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THE NECESSITY FOR THE ENACTMENT OF SURFACE DAMAGES ACT FOR OIL AND GAS PROJECTS IN NIGERIA

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ABSTRACT
The prevailing legal position in Nigeria is that, the Federal Government is the minerals interest owner whilst the rights over the surface of the lands are under the control of private individuals and communities. Therefore, it is the Federal Government that grant oil mining leases to the international Oil Companies (IOCs), empowering them to enter into the oil lands using the surface whose rights reside in private individuals. The goal of this article is to explore the legal effects of the subsisting severance in title to the surface and the mineral strata of lands with regards to crude oil production in Nigeria. The article also compared the legal effects of the severance of the land surface and the mineral interest in the United States of America and, Nigeria. The article emphasizes that, the enactment and enforcement of the Surface Damages Act in many States of the United States of America has created an outstanding legal model by which the rights of the owners of the surface of the lands where crude oil are exploited are able to seek redress against the oil companies for breach of such rights. It is therefore, recommended amongst others that, Nigeria should emulate the United States by enacting the Surface Damages Act in order to break the deadlocks of the incessant violence and agitations of the surface owners and communities where oil and gas are being extracted.

Keywords: Oil, Gas, Energy, Surface Damages, Liability, United States, Nigeria.

1. INTRODUCTION

The concept of private property ownership is central to modern democratic society. Generally, in property law, ownership of property usually consist of the 'bundle of legal and equitable rights'. The bundle of such rights include the owner's right to use and enjoy the property, the right to sell or rent the property to others, and the right to exclude others from using or interfering with the property.[1]

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In order to be able to enforce the rights to safe and healthy environment, there has to be the existence of some form of ownership or possessory rights over the acreage to which the rights accrues. In essence, it is practically impossible to enforce environmental safety rights against any polluter in the absence of the existence of the rights to the land, sea and air. For any environmental safety action to succeed, the possessory or ownership rights over the polluted lands must not be extinguished before the occurrence of the pollution.

With regards to the development and exploitation of crude oil and natural gas in the Nigeria, and the resulting environmental consequences, two issues must be differentiated. The first is the ownership of crude oil and natural gas. The second is the ownership of the surface of the lands where the crude oil and natural gases are being extracted. Both issues have significant but complicated legal implications with regards to the preservation of the environment.[2]

The first issue revolves on the pivotal strand of the theory of eminent domain. The theory states that the government or the monarch of a country can compulsorily take private lands for public use with or without compensation. For the government to successfully acquire the rights to the lands of private persons and communities, it must back its 'taking' by enacting coercive legislation to prevent the former private land owners from enforcing their land rights against the government and against the oil companies.[3] The Federal Government of Nigeria enacted coercive statutes that empowers it (the eminent domain) to forcefully acquire the ownership rights of all minerals in the country. The laws are: The Land Use Act 1978;[4] The Constitution Federal Republic of Nigeria 1999 (as amended);[5] The Exclusive Economic Zone Act 1978;[6] and, The Petroleum Act.[7] With respect to the ownership of crude oil and gases that are within the offshore zones, Nigeria acceded to the United Nations Convention on the Law of the Sea (UNCLOS) 1982.[8] In view of the preceding explanations, it is not in

[1] Kato Gogo Kingston & Samuel Chisa Dike (2019) The Accommodation Doctrine and The Compulsory Acquisition of Lands for Oil and Gas Projects in Nigeria. Prime Journal of Advanced Legal Studies Volume 9 Number 1

[2] Kato Gogo Kingston (2018) Oil and Gas Laws: A Guide for International Practitioners (Second Edition) (Mauritius: Lambert Academic Publishing).

[3] The implication of this theory is that, the government can enact coercive legislation to back its desire to seize any land from private persons for any purpose it may classify as public good.

[4] Section 1 vest all lands in the governor of each state. Section 28(1) of the Land Use Act 1978 states the "it shall be lawful for the Governor to revoke a right of occupancy for overriding public interest."

[5] Section 44(3) states: "…. entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic zone of Nigeria shall rest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."

[6] Section 2(1) "…. sovereignty and exclusive rights with respect to the of exploration and exploitation of the natural resources of the seabed, subsoil and superjacent waters of the Exclusive economic Zone shall vest in the Federal Republic of Nigeria and such rights shall be exercised by the Federal Government……"

[7] Section 1 provides as follows: "… to the effect that the entire ownership and control of all petroleum in, under or upon any lands, including and covered by water) which is: (a) is in Nigeria or (b) is under the territorial waters of Nigeria, (c) forms part of the continental shelf; or (d) forms part of the Exclusive Economic Zone of Nigeria."

[8] Article 77 (1) of the United Nations conference on the law of the sea (UNCLOS) 1982 provides that the coastal sovereign state has ownership, control and development of natural resources in the exclusive economic Zone.(Which Nigeria became a party of in 1986), this rights are prevented from extending to interfere with the territory and territorial rights of neighbouring states.

doubt that the Federal Government of Nigeria is the legal owner of all the minerals in Nigeria including the minerals that are situated within its maritime zone.

The second issue centres on surface ownership of land, surface use, reckless use (including pollution) and the rights to seek redress. It must be highlighted that rights of the legitimate surface occupier or surface owner of land are enshrined in customary international law under the general concept of accommodation doctrine, now fully entrenched in oil and gas law.

ACCOMMODATION DOCTRINE AND THE RIGHTS OF THE LAND SURFACE OWNERS

The canon of accommodation doctrine evolves from the theory of *due regard.* Accommodation doctrine is also known as the principle of '*alternative means.*'[9] The doctrine denotes that, irrespective of the fact that the owner or holder of the surface of the land may not be the owner of the crude oil or other minerals underneath the land, he has the right to protect the surface and any violation of his surface right attracts remedies in law. For example, in Nigeria, Section 44(3) of the Constitution FRN 1999 (as amended); Section 2(1) Exclusive Economic Zone Act 1978; and, Section 1 Petroleum Act[10] firmly placed all the minerals in Nigeria under the ownership and control of the Federal Republic of Nigeria. For this reason, the Federal Government may transfer or assign some aspects of such rights to the oil companies by way of licences (concessions).

The oil companies therefore become the minerals lease holders. There is thus, an implied rule that the oil companies have automatic easements (the right of way) allowing them to gain access to the crude oil by passing through the surface of the lands that are occupied or owned by private persons and communities. Hence, the oil firms must *reasonably accommodate* the private surface owners' rights. This implies that the oil firms are obliged to act in such manners that they should satisfactory accord due regards to the surface rights owners. In some instances, such due regards may include but not limited to making adequate plans for the relocation of the surface rights owners by providing alternative arrangements such as the provision of alternative accommodation.[11] Due regards also require that the oil firms should use alternative routes to gain access to their project sites to minimise interference with the surface occupation of persons and communities. It also involves making adequate plans to compensate the land surface owners where the use of the surface has caused damages or hardship.

The utility of accommodation doctrine was prominently explained in *Getty Oil Company v. Jones*.[12] In that case, the cause of action was that, Jones sought remedy from Getty for negligently violating his accommodation doctrine in that Getty installed

[9] [n 1]

[10] CAP P10 LFN 2004

[11] This happens where there is a foreseeable chance that the exploitation of crude oil will cause significant disruption to the lives and properties of the surface dwellers. In such instances, the oil companies are obliged under this principle to pay compensation as well as make provision for the resettlement of the communities/persons.

[12] 470 S.W.2d 618 (Tex. 1971)

a very high oil pumps in the boundary of Jones' property which obstructed the water sprinkler system of Jones to the effect that Jones could not supply water to his own property, which consequently affected Jones crops.[13] The Supreme Court of Texas decided that Jones was entitled to peaceful enjoyment of the surface of his land which otherwise was impeded by Getty Oil. The court further said that, Getty Oil ought to have reasonably accommodated the rights and concerns of Jones. Therefore, Jones rights over the surface of the land were violated by Getty Oil notwithstanding that Getty Oil was the minerals interest owner. [14] Irrefutably, the court made it clear that, "the rights implied in favour of the mineral estate are to be exercised with due regard to the rights of the owner of the *servient* estate."[15] This simply mean that the mineral right owners[16] should reasonably accommodate the surface owners in the following circumstances:

a) When there is an existing use of the surface prior to the acquisition of the mineral mining license;
b) Where the mineral owners' use of the surface impedes or harms the existing use of the surface to the detriment of the surface rights owners; and
c) Where it is within the recognised minerals industry practices, that there are available alternatives means by which the mineral license owners could use to recover the minerals without interfering with the surface owners' rights.[17]

In the case of *Buffalo Mining Co. v. Martin*,[18] it was decided that the mineral interest owners must exercise care and use proper skills which are "reasonably necessary for the extraction of the mineral" and "without substantial burden to the surface owner." In the same direction, in *Chartiers Block Coal Co., v. Mellon*[19] where the court was confronted with decision as to the applicability of accommodation doctrine on multiple mineral interest owners. The court reached the decision that, "… against the owner[s] of the surface each of the several purchasers would have the right...to go upon the surface to open by way of shaft, or drift or well, to his underlying estate..." This decision reiterates the willingness of the court to enforce the rights of the surface owners against the reckless mineral right holders. This is because: "when the soil belongs to one person and the mine another, the right to work the mine carries with it the use of so much of the surface as is strictly necessary and reasonable."[20] In this circumstance, it is important to explain the legal concept of reasonableness. In *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*[21] the English Supreme Court explained that an action of a private or public entity is construed as unreasonable "if it is so unreasonable that no reasonable person acting reasonably could have made it."

[13] [n. 11]
[14] *Haupt Inc. v. Tarrant County Water,* 870 S.W.2d 350 (Tex. App. Waco 1994)
[15] [n. 11]
[16] This refers to the oil companies that have subsisting mineral lease licences.
[17] [n. 11]
[18] 267 S.E.2d 721 (W.Va. 1980)
[19] 152 Pa 286, 25 A 597 (1893)
[20] *Dewey v. Great Lakes Coal Co* 84 A. 913 (Pa. 1912)
[21] [1948] 1 KB 223

PROOF OF VIOLATION OF ACCOMMODATION DOCTRINE

To triumph on a claim under the accommodation doctrine the surface rights owner must prove two things as follows:

(a) That the oil company's use of the surface totally impedes or considerably damages the existing surface use, and

(b) That the surface owners have no reasonable alternative method available to continue their existing use of the surface alongside the reckless use and/or damages by the oil company.

The claimant (surface owner) must also show that under the circumstances, that there are alternative reasonable, customary, and industry-accepted methods that are available to the oil company which ought to have been used by the oil company to extract crude oil without interfering with the surface owners existing use of the surface. Honestly, what this means is that, the claimant have to put up a convincing argument to show that, the damages to the surface of the lands could have been avoided *but for* the wilful negligence and recklessness of the oil company.

The *but for test* was further developed in *Merriman v. XTO Energy, Inc.*,[22] in which the court laid out the requirements for proof of violation of the accommodation doctrine. To prove breach of the accommodation doctrine, the surface owner must first show that:

a) That the oil firm's use of the surface of the land of the claimant completely precludes or substantially impairs the existing use. This means that, the oil company recklessly and negligently use of the surface thereby cause harm to the claimant;

b) That the oil company did not show that there were no reasonable, customary, and industry-accepted methods available to the oil company that would have allowed the recovery of crude oil and also allow the surface owner to continue the existing use. This means that the claimant need to show that there were other rational options by which the defendant ought to have adopted in the course of the conduct of the oil production activities in the project location.

Furthermore, in *Amoco Production Co. v. Carter Farms*,[23] the court found that the defendants were in violation of accommodation doctrine in that they recklessly neglected the due regards of the claimant's surface rights hence, they were liable to pay substantial damages to the claimants. By the same token, in *Hunt Oil Co. v. Kerbaugh*,[24] the court decided *inter alia*:

> …the owner of the mineral estate must have due regard for the rights of the surface owner and is required to exercise that degree of care and use which is a just consideration for the rights of the surface owner…

The same outcome was reach in other notable cases such as the case of *Flying Diamond Corp. v. Rust*,[25] where the court explicitly stated that both the mineral rights[26] owner and

[22] 407 S.W.3d 244 (2013)
[23] 703 P.2d 894 (N.M. 1985)
[24] 283 N.W.2d 131 (N.D. 1979)
[25] 551 P.2d 509 (Utah 1976)

the surface occupier/owner have the rights to use and enjoy their properties without interference. In *Diamond Shamrock Corp. v. Phillips*,[27] the court decided that the "mineral owner must make reasonable usage of the surface and is liable for damages caused by any unreasonable use." In *Buffalo Mining Co. v. Martin*,[28] the court affirmed that the mineral owner's use of the land surface must be "reasonably necessary for the extraction of the mineral" and "without substantial burden to the surface owner."[29]

Despite the provisions of the Land Use Act[30]of Nigeria which created a trust of land in each State of the country by making the State Governors the trustees holding same for the Federal Government, the Land Use Act did not exclude the overall interests of the land surface owners. Nonetheless, in *Kachalla v. Banki,*[31] and in *Ezennah v. Attah,*[32] it was stated that the highest legal rights an individual can acquire over land in Nigeria is the right of occupancy. The restricted right is provided in Section 5(1) of the Land Use Act. Therefore, it is notable that, so far as the right of occupancy of the surface subsist, there is the existence of accommodation doctrine by which breach of same could attract remedies, *ubi jus ibi remedium.*[33]

DEFENCES AVAILABLE FOR BREACH OF ACCOMMODATION DOCTRINE

The oil company may be able to defend itself against the claim of breach surface rights where appropriate steps are taken to ensure reasonability. The defendant should show that it did what any reasonable person (private or corporate) could have done in the circumstance to minimise the damage caused to the surface of the lands. It is important to explain that, the test for reasonableness flows from the tort of Negligence,[34] therefore, the reasonable[35] person standard is the standard of care that a reasonably prudent person would observe under a given set of circumstances.[36] For example, in *Dewey v. Great Lakes Coal Company*,[37] the court formulated three tests by which the defending oil firm must satisfy in order to prove that its surface use is reasonable. The tests are:

(a) That it was absolutely necessary to use the surface without the need for cooperative agreement with the land surface owners (the necessity test);
(b) That the tradition and custom of the country allows the use of the surface with without the consent and agreement of the surface rights holders (the norm test); and,

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[26] In Nigeria, the rights are Oil exploration licence; Oil Prospecting Licence and Oil Mining Lease contained in Section 2(1)(a) to 2(1)(c) of the Petroleum Act, respectively.
[27] 511 S.W.2d 160
[28] 267 S.E.2d 721
[29] In *Gillespie v. American Zinc & Chemical* 93 A. 272 (Pa. 1915) the court avowed the grant of an injunction which ordered the well location originally designated by the mineral titleholder. The planned location would have "interfered" with the surface owner's use and development of land.
[30] Chapter L5 LFN 2004
[31] (2006) All FWLR (Pt. 309) p. 1420
[32] (2004) All FWLR (Pt. 202) p. 1858 at 1884
[33] Latin maxim meaning, where there is a wrong, there must be a remedy.
[34] Holmes, Oliver Wendell, Jr. (1909). The Common Law (2nd ed.). Little, Brown. ISBN 0-674-14605-0.
[35] *Healthcare at Home Limited v. The Common Services Agency*, [2014] UKSC 49
[36] *Regina v Smith, 4 AER 289*
[37] 236 Pa. 498, 84 A. 913 (1912)

(c) That the breach of surface rights had been consistent and, that the surface rights holders have never resisted for a very long period of time (the acquiescence test). This defence is based on the maxim of equity which states that: "Equity aids the vigilant, not those who slumber on their rights (*Vigilantibus Et Non Dormientibus Jura Subveniunt*)."[38]

In addition to the standard proofs and possible defences earlier discussed, in Nigeria, the rights to claim remedies for breach of accommodation doctrine is implied in Section 5 and Section 6 of the Land Use Act.[39] Section 5 authorizes the governor of each State to grant *statutory right of occupancy* to private persons where the land is in the urban area. Section 6 of the Act permits the local governments to grant *customary right of occupancy* where the land is in the rural area and is for residential and agricultural uses. Section 6(2) indicates the maximum size of land that the local government can grant customary right of occupancy for agricultural purposes.

It specifically states *inter alia*: "No single customary right of occupancy shall be granted in respect of an area of land in excess of 500 hectares if granted for agricultural purposes, or 5,000 hectares if granted for grazing purposes, except with the consent of the Governor." The implication of the grant of statutory right of occupancy and customary right of occupancy as well as the lands that are deemed[40] to have been granted the customary rights of occupancy, is that the holders of such rights are entitled to all the surface rights and therefore, may wish to exercise their surface rights in accordance with the accommodation doctrine.

Nonetheless, section 6(3) of the Land Use Act is inconsistent with the principle of due regards contained in accommodation doctrine. The section of the Act permits the "local government to enter upon, use and occupy for public purposes any land within the area of its jurisdiction." It is important to note that, this section of the Act does not imply to the oil companies. With respect to the interference and reckless use and damages of the surface of the lands by the oil companies, Paragraph 37 of the First Schedule of the Petroleum Act[41] states *inter alia*:

> The holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands.[42]

[38] This maxim was first used in the English court in the case of *Chief Young Dede v. African Association Ltd (1910) 1 N.L.R 130 at 133* where the court explained that, the law assists those that are vigilant with their rights, and not those that sleep thereupon.

[39] Chapter L5 LFN 2004

[40] Section 36(2) of the Land Use Act authorises the occupiers or holders of rural lands used for agricultural purposes prior to enactment of the Act, to continue to use the same, irrespective of whether the lands are subject to customary rights or otherwise. It is construed that such lands are deemed to have been granted customary rights of occupancy.

[41] CAP P10 LFN 2004

[42] [n 2]

This provision of the Petroleum Act is the only statutory recognition of the accommodation doctrine (the principle of due regards) in Nigeria. Hence, the oil companies owe a duty of care for the surface of the lands of private persons including communities.

LEGAL OBLIGATIONS AND LIABILITIES OF THE OIL COMPANIES

Under the application of the accommodation doctrine, the mineral rights operator[43] is under the obligation to act with due care and regard to preserve the rights of the land surface owners in the course of carrying out the exploration and production of crude oil and natural gases. Hence, in the use of the surface of the land for transportation, exploration, prospecting and production of mineral resources, Paragraph 37 of the First Schedule of the Petroleum Act expressly obligates the oil companies to negotiate and reach agreements with the surface rights holders. The legal essence of the accommodation doctrine is that the land surface owners is entitled to damages and compensations from the mineral rights operator.

It is important to highlight that, the accommodation doctrine is not applicable where the surface interest owner is the same as the mineral interest owner. For example, in Nigeria, there are State lands and Federal lands. Where the crude oil projects are taking place on government lands, the doctrine is inoperative.[44] It is also necessary to indicate that, the right of access to the minerals location is implied into licenses granted to the oil companies. The oil companies are entitled to easement rights however, such right of way must not significantly interfere with the existing land surface rights of the private occupiers and owners.

ACCOMMODATION DOCTRINE AND THE OIL COMPANIES' RIGHT OF WAY

It is a globally acceptable rule that, the oil companies that have successfully obtained any form of concession or license by which they possess minerals interest in land, can use the land surface belonging to others, to gain access to the site of the minerals. Therefore, the minerals interest licensee has an automatic easement which is implied by the grant of the mineral lease, as stipulated in *Harris v. Currie*.[45] This implied right of way was clarified in *Empire Gas & Fuel Co. v. Texas,*[46] where the Supreme Court of Texas declared *inter alia*:

> This common law right was created because a grant or reservation of minerals would be wholly worthless if the grantee

[43] The oil company

[44] It is important to point out that, whether the project location is within the Government lands or not, where in the course of the oil and gas projects, pollution of adjoining private lands or communities become affected by the hazards such as those types caused by migrating substances such as drill mud, drill cuttings, oil spills and gas flaring, claims may be pursued under the accommodation doctrine in conjunction with the rules in *Ryland v. Fletcher UKHL 1, (1868) LR 3 HL 330*

[45] 176 S.W.2d 302, 305 (Tex. 1943)

[46] 47 S.W.2d 265, 268 (Tex. 1932)

> or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.[47]

The Supreme Court of Texas did not exclude the rights of the surface occupier/owner. The judgment in *Empire Gas* simply stressed that, the land surface owners should not deprive the oil company the rights of access to the licensed sites however, the licensee is obliged to negotiate and reach agreements with the surface owners prior to the use of the surface to gain access to the sites of the minerals project. It is also important to note that the granting of unrestricted access to the mineral sites does not preclude the rights of the surface owners to seek redress in the event of reckless use (including dumping of toxic waste and pollution of the surface).

In Nigeria, the land rights of private citizens are limited to the surface only. This creates a complicated relationship between the oil companies and the surface rights owners because the former requires access to the oil and gas facilities. The oil companies need the land surface to convey heavy equipment and other logistics to the oil facilities. "The question therefore arises as to whether the oil firms can gain such access without violating the surface rights of the private citizens."[48] The Pennsylvania Supreme Court case of *Babcock Lumber Company v. Faust*,[49] provides the answers to the question. It held that the holders of mining license have the right of way[50] which are servitude appurtenant to the acreage of the minerals. The court also stated that the right of way of the mineral licensee does not permit them to reckless use. Hence, the minerals licensee should not:

> Subject any part of the surface through occupation at their pleasure. Therefore, the use of the surface by the mineral rights holder should be constrained to [reasonable and justifiable use of both parties], as to place and mode of use by an apparent and direct relationship between the occupation of the surface and the economic prosecution of the mining and related activities.[51]

This simply mean that the mineral license holder and the land surface rights owner should take all necessary steps to agree on a settlement in accordance with the principles of the accommodation doctrine. A settlement is considered reasonable where the surface and mineral rights licence holders are able to benefit from their proprietary rights.[52] In *United States v. Minard Run Oil Co*.,[53] the court issued an injunction restraining the defending oil firm from the clearing of the bushes, construction of roads, and laying of pipelines without the permission of the land surface rights owners. The

[47] Lisa Vaughn Lumley. The Balance of Power in Accommodation Doctrine Disputes After Merriman v. XTO. A paper presented at the Oil, Gas and Mineral Fundamentals and Institute, March 27 – 28, 201, Houston, TX

[48] [n. 1]

[49] 156 Pa. Super. 19, 39 A.2d 298 (1944)

[50] Easement

[51] R. D. Davis Jr *et. al*. (2016) The Accommodation Doctrine in Pennsylvania P.C.: 60-4 CAIL Annual Institute on Oil & Gas Law § 4.04. The Institute for Energy Law of the Center for American and International Law's 56th Annual Institute on Oil & Gas Law.

[52] For more of similar decisions see: *Pennsylvania Water and Power Company v. Reigard*, 127 Pa. Super. 600, 193 A. 311 (1937); *Bowers v. Myers,* 237 Pa. 533, 85 A. 860

[53] 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. Dec. 16, 1980)

court further decided that *Minard Run Oil Co* (the defendants) were liable for irreparable damages caused to the surface of the land which adversely affected the land surface rights owners. This was because the damages caused by the oil company occurred without prior agreement of the parties.[54]

The legal effect of the decision of the court in *United States v. Minard Run Oil Co* is that the oil companies must exercise their minerals licence rights with reasonable care and with *due regard* to the rights of the land surface owners. Hence, the oil companies *must reasonably accommodate* the rights of the land surface owners.[55] The oil firms are therefore under the obligation to make contacts with the land surface owners to provide details of their intention to use the land surface including but not limited to the ground plans and the maps of the proposed course of minerals exploration and other related activities.

In the event that the surface rights owner/holder seeks to pursue a cause of action against the minerals interest owners, he must show that the three-level tests specified in *Dewey v. Great Lakes Coal Company* has not been met by the defending oil company. In *Humble Oil & Ref. Co. v. Williams*,[56] the court held that:

> A person who seeks to recover from the lessee [Oil Company] for damages to the surface has the burden of alleging and proving either specific acts of negligence or that more of the [surface of the] land was used by the lessee than was reasonably necessary.[57]

Furthermore, the doctrine of reasonableness is the need for *alternative use* which simply means that:

> Where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.[58]

[54] "In making its decision, the court held that the parties were required to exercise due regard for the rights of the other and to attempt to reach a reasonable accommodation so that each could reasonably enjoy its respective property rights. The court determined that while an owner of mineral rights has unquestioned right to enter upon the property for the purpose of access and extracting his minerals, he nevertheless is required to exercise such rights with a recognition of surface rights and taking appropriate action to prevent unnecessary disturbance to the owner of the surface" (Adapted from R. D. Davis Jr *et. al.* The Accommodation Doctrine in Pennsylvania P.C.: 60-4 CAIL Annual Institute on Oil & Gas Law § 4.04. The Institute for Energy Law of the Center for American and International Law's 56th Annual Institute on Oil & Gas Law).

[55] See: *Gillespie v. American Zinc and Chemical Co., 247 Pa. 222, 227 (1915)*

[56] 420 S.W.2d 133, 134 (Tex. 1967)

[57] See*: Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1974); Amoco Prod. Co. v. Carter Farms Co., 703 P.2d 894 (N.M. 1985), abrogated by McNeill v. Burlington Res. Oil & Gas Co., 182 P.3d 121 (N.M. 2008); Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976); Buffalo Mining Co. v. Martin, 267 S.E.2d 721 (W.Va. 1980).*

[58] See: *Getty Oil Co., v. Jones, Supra.* It is important to explain that in another relevant case of *Valence Operating Co. v. Tex. Genco, L.P 187 S.W.3d 118,* the court stated that: "If the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended and one of which would preclude that use by the surface owner the mineral owner must use the alternative that allows continued use of the surface by the surface owner."

The valid nature of the accommodation doctrine in Nigeria was anchored in the case of *SERAC v. Nigeria,*[59] where the African Commission's decision was solely based on the accommodation doctrine. The Commission decided that the Federal Government of Nigeria negated its obligation to protect the land surface rights of the Ogoni people therefore, the reckless use of the land surface of the Ogoni's by ShellBP did not only violate their rights to livelihood under International Human Rights Law but also, violated their rights to dignity. The African Commission further emphasised that the surface rights of the lands of the Ogoni people were violated and therefore, that the Nigerian government should guarantee that suitable compensations are paid to the victims in addition to remediation of the polluted environment.

Unlike Nigeria, many of the minerals rich States in the United States have enacted the *Surface Damages Act* to specifically deal with the issues of access to mineral lands and to address all concerns regarding the rights of the land surface owners. For example, the *Surface Damages Act* in Oklahoma was the basis of the decision of the court in *Schneberger v. Apache Corp.,*[60] where it was stated that, the aim of the *Surface Damages Act* is to offer suitable reparation to the land surface owners for damages resulting from the activities conducted by oil and gas companies.[61] In *Compton v. Davis Oil Co*.,[62] the court observed *inter alia*:

> It cannot be said that the surface of the land constitutes a less vital resource to the State of Oklahoma than does the mineral wealth which underlies it. The surface supports development for business, industrial and residential purposes. It also supports our vital agricultural industry. The passage of the surface damages act guarantees that the development of one industry is not undertaken at the expense of another when the vitality of both is of great consequence to the well-being of our economy.

THE LEGAL PROTECTION OF LAND SURFACE OWNERS IN THE UNITED STATES

Unlike Nigeria, in the United States, many states have enacted laws obligating the oil and gas companies to ensure that negotiated agreements are reached with the owners of the surface of lands with regards to the usage of the lands for access to the crude oil production sites. The agreements are necessitated by the split in the title to the estates.[63] Some of the states in the United States that have Surface Usage Laws are Texas, Pennsylvania, Colorado, Wyoming, Oklahoma, New Mexico and North Dakota.

[59] Communication No. 155/96 (2001) § 44-47, 57
[60] 1994 OK 117, 14, 890 P.2d 847, 853-54.
[61] L. Mark Walker (1983) Note, Oil and Gas: Surface Damages, Operators, and the Oil and Gas Attorney, 36 OKLA. L. REV. 414, 414
[62] 607 F. Supp. 1221 (D. Wyo. 1985)
[63] This refers to the split in the ownership of the minerals and the land surface

The essential feature of the law is the provision which requires that the Oil companies must give notices to the land surface owners on several prospective activities they intend to embark upon including but not limited to the proposed date of commencement of drilling, documented plan of entire operations, the name and address of the operator of the facilities. In addition to the disclosures, the law also obligates the oil companies to compensate the surface owners for surface damages and any consequential effects of the oil and gas production activities. Some of the states such as North Dakota, include in the law that, where oil companies and land surface owners are not able to reach an agreement concerning damages and compensations, arbitration is stipulated as the approved route for the determination of disputes. Consequently, the laws did not preclude the possibility of the land surface owner seeking redress by way of litigation.

Unlike Nigeria, where there is no law that address the contentious problem of surface use and surface damages, in the US state of Oklahoma and New Mexico, the Surface Use laws essentially obligates the oil companies to enter into the surface use agreements with the surface owners before the commencement of any crude oil and gas undertakings. Furthermore, the Surface Use laws also encourage the parties[64] to enter into *surface use agreements*[65] which should stipulate obligations and liabilities of parties. Such agreements may also insert the mode of possible dispute settlement in the event of any breach thereof. It must be noted that, the negotiation and agreement is very important in that, "Each of the parties have something the other wants and a real negotiation can be held. Surface protections are best included as part of the actual lease agreement. Many times however, the mineral ownership has been severed from the surface and the first time that the surface owner is aware that an oil and gas lease was signed is when the oil company shows up to develop the minerals. In these instances, a Surface Use Agreement is likely the best alternative."

THE NEED FOR THE ENACTMENT OF SURFACE DAMAGES ACT IN NIGERIA

As previously explained, for the avoidance of doubt and ease of reference, it is vital to reiterate that, accommodation doctrine is recognised in Nigerian law and preserved in the Petroleum Act,[66] at Paragraph 37 of the First Schedule. Similarly, not less than ten States[67] have enacted surface owner protection or damage compensation legislation in the United States of America. For example, in the State of Oklahoma, the Surface Damages Act[68] provides the mechanism for maintaining the equilibrium between the oil and gas industry and land surface right owners. The law also obliges the oil companies to negotiate and enter into written agreements with the land surface owners before drilling begins.[69]

[64] The oil companies and the Land surface owners

[65] Surface use agreements enable the surface owners and oil companies to reach an agreement regarding the use of a piece of property's surface during the drilling, production, storage and transportation of crude oil. Such agreements are crucial in that, the surface damages that the entire economic activities can cause to the land can be substantial and could result in violent conflicts if not carefully managed.

[66] CAP P10 LFN 2004

[67] The States are: Wyoming, Texas, Tennessee, South Dakota, Pennsylvania, Oklahoma, North Dakota, Montana, Illinois, Alaska.

[68] Title 52 Chapter 318.2 (1982)

[69] Equalizing the Imbalance between Mineral and Surface Owners: The Case for Surface Owner Protection Legislation. Online at:

The implication of the Oklahoma's Surface Damages Act is that the oil companies cannot exclude or limit liabilities for any surface damages (including pollution) resulting from any aspect of crude oil exploration and production. The parties must discuss and enter into a written agreement in advance of the oil companies' actual entry into the lands and prior to the commencement of crude oil development projects. "The courts may award triple damages where the mineral owner wilfully and knowingly begin to drill without giving [satisfactory notice] or without [the consent and] agreement of the surface owner; or the operator wilfully and knowingly failed to keep posted the required bond."[70]

CONCLUSION AND RECOMMENDATIONS

Despite the protection of the surface rights' owners in Paragraph 37 of the First Schedule of the Petroleum Act and the existence of several laws and institutions that are meant to ensure that crude oil and natural gas pollution are adequately controlled, the prospect of achieving socially efficient solution lies in the enactment and enforcement of Surface Damages Act in Nigeria.

The current state of affairs between the oil companies and the surface rights' owners in Nigeria, is that, the surface rights' owners are often engaged in non-legal relationship confined in Memorandum of Understanding (MOU). As a matter of fact, the oil firms are not obliged to comply with the provisions of such documents. They simply treat such documents in the same category as the provisions of Corporate Social Responsibility (CSR).

In the meantime, pending the actual enactment of the Surface Damages Act, it will be very productive, legally and socially efficient for the surface rights' owners and the oil firms to enter into surface use agreements. This will eliminate uncertainty and boost crude oil and natural gas production. This is possibly the only solution to pipelines vandalism (bunkering) and the revolts by the host communities.

All persons from the age of 21 years old can acquire, possess, own and deal in landed properties in Nigeria in accordance with Section 7 of the Land Use Act and Section 43 of Constitution of the Federal Republic of Nigeria 1999 (as amended). In the preceding discussions, it has been presented that, the right of persons to acquire property in Nigeria can be ended by way of compulsory revocation in accordance with section 28 of the Land Use Act. However, the preceding discourse has illustrated the intricacies involved in the deliberation as to the extent of the coverage of the mining rights of the oil companies with respect to their rights to gain access to the sites of crude oil operations and, their obligations to use the land surface of others with reasonable care.

In view of the preceding discourse, the way forward is for Nigeria to enact the *Surface Damages Act* which should clearly provide the scope of rights to which the land surface and minerals license owners should possess. The law should also set out the duties of the oil companies with regards to the remediation of the environment and specify the

https://earthworks.org/issues/suface_owner_protection_legislation/ retrieved 1 May 2019

[70] ibid

scale that should be used in the payment of compensation to victims of crude oil damages which are found to be the direct consequences of reckless use of the surface of the lands. In the absent of such a law, it is foreseeable that the consistent resistance of the communities hosting the oil companies may continue indefinitely.

In the meantime that the Surface Damages Act has not been enacted in Nigeria, it is imperative that the oil firms should take the initiatives of engaging the host communities in negotiations and enter into surface use agreements instead of the current model of engaging the host communities in non-contractual memorandum of understanding.

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