar JCA, explained as follows:

> Where there is an allegation of commission of crime against a customer of a bank in relation to the funds in his account, the Economic and Financial Crimes Commission is empowered by law to set in motion the process of investigating any such funds perceived to be derived from proceeds of crime. In conducting the investigation, the Commission is required to observe due process and satisfy the requirements of the law. The Commission or its officers must go to court and obtain an *ex parte*[54] order before freezing the account; any failure to follow due process will render the action taken by the Commission a violation of the right of a customer.

In that case, the court went further to stress that the bank must be satisfied that there is the order of court before it can freeze a customer's account or place any form of restraint on any bank account because the Economic and Financial Crimes Commission (and indeed the other investigation bodies) has no power to give direct instructions to bank to freeze the account of a customer without a court order.

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[52] In the suit marked FHC/ABJ/CS/1635/2019, Justice InyangEkwo made a declaration ordering banks to desist from acting on "bankers' order" obtained from magistrate's court and served on them, particularly by the police, to freeze or place a post no debit order on personal account. In his words, "a magistrate lacks the power to make bankers' order and / or post no debit on bank accounts pursuant to non-existent / repealed section 7 of the Banker Order, Act, 1847".

[53] *Supra*.

[54] An *ex parte* order is an order obtained through the filling of an *ex parte* motion. It is call *ex parte* because upon the motion being filled, the applicant is not obliged to serve same on the other party. It is enough if the application is brought to the attention of the court as it is permitted by law to consider it and grant same (if necessary) without hearing the person to be affected. The purpose of such interim order is basically to preserve the subject matter (in this case the money in the suspicious account) from being disposed of, usually, such order are only to last for a short period (pending the hearing and determination of a motion on notice). Thus, in many cases, the *ex parte* motion is to be accompanied by a motion on notice which would be served on the person affected, thereby giving him opportunity to be heard. The motion on notice would then be seeking for an order that will last till the case is ultimately heard and decided. The court will rule on the application, one way or the other, after hearing both sides.

8. FRUSTRATION OF VICTIMS OCCASIONING INCREASE IN CYBERCRIMES

It must be remarked that the nearest places for the report of criminal cases are the police stations which are relatively visible in every Local Government Area in Nigeria. It should be noted also that although the police can investigate and prosecute all cases in any court in Nigeria, most of the prosecution duties of the police are carried out in the lower courts. At the moment and going by the provisions[55] of the Police Act, 2020, the Administration of Criminal Justice Act, 2015 and the Administration of Criminal Justice Law for States that have domesticated the Act whereby only police lawyer can prosecute criminal cases, it means many police officers may not be able to prosecute cases in the courts especially the High Courts. The fundamental question that comes to mind is, how many qualified lawyers do we have in the Nigeria Police Force at the moment that can file court processes and prosecute criminal cases in the 774 Local Government Areas of Nigeria? It must be noted here that most of the lawyers in the Nigeria Police Force are in the legal section of the Force and States Criminal Investigation Department which are in the capital cities.

Thus, where cases that require the touch of a lawyer are reported to the Police, the implication is that such cases are transferred to the State Criminal Investigation Department in the capital city of that State and the next problem that confronts the victims of such crimes is the cost and time of investigation. The consequence of this is that the victims of such crimes will consider the amount of money that would be involved, the man hour (time) that would be wasted, and the risks and energy that would be dissipated on the one hand and the possibility of recovering the money involve and the benefit they would derive from the entire process on the other hand. The very likely result after considering all the issues above is that the victims of such crimes will not report such cases and where they report such cases, they will abandon them as a result of frustrations in the entire process.

9. CONCLUSION

It is crystal clear from the foregoing that the commission of cybercrimes in Nigeria is on the increase even in the face of the Cybercrimes (Prohibition, Prevention etc) Act, 2024. This is a function of some factors which have been classified as general and specific in this study. Many business organisations have collapsed and many individual victims are in pains and others have died whereas taming this menace appears not to be in sight. The agony faced by victims of cybercrimes calls for urgent and more radical steps being taken by all stakeholders to turn the situation around. This is with a view of reducing the commission of not only cybercrimes to the barest minimum but also non cybercrimes since the commission of every crime today is either cyber facilitated, dependence or cyber-enabled.

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[55] Section 66(1) of the Police Act, 2020 provides as follows, “subject to the provisions of sections 174 and 211 of the Constitution of the Federal Republic of Nigeria, 1999 and section 106 of the Administration of Criminal Justice Act which relate to the powers of the Attorney General of the Federation and of a State to institute, takeover and continue or discontinue criminal proceedings against any person before any court of law in Nigeria, a police officer who is a legal practitioner, may prosecute in person before any court whether or not the information or complaint is laid in his name”.

10. RECOMMENDATIONS

Arising from the above, the following recommendations are hereby offered: (i) lawmakers should revisit the Nigerian Cybercrimes Act and grant jurisdiction to the magistrate courts all over the country when electronic financial fraud involves amount not exceeding N500,000.00 while the Federal High Court can be left with frauds that exceed that amount. (ii) banks should be mandated to develop mobile money applications that would require second-level-authentication (2-face-authentication) using the biometric, since every account holder has his or her biometrics with the banks. For corporate accounts, voice call confirmation for every transaction should be required. (iii) SIM swap should require the physical presence of the owner of the SIM in addition to his or her biometric confirmation as well as a valid identity card. (iv) all request for information to either the banks or mobile service providers should be responded to within a stipulated time of not more than 48 hours after the making of such request, otherwise section 46 of the Cybercrimes (Prohibition, Prevention etc) Act, 2024 should be invoked. (v) requests signed by an Assistant Commissioner of Police in the case of the Force, Zonal and State Criminal Investigation Department; and the Divisional Police Officer in the case of Divisions should be honoured without delay. (vi) the Chief Justice of Nigeria and the Chief Judge of each state to designate a Judge / Magistrate and Police Officers (as in (v) above) who will mutually agree on ways to ease the process of obtaining orders from the courts since many police officers are non-lawyers.

The Imperatives of Passing the Corporate Manslaughter and Homicide Bill into Law in Nigeria

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ABSTRACT

Corporate personality and imposition of corporate criminal liability for manslaughter have caused a great unease in the field of criminal law. Today, the doctrine of corporate manslaughter is recognised in a number of jurisdictions and holds that a company is to be penalised for negligent acts which result in the death of an individual. This paper examines the legislative approach taken in Nigeria to deal with death arising from work activities and, in particularly, deaths that can be directly attributed to the negligent behaviour of corporate organisations. It also examines whether Corporate Manslaughter Law addresses the apparent or perceived shortcomings in the current approach to prosecution for corporate manslaughter. This approach is compared with some of those available in other selected countries. The paper adopts a doctrinal approach and analyses the basis of corporate criminal liability, what can be done to further the business of corporate criminal responsibility for manslaughter and a comparative analysis of the proposed corporate manslaughter law with similar laws in other countries. This work finds that the offence of corporate manslaughter is not provided for in Nigeria'sCriminal/Penal Codes which makes it imperative for a law to be enacted expeditiously to address this gap. It also finds that the corporate manslaughter is the product of a campaign to punish corporations following a number of high profile accidents at the end of the twentieth and start of the twenty-first centuries. The work therefore recommends that there is need to expeditiously review and pass into law the Corporate Manslaughter Bill to penalise public and private organisations and arms of government whose negligent activities cause the death of individuals, if the menace of corporate killings is to be frontally confronted in Nigeria.

Keywords:Corporate manslaughter; homicide; criminal liability; imperative; *actusreus* and *mensrea.*

1. INTRODUCTION

Homicide is a global phenomenon especially in the area of unsafe goods and services and work place related deaths. There have been global incidences of death occurring as a result of some activities of corporations. For example, in 1987, in the United Kingdom (UK), the Herald of Free Enterprise ferry capsized leading to the death of about 193 personson board. In the same year, there was the King's Cross Station fire also in the UK which killed 31 persons.

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Similarly, a gas explosion caused by leaking pipes killed 4 persons in their home in Scotland in 2001. In 2005, the British Petroleum American Refinery exploded in the United States killing 15 persons.

Back in Nigeria, on 22 January, 1973, the Royal Jordanian 707-300 Airline crashed in Kano. 6 of the 11 crew members and 170 of the 198 passengers were killed.[1]While on 10 December, 2005, Sosoliso Airlines DC9-32 crashed in Port-Harcourt, all 7 crew members and 101 of the 103 passengers including many school childrenwere killed.[2]On 29 June, 2014 30,000 barrels of oil spilled near Exxon Mobil's Ibeno oilfield, Eket in Akwa-Ibom State leading to loss of many lives and property.[3]

In June 2012, a Dana commercial plane crashed in the Lagos suburb, killing more than 150 persons.[4]This plane crash in Nigeria attracted so much condemnation and uproar across the length and breadth of the country, and even beyond. The crash was described as one crash too many as there had been series of plane crashes in Nigeria over time, as shown above.The Dana crash popped up the question whether or not the airline could be criminally liable for the death of the over 150 persons involved in the crash. However, the existing legal framework that is the Criminal and Penal Codes do not expressly provide for the criminal liability of a corporation or corporate body for manslaughter and murder, as the case may be. As an obvious follow up of this and previous developments, the Nigerian CentralLegislature, precisely the National Assembly made efforts to address this challenge by proposing a Corporate Manslaughter Bill which was co-sponsored by Senator Chris Anyanwu and Honourable Yakubu Dogara, of the then Senate and the House of Representatives respectively. Their efforts gave birth to the Corporate Manslaughter Bill 2018, which was tailored in line with the United Kingdom(UK)'s Corporate Manslaughter and Corporate Homicide Act 2007. Hitherto, the Senate on the 23rd of September. 2013 passed the 'Bill for an Act to make Provisions Creating The Offence Of Corporate Manslaughter and for The Matters Incidental Thereto' (the Bill). This earlier Bill wassponsored by Late Senator Pius AkporEwherido in February, 2013 as a result of the Dana airplane crash where it was evident that the decisions made by the management of Dana Airlines may have resulted in the crash, Although, the Distinguished Senators said that the passage of the Bill would be an expression of solidarity with their deceased colleague, it is obvious that beyond that statement, the recent spate of buildings collapse and public agitations may have provided an added impetus to the passing of the Bill which has been before the National Assembly.

It is, therefore, disappointing that over a decade since the Dana crash mentioned above, the Bill still straddles the National Assembly and the Presidency in Nigeria. The Bill was denied assent by former Nigerian President, MuhammaduBuhari on 9 July, 2018 on the grounds that it is inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria 1999. The thrust of this paper,

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1 See '10 Air Crashes That Shook Nigeria' <https:/9am/saharareporters.com/2019/06/14/10-air-crashes-shook-nigeria> accessed 3 November 2023.

2 ` *Ibid.*

3 *Business day* (Lagos 1 September 2012) 14.

4 KO Akanbi, 'The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom' (2014) 22(1) *International Islamic University Malaysia Law Journal,* 115.

therefore, is to appraise the situation in Nigeria and highlight the imperative of passing the Nigerian Corporate Manslaughter and Corporate Homicide Bill into law forthwith. The paper addresses the perceived lacunaein the Bill that are likely to clog its implementation when eventually passed particularly the challenges already being faced by the UK Corporate Manslaughter and Corporate Homicide Act.

2. THE CONCEPT OF CORPORATE HOMICIDE

The concept of corporate homicide as would be shown here under, is yet to gain the necessary judicial recognition in Nigeria despite the progress in UK and other Commonwealth nations. Corporationsin Nigeria still escape liability for deaths caused by them because the existing legal framework does not easily accommodate corporate liability for homicide. In addition, the fact that Nigeria is a developing country means many of its experiences of corporate homicide are unreported because of ignorance, poverty and religious influence.[5] The influence of religion is hinged on such beliefs, as the devil is responsible for or influences deviant behaviour in people, illnesses and deaths are seen as punishments from God for possible unrighteous acts, and that everything happens based on the will of God. These beliefs therefore discourage victims of crimes from doing anything to report the crimes or seek redress.

The menace of fake food, drugs and substandard services has also contributed greatly to the incidences of corporate homicide in Nigeria. According to Dora Akunyili, a one-time Director-General of the National Agency for Food, Drugs Administration and Control (NAFDAC), the menace of fake and sub-standard drugs had been killing Nigerians as far back as the 1970s.She cited an incident when Nigeria donated meningitis vaccines to Niger Republic and the vaccines were later detected to be counterfeits after approximately 600,000 persons had been vaccinated with them.[6] In another instance, fake drugs worth about sixteen million dollars were recovered by NAFDAC.[7] The infiltration of fake drugs into the Nigerian drug market has been made easy by the endemic corruption in the country as compromised enforcement officials connive with manufacturers of fake drugs to beat legal safe-guards provided by law thereby perpetuating illegality.[8]

In related development, more than eighty children were killed as a result of ingesting adulterated teething mixture, this caused a major outcry which resulted in the pharmaceutical company being prosecuted for violating a regulatory offence, as the legal framework could not sustain prosecution for manslaughter.[9] Generally, the Nigerian legal framework, atthe moment, does not expressly support corporate

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5 Although the country has no state religion, it is a multi-religious society where three major religions to wit: Christianity, Islam and Traditional religion are recognised. See also section 10 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which affirms the secularity of Nigeria.

6 Bulletin of the World Health Organization (Vol. 84, No. 9, September 2006), pp. 656 – 764. <https://www.who.htbulletin>volumes> accessed 2 January, 2024.

7 *Ibid.*

8 Nigeria's Corruption Rating according to Transparency International Corruption Index has been poor.

9 *AdeyemoAbiodun v FRN* (unreported) Suit No. CA/L/550/M/2013. Decided by the Federal High Court Lagos, on 17 May 2013.

criminal liability beyond strict liability for regulatory offences.[10] In addition,the existing homicides legislation are unsuitable and/or inadequate for prosecuting corporations.[11]

In the aviation sector alone, Nigeria has experienced over forty major avoidable plane crashes from 1960 to date and almost all of them resulted in loss of lives.[12] Yet the airlines escaped criminal liability as none of them was prosecuted for the deaths. Consequently, the crash on the 3rd of June, 2012, involving a commercial plane; operated by Dana Airlines in Lagos Suburb, Nigeria was considered as a climax.[13] There was a huge uproar and public condemnation of the crash. In particular, there were complaints by passengers who travelled inthe plane on another flight shortly before the crash that the plane had a near-crash experience and was considered not air-worthy.[14] The above made the need to define a framework for holding corporations liable for homicide become inevitable. More so, a little over a year after, in October 2013, another plane owned by Associated Airlines crashed minutes after take-off in Lagos, killing16 persons on board.[15]

Homicide generally is the killing of one person by another.[16] Corporate Homicide will therefore mean a situation where the acts or omission causing death occurred as a result of the systemic misconduct of a corporation, and the corporation is the truly blameworthy party and not the individual members of the corporation. Homicide also means when a person kills another person. It includes murder, manslaughter and infanticide.[17] It is regarded as the most grievous crime as a result of the general belief in the sanctity of life.[18] Corporate homicide, therefore, simply means when a corporation as a "legal person" kills another person.[19] However, as a result of the peculiar personality ofa corporation, a number of questions need to be answered in determining what qualifies as corporate homicide. Firstly, what class of homicide qualifies as corporate homicide? Will it be murder, manslaughter or infanticide? Secondly, how can a corporation, as an artificial person, kill another person?

In an answer to the first question, the latin maxim *actusreus non facitreum nisi mens sit rea*is seen as the basis for criminal liability: The *actusreus* for manslaughter and murder is the same, which means that a life must have been lost as a result of the act or omission of another. With respect to infanticide, there is a little variation as the life that must have been lost must be that of an infant under the age of twelve

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10 See KO Akanbi, "Corporate Criminal Liability as a Catalyst for Effective Anti-Corruption Law in Nigeria" (2018) 3(1) *KIU Journal of Humanities*.

11 Akanbi, supra (n4) 1.

12 <https://www.channelstv.com/2013/10/04timeline-of-plane-crashes-in-Nigeria> accessed 2 January 2024.

13 Vanguard (Lagos: 21 July 2012) 13

14 KO Akanbi, 'Corporate Criminal Liability: Towards Regulating Corporate Behaviour through Criminal Sanctions in Nigeria' (2015) (unpublished) Ph.D Thesis, Ahmad Ibrahim Kalliyah of Faculty of Law, International Islamic University, Malaysia.

15 <https//www.channelstv.com/home/2013/10/03/updateprivate-aircraft-crashes-near-Lagos-depot/> accessed 2 January 2024; Akanbi, supra (n4), 115 – 117.

16 CMV Clarkson, H.M Keating and SR Cunningham, *Criminal Law* (7thedn. Sweet and Maxwell, 2010) 660.

17 *Ibid*.

18 *Ibid*.

19 The case of *Salomon v Salomon and Co. Ltd* (1897) AC 22 has already settled the personhood of a corporation in the eyes of the law.

months. The difference between murder and manslaughter is the *mensrea*, known as malice aforethought or guilty mind.[20] Thus, a murder is said to have occurred when a person kills another with malice aforethought. On the other hand, manslaughter occurs when a person kills another without malice aforethought.[21]

Manslaughter has been described as the most complex form of homicides because it is quite wide-ranging, from voluntary manslaughter when a person seemed not to have the mental element for murder but kills in circumstances recognised by law, it is involuntary manslaughter when a person lacks the necessary intention but still committed the *actusreus* of killing. Manslaughter also includes gross negligent manslaughter, which is when a person is negligent in the discharge of a lawful activity leading to death. In *R v Adomako,*[22] the House of Lords provided an exposition of what constitutes involuntary manslaughter when it stated that in cases constituting involuntary manslaughter, there must be a duty of care that must have been breached as a result of negligence leading to loss of life. With respect to corporate homicide, death occurs as a result of corporate activity and the corporation is responsible for the death and not individual members of the corporation. This means that the death must have been because of a systemic breakdown within the corporation.A corporation by virtue of registration or incorporation is ordinarily formed for lawful purposes.[23] Therefore, when death occurs as a result of corporate activity, it is usually as a result of negligence and not because the corporation had pre-meditated itor had malice aforethought. So, corporate homicide occurs when in the course of doing its legitimate business, a corporation becomes negligent leading to loss of lives. Hence, corporate homicide qualifies as a form of gross negligence manslaughter.[24]

3. CHALLENGES IN CORPORATE HOMICIDE

The latin maxim *actusreus non facitreum nisi mens sit rea*accurately captures the basis of criminal liability. The challenge of corporate homicide is, therefore, in applying the twin ingredients of *actusreus* and *mensrea*to a corporation being an artificial entity. As stated earlier, one of the earliest challenges to corporate criminal liability was in attributing a corporate body with *actusreus*and*mensrea.*[25]

The issues to be addressed, therefore are how to determine

a. The *actusreus*of a corporation; and
b. The corporate *mensrea*

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20 *Ibid*, 665. That the term "malice aforethought" has undergone reform under the English law, from intention to kill to intention to cause grievous bodily harm. See *Hyam v DPP* (1975) A.C 55.

21 See the Supreme Court of Nigeria's decision in *Festus Amayo v State* (2002) SCM 109.

22 (1955) 1 AC 171.

23 CMV Clarkson, 'Context and Culpability in Involuntary Manslaughter: Principle or Instinct? In Ashworth and Michell' (eds.) *Rethinking English Homicide Law* (London: Sweet and Maxwell 2000) 152.

24 Akanbi, supra (n4), 117 – 118.

25 V S Khana, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) *Harvard law Review,* 1479.

3.1 Determining the *Actus Reus* of a Corporation

The *actusreus*is the physical manifestation of the crime. Therefore, the first requirement for criminal culpability is the *actusreus*which can be in form of acts or omission. However, determining the acts or omission of a corporation is peculiar because the corporation is a legal creation and cannot act physically by itself but only through its agents and officers. Therefore, the *actusreus*of a corporation can be found in the acts or omission of its agents and officers which are clearly regarded as the acts of a corporation.

Statutes usually provide for acts that should be regarded as the acts of a corporation. For example, section 65 of the Companies and Allied Matters Act of Nigeria[26]provides that actions of the members in general meeting, the managing director and the board of directors done while carrying out the usual business of the company will be construed as acts of the corporation itself.

It provides further[27] that acts of officers and agents of the company will be deemed to be that of the company if the company through its member in general meeting, the managing director or through the board of directors had expressly or implicitly authorised the officer or the agent to act.[28]

In the same vein, the Australian Criminal Code[29] provides that the physical element of a crime will be attributed to the corporation[30] if the crime was committed by an employee, agent or officer of the corporation within the actual or apparent authority or scope of employment.[31]The *actusreus*of a corporation therefore will include acts done by officers and agents of the corporation while carrying on the usual business of the corporation.

3.2 Determining the Corporate *MensRea*

Mensrea which is the mental element of an offence poses the greatest challenge to holding a corporation liable for homicide. This stems from the fact that a corporation is an artificial person and as such, it appears difficult to attribute a mental element to an artificial person which normally is incapable of any emotive thoughts or feelings. But, the courts have over the years sought to impute corporate *mensrea* by adopting several distinct methods. The English courts had used the civil law doctrine of vicarious liability by holding a corporation vicariously liable for the *mensrea* of its officers. Thus in the case of *Mousell Brothers Ltd v London and North-Western Rly Co.,*[32]the English Court held that the corporation could be vicariously liable for the acts of its employees. This method was also adopted in South Africa by the statutory provisions of the Criminal Procedure Act[33] which states[34] that a corporate body is vicariously liable for acts done by or on instruction or through implied or express

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26 Section 65 CAMA Cap. C20 Laws of the Federation of Nigeria 2004.
27 Section 66 CAMA, *Ibid*.
28 Adeniji v State [1992] 4 NWLR (pt. 547) 53 at 60.
29 Section 12(2) Criminal Code Act 1995
30 The word “corporate body” is used in the Act.
31 Section 12(2) Criminal Code Act.
32 (1972) 2 K.B 836.
33 Act 51, 1977.
34 Section 332, *Ibid*.

permission of its directors or servants.[35] However, the vicarious liability method does not accurately capture the corporate *mensrea.* This is because it is against the individualistic notion of the criminal law to hold a "person" liable for the wrong of another person. Secondly, it seems to render the issue of *mensrea* which is the pivot of criminal responsibility irrelevant. This is because applying vicarious liability to corporate criminal liability renders a corporation guilty irrespective of the fact that it had not the *mensrea* to commit the act constituting the offence or notwithstanding the fact that the act itself might have been committed contrary to corporate policy.[36]

The principle of *respondent superior* has also been used to justify holding a corporation liable for the *mensrea* of its officers or agents. It was adapted to the criminal law for the first time by the American Court in the case of *New York Central and Hudson River v United States.*[37]In arriving at the decision, the court held that since the corporation can only act through its officers and agents, then it should in the same vein be liable for the acts of its agents who have the authority to act in a particular manner. Under this theory, three factors must exist. The first is that there must be the commission of a crime by an agent of the corporation.

Secondly, the crime must be committed in the course of employment and lastly, such crime must be done with the intent to benefit the corporation. In applying this theory, the court considers both the apparent and express authority of the employer. In *United States v Hilton Hotels Corporation*[38]*,* Hilton Hotel was held liable despite evidence that the responsible employee acted contrary to the corporation's instructions.[39] The corporation is held liable even if it had in fact received no actual benefit from the crime committed so long as the employee intended to benefit the corporation.[40]

Same as the vicarious liability method, this approach is against the individualistic notion of criminal law and may in fact disregard the *mensrea.* It is the most prominent method of determining the corporate *mensrea* having been adopted in various commonwealth countries like Malaysia, Nigeria, and Australia. It was introduced into the criminal law by the English Courts in a series of cases that were decided in 1944.[41] This method locates the corporate *mensrea* in a person who is the directing mind of the corporation.[42] In *D.P.P v Kent and Sussex Contractors Ltd,*[43]it was stated thus:

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35 The Statutory Provision of the Criminal Procedure Act even extends the liability of the corporation beyond acts done within the scope of employment. C.N. Nana, "Corporate Criminal Liability in South Africa: The Need to Look Beyond Vicarious Liability" (2011) 55(1) *J.A.C.* 94.

36 Nana, *Ibid*., 101.

37 212, U.S. 481 (1909).

38 467 F.2d 1000 (9th Cir. 1972).

39 The rationale given for ascribing liability to the company was that the corporation did not take stringent measures to ensure that its instructions were complied with.

40 *United States v American Radiator and Standard Sanitary Corp*. 433 F 2d 174, 204 (3d Cir. 1970), Cert. denied, 401 US. 94(1971).

41 *D.P.P. v Kent and Sussex Contractors Ltd* (1944) 1 K.B 146; *R v ICR Haulage Ltd* (1944) 2 K.B 515.

42 The courts were probably influenced by the decision in the civil case of *Lennards Carrying Co. v Asiatic Petroleum Co. Ltd* (1915) A.C 705, H.L.

43 Supra.

> It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate … If the responsible agent of a company, acting within the scope of its authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive. I apprehend that his knowledge and intention must be imputed to the company.

In a follow up case of *Bolton (Engineering) Co. Ltd v Graham and Sons*[44], Lord Denning, L.J. held that;

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with the directions from the centre. Some ofthe people in the company are servants and agents who are nothing more than hands to the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does.

This method[45] has been applied to prosecute corporations for deaths caused by corporate activities. It was used in the prosecution following the collapse of the Herald of Free Enterprise,*H.M. Coroner for Kent, Exparte. Spooner*[46]and the case of *Attorney-General's Reference* (No. 2 of 1999)[47]which followed the South Hall Rail crash where seven people were killed. In the same order,*Transco's* case was prosecuted using this method for the gas explosion tragedy in Scotland.[48] However, this method has proved inadequate in determining the *mensrea* of large corporations. This is because in large corporations, the directing mind might not be easily linked with the actions constituting the crime. Therefore, the prosecution of the three cases cited above was unsuccessful because the directing mind could not be linked with the acts constituting the crime. In *Transco's* case, the prosecution failed because there was no evidence of negligence on the part of the directing mind of the corporation. Another shortcoming of this method is that it does not capture the reality of corporate crimes where crimes are committed more as a result of systemic process than as a result of a deliberate act by a specific person. However, the identification method was used to successfully prosecute the case of*Kite and Oil Limited* following a canoeing accident which killed four children.[49] The corporation in this case was a small one man company; therefore, it was easy to attribute the crime to the directing mind.

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44 (1957) 1 Q.B 159.

45 The identification theory also known as the alter ego theory was originally developed as a civil law principle in the case of *Lennards Carrying Co. Ltd v. Asiatic Petroleum Co. Ltd* (1915) AC 705 HL and it identifies certain categories of people within the company as the alter ego of the company. The alter ego is not treated as the agent of the company but as the company itself as it is the embodiment of the company. This principle is influenced by the fiction theory of the corporation. The management failure theory is the theory developed by the UK's Corporate Manslaughter and Corporate Homicide Act 2007 and hinges the company's *mensrea*on the senior management of the company.

46 (1989) 88 Cr App. 207.

47 (2000) 2 Cr. App R. 207.

48 *Transco Plc. v H.M. Associate* (2003) GWD 38 – 1034, (2004) S.L.T, 995.

49 *R. v Kite and Oil Limited* (1994) 99 Cr App. R 362.

Another distinct approach of ascertaining the corporate *mensrea* is through locating the corporate culture. It was developed in Australia as a statutory response to violations of federal crimes.[50] It has, however, not been subject to much judicial interpretation even in Australia, this method was introduced in the Australian Criminal Code Act 1995[51] and it locates the corporate *mensrea* in the corporate ethos or standard, corporate politics, culture, practices and management. The corporate culture is defined in section 6 as the attitude, policy rules and course of conduct or practice existing in a corporation. It further provides[52] that the *mensrea* of an offence is attributed to a corporation that has expressly, impliedly or tacitly permitted or authorised the offence, and the existence of a corporate culture that tolerates or permits the offence can be used to determine whether a corporation gave implied or tacit permission.[53]

It has been said that the rationale for corporate culture as a method of determining the corporate *mensrea* s that the policies, practices and culture of the corporation are evidence of corporate aims and intentions which developed from the decision making process of the company.[54] This method is a good way of determining the corporate *mensrea* because liability is personal and not derivative and only a truly blameworthy corporation will be liable. However, as stated earlier, this method of determining the corporate *mensrea* has not been subjected to much judicial interpretation and it deals with corporate criminal liability generally and not corporate liability for homicide specifically.[55]

4. THE NIGERIAN EXPERIENCE WITH SPECIFIC REFERENCE TO THE TWO MAJOR SOURCES OF CRIMINAL LAW IN NIGERIA: THE CRIMINAL CODE AND THE PENAL CODE

This section appraises the Nigerian experience with specific reference to the two major sources of criminal law in Nigeria: that is, Criminal Code and Penal Code.

4.1 Criminal Code

Under the Criminal Code, chapter 27 deals with homicide, section 306of the Code provides that it is unlawful for a person to kill another except in circumstances justified, authorised or excused by law. It provides further in section 308that whenever a person directly or indirectly caused the death of another, subject to other provisions in the chapter, such a person is deemed to have caused the death of such other person. Section 315also provides that it is the circumstances in which death occurs that determine whether the offence is murder or manslaughter. It goes further in section 317to give a comprehensive list of instances when the offence of murder will be said to have been committed. The instances are:

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50 Australia is a Federal State, the powers of the commonwealth to legislate on criminal matters is limited to some specific federal offences.

51 Part 2.5.

52 Section 12 (1).

53 Section 12 (2).

54 Field and Jony, 'Corporate manslaughter and Liability: Should we be Going Dutch' (1991) *Crim. L.R,* 156 at 159.

55 Akanbi, supra (n1) 120 – 125.

a. When a person intended to kill the deceased or any other person;
b. When a person intended to cause grievous harm to the deceased or any other person. This is irrespective of the fact that he did not intend to kill the deceased.
c. If the death of the deceased occurred as a result of the action of the person done in furtherance of an unlawful purpose irrespective of the fact that he did not intend to hurt any person;
d. If the person intended to do grievous harm in order to facilitate the commission of an offence of such a nature that an arrest could be made without warrant. It is immaterial that the person did not intend to cause death or know that death is likely to occur;
e. If a person caused the death of another through the application of any stupefying or overpowering substance either in furtherance of an unlawful purpose or to facilitate the commission of an offence of such a nature that an arrest without warrant could be made. This is irrespective of the fact that the person had no intention to cause death or knew that death was likely to occur; or
f. If a person willfully stopped the breath of another for either of such purposes. It does not matter that the person/accused did not intend to cause death or knew that death was likely to occur.

The Criminal Code also defines manslaughter in section 317as when a person unlawfully kills another in such a circumstance that does not constitute murder. Therefore, all other circumstances in which deaths occur apart from that expressly provided in section 316 shall suffice as manslaughter.

From the provisions of sections 316 and 317above, although corporate manslaughter is not expressly stated in the Criminal Code, corporate homicide qualifies as a form of manslaughter. The phrases *actusreus* and *mensrea* are not expressly mentioned in the Code. Nevertheless, the Act recognises that there must be both physical and mental elements to a crime. The courts also often make reference to the common law terms of *mensrea*and *actusreus.*[56]For example, in *Abeke v State,*[57]it was held that *mensrea* means a guilty mind.[58]

Chapter five of the Criminal Code deals with criminal responsibility and it provides in section 24thus:

> Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally liable for an act or omission, which occurs independently at the exercise of his will, or for an event which occurs by accident.
>
> Unless, the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or

[56] This is mainly due to the influence of the common law in Nigeria being a former British colony. These common law terms have imparted into the Nigerian criminal law through the doctrine of judicial precedent.
[57] [2007] 9 NWLR (pt 1040) 411, at 429 – 430.
[58] Similarly in *Mandillas and Karaberis v IGP* [1958] 3 FSC 20. The court relied on the common law principle of *mensrea.*

> part, by an act or omission, the result intended to be caused by an act or omission is immaterial. Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

The above explains criminal responsibility under the Code. First, the physical element is recognised to be in the form of an act or omission. Secondly, the requirement for the mental element is explained in two ways as follows. The first paragraph means that there can be no liability without fault. The word "will" in the paragraph means the accused's intention and awareness of the circumstances connected to the act. The second paragraph provides for result offences and simply denotes the common law rule on presumption of *mensrea* that unless intention is expressly stated as part of the definition of an offence, it is immaterial that the accused intended to cause a different result. Also, the wording of section 24 shows a presumption against vicarious liability for a mental element; it states that a person is said not to be liable for act which occurs without the exercise of his will. This is in tandem with the principle of personal liability as the hallmark of criminal responsibility.[59] Therefore, from these provisions, the *mensrea* or mental element is recognised; it is a matter of semantics that the common law phrase is not used expressly.

4.2**Penal Code**

Under the Penal Code,[60] the words "murder" and "manslaughter" are unknown. What is recognised under this Code is the offence of culpable homicide punishable with death and culpable homicide not punishable with death depending on the circumstances.

Section 220defines culpable homicide as when death is caused in any of three instances:

a. If an act is done with the intention of causing death or inflicting bodily harm that can cause death;
b. If an act is done knowing that it is likely to cause death; or
c. By doing a rash or negligent act.

The Code goes further in section 221to state the instances under which culpable homicide shall be punishable with death. The first is when the act is done with the deliberate intention to cause death.Secondly, if the accused knew or ought to know that death will be the probable and likely consequence of his act.

From the above, corporate homicide cannot be a type of culpable homicide punishable with death. This is because corporate activities resulting in death are usually caused as a result of negligent acts. Corporate homicide therefore can be accommodated under paragraph 220(c) of the Penal Codewhich is when death occurs as a result of a rash or negligent act.

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[59] Section 25 however provides that mistake of fact will be a reference to criminal responsibility unless the law creating a particular offence states otherwise.

[60] This is the main legislation on criminal law operative in the Northern part of Nigeria.

Section 222 of the Codelists instances of when culpable homicide will not be punishable with death as follows:

1. When deaths occurs as a result of grave provocation where the accused had lost his self-control or when death occurs by accident or mistake.

2. When the accused, acting in good faith in exercising his right to defend himself or his property, exceeds the power given to him and causes the death of another;
3. Where a public servant (or persons who aid a public servant) acts in good faith in the line of duty, but has exceeded the powers given to him to promote public justice;

4. When death occurs in the cause of a sudden fight and in the heat of passion; or

5. When a person causes the death of another by doing a rash or negligent act.[61]

The cumulative effect of the provisions of the Penal Code above is that corporate homicide qualifies as a type of culpable homicide not punishable with death. Thus, the definitions of corporate homicide and manslaughter in both the penal and criminal code respectively encompass the common law offences of gross negligence, manslaughter and unlawful act of manslaughter. The offence can be manslaughter or culpable homicide not punishable with death, depending on the jurisdiction in Nigeria.

Under the Penal Code, the phrases *mensrea* and *actusreus*are also not expressly used. The Penal Code is also couched in a different way from the Criminal Code. However, it provides in Chapter Two for criminal responsibility and its provisions also show that the principle of no liability without fault is recognised. Words like intention, knowledge, fraudulently and dishonestly are used to depict the mental element in the Penal Code.

Section 48provides:

> Nothing is an offence which is done by accident or misfortune and without any criminal intent or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution.[62]

It is the opinion of the researchers that the reference to “proper care and caution” means without negligent intention, knowledge and negligence, and these words are used in the above provision to denote the mental element. Similarly, section 51also provides that:

> Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind is incapable of

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61 Section 222(5) and (6) relates to suicide and infanticide.
62 The emphasis is mine.

knowing[63] the nature of the act, or that he is either wrong or contrary to law.

Also, the principle of no liability without fault is recognised in the penal code. Therefore, although the terms *actusreus* and *mensrea* are not expressly used in both the Criminal and Penal Codes, however, both legislation recognise that there must be a physical and mental elements to criminal liability.[64]Note, with respect to corporate liability for homicide under the Criminal and Penal Code, the Nigeria criminal law legislation recognise the principle of no liability without fault; the challenge of corporate liability for homicide is therefore in attributing the corporate body with the mental element.

In addition, the offence of corporate homicide is hitherto unknown to the Nigerian criminal laws. However, the challenge, therefore, is whether the existing legal framework is sufficient to accommodate corporate homicide. The answer is in the negative because of the following reasons:

i. Based on the provisions on criminal responsibility under the two Codes, mental element is fundamental to criminal liability except when otherwise stated in the Codes.

ii. Based on the definition of the offences of manslaughter and culpable homicide not punishable with death in the Criminal and Penal Codes, a mental element is required as an element of the offence.

Therefore, the mental element of a corporation must be determined for the purpose of holding it liable for homicide. The Criminal and Penal Codes are silent on the issue of the mental element of an offence by a corporation. Also, the wording of the two Codes on the definition of the offence implies that a natural person was intended by the drafters. This is not surprising because the Codes are more than fifty years old respectively. It seems therefore that the drafters did not envisage that a corporate body will be liable for an offence that requires *mensrea.*[65]

There is also a dearth of cases involving prosecution of corporate bodies beyond that of strict liability regulatory offences such as the case in *AdeyemoAbiodun and Others v. Federal Republic of Nigeria,*[66]where a pharmaceutical company manufactured a teething mixture with a toxic substance which killed more than eighty children sometime in February 2009 in Nigeria. The company together with three of its officials were prosecuted and convicted for breach of a statutory offence under the Miscellaneous Offences Act.[67] The company was specifically charged under section 1(18)(a)(ii)which was a strict liability offence.[68]

Another approach used in criminal prosecution of corporations is by lifting the corporate veil and prosecuting individual members or officers of a corporation. For

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63 The emphasis is mine.
64 Except in the circumstances stated otherwise in the two codes.
65 Corporate criminal liability for strict liability has been recognised much earlier in Nigeria.See*R v Zik Press* (1947) 12 WACA 202. See also, *Mandilas&Karaberis Ltd v COP* (1958) 3 FSC 20.
66 Suit No. 2013 CA/L/550A/13.
67 M17, Laws of the Federation of Nigeria 2004.
68 The company was convicted and wound up.

example, in *Federal Republic of Nigeria v Odogwu and Another No. 1,*[69]involving a prosecution before the then Failed Banks Tribunal, the corporate veil was lifted and the managing director of the bank was convicted.[70]However, it is the identification theory that is used in place of the corporate *mensrea* in civil cases. For example, in *Bank for Commerce and Industry v Integrated Gas (Nigeria) Limited,*[71]the Court of Appeal held that:"the state of mind and will of the *alter ego* of a company, that is, the directing mind and will, is the state of mind and will of the company itself."[72]

5. IMPERATIVE OF PASSING THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE BILL INTO LAW IN NIGERIA

Corporate homicide qualifies as a form of gross negligent manslaughter. It might be asked why should there be a separate legal framework for corporate liability for homicide since, in actual fact, a corporation is only an abstraction who can do nothing for itself except through its natural persons; thus, why not hold the culpable officer or member of a corporation liable? The justification for corporate liability as opposed to individual liability lies in the very nature of the act or omission leading to death. In essence, the justification lies in the nature of the "killing" itself. Therefore, corporate homicide occurs when the act or omission leading to death is caused by the systemic breakdown or misconduct of a corporation and the corporation is indeed the blameworthy person and not an individual member or officer of a corporation.[73]

Another argument could be that considering the peculiar nature of corporations as artificial persons and the "definition" of corporate homicide as a form of gross negligence manslaughter, it is not necessary to "punish" the corporation through the instrumentality of the criminal law, since the corporation is primarily formed for a lawful purpose. However, the paramount justification for criminalising corporate homicide is the fact that societal quest for justice is better served through the criminal law than the civil law. Besides, homicide is a crime; it is indeed a grievous crime, because the sanctity of life should ordinarily be preserved. In addition, the fact of legal personality itself is a justification for criminalising corporate homicide. The recognition of a corporation as a person in law means it is recognised as a right-and duty-bearing entity whose acts and omissions can constitute a crime.[74] Finally, the increasing rate of corporate deaths makes it imperative that it should be brought into the realm of the criminal law even if only for deterrence purposes. One of the goals of sanction that is the consequence of crime and criminality is deterrence, which may be specific or general deterrence.[75]

The Bill initiated simultaneously in the upper and lower legislative arms of the Nigerian Government by Senator Chris Anyanwuand Honourable Yakubu Dogara

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69 (1977) 1 FBTLR 179.

70 K.O Akanbi, "Perspectives on the Legacy of *Salomon v Salomon* on the Nigeria and Malaysian Company Laws" (2012), I LNS (A) I VII PAGE.

71 *Ibid*, a similar decision was reached in *Delta Steel (Nig.) v American Computer Technology Incorporated* [1999] 4 NWLR (Pt. 597) 53 C.A.

72 Akanbi, (n4) 125 - 133.

73 *Ibid*.

74 KO Akanbi and DA Ariyoosu, 'Corporate Criminal Liability: Imperatives of Criminalising Corporate Wrongs' (2014) 9 *University of Ife Law Journal* 190.

75 *Ibid*, 195.

respectively, is to provide for corporate manslaughter, corporate homicide and incidental matters. It is a short piece of legislation with twenty-six chapters. The Bill is fashioned after the UK's Corporate Manslaughter and Corporate Homicide Act 2007 and thus shares many similarities with the UK Act.

The provisions of the Bill will now be examined:

5.1 The Offence

The Bill creates an offence when death occurs because of the way the activity of an organisation is managed or organised and as a result of which there had been a breach of a duty of care by the organisation to the deceased. It further provides that an organisation can only be guilty of the offence if the way in which its activities are managed by its senior management is an important factor in the breach of the duty of care.[76]

From the definition of the offence, the organisation must owe the deceased a duty of care, which must have been breached, thus suggesting that there must have been some form of relationship between the organisation and the deceased. Most importantly, there must be a nexus between the senior officers or managers and the corporate activity resulting in death. It seems that creating a nexus between the senior management and the activity constituting the crime is a subtle endorsement of the identification theory or perhaps the management failure theory of determining the corporate *mensrea.*[77]Thus, there are bound to be challenges in applying the theories. First, in large corporations, the senior management, who are often the directors, is usually disconnected from the corporate activity constituting the crime. Thus, hinging corporate fault on the nexus may mean that the successful prosecution of large organisations will be a mirage.

Beside the above, another challenge is where to locate the managerial powers in large corporations with branches. A limiting factor is that the senior management might, as is often the case, delegate managerial duties and makes it difficult to establish the nexus. Thus, delegation of managerial duties and the extent of delegation are likely challenges.[78] Another limitation is the likely injustice to a corporation when corporate activity is managed negligently, but contrary to corporate policy.

The meaning of relevant duty of care is given in section 2 of the Draft Bill as duties owed under the law of negligence, which covers duties to employees, agents, occupier of premises, and duties owed in connection with the supply of goods and services. Briefly, these are duties owed by virtue of the old common law principle established in *Donoghue v. Stevenson*[79]on the basis of the neighborhood principle. The broad definition of relevant duty of care is commendable, as it places a

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76 Section 1(3).

77 See (n.47).

78 C. Wells, *Corporations and Criminal Responsibility*(2ndedn., Clarendon Press, 2011) 98 see the conflicting judgments in *Meridian Global Funds Management Asia Limited v Securities Commission* (1995) 2 AC 500 JCPC and *Attorney-General's Reference No. 2* (1999) (2000) 2 Cr. App. R. 207.

79 [1932] AC 562 1.

responsibility on corporations with respect to all those that can be affected by corporate activities: employees, agents, consumers and members of the general public. It is also provided that, what qualifies as a relevant duty of care is a question of fact that is determinable by the court.

However, some categories of duty are exempted from qualification as relevant duty of care within the meaning given in the Bill. For example, section 3 exempts any duty of care owed by a public authority in respect of a decision as to matters of public policy. Similarly, a duty of care owed in respect of actions done while exercising an exclusively public function are qualified, as such will not be regarded as a relevant duty of care unless it is in respect of employees, a duty owed as occupier of premises, or owed to one for whom the organisation is responsible for his safety.[80] Military and policing activities are also qualified with respect to the meaning of relevant duty of care, as certain actions done in specific instances will be exempted from the relevant duty of care rule.[81]

5.2 The *Mens Rea*

The greatest challenge to the development of corporate criminality as repeatedly noted earlier has been the *mensrea.* This is because of the peculiar nature of a corporation as an artificial person that is not capable of emotion, and the fact that the criminal law is founded on the principle of *actusreus non facitreum nisi mens sit rea.* (meaning an act is not necessarily culpable or a guilty act unless the accused has the guilty mind required for that offence). Therefore, any attempt at defining corporate homicide must necessarily include the yardstick of determining corporate *mensrea.* The Corporate Manslaughter Bill has adopted the management failure model developed in the UK's Corporate Homicide and Corporate Manslaughter Act 2007 as the attribution model for determining the corporate *mensrea.* It provides in its section 1(3) that an organisation will only be guilty of the offence if the way its activities are managed by its senior management is an important element of the breach of the duty of care. Thus, the *mensrea* necessary for manslaughter will be found in the senior management's conduct. In simpler terms, the organisation's mental element is evident in how the members of management behave, and the corporate *mensrea* lies in the actions of the senior management.

While the attempt to adopt a corporate *mensrea*is commendable, it must be stated that the management failure model adopted is not the most suitable and thus will affect the efficiency and efficacy of the Bill when and if it is fully passed into law. First, the management failure model is derivative and at variance with the core of the criminal law, which is based on individual liability. The ideal model for corporate criminality is individualistic and based on personal fault. Secondly, the management failure model developed in the UK to cure the challenges of the identification model is still tied to the apron strings of the identification model.[82] Thus, it is inevitable that with time it will become saddled with some if not all the challenges that the identification model has faced. Indeed, it can be argued that the difference between

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80 Section 3.

81 Sections 4 and 5.

82 J. Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2001: Thirteen Years in Making but was it Worth the Wait?' (2008) 71, *MLR,* 413, 428.

Section 14(1) and (2) is commendable as it recognises transfer of liability. While the concept of transfer of liability might be alien to the criminal law, it is appropriate in this context based on the peculiarity of the corporation as an artificial person. It provides that where death occurs as a result of the activity of a public organisation and such organisation has its functions transferred to another organisation, the new organisation shall inherit the liability of the original organisation even if such change in organisational functions took place in the course of proceedings under the Bill. This provision succinctly captures the reality of the workings of government ministries, extra-ministerial department and agencies especially in Nigeria, which is fraught with the vagaries of policy change which comes with every change of government.

An aspect of the Bill that deserves jettisoning is the mandatory requirement that the consent of the Attorney-General must be sought and obtained before a criminal proceeding can be instituted as provided in section 15 of the Draft Bill. This, no doubt, can be a veritable clog in the wheel of prosecutorial progress. This requirement can cause delay because of the usual administrative bottlenecks. Besides, this will add to the already bloated powers of the office of the Attorney-General, who is presently being described as a 'law unto himself'.[86] Thus, making the provision of section 15 is unnecessary.

But commendable, is the fact that a prosecution under the Bill does not preclude a prosecution under health and safety legislation if the circumstances so determine. Section 17(1) provides:

> Where in the same proceedings there is-
>
> a) a charge of corporate manslaughter arising out of a particular set of circumstances,
> b) a charge against the same defendant of a health and safety offence arising out of some or all of those circumstances, the court may, if the interests of justice so require, return a verdict on each charge.

The Bill further provides in section 17(2) that an organisation that has been convicted of corporate manslaughter may in the interest of justice be charged with a health and safety offence arising out of all or some of the circumstances.

5.4 **Sanctions**

Like most other Nigerian legislation with respect to corporate wrongs, fines are the main sanction recognised in the Bill.[87] This is, however, not peculiar to Nigeria as fine is the most common corporate sanction in most jurisdictions globally. This is probably because of the artificial nature of a corporation with no physical body to incarcerate, thus the reasoning that corporate sanction will always be financial especially as corporations are usually formed for profit purposes. However, as common and suitable as fine is as a corporate sanction, it is not without its flaws. One of which is that it can be built into the normal cost of doing business and the consuming public ultimately made to pay the price for it.[88] Hence, the proposition for

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86 *State v. Ilori*(1983) 1 SCNLR 94.
87 Section 1(5).
88 L Ali, *Corporate Criminal Liability in Nigeria* (Malthouse Law Books, 2008) 292.

the introduction of equity fine whereby a corporation is made to issue shares to a victim's compensation fund and cash is not removed from the corporation is justified.[89]

In addition, it confers power on the court to make orders as to remedying the wrong and a further order of publicity. Section 8 empowers the court to make a remedial order upon application by the prosecutor stating the terms of the proposed order. Such remedial order may be to remedy a breach or a state of affairs resulting from a breach. It may also be to remedy a health and safety deficiency or a particular policy or practice of the organisation. It is also required that before making an application for a remedial order, the prosecutor must have consulted with relevant enforcement authorities under whose supervision the remedy may be effected if eventually ordered by the court.[90] It should be noted however that the decision whether to order a remedy or not is entirely at the discretion of the court upon consideration of the proposal by the prosecutor and considering the available evidence. The remedial order is a good innovation as it has the effect of preventing future wrongs if the prevailing circumstances are remedied. However, with respect to the instant wrong, it cannot be remedied, as death cannot be remedied.

The researchers, therefore, suggest here, as opined by a learned writer[91]that a corporation even though being an artificial person, could also be subjected to an artificial death and imprisonment. The learned writer stressed that this could be achieved by winding up the corporation or striking off its name from the Register of Companies under the provisions of the CAMA 2020[92]to bring its life to an end. Also that a temporary closure of a corporation could be viewed as a form of imprisonment since during this period, the corporation would be incapacitated and restrained from functioning effectively.

Section 9 provides for an order of publicity, entailing the court giving an order to a convicted organisation that it should make a publication stating: the terms of the offence committed; the fact of conviction and the amount of fine; and the terms of the remedial order made if any. It also provides that the court in determining whether to order publication must seek the views of an enforcement authority. The publicity order has been described as an effective sanction that can achieve the deterrence goals of sanction because it can affect the public perception of an organisation, thereby leading to possible loss of reputation and patronage.[93]

Generally, the attempt to extend corporate liability to homicide is commendable, as it will ensure that corporations take more appropriate measures with respect to their safety standards and generally enhance a culture of compliance. It is also suggestive of the government's responsiveness to social reality since the Bill was introduced as a response to the yearnings of the public. The only snag, therein, is the procedure provided for in the Bill, the procedure may just culminate in a futile exercise. This is

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89 See generally Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulations, Theory, Strategy and Practice.* (2ndedn., Oxford University Press, 2011) 250.

90 Section 8(3) and (4).

91 D.F Tom, *Nigerian Corporation Law: The Criminal Liability of Bodies Corporate in Nigeria,* (Chenglo Ltd, 2005) 5

92 Section 564 of The Companies Allied Matters Act 2020

93 Ali, (n87).

so because the Bill is an adoption of the UK's Corporate Manslaughter and Corporate Homicide Act 2007, which itself has not proved to be a successful model for corporate liability for homicide. The management failure model developed in the Act as a means of determining the corporate *mensrea*is suitable only for small corporations. The pattern of conviction following the Act in the UK has shown that most of the convictions were of small corporations,[94] and not large multinationals and or even government agencies.[95] It does not reflect the essence of the reality of modern corporate operations that is hinged more on systemic structure than on acts of individual officers of the corporation. Thus, in most instances, the corporate officials are disconnected from the acts constituting the offence.

In addition, the management failure model contained in the Bill as its principal, the UK Act, is likely to throw up some of the evidential challenges of the identification model. For example, section 1 (4)(c) of the Bill defines senior management as persons who play significant roles in:

> (i) the making of decisions about how the whole or substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or substantial part of those activities…

Thus, evidential issues of what qualifies as a substantial part of an organisation's activities, and what qualifies as a significant role, would be some of the challenges that may arise if the Bill is passed and it faces trial in court. Added to the above, is the need to expand the sanctions and introduce more suitable and contemporary sanctions. Further, the financial sanction of fine as it stands needs to be modified to the nature of equity fine in order to be effective as a corporate sanction.

6. CONSTITUTIONALITY OF THE NIGERIAN CORPORATE MANSLAUGHTER BILL

As stated above, the reason given for the refusal of Presidential assent is that the Bill as it is, is unconstitutional and violates the constitutional provisions on the presumption of innocence. Section 36 of the 1999 Nigerian Constitution is part of the fair hearing provisions of the Constitution and provides in subsection (5) that everyone charged with a crime shall be presumed innocent unless the contrary is proved, except in situations whereby any law imposes the burden of proving particular facts on the person.[96] Similarly, the presumption of innocence provisions is embedded in the Evidence Act,[97] to the extent that the burden of proving the guilt of the accused is on the prosecution and such must be proved beyond reasonable

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94 The first conviction under the Act was that of a small one-man company: *R v. Cotsworld Geotechnical Holdings Ltd* (2011) ALL ER (D) 100. See also *R v Lion Steel Equipment* (Unreported) July (2012) Crown Court (NI); *R v Prince Sporting Club* (Unreported) (2013) Crown Court Southwark; *R v Mobile Sweepers (Reading) Ltd* (Unreported) (February) 2014 Crown Court Winchester; and *Health and Safety Executive v Huntley Mount Engineering Ltd* (Unreported) July, (2015) Crown Court Manchester.

95 *R v CAV Aerospace Limited* (Unreported) July, (2015) Central Criminal Court involved a large company with more than 400 employees. A parent company was convicted when an employee of its subsidiary was crushed by stacks of aircraft grade metal billets.

96 The requirement of presumption of innocence is in fact a global one as there are international instruments endorsing the same. An example is Article II of the Universal Declaration of human Rights 1948.

97 Section 135 Evidence Act 2011, Cap E14 Laws of the Federation of Nigeria (LFN) 2004.

doubt. Thus, the yardstick for criminal culpability will be that the prosecution must establish that the accused actually committed the offence; otherwise, the accused will be acquitted. It has been held that the purpose of the Constitution is to safeguard the interest and ensure that accused persons are given a fair trial.[98] Therefore, the presumption of innocence requirement is not to forestall criminal culpability, but merely to enhance justice and make sure an innocent party is not wrongly convicted.[99]

There is nothing in the Corporate Manslaughter Bill that forecloses the presumption of innocence or shifts the evidential burden of proof to the accused. First, from the definition of the offence, the offence is committed when the way in which an organisation is managed amounts to a breach of a duty of care and causes a person's death. It goes further that an organisation is guilty only if the way that the activities are managed is a major element in the breach of duty of care. There is nothing in the Bill that says that the gross breach occasioned by the management of the organisation must not be proved beyond reasonable doubt, or shifting the burden of proof to the accused organisation. Furthermore, the Bill provides that the question of whether an organisation owes the deceased a duty of care is a question of law, which the court must make findings on, based on the evidence before it. This, further strengthens the presumption of innocence requirements. Presumption of innocence merely applies to give the accused a reasonable benefit of doubt considering the context of the case.[100] Therefore, the refusal of presidential assent on the grounds that it is a violation of requirements of presumption of innocence is like merely giving a dog a bad name in order to hang it and should not be allowed to stand.

The second reason proffered for the refusal of presidential assent is that the Bill's provisions could lead to ambiguous legal interpretations or over-reach other laws potentially penalising corporations excessively or unfairly.[101] In answer to this reason, the researchers argue that existing legal provisions on corporate criminal liability are not sufficiently intentional and specific enough to engender a robust corporate criminal liability regime. Besides, the Nigerian criminal justice system is not proactive enough to articulate the several pieces of legislation in order to achieve a successful prosecution of erring corporations. Therefore, a separate dedicated legislation is imperative.

7. FINDINGS/OBSERVATIONS

In this section, the researchers put forward a summary of the observations or findings during the study as shown in the preceding sections

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98 *Adeniji v State* [2001] NWLR (pt. 73) 50, see also *Laoye v State* [1995] NWLR (pt. 10), 832.

99 See generally on presumption of innocence, Jacob Abiodun Dada and Eugene A. Opera, 'Application of Presumption of Innocence in Nigeria: Bedrock of Justice or Refuge for Felons' (2014) 28, *Journal of Law, Policy and Globalization,* 68 - 77, ISSN 2224-3259.

100 KO Akanbi, 'The Nigerian Corporate Manslaughter Bill: a thousand steps to nowhere'(2014) 22(1)*IIUM Law Journal*125.

100 See *Okoro v State* [1988] 5 NWLR (pt. 94), 255; *Onafowokan v State* [1987] 3 NWLR (pt. 61) 538; and *Garba v State* [2011] 14 NWLR (Pt. 1266) 98.

101 See Federal Government Official Notice on Refusal of Assent to Corporate Manslaughter Bill, URL: <https://gazzette.ng/Unofficial online access> accessed 29 May 2025.

It is limpid from the foregoing that the Bill, though very necessary at this point in the Nation's development, should not be rail-roaded into operation without providing safe-guards against the drawbacks or hick-ups presently being faced by the UK Act after which it was modelled. It is unarguable that the reality of contemporary times is that there is a paramount need to hold corporations criminally liable for deaths that occur from corporate activities as a result of the inevitable growing interaction between corporations and humans. This notwithstanding, the need to get it right can never be over emphasised as stated by a learned writer.[109]

This, researchers, therefore observe as follows

1. That there is the need for a rejigging of the Bill with the right parameters and needed local contents that will ensure its effectiveness and efficiency.

2. That the adoption of fines assanction or penalty to act as deterrent has not achieved the desired results in dealing with corporations as the financial burden of the fines is often watered down by the corporations through a transfer of same to members of the public who consume their goods and/or services as the case may be.

8. RECOMMENDATIONS

The problem of the management failure theory of corporate *mensrea,*which is incorporated in section 1(3) of the Bill perpetuates the complexity of proving the corporate *mensrea*. For the Bill to surmount this and other drawbacks identified above, the researchers strongly recommend the following:

(i) The corporate *mensrea* theory be replaced with the corporate culture theory which was developed in the Australian Criminal Code Act 1995 as the means of determining corporate *mensrea*[102]as it is based on personal liability and not derivative like the management failure.

(ii) The director's accessorial liability should be introduced into the Bill. This is because of the vantage position that directors hold in corporations. Having directors as accessories to corporate liability will ensure a culture of compliance, as there is a higher motivation to do the right thing.

(iii) Section 15 of the Draft Bill which requires the mandatory consent of the Attorney-General to commence prosecution be expunged.

(iv) The sanctions to be imposed upon being convicted be expanded where deserving to include winding up the corporation or striking of its name from the Register of Companies under the provisions of the CAMA 2020.

(v) The Corporate Manslaughter and Corporate Homicide Bill be rejigged in totality with the right parameters and specific reference to local content by the National Assembly and represented to the President for prompt assent.

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[102] Jonathan Clough and Carmel Mulhem, "The Prosecution of Corporations" in *Corporate Culture as a Basis for the Criminal Liability of Corporations* (An Allen Arthur Robinsons Report for the United Nations Special Representative of the Secretary General on Human Rights and Business 2008).

9. CONCLUSION

The paper has highlighted the imperatives of passing the Corporate Manslaughter and Corporate Homicide Bill into Law in Nigeria. It has identified the challenges in determining the corporate *actusreus* and the corporate *mensrea*and also torch-lighted the Nigerian experience with specific reference to the two major sources of Nigerian criminal law; the Criminal Code and Penal code. The paper has also highlighted the short-comings in the Draft Bill and the UK Act after which the Draft Bill was modelled, and proffered suggestions or recommendations, which if consciously implemented could engender an effective corporate criminal law and corporate homicide law regimes in Nigeria.

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