

# The Role of the ECOWAS in Addressing the Challenges of Ineffective Regulation of Transnational Oil Corporations in Nigeria

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## ABSTRACT

The thesis explores the potential of a regulatory oversight role for the ECOWAS aimed at driving further effectiveness of regulatory framework for transnational corporations in Nigeria, as well as ameliorating constitutional concerns that hinder effective protection for victims of environmental pollution. It reviews constitutional failures and judicial obstacles within Nigeria that hinder effective protection of victims of environmental pollution and reviews specific regulatory concerns within the Nigerian regulatory framework which require reform. It argues that constitutional and regulatory failures in Nigeria as well as the government's attitude towards enforcing existing regulation justify the need for a regulatory oversight framework.

Specifically, the thesis is concerned with problems relating to persisting oil pollution in the Niger Delta region of Nigeria. It examines the implication of oil pollution on the environment, rights of local communities, the Nigerian economy and specifically the Nigerian government's responsibilities towards preventing or remediating oil pollution. The thesis identifies ineffective regulation as primarily responsible for persisting oil pollution and transnational corporations as the major perpetrators of oil pollution in the Niger Delta region of Nigeria. This thesis is therefore concerned with interrogating existing framework for regulation of Oil Companies in Nigeria and reasons why such existing regulations are not effectively enforced, including the Nigerian government's involvement in oil extraction and potential conflict of interest for enforcing existing regulation.

The research provides scholarly insight into challenges and consequences of ineffective regulation of TNCs in Nigeria while exploring the potential of a novel approach to addressing seemingly intractable challenges. It provides a useful contribution to identifying concerns relating to protection and promotion of human rights of local communities, regulatory framework for regulation of the oil and gas industry, and protection of the environment as well as suggestions regarding reforms in the problem areas identified.

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# CHAPTER 1: INTRODUCTION AND BACKGROUND

## 1.1 Introduction and Context of Research Problem

In 2001, following an inquiry by the African Commission on Human and Peoples' Rights, the degree of environmental oil pollution in the Niger Delta<sup>1</sup> region of Nigeria was described as “nightmarish”<sup>2</sup> and “humanly unacceptable”.<sup>3</sup> Several years after the Communication of the African Commission, the environmental pollution in the Niger Delta seemed unchanged and if changed at all, seemed to have only worsened. Environmental pollution and perhaps the activities of militant protesters of oil activities in the Niger Delta forced the Nigerian government in 2011 to request the United Nations Environment Program (UNEP) to investigate oil pollution in Ogoniland (one of the local communities in the Niger Delta) and make recommendations for the remediation of the effects of oil pollution on the region.<sup>4</sup> UNEP's Report was quite damning, providing details of pollution that had gone on for over 50 years, and recommended several measures for environmental restoration and alleviation of suffering on local communities.<sup>5</sup> Since the Report however, rights groups have alleged that little or “no progress” has been made regarding implementing the recommendations of the *UNEP* and insisting that environmental pollution infringes rights of local communities.<sup>6</sup>

Concerned therefore about the persisting oil pollution in the Niger Delta region, its effects on the environment and rights of local communities and the Nigerian government's responsibilities

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<sup>1</sup> The Niger Delta region is made up of 8 oil producing states in Nigeria. It consists of a total land mass of approximately 70,000 square kilometers, with a population of approximately 20 million people. See Damilola S. Olawuyi, *The Principles of Nigerian Environmental Law* (Ado Ekiti, Nigeria: Afe Babalola University 2015) at 173 [Olawuyi].

<sup>2</sup> *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (Communication 155/96) African Commission on Human and Peoples Rights, 27 October 2001, online: ACHPR <http://www.achpr.org/communication/decisions/155.96/> [SERAC Case].

<sup>3</sup> *Ibid*, Ibiroke T. Odumosu-Ayanu, “Multi-Actor Contracts, Competing Goals and Regulation of Foreign Investment” (2014) 65, U.N.B.L.J. 269 at 285 [Odumosu-Ayanu, Multi-Actor Contracts]

<sup>4</sup> See Foreword of the United Nations Environment Programme, “Environmental Assessment of Ogoniland Report” at 6

Online: <http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentofOgonilandreport/tabid/54419/Default.aspx> [UNEP Report].

<sup>5</sup> UNEP Report *Ibid*.

<sup>6</sup> Amnesty International, “No Progress: An Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoniland, Three Years On” Online: <https://www.amnesty.org/en/documents/afr44/013/2014/en/>

towards preventing or remediating oil pollution, this thesis interrogates existing mechanisms under the Nigerian judicial and regulatory system for responding to oil pollution in local communities. The thesis also concerns itself with what is described by one scholar as state complicity in acquiescing to continued environmental pollution by Transnational Corporations (TNCs).<sup>7</sup> The research is specifically interested in investigating the regulation of TNCs because 95 percent of oil production in the Niger Delta is carried out by TNCs such as Shell, Chevron, ExxonMobil and others.<sup>8</sup> As one might expect, indigenous oil companies in Nigeria do exist, however TNCs make the largest contribution to pollution given their domination of the oil extracting industry. As such, the thesis is interested in investigating legal and regulatory framework in Nigeria for the regulation of oil companies, with a view to proposing a framework that addresses ineffective regulation of oil companies.

In setting the context, it is necessary to give a brief history of oil and gas exploration in Nigeria. Oil extraction can be traced to 1908 when a German entity, the Nigerian Bitumen Corporation, commenced exploration activities in the Araromi area around what is now known as Ondo State.<sup>9</sup> These pioneering efforts ended abruptly with the outbreak of the First World War in 1914. Oil prospecting efforts resumed in 1937, when Shell D'Arcy (the forerunner of Shell Petroleum Development Company of Nigeria) was awarded sole concessionary rights covering the entire territory of Nigeria.<sup>10</sup> In 1959, the sole concessionary rights were reviewed and extended to companies of various nationalities such as Mobil and Gulf (now Chevron). However due to its previous monopolistic role, Shell remains the largest producer of oil in Nigeria.<sup>11</sup>

After Nigeria's independence in 1960, the government mandated all foreign oil companies to re-register as Nigerian entities in a bid to secure local control of the industry.<sup>12</sup> In 1971, when Nigeria joined the Organization of Petroleum Exporting Countries (OPEC), the organization encouraged

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<sup>7</sup> See generally, Larisa Wick, "Human Rights Violations in Nigeria: Corporate Malpractice and State Acquiescence in the Oil Producing Deltas of Nigeria" (2003-2004) 12 Mich. St. U. J. Int'l L. 63.

<sup>8</sup> The Climate Justice Programme, "Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity" (2005) online: [https://www.foe.co.uk/sites/default/files/downloads/gas\\_flaring\\_nigeria.pdf](https://www.foe.co.uk/sites/default/files/downloads/gas_flaring_nigeria.pdf) at 8 [Gas Flaring in Nigeria].

<sup>9</sup> Yinka Omorogbe, *Oil and Gas Law in Nigeria* (Lagos, Nig.: Malthouse Press, 2003) at 16 [Omorogbe].

<sup>10</sup> *Ibid* at 17.

<sup>11</sup> *Ibid*.

<sup>12</sup> Rhuks Ako, "Resource Extraction and Environmental Justice" in Francis N Botchway, *Natural Resource Investment and Africa's Development* (Cheltenham, UK, Northampton, MA: Edward Elgar Pub, 2011) at 73.



it members to undertake more prominent roles in oil mining, incorporate national oil companies (NOCs) and acquire equity shares in TNCs operating within their regions.<sup>13</sup> Nigeria then acquired 34 percent equity shares but later increased it to 60 percent in 1974, making the government the principal player in the oil industry.<sup>14</sup>

As early as 1970, local communities had begun vocalizing their concerns against TNCs for “*seriously threatening the well-being, and even the very lives*”<sup>15</sup> of the Ogoni, a local community in the Niger Delta. That year there had been a major blow-out at the Bomu oilfield in Ogoni. It had continued for three weeks, causing widespread pollution and outrage.<sup>16</sup>

In 1990, the Movement for the Survival of the Ogoni People (MOSOP) was created by the Ogoni people, seeking “political control of Ogoni affairs by Ogoni people, control and use of Ogoni economic resources for Ogoni development, adequate and direct representation as of right for Ogoni people in all Nigerian national institutions and the right to protect the Ogoni environment and ecology from further degradation”.<sup>17</sup> These agitations attracted international attention as the leader of MOSOP addressed the United Nations Working Group on Indigenous Peoples in Geneva in July 1992 asking for international intervention in what he termed “Genocide in Nigeria: The Ogoni Tragedy”.<sup>18</sup> He accused the government of Nigeria of genocide and the TNC, Shell, of complicity in ecological destruction and abuse of the Ogoni people.<sup>19</sup>

Perhaps the most significant of the far reaching negative consequences of local resistance to oil extraction in the Niger Delta region, was the trial and execution of Ken Saro-Wiwa, the leader of MOSOP, and eight others on charges of murder.<sup>20</sup> At the trial, there was evidence that Shell (the TNC that MOSOP had fought against) and the Military Government of Nigeria were bribing the

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Project Underground, “The Life & Death of Ken Saro-Wiwa: A History of the Struggle for Justice in the Niger Delta”, Online: <http://www.ratical.org/corporations/KSWlife+death.pdf> at1 [Life & Death of Saro-Wiwa]

<sup>16</sup> *Ibid.*

<sup>17</sup> The Ogoni Bill of Rights, *Presented to the Government and People of Nigeria with an Appeal to the International Community*, December 1991 in Life & Death of Ken Saro-Wiwa *supra* note 15.

<sup>18</sup> Ken Saro-Wiwa, *Genocide in Nigeria – The Ogoni Tragedy*, (Nigeria: Saros International Publishers, 1992).

<sup>19</sup> *Ibid* at 82-83.

<sup>20</sup> See Michael Birnbaum QC, “Nigeria: Fundamental Rights Denied: Report of the Trial of Ken Saro-Wiwa and Others”, (1995) ARTICLE 19 in Association with the Bar Human Rights Committee of England and Wales and the Law Society of England and Wales Online: <https://www.article19.org/data/files/pdfs/publications/nigeria-fundamental-rights-denied.pdf>

chief prosecution witnesses to testify against the accused persons.<sup>21</sup> The trial and executions remain the most profound manifestation of the negative consequences of local resistance to environmental pollution, TNC complicity and state oppression of local communities in the Niger Delta region of Nigeria.

These events can perhaps be explained away as having occurred when Nigeria was being run by military dictators who are infamous for abuse of power and violation of human rights. With Nigeria's return to democracy in 1999, it was expected that the rights of long oppressed ethnic minorities would receive much greater protection from incidences of oil pollution and oppression as a result of oil exploration activities. However, incidences such as the "Odi massacres"<sup>22</sup> which happened in November 1999 under the Obasanjo civilian administration provide justifiable cause for concern even in light of Nigeria's new found democracy. It had been alleged that in November 2009, shortly after the Nigeria's civilian President, Olusegun Obasanjo, took office, that restive youth in the oil-rich local community of Odi in the Niger Delta region had killed some policemen while agitating against TNCs in the area.<sup>23</sup> Human rights organizations allege that in response to that incident, the Nigerian government sent in Military troops to retaliate against the community and quell any opposition to the government, which resulted in the destruction of the village.<sup>24</sup> While unfortunate, scholars such as Bacher argue that such incidences of blatant assaults on local communities "will be difficult to repeat as Nigeria's democratic institutions mature".<sup>25</sup>

Demonstrably, a number of regulatory agencies were indeed created by the National Assembly to ensure the compliance of TNCs with international best practices.<sup>26</sup> Nevertheless, the problem of

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<sup>21</sup> Andrew Rowell, *Green Backlash: Global Subversion of Environmental Movement* (Great Britain: Routledge, 1996) at 309 [Rowell].

<sup>22</sup> "Nigeria: Odi Massacre Statements", University of Pennsylvania – Africa Studies Centre, Online: [https://www.africa.upenn.edu/Urgent\\_Action/apic\\_122399.html](https://www.africa.upenn.edu/Urgent_Action/apic_122399.html)

<sup>23</sup> John Backer, *Petrotyranny*, (Toronto: Dundurn Press, 2000) at 89 [Backer].

<sup>24</sup> *Ibid*, See also Human Rights Watch (HRW), "Nigerian Army Accused of Excessive Force, Rape in Niger Delta." Dec 22, December 1999, Online: <https://www.hrw.org/news/1999/12/22/nigerian-army-accused-excessive-force-rape-niger-delta> and Human Rights Watch (HRW), "The Destruction and Rape of Odi and Choba" Dec 22, 1999 Online: <https://www.hrw.org/report/1999/12/22/destruction-odi-and-rape-choba/december-22-1999>

<sup>25</sup> Backer, *supra* note 23 at 91.

<sup>26</sup> The National Environmental Standards and Regulations Enforcement Agency (NESREA), established under the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act of No. 25 of 2007 empowered to enforce environmental standards, regulations, policies and The National Oil Spill Response and Detection Agency (Establishment) Act No. 15 of 2006 established the National Oil Spill Detention Response Agency to ensure compliance with existing environmental legislation

oil spills as a result of activities of certain TNCs remains a great source of concern to many academics, experts, foreign and domestic observers and more importantly to the affected local communities. As such, international organizations such as the United Nations Environment Programme,<sup>27</sup> and Amnesty International,<sup>28</sup> among several others have undertaken and published reports on the persistence of oil pollution, its negative impact on local communities in Niger Delta and the need for remediation. The working hypothesis for this thesis therefore is that better regulation of oil mining corporations will remediate the challenge of oil pollution.

In interrogating more effective regulation in Nigeria, it is significant to note that oil mining in Nigeria is carried out partly through the state-owned oil corporation, the Nigerian National Petroleum Corporation (the NNPC), which holds 55-60 percent interests in the oil mining leases of TNCs through joint venture agreements (JVA).<sup>29</sup> Although the TNCs hold minority interests in the JVAs with the NNPC, these TNCs are designated as operators under the JVA and so undertake the actual oil prospecting, exploration and mining. Being the ones with the technical knowledge, the more significant capital and the foreign investment, these TNCs wield immense power which tilts the balance of power in their favour. By implication the Nigerian government, while in business with these TNCs through the state-owned corporation, is then placed in a precarious position of regulating the activities of its more powerful partners in production. Some scholars argue that the framework for regulation is plagued by a conflict of interest for the regulator (government) as they are stakeholders in oil extraction.<sup>30</sup>

In addition, the character and structure of the NNPC contributes to the imbalance of power between TNCs and the government. While some NOCs in the other OPEC countries in the Middle East have succeeded in maintaining their autonomy,<sup>31</sup> the NNPC is described as:

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<sup>27</sup> UNEP Report, *supra* note 4

<sup>28</sup> Amnesty International Nigeria, "Petroleum, Pollution and Poverty in the Niger Delta" (2009) online: Amnesty International <http://www.amnestyusa.org/research/reports/nigeria-petroleum-pollution-and-poverty-in-the-niger-delta-report> at 42 [Amnesty Report].

<sup>29</sup> Ibironke T. Odumosu, "Transferring Alberta's Gas Flaring Reduction Regulatory Framework to Nigeria: Potentials and Limitations" (2006-2007) 44 *Alta. L. Rev.* 863 at 876 [Odumosu, Transferring Alberta's Gas Flaring Regulations]

<sup>30</sup> See Odumosu, Transferring Alberta's Gas Flaring Regulations *ibid* at 877, Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes*, (Toronto: University of Toronto Press, 2009) page 74-76 [Oshionebo]

<sup>31</sup> Marc-Antoine Perouse De Montclos, "The Politics and Crisis of the Petroleum Industry Bill in Nigeria" (2014) 52 *J. of Modern African Studies* pp. 403-424 at 407 [Monclos]

“neither a real commercial entity nor a meaningful oil operator. It lacks control over the revenue it generates and thus is unable to set its own strategy. It relies on other firms to perform essentially all of the most complex functions that are the hallmarks of operating oil companies. Yet unlike some NOCs it also fails to fit the profile of a government agency: its portfolio of activities is too diverse, incoherent, and beyond the reach of government control for it to function as a government policy making instrument.”<sup>32</sup>

These challenges make the NNPC “structurally insolvent”<sup>33</sup> as its crude oil sales pass directly into the Federation account and loses money because it subsidizes the sale of refined oil products.<sup>34</sup> It is therefore constantly indebted to its partners, in addition to being plagued by problems of accountability, fraud and mismanagement.<sup>35</sup> Given that the NNPC, the government’s primary agent for oil mining, is bedevilled by these problems, effective government regulation of the industry presents a formidable challenge.

Other concerns which are also closely related to the allegation of a conflict of interest include a high percentage of the Nigerian government’s earnings coming from the oil industry,<sup>36</sup> suggesting that it would be difficult to enforce sanctions against the highest earning industry. There is also the very important issue of allegations of sabotage, animosity and distrust between local communities, TNCs and the government. As seen earlier in the chapter, agitations against oil extraction and the resultant oil pollution has characterized relations between local communities, governments and TNCs from the early days of oil extraction. Local communities tend to regard governments and TNCs with distrust and resentment and the government being a party interested in oil extraction, which often results in pollution, has persistently failed to maintain credibility as one that can adequately respond to the concerns of its people. This atmosphere of animosity and distrust as well as government involvement in oil extraction colours relations between the parties and perhaps contributes to the challenge of effective regulation. An ideal regulatory regime ought to inspire confidence from all the parties involved in oil extraction, however the animosity that colours relations between the government, TNCs and local communities taints the credibility of

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<sup>32</sup> Mark C. Thurber, Ifeyinwa M. Emelife, and Patrick R.P. Heller, “NNPC and Nigeria’s Oil Patronage Ecosystem” (2010) Freeman Spogli Institute for International Studies, Stanford University at 5

<sup>33</sup> Montclos, *supra* note 31 at 407.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Oshionebo, *supra* note 30 at 76.

any existing regulatory regime and makes the optimal functioning of such a regime almost impossible. While there are several factors that contribute to ineffective regulation in Nigeria, the bottom line remains that oil pollution persists and there is a need for better implementation of the regulatory framework.

Scholars such as Odumosu<sup>37</sup> and Oshionebo,<sup>38</sup> acknowledging the problem of ineffective regulation, have suggested that the Nigerian situation possibly requires a shift in its style of regulation and advocate a more democratic solution to some of the problems of the industry.<sup>39</sup> Others have suggested closing the loop holes in existing legislative framework in Nigeria and empowering national institutions to enforce sanctions.<sup>40</sup> However, the recommendations made in this thesis are inspired in part by the recommendations of Amnesty International in its report on the Niger Delta, in which it recommended an independent and coordinated oversight of the oil industry in Nigeria including its impact on human rights,<sup>41</sup> as well as the work of Odumosu-Ayanu which proposes a potential role for regional supranational organizations such as the Economic Community of West African States (ECOWAS) to facilitate multi-actor contracts to regulate relations between governments, TNCs and local communities in oil extraction.<sup>42</sup>

In investigating problems of oil pollution in Nigeria and ineffective regulation of oil extracting TNCs, this thesis hypothesises that ineffective regulation is borne out of a number of concerns including government involvement in oil and gas extraction and therefore interrogates the potential role of a regional supranational organization such as the ECOWAS (in which Nigeria is a member) in contributing to more effective regulation.

## 1.2 Literature Review

A number of issues have been identified within scholarly literature as contributing to the seemingly intractable situation that is regulatory effectiveness in the Nigerian oil industry. The literature suggests that a number of challenges bedevil effective regulation of TNCs in Nigeria which require legislative and institutional reform. However, this thesis contends that such reforms require some

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<sup>37</sup> Odumosu-Ayanu, Multi-Actor Contracts *supra* note 3 at 290

<sup>38</sup> Oshionebo, *supra* note 30 at 210

<sup>39</sup> Odumosu-Ayanu, Multi-Actor Contracts, *supra* note 3 at 286

<sup>40</sup> Lisa Stevens, "The Illusion of Sustainable Development: How Nigeria's Environmental Laws Are Failing the Niger Delta" (2011 - 2012) 36 *Vt. L. Rev.* 387 2011-2012 at 407 [Stevens]

<sup>41</sup> Amnesty Report, *supra* note 28 at 86

<sup>42</sup> Odumosu-Ayanu, Multi-Actor Contracts, *supra* note 3 at 308

measure of political will if the reforms are to be undertaken. Specifically, the literature suggests a need for reform in the following areas:

- i. Constitutional reforms in order to recognize the right to a healthy environment;<sup>43</sup>
- ii. Amendments to legislative framework for regulation;<sup>44</sup>
- iii. Reforms within regulatory agencies;<sup>45</sup>

The Nigerian constitution does not recognize a right to a healthy environment, instead the constitution provides “directive principles” to the state “to protect and improve the environment and safeguard water, air and land, forest and wildlife in Nigeria.”<sup>46</sup> This constitutional failure not only precludes local communities from establishing a constitutional right based claim to a healthy environment, it places no enforceable obligation on the state to protect the environment. Although the *African Charter of Human and Peoples Rights (African Charter)*<sup>47</sup> which is domesticated in Nigeria provides for the right to a healthy environment,<sup>48</sup> scholars such as Ako write that such legislation is inferior to the constitution and risks being repealed, amended or declared to be in variance with the constitution which would render it null and void.<sup>49</sup> A detailed discussion about the need for constitutional reform in Nigeria is taken in the second chapter of this work.

There seems to be a consensus among most writers that environmental pollution infringes on human rights.<sup>50</sup> Rowell argues that there can be no greater human right than access to clean water,

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<sup>43</sup> See Kaniye S.A. Ebeku, “Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v. Shell* Revisited” (2007) 16:3 RECEIL 317 [Ebeku on Gbemre]

<sup>44</sup> See Oshionebo *supra* note 30 at 51-60.

<sup>45</sup> *Ibid* at 72-77.

<sup>46</sup> Section 21 of the Constitution of the Federal Republic of Nigeria.

<sup>47</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

<sup>48</sup> Cap 10, LFN. Also Article 24 of the African Charter provides for the right to a clean and healthy environment and the African Commission on Human and Peoples' Rights (The African Commission) in the SERAC case, held that such right to health and a clean environment of Ogoniland (the local community in issue) had been violated. See SERAC case *supra* note 2 at paragraph 52.

<sup>49</sup> See Rhuks Ako, *Environmental Justice in Developing countries: Perspectives from Africa and Asia-Pacific* (USA/Canada: Routledge, 2013) [Ako] at 26.

<sup>50</sup> Joshua P. Eaton, “The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment” (1997) 15 B.U. INT’L L.J. 261 [Eaton], See also Richard Desgagne, “Integrating Environmental Values into the European Convention on Human Rights”, (1995) 89 Am. J. Int’l L. 263; Robert K. Hitchcock, “International Human Rights, the Environment, and Indigenous Peoples”, (1994) 5 Colo. J. Int’l Env’t’l L. & POL’Y 1; Michelle Leighton Schwartz, “International Legal Protection for Victims of Environmental Abuse”, (1993) 18 Yale J. Int’l L. 355 (1993); Dinah Shelton, “Human Rights, Environmental Rights, and the Right to Environment”, (1991) 28 Stan. J. Int’l L. 103; Janusz Symonides, “The Human Right to a Clean, Balanced and Protected Environment”, (1992) 20 Int’l J. Legal Info. 24 (1992); Christopher Tracy, “The Roots of Influence:

land and clean air.<sup>51</sup> In his work, Eaton submits that the time has come for the recognition of the right to a healthy environment by way of international convention<sup>52</sup> as well as a court with jurisdiction to hear cases arising from environmental abuse.<sup>53</sup>

In the specific case of Nigeria, a number of scholars such as Eaton<sup>54</sup> and Shinsato<sup>55</sup> have argued that international human rights ought to do more to protect the rights of communities violated by oil pollution.<sup>56</sup> While Eaton called for an international court for the environment to hear cases of human rights abuses as a result of environmental pollution,<sup>57</sup> Shinsato identified existing domestic, international and United States legal framework for protection of local communities and suggests they be applied as short term means of protecting rights of local communities.<sup>58</sup>

Other scholars such as Omorogbe argue that Niger Delta communities have a right to equality, development and freedom from domination as enshrined in the *African Charter*.<sup>59</sup> Yusuf, another scholar, argues that the non-justiciability of economic and social rights under the Nigerian constitution is at variance with Nigeria's obligations under international law (as a party to the *International Covenant on Economic, Social and Cultural Rights*).<sup>60</sup> He does however, display some optimism regarding Nigerian courts establishing justiciability of such rights through judicial pronouncement.<sup>61</sup> Rights groups have also expressed concern over violations of Niger Delta

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Nongovernmental Organizations and the Relationship between Human Rights and the Environment", (1994) 3 J. Int'l L. & Prac. 21; Jennifer A. Downs, "A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right", (1993) 3 Dun J. Comp. & Int'l L. 351; Brian B.A. McAllister, "The United Nations Conference on Environment and Development: An Opportunity to Forge a New Unity in the Work of the World Bank Among Human Rights, the Environment, and Sustainable Development", 16 Hastings Int'l & Comp. L. R. 689 (1993); James T. McClymonds, "The Human Right to a Healthy Environment: An International Legal Perspective", (1992) 37 N.Y.L. SCH. L. R. 583; Scott D. Cahalan, "NIMBY: Not in Mexico's Back Yard? A Case for Recognition of a Human Right to Healthy Environment in the American States", 23 GA. J. Int'l & Comp. L. 409 (1993). 176

<sup>51</sup> Rowell, *supra* note 21 at 1.

<sup>52</sup> On the African continent, the right to a healthy environment was already provided for by way of an international convention in the *African Charter* in 1998, however the protocol did not come into force until January 2005. See African Charter on Human and Peoples Rights, Online: <http://www.achpr.org/instruments/achpr/>

<sup>53</sup> Eaton *supra* note 50 at 1.

<sup>54</sup> *Ibid.*

<sup>55</sup> Alison Lindsay Shinsato, "Increasing Accountability of Transnational Corporations for Environmental Harm: The Petroleum Industry in Nigeria" (2005) 4 NW. J. Int'l Hum Rts. 186 [Shinsato].

<sup>56</sup> *Ibid.*, Eaton *supra* note 50 at 1.

<sup>57</sup> Eaton, *supra* note 50 at 305.

<sup>58</sup> Shinsato, *supra* note 55 at 209.

<sup>59</sup> Omorogbe, *supra* note 9 at 146.

<sup>60</sup> Hakeem O. Yusuf, "Oil on Troubled Waters: Multinational Corporations and Realizing Human Rights in the Developing World, with Specific Reference to Nigeria" (2009) 8 Afr. Hum. Rts. L.J. 79 at 86 [Yusuf].

<sup>61</sup> *Ibid.*

peoples' human rights as a result of oil pollution and have decried the situation, accusing the Nigerian government of absenteeism and failure to effectively regulate activities of oil and gas companies.<sup>62</sup> A review of the literature therefore reveals a link between environmental pollution and human rights and identifies challenges to establishing rights-based claims to environmental justice in Nigeria especially in the face of an absence of constitutional provision for a right to a healthy environment. The research proceeds with and explores the hypothesis that this constitutional failure contributes to the state exhibiting a less than exemplary attitude toward effective regulation of oil mining and ultimately environmental protection.

In addition to the constitutional failure to provide a right to a healthy environment, there is also the challenge of the failure of the judiciary to effectively protect victims of environmental pollution. As a democratic state, judicial process in Nigeria ought to provide redress to local communities in the event of environmental pollution or human rights infringement. However, Oshionebo argues that Nigeria's judicial process is hampered by lack of infrastructure in courts, high cost of litigation and possible fear of reprisal by the government on privately instituted claims of pollution.<sup>63</sup> Odumosu-Ayanu however expresses optimism on the attitude of Nigerian courts towards gas flaring, citing *Gbemre v. Shell Petroleum Development Corporation*<sup>64</sup> where the court found that the *AGRA*'s provisions allowing continued flaring on the payment of fines amounts to a violation of the constitutional provisions on the right to life and are unconstitutional, null, and void.<sup>65</sup> However in spite of this promising move by the judiciary the *AGRA* still remains in force.<sup>66</sup>

A report by the International Commission of Jurists on access to justice regarding human rights abuses by TNCs in Nigeria, demonstrates the challenges of successfully litigating human rights abuses by TNCs in Nigeria.<sup>67</sup> It identifies problems of poverty in local communities, thereby limiting their access to legal representation, issues of jurisdiction, evidence gathering and

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<sup>62</sup> Amnesty Report, *supra* note 28.

<sup>63</sup> Oshionebo, *supra* note 30 at 76-77.

<sup>64</sup> Suit No: FHC/B/CS/53/05, Federal High Court of Nigeria (Benin Judicial Division), online: Climate Justice [www.climatelaw.org/media/media/gas\\_laring.suit.nov2005/ni.shell.nov05.judgment.pdf](http://www.climatelaw.org/media/media/gas_laring.suit.nov2005/ni.shell.nov05.judgment.pdf) [*Gbemre*].

<sup>65</sup> Odumosu-Ayanu, Transferring Alberta's Gas Flaring Regulations, *supra* note 29 at 890.

<sup>66</sup> Act and Regulations regulating the Oil Industry in Nigeria, Online: Department of Petroleum Resources <https://dpr.gov.ng/index/acts-and-regulations/>

<sup>67</sup> International Commission of Jurists, "Access to Justice: Human Rights Abuses Involving Corporations" (2013) Online: <http://business-humanrights.org/sites/default/files/media/documents/icj-report-access-to-justice-nigeria-22-feb-2012.pdf>



enforcement of judgments against TNCs.<sup>68</sup> Ultimately it seems judicial process has offered local communities little reprieve from environmental pollution as a result of activities of TNCs. These challenges underscore the need for better protection of local communities through effective regulation of TNCs as more effective regulation will address the problems of environmental pollution which give rise to appeals to the judiciary.

Another challenge to regulatory efficiency identified in the literature relates to the existing legislative framework in Nigeria that addresses oil extraction. Research into legislative framework for regulation of oil mining in Nigeria reveals that there are numerous statutes in Nigeria that regulate petroleum exploration. The Department of Petroleum Resources' (DPR) website lists 27 Acts and Regulations that purport to regulate the oil and gas industry.<sup>69</sup> Evidently, the challenge of regulation of oil pollution in Nigeria is not as a result of a lack of regulatory legislation.

The question then becomes, what are the challenges to effective regulation? A review of the literature finds scholars such as Odumosu<sup>70</sup> and Oshionebo<sup>71</sup> for example, arguing that the existing legislation in Nigeria on natural gas flaring makes it more economically prudent for TNCs to flare gas into the atmosphere rather than re-inject the gas. The *Associated Gas Re-Injection Act*,<sup>72</sup> is regulates natural gas flaring and seeks to compel TNCs to re-inject natural gas derived from oil extraction. However, the legislation provides an option of fines in negligible sums to TNCs for non-compliance with the requirement for reinjection of natural gas. Because these fines cost significantly less than it costs to re-inject natural gas, TNCs flare natural gas and pay these fines. Gas flaring has severe implications for the health of local communities and the environment. It causes heat that "kills vegetation, suppresses the growth and flowering of some plants, and diminishes agricultural production,"<sup>73</sup> which are all detrimental to local communities as they are essentially agrarian. Other adverse effects include respiratory problems in children, acid rain and contaminations of drinking water.<sup>74</sup> Scholars agree that option of fines for non-compliance with

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<sup>68</sup> *Ibid.*

<sup>69</sup> Act and Regulations regulating the Oil Industry in Nigeria, *supra* note 66.

<sup>70</sup> Odumosu, Transferring Alberta's Gas Flaring Regulation, *supra* note 29 at 888.

<sup>71</sup> Oshionebo *supra* note 30 at 54.

<sup>72</sup> Cap A25, Laws of the Federations of Nigeria 2004.

<sup>73</sup> United Nations Development Programme, "Niger Delta Human Development Report" (Abuja: UNDP 2006) quoted cited in Oshionebo *supra* note 30 at 23-24.

<sup>74</sup> Henry Clark, et al., "Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in The Niger Delta" at 5 online: [http://www.essentialaction.org/shell/Final\\_Report.pdf](http://www.essentialaction.org/shell/Final_Report.pdf)

provisions of the *AGRA* on re-injection of gas, coupled with the negligible sums to be imposed as fines for non-compliance prescribed by the Act hinder chances of reduced gas flaring in Nigeria.<sup>75</sup>

Other legislation which attempt to regulate environmental pollution in Nigeria include the *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007* (NESREA)<sup>76</sup> which has also received criticism for its prohibition of discharge of hazardous substances only if they are in “harmful quantities”.<sup>77</sup> The prohibition is also not absolute but rather subject to “any law in force in Nigeria”.<sup>78</sup> Oshionebo writes that the prohibition will be inoperative if any law in Nigeria permits such discharge.<sup>79</sup> Also the requirement for the NESREA to determine whether the discharge was in “harmful quantities” or otherwise further undermines the efficacy of the Act as the burden of proof is shifted to the agency to first make a determination as to the whether or not the discharge was harmful.

Another significant legislation regarding oil pollution in Nigeria relates to oil spills. The *Petroleum Act*,<sup>80</sup> is one of the numerous statute in Nigeria that regulate oil spills. Regulation 25 of the *Petroleum (Drilling and Production) Regulations of 1969* (implementing the *Petroleum Act*) requires that companies adopt all practicable precautions including the provision of up-to-date equipment in order to prevent pollution, and if pollution does occur, they must take prompt steps to control and, if possible end it.<sup>81</sup> Further, in 1991, the DPR expanded regulations for oil spill prevention with the introduction of *Environmental Guidelines and Standards for the Petroleum Industry* (EGASPIN) (revised in 2002) which provides that “clean up shall commence within 24 hours of the occurrence of the spill”.<sup>82</sup> While these are laudable provisions, legislation requires TNCs to undertake self-monitoring of compliance with the provisions. This requirement for industry self-regulation is perhaps not unrelated to the challenges relating to technical capacity within agencies responsible for enforcement of regulations,<sup>83</sup> and ultimately the need for institutional reforms in Nigeria, which is discussed in further detail in Chapter 3 of this thesis.

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<sup>75</sup> Oshionebo *supra* note 30 at 54.

<sup>76</sup> *NESREA Act 2007*, published in the Official Gazette No. 92. Vol. 94, 31st July, 2007.

<sup>77</sup> *Ibid* at Section 27.

<sup>78</sup> Oshionebo, *supra* note 30 at 57.

<sup>79</sup> *Ibid*.

<sup>80</sup> Cap 350, Laws of the Federation of Nigeria 1990

<sup>81</sup> *Petroleum (Drilling and Productions) Regulations*, L.N. 69 of 1969.

<sup>82</sup> *Environmental Guidelines and Standards for the Petroleum Industry*, (EGASPIN), 2002, 2.6.3 at 158

<sup>83</sup> Oshionebo, *supra* note 30 at 73.

The consensus within the literature suggests that regulatory ineffectiveness in Nigeria subsists for reasons other than the lack of regulatory legislation. Olawuyi,<sup>84</sup> like Steiner,<sup>85</sup> argues that environmental pollution in Nigeria subsists not for lack of environmental laws and institutions but rather “lack of effective implementation of the series of environmental laws that have been put in place”.<sup>86</sup> Steiner further argues that regulations regarding oil spills in Nigeria are sufficient to curb the menace if relevant TNCs would comply.<sup>87</sup>

This thesis, following the literature, studies this existing legislation on regulation of the oil industry with a view to identifying if in fact these laws are sufficient to regulate oil exploration and if not, what are their failings and how can they be remedied. The thesis also interrogates the institutional framework for regulation with a view to identifying the challenges inherent to the institutional framework which further hamper regulatory effectiveness. In that light, we look at for example the DPR, which is responsible for ensuring that health, safety and environment regulations conform with national and international best oil field practice.<sup>88</sup> However, the history of the DPR can be traced to the NNPC, which is the state-owned oil company through which the state participates in oil mining and exploration. The DPR (initially called the Petroleum Inspectorate) was originally created as a part of the NNPC, and even in 1985, when the Ministry of Petroleum Resources was re-established,<sup>89</sup> the Petroleum Inspectorate (now the DPR) remained within the NNPC until March 1988 when the NNPC was reorganized.<sup>90</sup> It was as a result of the reorganization of the NNPC in 1988 that the Petroleum Inspectorate was excised from the NNPC, and transferred to the Ministry of Petroleum Resources as the technical arm of the Ministry in charge of regulating oil mining and renamed the DPR. While Omorogbe argues that no law directly empowers the DPR to undertake regulatory functions because the NNPC Act empowers the Petroleum Inspectorate (the

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<sup>84</sup> Olawuyi, *supra* note 1 at 207.

<sup>85</sup> Richard Steiner, “Double Standard: Shell Practices in Nigeria Compared with International Standards to Prevent And Control Pipeline Spills And the Deep Water Horizon Oil Spill” Friends of the Earth Neth online: <https://milieudefensie.nl/publicaties/rapporten/double-standard> at 4 [Steiner].

<sup>86</sup> Olawuyi, *supra* note 1 at 207.

<sup>87</sup> Steiner, *supra* note 85 at 17.

<sup>88</sup> Department of Petroleum Resources, *supra* note 66.

<sup>89</sup> It had been merged with the Nigerian National Oil Corporation (NNOC) in 1977 to create the NNPC

<sup>90</sup> Omorogbe, *supra* note 9 at 141.

precursor of the DPR),<sup>91</sup> Oshionebo argues that the DPR as presently constituted creates room for intimidation and interference in regulation from government officials or powerful individuals.<sup>92</sup>

The significance of tracing the history of the DPR is that it speaks to a number of issues relating to regulatory effectiveness in Nigeria. Firstly, it demonstrates the attitude of the Nigerian state as regards regulation of oil production as it hitherto expected the state-owned oil corporation (the NNPC) to also enforce regulation. Secondly, the close relationship between the regulator (the DPR) and the extractive companies (the NNPC and the TNCs) presents a considerable challenge for regulatory efficiency and a number of writers identify such closeness as possibly responsible for state ineffectiveness in enforcing regulation.<sup>93</sup> According to the World Bank, “this situation has resulted in the government inadequately regulating oil pollution while at the same time, being party to much of the oil-related environmental problems of the Niger Delta.”<sup>94</sup>

Other challenges regarding the institutional framework for regulation of oil mining in Nigeria relates to multiplicity of regulatory agencies, challenges relating to capacity, funding, duplication of efforts and sometimes inter-agency rivalry which hampers regulatory effectiveness. In the third chapter of this thesis, we examine in detail existing regulation as well as the institutional framework for regulation of the oil industry. In its examination, the chapter seeks to identify some of the challenges to regulatory effectiveness and proposes solutions to those challenges. Having surveyed the literature, the research proceeds with the hypothesis that the extensive legislation and regulatory institutions in Nigeria would benefit from consolidation and oversight respectively. It interrogates the potential of the ECOWAS to provide such oversight.

Central to this thesis is the hypothesis that the most potent challenge to regulatory effectiveness in the Nigerian oil industry relates to the apparent conflict of interest of the Nigerian government. The state’s involvement in oil exploration, the precarious nature of its relationship with TNCs (being the operators they have the technical knowledge, capital and experience) as well as the state having its highest amount of earnings coming from oil has led to allegations that the state is not

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<sup>91</sup> Omorogbe, *supra* note 9 at 141.

<sup>92</sup> Oshionebo *supra* note 30 at 75.

<sup>93</sup> See Odumosu, Transferring Alberta’s Gas Flaring Regulations, *supra* note 29 at 877, Oshionebo, *supra* note 30 at page 74-76, Amnesty Report, *supra* note 28 at 42.

<sup>94</sup> World Bank, “Defining an Environmental Development Strategy for the Niger Delta”, (1995) Vol II, Industry and Energy Operations Division West Central Africa Department at 45 [World Bank Report].

adequately positioned to effectively enforce existing regulation. The said conflict of interest is identified as the most potent challenge to regulatory effectiveness in Nigeria's oil mining industry as it informs the political will to not only enforce existing legislation, but to undertake reforms such as the ones being suggested in this thesis.

One illustration of this conflict of interest is the existence of Joint Venture Agreements (JVAs) for oil exploration between the NNPC and several TNCs operating in Nigeria as sanctions enforced against TNCs ultimately affect the bottom line of the state-owned NNPC.<sup>95</sup> Also the NNPC is not an operator under the agreements and therefore is not directly involved in oil extraction.<sup>96</sup> The effect of such an arrangement is that the NNPC has limited technical knowledge of the process of oil production thereby increasing government's dependence on TNCs.<sup>97</sup> Also related to the limited technical skill of the NNPC are problems of endemic corruption linked to the NNPC.<sup>98</sup> In relation to its JVAs with TNCs, the NNPC has often fallen short of financing its equity holdings, often borrowing from its TNC partners to fund the ventures.<sup>99</sup> This heavy indebtedness of the government (through the NNPC) to the TNCs, often creates a conflict of interest where the government appears to be reluctant to empower its regulatory agencies to enforce regulations against corporations it is heavily indebted to.<sup>100</sup>

Other allegations relating to the government's conflict of interest and its seeming inability to enforce regulations involves allegations of political ambivalence on the part of civil servants who head ministries or agencies of regulation. Because governments are part of oil mining activities, heads of agencies may be wary of enforcing negative sanctions in order not to offend government

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<sup>95</sup> Amnesty report, *supra* note 28 at 45.

<sup>96</sup> See NNPC Joint Venture Agreements online: <http://www.nnpcgroup.com/nnpcbuisness/upstreamventures.aspx>. TNCs are usually termed operators as they participate in the oil extraction activities. According the NNPC website, "The operator is the one to prepare proposals for programme of work and budget of expenditure joint on an annual basis, which shall be shared on shareholding basis."

<sup>97</sup> Julia Pitkin, "Oil, Oil, Everywhere: Environmental and Human Impacts of Oil Extraction in the Niger Delta," (2013) Pomona Senior Theses. Paper 88. [http://scholarship.claremont.edu/pomona\\_theses/88](http://scholarship.claremont.edu/pomona_theses/88) at 18.

<sup>98</sup> See generally Aaron Sayne, Alexandra Gilies and Christina Katsouris, "Inside NNPC Oil Sales: A Case for Reform in Nigeria" (2015) Natural Resource Governance Institute Online: [http://www.resourcegovernance.org/sites/default/files/documents/nrgi\\_insidennpcoilsales\\_completereport.pdf](http://www.resourcegovernance.org/sites/default/files/documents/nrgi_insidennpcoilsales_completereport.pdf)

<sup>99</sup> *Ibid* at 23.

<sup>100</sup> Some governance systems set out clearly defined lines of authority, separating policy maker, regulator, and operator responsibilities See David R. Hults, "Hybrid Governance: State Management of National Oil Companies" at 62 in David G. Victor, David R. Hults & Mark Thurber eds. *Oil and Governance: State-Owned Enterprises and the World Energy Supply* (United Kingdom: Cambridge University Press 2012).

interests.<sup>101</sup> Odumosu-Ayanu in discussing government's interest in oil revenue without commiserate focus on local communities, writes that Nigeria's problem is not a lack of capacity to make regulations but calculations based on interests that powerful stakeholders deem "more important".<sup>102</sup> However, she argues that the passage of the *Nigerian Oil and Gas Industry Content Development Act* enacted in 2010 to increase local participation in the industry, demonstrates that the government is capable of adopting regulatory changes in the oil industry.<sup>103</sup>

In summary, issues identified in the literature demonstrate that the challenge of ineffective regulation of the oil industry in Nigeria is not restricted to one factor but to several factors. This thesis therefore in examining and making recommendations for reforms within the legislative and institutional framework for regulation in Nigeria, also advocates for constitutional and judicial reform which would make the failures of regulation subject to constitutional and judicial remedies. However, having identified the challenge of the state's conflict of interest, the thesis investigates the potential of ECOWAS oversight over the Nigerian regulatory framework to introduce a party that is neutral in the politics of oil and gas exploration. The thesis investigates the potential contributions of regulatory oversight by a regional supranational institution, whose credibility is not coloured by involvement in oil mining, to more effective regulation of the oil industry. The thesis advocates that regulatory oversight provides an avenue for state agencies to surmount the challenges that relates to conflict of interest in enforcing regulation as an independent oversight mechanism is likely removed from the politics relating to regulation. Specifically, the thesis proposes the adoption of a framework of oversight under the ECOWAS, given Nigeria's membership in the organization and the supranationality of the organization.

Although a detailed discussion of the ECOWAS is undertaken in the fourth chapter of this thesis, it is prudent to provide a brief introduction to the ECOWAS to better contextualize the justification for the use of the ECOWAS for regulatory oversight in Nigeria. The ECOWAS is a regional community comprising 15 West African states including Nigeria. It was established in 1975 under the ECOWAS Treaty<sup>104</sup> to garner regional and economic integration in member states.<sup>105</sup> In 1993,

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<sup>101</sup> Oshionebo *supra* note 30 at 75.

<sup>102</sup> Odumosu-Ayanu, *Multi-Actor Contracts*, *supra* note 3 at 286.

<sup>103</sup> *Ibid* at 289.

<sup>104</sup> 1975 Treaty of ECOWAS reprinted in XIV *International Legal Materials* (1975) pp. 1200-09 [The 1975 Treaty].

<sup>105</sup> Eghosa O. Ekhaton, "Improving Access to Environmental Justice Under the African Charter on Human and Peoples' Rights: The Roles of NGO's in Nigeria" (2014) 22 *Afr. J. Int'l & Comp. L.* 63 at 70.

the Treaty was revised and the organization gained supranational status.<sup>106</sup> A detailed discussion on the supranationality of the ECOWAS is taken in the fourth chapter of this thesis. However, it is significant to note that as a supranational organization and not an inter-governmental organization, the ECOWAS represents an organization to which member states (Nigeria included) have surrendered their sovereignties with respect to the mandate of the organization.<sup>107</sup> One of the implications of the supranationality of the ECOWAS is that it can make binding decisions on behalf of member states which are immediately binding and not subject to ratification by member states.

An organization such as the ECOWAS therefore, if presented with the task of overseeing the affairs of the regulatory framework in Nigeria has the advantage of being a potentially neutral party as it is not as involved as the Nigerian government in oil mining. It has the potential to avoid concerns regarding the Nigerian government's conflict of interest and as a supranational organization, avoids infringing on state sovereignty as the Nigerian state has already surrendered part of its sovereignty to the organization. Ultimately, the thesis explores the potential of the ECOWAS to undertake regulatory oversight over the Nigerian oil industry.

### 1.3 Justifying Regional Oversight Over the Nigerian Regulatory Framework

As demonstrated in the previous subsection, a number of scholars such as Odumosu-Ayanu,<sup>108</sup> Oshionebo,<sup>109</sup> Stevens,<sup>110</sup> and Eaton,<sup>111</sup> have identified the problem of ineffective regulation in Nigeria and have advanced potential solutions to the problem. While acknowledging the merits of

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<sup>106</sup> See the ECOWAS 1993 Treaty, *ECOWAS Doc. ECW/LEX/IV/2A/Rev.3*, Lagos, October 1992, signed at Cotonou, 24 July 1993.

<sup>107</sup> See Jadesola O. Lokulo-Sodipe & Abiodun J. Osuntogun, "The Quest for a Supranational Entity in West Africa: Can the Economic Community of West African States Attain the Status?" (2013) 16(3) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regbald* 255 at 271 [Lokulo-Sodipe & Osuntogun].

<sup>108</sup> Odumosu-Ayanu, *Multi-Actor Contracts*, *supra* note 3 at 286. See also Ibronke T. Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework", 2014, 15 *Melb. J. Int'l L.* 473 [Odumosu-Ayanu, *Governments, Investors and Local Communities*]. Her work on Multi-Actor contracts, proposes a quasi-regulatory framework involving local communities, government and TNCs in order to further regulate the oil extraction process.

<sup>109</sup> Oshionebo, *supra* note 30 at 210 – 226, proposes the use of more persuasive regulatory strategies (responsive regulation) the form of incentives or reward schemes and resort to punitive sanctions only in the face of egregious breaches or regulation by TNCs.

<sup>110</sup> Stevens, *supra* note 40 proposed amendments to the legislative framework in Nigeria and empowerment of regulatory agencies in order to achieve better efficiency

<sup>111</sup> Eaton *supra* note 50, proposed the international recognition of the right to a healthy environment by way of hard law convention and the establishment of an international court for enforcement of environmental law

previously proposed solutions, this thesis charts a new course in proposing a regulatory oversight framework. Although the recommendation for ECOWAS oversight is (to the author's knowledge) new, the selection of the ECOWAS to provide such oversight is inspired in part by existing research and jurisprudence.

Pointedly, Odumosu-Ayanu's research into *Local Communities and Oil and Gas Contracts* suggests the use of a regional framework such as the ECOWAS for the effective delivery of multijurisdictional large projects, suggesting that they are more robust since such frameworks are designed for states of similar, but not identical, socio-economic status.<sup>112</sup> Her research advances a quasi-regulatory framework to run in tandem with existing frameworks to regulate large projects acknowledging that states are often constrained by "lack of capacity, lack of interest or even conflict of interest".<sup>113</sup> The problem of ineffective regulation identified in this thesis, shares some of the concerns identified in Odumosu-Ayanu's work, such as lack of capacity, lack of interest and a conflict of interest on the part of the state. Perhaps the Nigerian state can also benefit from regulatory oversight from the ECOWAS.

Secondly, jurisprudence from the ECOWAS Court further informs the choice of the ECOWAS to perform such regulatory oversight. In *SERAP v. Nigeria*,<sup>114</sup> the ECOWAS Court found the Nigerian government responsible for failing to effectively regulate TNCs. The court then ordered Nigeria to "take all measures" to restore the environment, prevent future damage, and hold the perpetrators accountable.<sup>115</sup> However the Court failed to specify how the Nigerian state should implement the judgment.<sup>116</sup> The significance of the judgment which is further discussed in the fourth chapter of this work, is that ECOWAS has in the recent past interceded in concerns relating to ineffectiveness of regulation in Nigeria's oil industry. A second concern is that even though the ECOWAS Court reprimanded the Nigerian state for failing to effectively enforce its existing laws and directed it to remedy its failings, the Court failed to identify a means for Nigeria to implement

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<sup>112</sup> Odumosu-Ayanu, *Governments, Investors and Local Communities*, *supra* note 108 at 476.

<sup>113</sup> *Ibid* at 478.

<sup>114</sup> *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. President, Federal Republic of Nigeria ECW/CCJ/APP/08/09 Ruling of 10<sup>th</sup> December, 2010 [SERAP Niger Delta Judgment]*

<sup>115</sup> *Ibid* at paras 121.

<sup>116</sup> See Karen J. Alter, Lawrence R. Hefler and Jacqueline R. McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013) 107 *Am. J. Int'l L.* 737 at 755 [Alter, Hefler and McAllister] at 767.



its decision.<sup>117</sup> This thesis therefore proposes a framework which advocates regulatory oversight that anticipates the involvement of other organs of the ECOWAS, not just the Court, in getting Nigeria to enforce her existing regulation. The framework proposed anticipates the involvement of the ECOWAS and Nigerian state institutions to implement a decisive approach to regulation aimed at increasing regulatory effectiveness of the oil industry in Nigeria. The scope of the proposed oversight framework is discussed in detail in Chapter four of this thesis. It is designed to involve the receipt of mandatory reports from Nigeria's regulatory institutions, provision of technical assistance, on-site inspections, and possible blacklisting of errant TNCs in other West African states.

The employment of the ECOWAS framework would seem an educated choice for oversight function in Nigeria given the reasons adduced in section 1.2. The ECOWAS also has some experience in extractive industries,<sup>118</sup> and its membership is smaller<sup>119</sup> when compared to the membership of the African Union which inspires confidence that the framework being proposed would be easier to manage. In addition, the new legal regime of the ECOWAS translates all conventions or regulations by the Authority of the Heads of State (which is the decision-making body of the ECOWAS) into immediately binding law on member states, eliminating the need for lengthy domestication processes within member states which often frustrates progress.<sup>120</sup>

#### 1.4 Theoretical Framework for the Research

The conceptual framework for ECOWAS oversight of the activities of the oil industry in Nigeria being proposed by the research is inspired by the concept of “carrots, nudges and sticks” put forth by Penelope Simons and Audrey Macklin in *The Governance Gap*<sup>121</sup> while the broader inquiry in the research is situated in Finnemore and Sikkink's norm “life cycle” theory. Drawing on Finnemore and Sikkink's theory, this thesis interrogates the socialization of norms relating to effective regulation of the oil industry and prevention of oil pollution, into domestic practices.<sup>122</sup>

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<sup>117</sup> *Ibid.*

<sup>118</sup> See generally, Kabele-Camara, Abdoul Karim. “Achieving Energy Security in ECOWAS through the West African Gas Pipeline and Power Pool Projects: Illusion or Reality?” (2013) 16 CEPMLP Annual Review - CAR

<sup>119</sup> There are fifteen member states in the ECOWAS, Online: <http://www.ecowas.int/member-states/>

<sup>120</sup> ECOWAS New Regime for Community Acts Online: <http://www.ecowas.int/ecowas-law/find-legislation/>

<sup>121</sup> Penelope Simons and Audrey Macklin, *The Governance Gap* (United States of America: Routledge 2014)

<sup>122</sup> See Eaton *supra* note 50 at 293; Thomas Risse and Kathryn Sikkink, “The Socialization of International Human Rights Norms into Domestic Practices: Introduction” in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink eds. *The*

Central to the thesis is the argument that the normative framework relating to the right to a healthy environment and the prevention and remediation of oil pollution in Nigeria is need of reform. The second chapter argues the need for constitutional reforms relating to the recognition of a right to a healthy environment and the third and fourth chapters argue for institutional reforms that are designed to increase greater effectiveness in the regulation of oil pollution. Ultimately, the thesis is concerned with putting forth an argument for attitudinal, constitutional, jurisprudential and institutional change in the way the state responds to issues of environmental justice and oil pollution.

With regard to the conceptual framework, Finnemore and Sikkink's theory of norm "life cycle" outlines three stages which a norm undergoes before it assumes universal acceptance within states.<sup>123</sup> According to the theory, the first stage is norm emergence, where the norm entrepreneur creates a general consciousness about the norm and attempts to convince norm leaders (identified as a critical mass of states) to embrace this new norm.<sup>124</sup> According to Finnemore and Sikkink, norm entrepreneurs are often non-governmental organizations creating awareness about the norms. The second stage is the norm cascade where these norm leaders attempt to socialize other states to become followers of the norm.<sup>125</sup> The authors of the theory suggest that states are convinced by norm leaders to accept new norms for a number of reasons including: pressure for conformity, desire to enhance international legitimation and perhaps a desire for states to enhance their self-esteem.<sup>126</sup> The final stage of the cycle is internalization. The authors posit that this is when the norm acquires a "taken-for-granted quality"<sup>127</sup> and is no longer a matter for broad public debate.<sup>128</sup> The authors admit however that the completion of the "life cycle" is not an inevitable process and some norms might fail to reach the "tipping point".<sup>129</sup> They identify the tipping point as between

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*Power of Human Rights: International Norms and Domestic Change* (United Kingdom: Cambridge University Press, 1999)

<sup>123</sup> Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 *International Organization* at Fifty: Exploration and Contestation in the Study of World Politics 887 at 895

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

the first and second stage of the norm life cycle, identified as when the norm receives acceptance from a sufficient number of states.

The thesis, however, tests Finnemore and Sikkink's theory as it presents the ECOWAS as both norm entrepreneur and norm leader. In this thesis, the ECOWAS is presented as the medium for creating awareness of the existence of the norm through its oversight and insistence on regulation of the oil industry and oil pollution (norm entrepreneur) as well as a norm leader as it will be responsible for convincing a "critical mass of states" to adopt the new norm. By virtue of its supranational status, the ECOWAS by its very nature is "a critical mass of states", therefore its role in getting the Nigerian state and perhaps other member states to adopt new norms qualifies it as a norm leader. The potential role of the ECOWAS therefore, presents a dual role for the ECOWAS within the "norm life cycle" theory, which troubles and might suggest an expansion and refinement of Finnemore and Sikkink's theory where norm entrepreneurs are usually NGOs and the norm leaders are often states, to accommodate the potential role of supranational organizations as both norm entrepreneurs and norm leaders.

Ultimately, the described theoretical framework provides the optics with which the contributions in the thesis are to be examined. It helps to examine what role the ECOWAS can play in encouraging states, Nigeria specifically, to advance the life cycle of the norm of effective regulation and environmental protection so that the norm can achieve a "taken-for-granted"<sup>130</sup> quality. The authors describe the completion of the life cycle of the norm as becoming one that is no longer subjected to public debate. They give examples of norms that have achieved internalization in how people no longer question whether women have a right to vote, or whether slavery is useful, or whether medical personnel ought to be granted immunity during times of war.<sup>131</sup>

## 1.5 METHODOLOGY ADOPTED FOR THE RESEARCH

The methodology adopted in this research is multi-disciplinary. It involves an analysis of law, history, and international relations theory. The thesis identifies legal and social issues that hamper effective regulation of TNCs in Nigeria by analyzing existing legislation and institutional framework for oil mining, environmental pollution, and human rights applicable in Nigeria. The

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<sup>130</sup> *ibid*

<sup>131</sup> *ibid.*

analysis of existing legislation is derived from statutes, policy statements, international conventions, books, journals, newspaper articles, seminars, leaflets, periodicals, magazines, lecture notes and online resources. A study of history is also helpful to the thesis as it traces the history, growth and potentials of the ECOWAS, in a bid to determine its prospects for regulatory oversight. Significant to the thesis also is Finnemore and Sikkink's international relations theory upon which the theoretical framework of the study is situated.

Ultimately, the primary means of executing the research is library and internet-based research, that is information contained in published material available from libraries, databases and the internet.

## 1.6 Conclusion

In summary, this thesis provides scholarly insight into challenges and consequences of ineffective regulation of TNCs in Nigeria while exploring the potential of a novel approach to addressing such challenges. It provides a useful contribution to identifying concerns relating to protection and promotion of human rights of local communities, regulatory framework for regulation of the oil and gas industry, and protection of the environment as well as suggestions regarding reforms in the problem areas identified.

In contributing to theory, the thesis proposes the expansion and refinement of the norm "life cycle" theory to anticipate norm entrepreneurs and leaders taking the form of supranational entities. The interrogation of the ECOWAS as a supranational organization, capable of affecting attitudes of sovereign state lends its voice to the growing discourse surrounding modern day redefinitions of the concept of state sovereignty.<sup>132</sup> The thesis demonstrates the advantages of a shift from non-interference as regards international relations between states to pooling of sovereignties under supranational organizations and the potentials of such a shift for states and ultimately local communities. The European Union (EU) is an example of one of such supranational organizations. The EU first started to evolve as a supranational organization with the establishment of the European Coal and Steel Community (the ECSC), whose mandate was to establish a common market without trade barriers.<sup>133</sup> Given the successes of the common market, European

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<sup>132</sup> See Francis Fukuyama, *State Building: Governance and World Order in the 21<sup>st</sup> Century* (Ithaca: Cornell University Press, 2004); Horacio A. Grigera Naon, "Sovereignty and Regionalism" (1995-1996) 27 *Law & Pol'y Int'l Bus.* 1073, Jay Lawrence Westbrook, "Legal Integration of NAFTA Through Supranational Adjudication" (2008) 43 *Tex. Int'l L.J.* 349.

<sup>133</sup> Lokulo-Sodipe and Osuntogun, *supra* note 107 at 274.

governments decided to consolidate their gains and extended their delegation of power by signing the *Maastricht Treaty*<sup>134</sup> and creating the European Union.<sup>135</sup> Recent events surrounding the United Kingdom's referendum to leave the EU have demonstrated the advantages and perhaps disadvantages of economic integration and shared sovereignty under a supranational organization.<sup>136</sup> Nevertheless, it remains the contention of this thesis that the benefits of economic integration and shared sovereignties, far outweigh the disadvantages of integration and that the Nigerian state will benefit greatly from regulatory oversight from the ECOWAS.

The thesis also lends its voice to the growing body of literature that propose a new governance model for the regulation of TNCs in extractive industries. The works of Penelope Simons and Audrey Macklin<sup>137</sup> and Larry Cata Backer<sup>138</sup> are instructive in this regard as they advocate governance models for the regulation of TNCs that go beyond the host states or home states of the TNCs. Scholars such as Nupur Chowdury and Ramses A. Wessel studying the concept of regulation at the EU, acknowledge that certain aspects of regulatory processes are no longer located in one single governmental actor.<sup>139</sup> Although their work does not contemplate TNCs in extractive industries, their research provides insight into the potential for regulation beyond states.<sup>140</sup>

The thesis is divided into four chapters, with the first being the just concluded introductory chapter outlining the scope and significance of the thesis. The second chapter undertakes an analysis of the debilitating effects of oil pollution on local communities in the Niger Delta, identifying the failure of the Nigerian constitution to provide constitutional protection to local communities affected by environmental pollution. In making a case for constitutional reform, the chapter

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<sup>134</sup> European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5.

<sup>135</sup> Lokulo-Sodipe and Osuntogun, *supra* note 107 at 274.

<sup>136</sup> "EU Referendum: What are the Pros and Cons of Brexit" *The Week*, (June 27, 2016) online:

<http://www.theweek.co.uk/brexit-0>

<sup>137</sup> The Governance Gap, *supra* note 120.

<sup>138</sup> Larry Cata Backer, "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order" (2011) 17 *Indiana Journal of Global Legal Studies*.

<sup>139</sup> Nupur Chowdury, Ramses A. Wessel, "Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?" (2012) 18 *European Law Journal* p. 335-357.

<sup>140</sup> See also Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State', in Jacint Jordana and David Levi-Faur ed., *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing, 2004), at 145–176. See generally, Giandomenico Majone, *Regulating Europe* (London: Routledge, 1996).

identifies other challenges such as limited access to justice which hamper the protection of the local communities that are affected by oil pollution. It identifies the significant potential of engaging the ECOWAS Court in protecting rights of local communities in the Niger Delta region of Nigeria. Having made a case for the protection of the environment as a human right of local communities, the third chapter undertakes an analysis of the existing regulatory framework in Nigeria. It examines the existing regulatory framework for regulation of the oil industry in Nigeria identifying the challenges of such framework and the need for reform. Ultimately, having identified the challenges to regulatory effectiveness in Nigeria, the thesis explores the potentials for regulatory oversight in remedying some of these challenges using the ECOWAS. The fourth chapter examines the ECOWAS, tracing its history, evolution and potential for regulatory oversight. The chapter defines a framework to be adopted under the ECOWAS for regulatory oversight of regulatory institutions in Nigeria. It identifies the prospects and challenges of adopting the said framework under the ECOWAS and concludes with a reiteration of the need for regulatory oversight in Nigeria and identifies reasons why the ECOWAS is well suited to provide such oversight.

## Chapter 2: CONSTITUTIONAL PROTECTION OF THE ENVIRONMENT: POTENTIAL CONTRIBUTION TOWARDS MORE EFFECTIVE REGULATION OF NIGERIA'S OIL INDUSTRY

### 2.1 Introduction

This chapter undertakes an analysis of Nigeria's constitutional and judicial framework for the protection and promotion of the right to a healthy environment, arguing the need for such protection and its potential contribution to more effective regulation. It examines the normative basis for asserting a right to a healthy environment within the Nigerian judicial process and the implications of the failure of the Nigerian constitution to provide a substantive right to a healthy environment. In undertaking its enquiry, the chapter recognizes that the right to a healthy environment is guaranteed under the *African Charter of Human and Peoples Rights* as well as under the African Charter Act<sup>1</sup> (which domesticates the African Charter) but argues the need for a constitutional provision recognizing a healthy environment as a justiciable human right.

Having identified certain normative challenges to asserting the right to a healthy environment in Nigeria, the chapter undertakes a survey of the Nigerian judicial framework for addressing concerns arising from environmental pollution. It identifies certain barriers that hinder the protection of rights of local communities in the Niger Delta and makes recommendations for reform. Arguing that constitutional and judicial reforms are central to achieving environmental justice in Nigeria, the thesis makes recommendations for the potential role of the ECOWAS Court in addressing specific challenges to the Nigerian judicial system of adjudicating concerns regarding oil pollution.

The chapter argues that constitutional reform provides the best protection to local communities bedeviled by oil pollution as it provides a constitutional right to a healthy environment which in turn creates an obligation on the part of the state to ensure a healthy environment and therefore better regulate activities of oil companies which result in environmental pollution. In the absence

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<sup>1</sup> African Charter of Human and Peoples Rights Act, Cap 10, Laws of the Federation of Nigeria 1990 [*African Charter Act*]

of such constitutional reform however, the thesis identifies existing human rights protection instruments that can provide protection to local communities, as well as remediate certain failings of the Nigerian judicial system through the ECOWAS Court which is an organ of the ECOWAS.

In undertaking this inquiry, the chapter is divided into six subsections. The first is the just concluded subsection, giving a brief introduction to the proposed enquiry. The second subsection introduces the problems of resource extraction in the Niger Delta as a human rights concern and discusses the attitude of the government and TNCs to remediating such pollution. The chapter then examines the right to healthy environment under the Nigerian Constitution and domestic legislation. It identifies the challenges to enforcement of a right to a healthy environment in Nigeria in a bid to illustrate the failure of the Nigerian system to adequately provide for, and protect this right. The fifth subsection undertakes an analysis of judicial process in Nigeria, it argues that in addition to the constitutional challenges with regards providing for a right to a healthy environment in Nigeria, limited access to justice presents another formidable obstacle to environmental protection. Considering the above failures within the Nigerian constitutional and judicial frameworks, the next subsection of the chapter discusses the role of regional and international human rights protection mechanisms in lending protection to local communities in the Niger Delta as well as potential challenges of such international protection. The chapter concludes with the reiteration of the need for constitutional as well as judicial reform in Nigeria to protect victims of environmental pollution.

## 2.2. Environmental Pollution in the Niger Delta: State and TNC Response to the Challenges

*“The rivers here are messed up, oil everywhere. The plants are abnormal, even we have become abnormal (laughs). The gas flaring is constant, and people are getting sick with illnesses that our forefathers didn’t have. The worst part is that no one is saying anything about it... Even the president (sic) does not seem to care”<sup>2</sup>*

The Niger Delta has suffered from environmental pollution for decades. This pollution is often in the form of oil spills, dumping of waste generated from oil exploration and flaring of natural gas

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<sup>2</sup> Words of Interviewee 2 from Ogoniland, Nigeria (1<sup>st</sup> December 2014) in Jake Effoduh, “Economic and Other Human Rights Remain Hostages Of Oil Companies” (2015) CASADE online: <http://www.casade.org/economic-human-rights-remain-hostages-oil-companies/>



which damages fisheries, contaminates drinking water and ruins agriculture.<sup>3</sup> The United Nations Development Programme Report of 2006 described the Niger Delta region of Nigeria as “one of the most severely petroleum-impacted ecosystems”.<sup>4</sup> The report stated that “the damage from oil operations is chronic and cumulative, and has acted synergistically with other sources of environmental stress to result in a severely impaired coastal ecosystem and compromised the livelihoods and health of the region’s impoverished residents.”<sup>5</sup> Oil pollution frustrates local communities’ access to clean water, clean air and economic activities such as farming, fishing and access to unaffected aquatic life.<sup>6</sup>

In 2001, following a complaint on behalf of a local community in the Niger Delta, the African Commission described the environmental pollution in that local community as being at a level that was “humanly unacceptable”.<sup>7</sup> The complaint against the Nigerian government that gave rise to the decision of the African Commission was lodged on behalf of the Ogoni people (one of the local communities in the Niger Delta). The decision exemplifies one of the more peaceable ways which Niger Delta communities have sought to protect their lives, livelihoods and their environment.

Clearly dissatisfied with conditions of the Niger Delta, several groups in the Niger Delta have adopted both peaceable and more violent means of expressing their dissatisfaction with oil mining activities and the effects of such activities. One scholar argues that unrest and conflict in the Niger Delta is a direct result of the denial of economic, social and cultural rights.<sup>8</sup> He notes that because of this continued denial of rights, social discontent manifests itself in in paramilitary criminality, hostage taking, the sabotage of oil installations and car bombings in the area.<sup>9</sup>

Niger Delta communities have often been at loggerheads with the government given their dissatisfaction with oil pollution, lack of infrastructure within local communities, lack of jobs and

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<sup>3</sup> Amnesty International Nigeria, “Petroleum, Pollution and Poverty in the Niger Delta” (2009) online: Amnesty International <http://www.amnestyusa.org/research/reports/nigeria-petroleum-pollution-and-poverty-in-the-niger-delta-report> at 42 [Amnesty Report]

<sup>4</sup> United Nations Development Programme (UNDP), Niger Delta Human Development Report, 2006, p74 .

<sup>5</sup> *Ibid.*

<sup>6</sup> See generally, Amnesty Report, *supra* note 3.

<sup>7</sup> *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (Communication 155/96) African Commission on Human and Peoples Rights, 27 October 2001, online: ACHPR <http://www.achpr.org/communication/decisions/155.96/> [SERAC Case]

<sup>8</sup> Hakeem O. Yusuf, “Oil on Troubled Waters: Multinational Corporations and Realizing Human Rights in the Developing World, with Specific Reference to Nigeria” (2009) 8 Afr. Hum. Rts. L.J. 79 at 80

<sup>9</sup> *Ibid.*

what they perceive as domination in politics by other regions even though the oil found in their communities provides most of the country's wealth.<sup>10</sup> While these grievances have often resulted in violence against TNCs and their operations, some groups have sought "autonomy" from the Nigerian state seeking to be able to participate in the affairs of the country as a 'distinct and separate entity'<sup>11</sup> along with a right to the control of a 'fair proportion'<sup>12</sup> of their resources for their development.<sup>13</sup>

The resentment harboured by local communities against the government and TNCs has influenced the way the government and TNCs respond to local agitation. Successive military governments in Nigeria have been accused of responding to agitation by Niger Delta communities with brute force, quelling protests through military interventions.<sup>14</sup> TNCs on the other hand often take what has been described as an "escapist stance"<sup>15</sup> when faced with concerns of local communities. They argue that issues of underdevelopment or autonomy are "political" matters which are outside of their competence.<sup>16</sup> TNCs respond to their protests by attempting to undertake pacifist corporate social responsibility projects which are often rejected by local communities suspicious of its motivations.<sup>17</sup>

The relationship between the Nigerian government and local communities has been described as one hovering between repression and pacification.<sup>18</sup> Since Nigeria's return to civilian rule, local communities have become even more vocal with their demands for remediation perhaps prompting the government to request that the United Nations Environment Programme to investigate oil pollution of Ogoniland in the Niger Delta. The study was intended to provide reliable information which could serve as a baseline for government and local communities to remediate the tensions

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<sup>10</sup> *Ibid* at 80.

<sup>11</sup> *Ibid*. See also The Ogoni Bill of Rights, *Presented to the Government and People of Nigeria with an Appeal to the International Community*, December 1991 cited in Project Underground, "The Life & Death of Ken Saro-Wiwa: A History of the Struggle for Justice in the Niger Delta", Online:

<http://www.ratical.org/corporations/KSWlife+death.pdf> at1 [Life & Death of Saro-Wiwa]

<sup>12</sup> *Ibid*.

<sup>13</sup> Yusuf, *supra* note 8 at 83.

<sup>14</sup> *Ibid* at 85.

<sup>15</sup> *Ibid* at 84.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* at 85.

<sup>18</sup> *Ibid*.

between them, given the long bitter history of repression and remedy the effects of oil pollution.<sup>19</sup> The results of the report were quite critical, revealing that oil contamination in Ogoniland was “widespread and severely impacting many components of the environment”.<sup>20</sup> As identified in the previous chapter, rights groups allege that “no progress” has been made regarding implementing the recommendations of the report.<sup>21</sup> This chapter argues therefore that continued neglect of the concerns of local communities in relation to environmental pollution, is a further demonstration of the state’s attitude toward issues surrounding oil pollution and a violation of the right to a healthy environment.

#### 2.4. Right to a Healthy Environment

The literature surrounding the case for the right to a healthy environment has evolved over the years. Earlier, writers had called for the recognition of the right to a healthy environment as a hard law convention, chastising the Stockholm Declaration of 1972<sup>22</sup> as soft law failing to compel state action.<sup>23</sup> Subsequently, regional instruments in Africa and America guaranteed the right to a healthy environment as a substantive right.<sup>24</sup> More than 100 national constitutions across the globe guarantee a substantive right to a healthy environment,<sup>25</sup> perhaps prompting scholars like Boyd to study the effectiveness of these constitutionally protected rights.<sup>26</sup> Boyd studies the impact of a constitutionally protected right to a healthy environment and concludes that a number of factors, not exclusive to constitutional protection, influence improved environmental protection.<sup>27</sup>

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<sup>19</sup> See Foreword of United Nations Environment Programme, “Environmental Assessment of Ogoniland Report” 2011 at 6 Online:

<http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentofOgonilandreport/tabid/54419/Default.aspx> [UNEP Report]

<sup>20</sup> *Ibid* at 9.

<sup>21</sup> See generally, Amnesty International, “No Progress: An Evaluation of the Implementation of UNEP’s Environmental Assessment of Ogoniland, Three Years On” Online:

<https://www.amnesty.org/en/documents/afr44/013/2014/en/>

<sup>22</sup> U.N. Doc. A/CONF/48/14/Rev.1 (1972)

<sup>23</sup> Joshua P. Eaton, “The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment” (1997) 15 B.U. INT’L L.J. 261 [Eaton].

<sup>24</sup> See the *African Charter on Human and People’s Rights* and the Additional Protocol to the *American Convention on Human Rights in the area of Economic, Social and Cultural Rights* cited in Dinah L. Shelton, “Human Rights and the Environment: Substantive Rights” (2011) 33 GW Legal Studies Research Paper No. 2013-33 265 at 267 [Shelton].

<sup>25</sup> Shelton *supra* note 24.

<sup>26</sup> David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (Vancouver: UBC Press, 2012).

<sup>27</sup> *Ibid*.

The Nigerian constitution does not provide such a right, the claim to right to a healthy environment is drawn out of the provisions of Chapter II of the Nigerian Constitution. The provisions of that Chapter of the constitution, place a mandatory duty on the State to *direct its policies* towards the achievement of certain objectives but does not place a duty on the state nor a corresponding right on citizens to enforce such as a right against the State in the event of failure. An example in specific reference to environmental protection, is Section 21 of the Nigerian Constitution, which provides that “the State shall protect and improve the environment and safeguard water, air and land, forest and wildlife in Nigeria”.<sup>28</sup> While such provision can be extended to make an argument for local communities to have the right to an “improved” “water” “air” and “land”, the protection of such a constitutional provision is hindered from access to local communities by a number of obstacles. The provision is unavailing to local communities seeking to make a rights-based claim as it fails to establish a positive “right” to a healthy environment for citizens, nor does it provide local communities with a justiciable claim against the government for failing to provide a healthy environment under Chapter II of the Constitution.<sup>29</sup> Section 6(6) (c) of the Constitution of the Federal Republic of Nigeria 1999 which provides the courts with judicial power, specifically excludes provisions found under Chapter II of the Constitution from the scope of the court’s contemplation. It provides:

“The judicial powers vested in accordance with the foregoing provisions of this section – **shall not except as otherwise provided by this constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.**”<sup>30</sup>  
[emphasis added]

Jurists have often made pronouncements on Chapter II, calling on the state to make such provisions justiciable in the face of an obvious need to hold the state accountable. For example, a former

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<sup>28</sup> Section 21, Constitution of the Federal Republic of Nigeria 1999.

<sup>29</sup> See Kaniye S.A. Ebeku, “Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v. Shell* Revisited” (2007) 16:3 REEIL 317 [Ebeku on Gbemre].

<sup>30</sup> Section 6(6) (c) of the Constitution of the Federal Republic of Nigeria 1999.

Justice of the Nigeria Supreme Court, Justice Uwaifo in delivering a judgement in the case of *Attorney General of Ondo State v. Attorney General of the Federal Republic of Nigeria*<sup>31</sup> stated:

“...to ensure that the Directive Principles are not a dead letter. Whatever is necessary is done to see that they are observed as much as practicable so as to give cognizance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the exclusive legislative list. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to anyone of them through appropriate enactment as occasion may demand.”<sup>32</sup>

Although the former Justice of the Supreme Court was not speaking in the context of environmental protection but as regards Chapter II generally, an argument can be made that there is a need to recognize environmental protection as a duty of the state and not a “mere or pious declaration”<sup>33</sup> especially in the face of devastating effects of oil pollution. In agreement, and speaking specifically in the context of environmental rights, Ekhator asserts that the non-justiciability of these rights under Chapter II undermine Section 13 of the Nigerian constitution which places an obligation on the Nigerian state and its organs to observe and apply the provisions of Chapter II of the Constitution.<sup>34</sup>

Despite this seeming constitutional failure, there has been some success in litigating rights based claims to a healthy environment in Nigeria. While some local communities have relied on common law torts such as trespass, negligence and nuisance to litigate environmental pollution,<sup>35</sup> in order to maintain the scope of this chapter, we are focusing on the human rights based litigation.

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<sup>31</sup> (2002) 27 NWLR (PT 772) 222.

<sup>32</sup> *Ibid* at page 391, paragraphs F-H.

<sup>33</sup> *Ibid* at paragraph G.

<sup>34</sup> Eghosa O. Ekhator, “Improving Access to Environmental Justice Under the African Charter on Human and Peoples’ Rights: The Roles of NGO’s in Nigeria” (2014) 22 Afr. J. Int’l & Comp. L. 63 at 66 [Ekhator]

<sup>35</sup> See Generally, George Jedrzej Frynas, “Legal Change in Africa: Evidence from Oil Related Litigation in Nigeria” (1999) 43(2) Journal of African Law 121.

Inspiringly, rights groups and local communities have litigated human rights claims on behalf of the Niger Delta people by appealing to fundamentally guaranteed human rights protected by the Nigerian constitution. These rights identified as fundamental by the Nigerian Constitution are enforceable against the state and private individuals, including corporate bodies.<sup>36</sup> A significant example is the appeal to the interpretation of the right to life to include the right to a healthy environment. This practice of appealing to fundamental human rights for environmental protection is a growing trend and is seen in several other countries. It has been described in the literature as a human rights approach to environmental protection.<sup>37</sup>

The most celebrated case regarding such human rights based approach to environmental protection in Nigeria is the case of *Gbemre v. Shell*.<sup>38</sup> Before that decision, Nigerian courts had often favoured economic benefits to the country as a result of oil exploration above environmental protection concerns.<sup>39</sup> The coming of *Gbemre* in 2005 reawakened the faith of local communities, rights groups and observers in the Nigerian judicial process. It is perhaps significant to briefly discuss the circumstances of the case in *Gbemre*.

The applicant, suing in a representative capacity, alleged that the gas flaring activities of the respondents (Shell and the Nigerian National Petroleum Corporation) as a result of oil mining violated his constitutionally guaranteed rights to life and dignity of human person as they had adversely affected his life, health and natural environment. Section 33(1) of the Constitution of Nigeria provides that:

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<sup>36</sup> International Commission of Jurists, "Access to Justice: Human Rights Abuses Involving Corporations" (2013) Online: <http://business-humanrights.org/sites/default/files/media/documents/icj-report-access-to-justice-nigeria-22-feb-2012.pdf> at 7 [ICJ Access to Justice Paper].

<sup>37</sup> See Alan E. Boyle and Michael Anderson, *Human Rights Based Approaches to Environmental Protection* (Oxford/Clarendon Press, 1996), Ebeku on *Gbemre*, *supra* note 29.

<sup>38</sup> *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (NgHC 2005), Centre for Human Rights, University of Pretoria, online: <http://www1.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html> [*Gbemre*].

<sup>39</sup> See *Allar Irou v. Shell B.P.* Unreported Suit No. W/89/71 in the Warri High Court, where the Court in denying the application for injunction of the Plaintiff, cited "the interest of third persons...stoppage of a trade and the throwing out of work of a large number of work people...mineral oil is the main source of this country's revenue" as the reasons for its denial of the application. See also *Chinda v. Shell BP* [1974] 2 RSLR and *Ogiale v. Shell* [1997] 1 NWLR (pt 480) in Kaniye S. Ebeku, "Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria" (2003) 12:2 RECEIL 199.

“...every person has the right to life, and no one shall be deprived intentionally of his life, save in execution of a sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.”

After hearing arguments of counsel, the court decided that:

“...(2) The constitutionally guaranteed rights to life and dignity of human person inevitably includes the rights to a clean, poison-free, pollution-free, and healthy environment”<sup>40</sup>

The decision has been applauded by many rights groups for a number of reasons. Firstly, it represents the first time in which a Nigerian court would change the discourse regarding what was previously regarded as a non-justiciable right (given the failure of the constitution to recognize it as such) by linking the act of environmental pollution to fundamental human rights that *are* justiciable under the Nigerian constitution.<sup>41</sup> The procedure under which *Gbemre* was heard is also progressive and highly significant to the struggle for environmental protection. The case was heard using the Fundamental Human Rights Enforcement Procedure (FREPE) Rules, a special legal procedure intended to fast track hearing of cases which involved allegations of infringement of fundamental human rights (such as the right to life and dignity of human person). The implication of the court allowing such a claim to adopt the FREPE rules is indicative of the belief that an environmental pollution claim could in fact adversely affect the fundamental rights of the applicants.<sup>42</sup>

Significant as well to rights-based environmental protection claims is the *African Charter for Humans and Peoples Rights (African Charter)*<sup>43</sup> which has been domesticated in Nigeria as the *African Charter Act*.<sup>44</sup> After a lengthy court battle in the case of *Abacha v. Fawehinmi*,<sup>45</sup> the Nigerian Supreme Court settled not only that the *African Charter* was enforceable in Nigeria but that rights derived under the *African Charter* are justiciable. The significance of the *African Charter* to environmental protection is that Article 24 of the *African Charter* provides for the right

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<sup>40</sup> *Gbemre*, *supra* note 38.

<sup>41</sup> *Ebeku on Gbemre*, *supra* note 29 at 318.

<sup>42</sup> Rhuks Ako, *Environmental Justice in Developing countries: Perspectives from Africa and Asia-Pacific* (USA/Canada: Routledge, 2013) at 26 [Ako].

<sup>43</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [*African Charter*]

<sup>44</sup> *African Charter Act*, *supra* note 1.

<sup>45</sup> (2000) 6 NWLR 228 S.C.

to “a general satisfactory environment favorable to their development.” Although initially regarded as “vague and ambiguous”,<sup>46</sup> the African Commission’s finding in the SERAC case interpreted the provisions of article 24 of the *African Charter* to mean the right to a healthy environment and found Nigeria to be in violation of the provisions in 2001.<sup>47</sup> Significantly as well, the FREP Rules avails itself to persons enforcing their rights under the *Charter* (which includes the right to a healthy environment).

However, scholars such as Ako<sup>48</sup> have expressed some apprehension regarding the use of the *African Charter Act* to pursue rights-based claims to a healthy environment. He argues that the location of environmental protection within Chapter II of the constitution makes it non-justiciable under the constitution. Secondly, and not unrelated to the first reason, he argues that the *African Charter Act* is a legislative enactment and so “inferior”<sup>49</sup> to the Constitution and can be subjected to an amendment or repeal.<sup>50</sup>

Nevertheless, the decision in *Gbemre* is adjudged a laudable use of judicial reasoning by the Federal High Court, even though it remains to be seen whether that decision will become the legal norm surrounding oil litigation in Nigeria. Presently, an appeal of the judgment is pending before the Nigerian Court of Appeal and there are speculations that the hearing of the appeal is being frustrated given the huge impacts such a decision would have on oil mining in Nigeria.<sup>51</sup> Justifiably so, rights groups, academics and observers are beginning to express anxiety as to whether the celebration of the judgment in *Gbemre* is premature and such victory would be short lived if overturned at the superior court.<sup>52</sup>

The study of the events surrounding the appeal of *Gbemre* are significant to this chapter as they demonstrate that even when laudable pronouncements are made by the Courts, the judicial process

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<sup>46</sup> Morné van der Linde and Lirrete Louw, “Considering the interpretation and implementation of Article 24 of the African Charter on Human and Peoples’ Rights in light of the *SERAC* communication” (2003) 3 Afr. Hum. Rts. J. 167 at 174 [Linde and Louw].

<sup>47</sup> Linde and Louw *Ibid*, SERAC case *supra* note 7.

<sup>48</sup> Ako, *supra* note 42 at 25.

<sup>49</sup> *Ibid* at 25.

<sup>50</sup> *Ibid*, Ebeku on *Gbemre*, *supra* note 29 at 319.

<sup>51</sup> Ebeku on *Gbemre*, *supra* note 29 at 319.

<sup>52</sup> Some scholars express skepticism on the judgment being upheld on appeal based on inherent weaknesses of the judgment such as the failure to cite binding or even persuasive authorities in the judgment and failing to resolve evidentiary issues before making this judgment. For more details see Ebeku on *Gbemre supra* note 29 at 319.



in Nigeria can be employed to frustrate genuine claims for environmental protection. Part of the contention in this chapter is that the provision of a right to a healthy environment under the constitution provides constitutional protection to environmental protection claims, such claims are therefore less likely to be frustrated by existing judicial process as they assume the position of *settled law*. The interrogation in the chapter is therefore divided into two, the first (discussed above) addresses the failure of the Nigerian constitution to protect its citizens from environmental pollution and the second investigates the roles that courts can play in protecting these citizens in the face of such constitutional failure.

## 2.5. Access to Justice for Local Communities

Several challenges bedevil local communities in their struggle to access justice as a result of environmental pollution. They relate to problems regarding systemic failure of the judicial process and independence of the judiciary. Access to justice is a major component of the rule of law. If aggrieved parties are left without redress, it can be argued that the rule of law has failed in such regard.<sup>53</sup> Other indicators of a state adherence to the rule of law are seen in the state's record of regulatory enforcement, the independence of its judiciary and availability of access to affordable and effectively enforced justice.<sup>54</sup>

For the Nigerian state, access to justice remains a great hurdle for local communities to overcome as a result of what is described by one scholar as “judicial obstacles”.<sup>55</sup> Access to justice in Nigeria is impeded by a lack of resources on the part of local communities to litigate often expensive and lengthy trials at the courts. Procedural and technical restrictions regarding jurisdiction and rules of court often frustrate the judicial process further rendering environmental justice inaccessible to local communities.<sup>56</sup>

### 2.5.1. Barriers to Access to Justice

#### 2.5.1.1. Resources

The United Nations Development Programme (UNDP) Human Development Report of 2014 ranked Nigeria as very low on its quality of life index, evidencing widespread poverty in the

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<sup>53</sup> Svend-Erik Skaaning, “Measuring the Rule of Law” (2010) 63 *Political Research Quarterly* 449-460.

<sup>54</sup> *Ibid.*

<sup>55</sup> Ekhaton, *supra* note 34 at 63.

<sup>56</sup> ICJ Access to Justice Paper, *supra* note 36.

country despite its oil wealth.<sup>57</sup> In reference to access to justice, resources play a highly significant role as litigation is often a lengthy and costly exercise. Retaining counsel as well as payment of court fees are expensive ventures especially in the face of other income-generating activities which might be lost in the pursuit of litigation.<sup>58</sup> Local communities, often concerned with what one scholar describes as “concerns of the belly,”<sup>59</sup> are not eager to undertake lengthy and expensive processes that might further impoverish them.

Scholars criticize the lack of a robust legal aid scheme in Nigeria which can potentially mitigate the constraints regarding access to resources of local communities. The existing legal aid scheme in Nigeria ironically faces challenges regarding resources itself as a result of severe underfunding by the government which results in its ineffectiveness.<sup>60</sup> The scheme has been unable to create offices within rural areas which would have alleviated the problem of lack of access to the scheme within local communities.<sup>61</sup>

#### 2.5.1.2. Procedural Restrictions: Jurisdiction

A number of procedural restrictions impede the Nigerian justice system and local communities in the Niger Delta are often victims of these procedural impediments. The first challenge relates to jurisdiction. Jurisdiction is considered to be central to any proceedings and determines the competency of a court to adjudicate any matter before it. An excerpt of the Nigerian Court of Appeal decision in *Ononye v. Odita*<sup>62</sup> demonstrates the import of jurisdiction:

"That the issue of jurisdiction is fundamental is a matter of trite law and where jurisdiction of a court is challenged, that issue must immediately be determined by the court before it embarks on any trial or determination of the action before it. Unless a court is cloaked with

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<sup>57</sup> The Human Development Index is used to measure the quality of life of citizens and is a summary measure for assessing long-term progress in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living. Nigeria's HDI value for 2014 is 0.514— which put the country in the low human development category— positioning it at 152 out of 188 countries and territories. See United Nations Development Programme, Human Development Index 2015 online: [http://hdr.undp.org/sites/all/themes/hdr\\_theme/country-notes/NGA.pdf](http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/NGA.pdf)

<sup>58</sup> ICJ Access to Justice Paper, *supra* note 36 at 44.

<sup>59</sup> L. Amede Obiora, “Symbolic Episodes in the Quest for Environmental Justice” (1999) 21 Human Rights Quarterly 464 at 472 [Obiora].

<sup>60</sup> ICJ Access to Justice Paper, *supra* note 36.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ononye v. Odita* (2008) 10 NWLR (Pt.1096) at page 492, paras G-H.

jurisdiction, its proceedings are rendered a complete nullity, no matter how well the case was determined.”<sup>63</sup>

Jurisdiction is derived from the Nigeria Constitution which allocates specific jurisdiction to specific courts. The National Assembly may by legislation provide additional jurisdiction to the courts.<sup>64</sup> The Courts also have power to develop rules of court that will aid interpretation of laws and procedure for the process of litigation.<sup>65</sup>

In specific reference to environmental protection cases, it is important to point out that jurisdiction affects local communities seeking justice through tort law differently than litigants with rights claims. Litigants seeking the protection from environmental pollution as a human right have availed themselves the mechanism of the FREP Rules that provides wider protection as suits can be filed both before the State High Court and Federal courts.<sup>66</sup> However even though the FREP Rules provide commendable protection, the debate regarding the justiciability of socio-economic rights in Nigeria might impede judges from applying the FREP to environmental protection cases. The advantages of engaging the FREP Rules in matters relating to jurisdiction is that to a large extent, they mitigate the challenges relating to the doctrine of *forum non conveniens* which essentially restricts litigants to specific courts in order to ventilate their claims. Because the doctrine is tied to the court’s jurisdiction to hear the matter, it is often invoked by defendants to frustrate judicial process and plaintiffs suing under torts law.

The doctrine of *forum non conveniens* is a common law doctrine which is applicable in Nigeria.<sup>67</sup> It provides that courts may refuse to assume jurisdiction in a case where there is a more appropriate forum to try the case available to the parties.<sup>68</sup> Although federal and state high courts in Nigeria

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<sup>63</sup> See also *Madukolu v. Nkemdilim* (1962) 1 All NLR 587; *Anya v. Iyayi* (1993) 7 NWLR (Pt.305) p.290; *Iwuagolu v. Azuka* (2007) 5 NWLR (Pt.1028) P. 628; *Governor of Gongola State v. Tukur* (1989) 4 NWLR (Pt.117) P. 592; *Okoya v. Santilli* (1990) 2 NWLR (Pt.131) p.172.

<sup>64</sup> See Sections 232-233, 239-240, 251 and 272 of the Nigerian constitution, conferring original and appellate jurisdiction on the Supreme Court, the Court of Appeal and the Federal High Court.

<sup>66</sup> Oder II, Rule 1, Fundamental Rights Enforcement Procedure Rules 2009 and Section 46(1) of the Nigerian Constitution

<sup>67</sup> Section 32 of Nigeria’s *Interpretation Act, CAP 192 LFN 1990* provides for the application of the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900 to be in force in Nigeria.

<sup>68</sup> See Kathryn Lee Boyd, “The Inconvenience of Victims: Abolishing Forum Nonconveniensi in U.S. Human Rights Litigation” (1998-1999) 39 Va. J. Int’l L. 41.

have concurrent jurisdiction in matters relating to human rights abuses,<sup>69</sup> the same cannot be said for environmental protection matters which are brought pursuant to tort law. The Nigerian Constitution vests jurisdiction over matters relating to mines and mining within the exclusive jurisdiction of the Federal High Court.<sup>70</sup> This situation presents a hindrance to local communities who may not have Federal High Courts and cannot avail themselves the use of State High Courts which are more readily available and perhaps accessible. It is argued that the doctrine of *forum non conveniens* mainly favours the defendant as the plaintiffs are prevented from instituting actions in courts of competent jurisdiction which might be closer in proximity to the plaintiffs and may be more favourable to their claims.<sup>71</sup>

The argument in this chapter however is that although the FREP rules provide a wider protection to victims of oil pollution, the failure of the constitution to provide a constitutional right to a healthy environment and the fact that *Gbemre* is still unsettled law (given its appeal), restricts the amount of protection that FREP Rules can avail victims of oil pollution. In other words, some litigants might be forced to sue under torts law, in which case the constitutional requirement that only Federal High Courts have jurisdiction to hear matters relating to mining and oil will impede the litigant's access to justice. Ultimately, it impedes the access to justice of local communities who decide to sue under tort law as they are restricted to federal high courts which are often not within close proximity of the communities.

#### 2.5.1.3. Inordinate Delays

Inordinate delay in the Nigerian judicial process is a factor that has frustrated many litigants seeking to enforce claims. While some scholars identify factors such as lack of infrastructure in courts such as stenographers, transcribers, recorders which forces judges to write in longhand as hindering the speedy resolution of judicial proceedings,<sup>72</sup> other scholars identify delay tactics

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<sup>69</sup> Section 46(1) of the Nigerian Constitution.

<sup>70</sup> Section 251 (1)(n) of the 1999 Constitution of the Federal Republic of Nigeria provides: "Notwithstanding anything to the contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and **exercise jurisdiction to the exclusion of any other court in civil causes** and matters....mines and minerals (including oil fields, oil mining, geological surveys and natural gas);" [emphasis added] in the case of *Shell Development Petroleum Company v. Isaiah* (2001) 11 NWLR (pt 732) 168, the Nigerian Supreme Court decided that the state high court lacked jurisdiction to hear oil related claims pursuant to Section 251 (1) (n).

<sup>71</sup> ICJ Access to Justice Paper, *supra* note 36 at 48.

<sup>72</sup> Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes*, (Toronto: University of Toronto Press, 2009) page 76-77 [Oshionebo].

employed by lawyers in a bid to frustrate the plaintiffs and force a settlement.<sup>73</sup> These tactics include late filing of process, unreasonable adjournments, frivolous challenges to the jurisdiction of the court which forces proceedings to stall until such issues are resolved and frivolous appeals to higher courts.<sup>74</sup> The reasons for inordinate delay in hearing and deciding cases in Nigeria is perhaps a combination of lack of infrastructure in court and antics by lawyers, ensuring that claims for justice are frustrated by a long, expensive and torturous process. While this is not exclusive to environmental protection claims, it serves as a further hindrance to achieving justice through the courts especially in the face of failures of constitutional and legislative provisions to provide protection for victims.

#### *2.5.1.4. Enforcement of Judgements*

Related to the reasons behind inordinate delays in adjudicating matters in courts, is the problem of enforcing judgments given in favour of plaintiffs. While there is no evidence of flagrant disobedience to court orders by TNCs,<sup>75</sup> defence lawyers are in the habit of adopting tactics aimed at frustrating the process of enforcement. An example is seen in the *Gbemre Case* where the judge declared gas flaring in the relevant community as unconstitutional and ordered the defendants to immediately desist from further flaring.<sup>76</sup> The court further directed the Nigerian government to:

“...immediately set into motion, after due consultation with the Federal Executive Council, necessary processes for the Enactment of a Bill for an Act of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Re-Injection Act and the Regulations made there under to quickly bring them in line with the provisions of chapter 4 of the Constitution, especially in view of the fact that the Associated Gas Re-Injection Act even by itself also makes the said continuous gas flaring a crime having prescribed penalties in respect thereof.”<sup>77</sup>

After the judgment, the defendants immediately filed an appeal against the decision and brought a motion to stay the execution of the judgment, they then served copies of the motion on the plaintiffs

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<sup>73</sup> ICJ Access to Justice Paper, *supra* note 34 at 54-60.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid* at 57.

<sup>76</sup> *Gbemre*, *supra* note 38.

<sup>77</sup> *Gbemre*, *supra* note 38 at paras 2 (6).

and the Sheriff's office (responsible for executing judgments against the defendants).<sup>78</sup> The filing and service of such applications creates a legal obligation on parties to maintain status quo pending the determination of such applications, often translating into the perpetuation of the status quo in the plaintiff community.<sup>79</sup> The Nigerian government, perhaps as a result of the defendant's appeal, has made no attempt to comply with the order of the court. In fact, in December 2006, about a month after the *Gbemre* decision was delivered, contempt of court proceedings were initiated against Shell (the relevant TNC) and the NNPC, for failure to comply with the decision of the court.<sup>80</sup> Shell claimed it was not in contempt of court as it has several appeals pending against the decision.

#### 2.5.1.5. Interference with Judicial Process

State interference with judicial process is often speculated in environmental protection claims arising from oil pollution. Given the heavy stake the government of Nigeria has in oil exploration and the Joint Venture Agreements (JVAs) it operates with TNCs,<sup>81</sup> it is often difficult to discern which party to hold responsible in the environmental pollution cases. Although the Nigerian NNPC that operates JVAs with TNCs is not usually an "operator"<sup>82</sup> and therefore does not participate directly in oil exploration, it does however participate in profit sharing and other ancillary matters as a major equity holder under the JVA.<sup>83</sup> In the past, the government has often taken the side of TNCs when faced with opposition from local communities,<sup>84</sup> it is perhaps not so far-fetched to speculate state interference in judicial decisions regarding oil suits.<sup>85</sup> For example, in the *Gbemre* Case, after the judge gave such a laudable and resounding judgment, he subsequently granted the

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<sup>78</sup> ICJ Access to Justice Paper, *supra* note 34 at 58-59.

<sup>79</sup> *Ibid.*

<sup>80</sup> "Gas Flaring Lawsuit (re oil companies in Nigeria)", Business and Human Rights Resources Centre, online: <https://business-humanrights.org/en/gas-flaring-lawsuit-re-oil-companies-in-nigeria>

<sup>81</sup> The Nigerian government through its state-owned agency, the Nigerian National Petroleum Corporation (NNPC), executes joint venture agreements with TNCs for the exploration of oil making it a party to resultant effects of exploration. See NNPC Joint Venture Agreements online:

<http://www.nnpcgroup.com/nnpcbusiness/upstreamventures.aspx> [NNPC JVAs]

<sup>82</sup> TNCs are usually termed operators as they participate in the oil extraction activities "The operator is the one to prepare proposals for programme of work and budget of expenditure joint on an annual basis, which shall be shared on shareholding basis." See NNPC JVAs *supra* note 80.

<sup>83</sup> The NNPC holds majority shares in all JVAs with TNCs. See NNPC JVAs, *supra* note 80.

<sup>84</sup> See Yusuf, *supra* note 8 at 85.

<sup>85</sup> Following the *Gbemre* decision, Civil Society Organizations speculated that the judge was transferred out of that jurisdiction as a result of his involvement with the *Gbemre* case. See Peter Rodrick, Climate Justice Programme, "Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again", Press Release, 2 May 2007 online: [https://www.foe.co.uk/resource/press\\_releases/shell\\_fails\\_to\\_obey\\_gas\\_fl\\_02052007](https://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007)

application for stay of execution in favour of the defendants. Perhaps this is not strange as it can be argued that cogent reasons may have existed for the grant of such application. However, after the expiration of the application, the judge was suddenly transferred to another court in the northern part of the country and the file went mysteriously “missing”. Peter Roderick, the co-Director of Climate Justice Programme, a Non-Governmental Organization in Nigeria (NGO) remarked:

“Many disturbing aspects have emerged during the process of the Iwherekan case [Gbemre]. First, Shell’s lawyers pull out as many delaying tactics as possible in court, even trying to get the judge kicked out of the case before it has barely started. Shell then fails to comply with the court order to stop flaring. And now, after the judge has extended the period of time for Shell to stop flaring, they ignore the order again and don’t even turn up to court... To add to this, the fact that the judge has been removed from the case, transferred to the north of the country, and there have been problems with the court file for a second time, suggests a degree of interference in the judicial system which is unacceptable in a purported democracy acting under the rule of law.”<sup>86</sup>

TNCs in environmental pollution cases are often sued alongside the NNPC, the state oil company.<sup>87</sup> This can create a situation where the state perceives any confrontation against the TNCs by way of litigation as threat against the state as well. Scholars such as Ebeku also note that judicial decisions in environmental protection cases are decided with regards to economic benefits of the country as opposed to environmental protection concerns.<sup>88</sup> This informs legal reasoning that puts concerns regarding the “source” of state revenue over those of victims of environmental pollution.<sup>89</sup> Ebeku writes that the pro-economic attitude of judges has often deterred the success of environmental protection claims.<sup>90</sup> Buttressing his point, he notes that the former Chief Justice of Nigeria, Justice Mohammed Lawal Uwais, observed that:

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<sup>86</sup> Climate Justice Programme, “Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again”, Press Release, 2 May 2007 online: [https://www.foe.co.uk/resource/press\\_releases/shell\\_fails\\_to\\_obey\\_gas\\_fl\\_02052007](https://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007)

<sup>87</sup> See Gbemre, *supra* note 38.

<sup>88</sup> See Ebeku on Gbemre, *supra* 29 note at 316.

<sup>89</sup> See *Allar Irou v. Shell B.P Development Nigeria*, *supra* note 39.

<sup>90</sup> Ebeku on Gbemre, *supra* note 29 at 316.

“The greatest deterrent to prosecution of [oil-related] environmental damage in Nigeria today is skepticism with which prosecutors are likely to approach the courts having regard to what is known as judicial posture.”<sup>91</sup>

Although the allegations surrounding state interference with judicial process are unsubstantiated, speculations surrounding such dampen the credibility of the process, and in addition to the other factors that plague the judicial process, impede environmental justice. Evidently there is a need for the judicial process in Nigeria to be reformed if it is to be employed to achieve justice for victims of environmental pollution.

As discussed earlier in the chapter, this author is of the view that constitutional reform to recognize the right to a healthy environment best serves the argument for environmental justice and better regulation of TNCs. However, the concerns identified in this subsection reveal a significant concern that hampers environmental justice in addition to the constitutional failure to recognize a right to a healthy environment. The chapter therefore suggests a reforms to the judicial process which will mitigate this constitutional failure and advance environmental justice. However, it is important to highlight the role of the National Human Rights Commission, as a non-judicial means of ventilating concerns regarding environmental protection before exploring the recommendations for reforming the judicial process.

## 2.5.2. Non-judicial Means of Accessing Justice

### 2.5.2.1. *The National Human Rights Commission*

The Nigerian National Human Rights Commission (the Commission) was established pursuant to the United Nations resolution enjoining states to create institutions for the protection and promotion of human rights.<sup>92</sup> The enabling Act of the Commission was amended in 2010 to expand the mandate of the Commission to include conducting of investigations and enquiries into allegations of human rights abuse in a manner it considers necessary and instituting civil actions on behalf of victims, making determinations as to damages or compensation payable.<sup>93</sup> Most significantly, it has the power to summon any public body, agency or corporate body to appear

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<sup>91</sup> M. L. Uwais, “Recent Development in Nigeria Strengthening Legal and Institutional Framework”, Paper presented at the Global Judges Symposium in Johannesburg, South Africa, cited in Ebeku on Gbemre, *supra* note 29 at 316.

<sup>92</sup> National Human Rights Commission website, online: <http://www.nigeriarights.gov.ng/Commission.php>

<sup>93</sup> Section 6(1) of the National Human Rights Commission (Amendment Act), 2010 [HRA].



before it for the purposes of conducting a public enquiry into the allegations of human rights violations.<sup>94</sup>

Most relevant to this thesis however is the potential for the Commission to make positive advancements for environmental protection rights. The Commission is empowered by its Act to promote rights guaranteed not just by the Nigerian Constitution and the *African Charter*<sup>95</sup> but also the United Nations Charter,<sup>96</sup> the Universal Declaration of Human Rights,<sup>97</sup> the International Convention on Economic, Social and Cultural Rights (CESCR)<sup>98</sup> and all international and regional instruments which Nigeria is a party to.<sup>99</sup> Under the Commission's enabling Act, the requirement for a right to be protected by the Commission is that Nigeria sign and ratify the relevant instrument.<sup>100</sup> The Commission can also receive complaints not only by the victims themselves but from persons acting on the victim's behalf and members of an interest group or class of persons.<sup>101</sup> The expanded mandate of the Commission holds great potential for local communities in the Niger Delta as it is less expensive and has power to make orders for compensation and initiate legal proceedings against perpetrators of environmental pollution.

Perhaps the biggest challenge that faces the Human Rights Commission in relation to fulfilling its mandate and ensuring rights protection is funding.<sup>102</sup> Funding constraints, which cut across a number of public agencies in Nigeria, affects the ability of a number of these agencies to procure manpower, build offices and build staff capacity necessary for the discharge of their mandate.<sup>103</sup> In the case of the Human Rights Commission, it maintains only six offices in a country with 36 states.<sup>104</sup> It has only one office in the South-South region of the country where the Niger Delta is located and given the wide geographical area and the remoteness of a number of these local

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<sup>94</sup> *Ibid* at Section 6(2) of HRA.

<sup>95</sup> *African Charter*, *supra* note 43.

<sup>96</sup> Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

<sup>97</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>98</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>99</sup> Preamble and Section 5 of HRA, *supra* note 92.

<sup>100</sup> *Ibid*.

<sup>101</sup> ICJ Access to Justice Paper, *supra* note 36 at 43.

<sup>102</sup> *Ibid* at 60-61.

<sup>103</sup> For detailed discussion regarding financial constraints of the National Human Rights Commission, See Obi Chinedu Okafor and Shedrach C. Agbakwa, "On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context" (2002) 24 Human Rights Quarterly 662 at 714.

<sup>104</sup> *Ibid*.

communities, the possibility of one office sufficiently providing for the whole area is impracticable.

In summary, environmental protection claims in Nigeria both through judicial and non-judicial means suffer a number of shortcomings, as identified in this chapter. To overcome these challenges however, the Nigerian state must be *able* and *willing* to undertake recommended reforms.

### 2.5.3. Recommendations for Reforms to Increase Access to Justice

Firstly, funding plays an important role in addressing a number of concerns expressed in this thesis. Funding of agencies responsible for non-judicial means of responding to environmental pollution as well as providing legal aid would enable these agencies develop their capacity, expand their reach to include rural areas and also educate the local communities of the obligations owed to them. The potential result of such enhanced funding will also reduce tensions and apprehension usually borne against government by local communities.

Increased funding of the judicial process will also address some concerns, particularly regarding the provision of resources through a legal aid scheme to local communities, expanding the reach of the legal aid scheme and address, to an extent, the challenge of inordinate delay in proceedings by providing the courts with infrastructure. This will however require a significant financial commitment from the government and as pointed out earlier, there must be ability and willingness on the part of the government to invest. Given that the Nigerian state earns a considerable amount of money from export of these natural resources which pollute the environment, there is little doubt regarding its ability to provide sufficient funding to these quarters.

Secondly, as noted earlier, there is a need to amend the Nigerian Constitution. Section II of the Constitution which hinders justiciability of environmental protection claims should be amended to include a right to a healthy environment, not just declarations of what the state should aspire to. Constitutional amendments to include the State High Courts' ability to exercise jurisdiction over oil related claims would also serve litigants who are often constrained by the constitutional provision which restricts litigation of oil related claims to the Federal High Court. Such expansion will not only unburden the Federal High Court but will also increase access to justice as state high courts are often in closer proximity to local communities.

Most significantly, constitutional amendment which serves to incorporate international human rights treaties which have been ratified by Nigeria directly into the Nigerian constitution will further serve environmental protection. Such incorporation would make international treaties immediately enforceable in Nigeria thereby eliminating any reservations that courts might have in enforcing rights guaranteed by international instruments which have been ratified by Nigeria but not domesticated. This provision will eliminate obstacles relating to awaiting domestication of treaties by the legislative arm and any reservations which judges might have regarding enforcing treaties not yet domesticated in Nigerian law. This is especially significant to the struggle for justiciability of socio-economic rights, given that Nigerian courts have consistently held that provisions of Chapter II of the Nigerian constitution are non-justiciable.<sup>105</sup>

Having identified the challenges to successfully litigating claims relating to oil pollution in Nigeria, the need for reform and the reasons why this author expresses skepticism regarding the Nigerian's government's willingness to undertake reforms, this chapter argues that international human rights mechanisms hold great promise for the realization of environmental protection in Nigeria. These international mechanisms are often broader and address a number of concerns that plague environmental protection as a right in Nigeria. The chapter's thesis therefore is that in the absence of constitutional or judicial reform, the ECOWAS Court has the potential to mitigate some of the challenges relating to environmental justice in Nigeria.

The next subsection will address international human rights mechanisms and discuss the potential of litigating such claims at before a regional human rights court such as the Economic Community of West African States (ECOWAS) Court. The promise of the ECOWAS Court lies in its mandate as simply a human rights court, it is not limited by concerns regarding justiciability of a right or the lack of such and it has power to bind the Nigerian state to its decisions by virtue of its protocol.<sup>106</sup> This promise will be discussed in further detail in the next subsection.

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<sup>105</sup> Ekhaton, *supra* note 34 at 71.

<sup>106</sup> Protocol on the Community Court of Justice, 19 *Official Journal of the Economic Community of West African States* (July 1991) and the ECOWAS Court Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Protocol.

## 2.6. Regional Human Rights Protection Mechanisms: Promise for Environmental Protection in the Niger Delta

“The Social and Economic Rights Action Center (SERAC) and the Centre for Economic and Social Rights (CESR) communication against Nigeria before the African Commission on Human and Peoples’ Rights (African Commission or Commission) reiterates the fact that inadequate protection of human rights at the domestic level necessitates the existence of human rights mechanisms at an international level”<sup>107</sup>

This subsection discusses specific human rights owed to Niger Delta people of Nigeria in the context of oil and gas under international human rights instruments. It identifies that although the right to a healthy environment is generally considered a socio-economic right, its established link to civil and political rights such as the right to life creates an even more serious obligation on states and international human rights institutions to offer protection to victims. The subsection undertakes a brief analysis of some rights that can protect victims of environmental pollution. Having identified the challenges to enforcing the right to a healthy environment in Nigeria as a right, the thesis makes a case for the use of regional human right enforcement mechanisms. It advances the use of the ECOWAS Court to enforce rights guaranteed under international instruments in an attempt to provide much needed support to the struggle for environmental protection in the Niger Delta.

### 2.6.1. Rights under International Human Rights Instruments

International human rights instruments such as the Stockholm Declaration of the United Nations Conference on the Human Environment 1972<sup>108</sup> recognize the relationship between human rights and the environment. Principle 1 of the Declaration states that there is “a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”.<sup>109</sup> The Stockholm Declaration however has no binding power on states;

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<sup>107</sup> Linde and Louw, *supra* note 46 at 168.

<sup>108</sup> U.N. Doc. A/CONF/48/14/REV.1 (1972)

<sup>109</sup> Report of the Office of the United Nations High Commissioner for Human: Rights on the relationship between climate change and human rights, UN Doc. A/HRC/10/61 (15 Jan. 2009) [UN Climate Change Report].

it is viewed as an aspirational document which international human rights mechanisms cannot strictly enforce.<sup>110</sup>

There are a number of instruments on an international level that provide opportunities for filing communications in cases of torture, arbitrary detention, racial discrimination, discrimination against women and violations of freedom of speech and religion,<sup>111</sup> generally considered civil and political rights. However, national and international levels of government have often viewed economic, social and cultural rights, which provide for healthy environments, “with caution, skepticism or triviality”.<sup>112</sup> It seemed that while the world would be outraged by certain breaches of civil and political rights, there was a hesitance to express the same amount of outrage for economic, social and cultural rights.<sup>113</sup> The African Commission in deciding the SERAC Case<sup>114</sup> against Nigeria, upheld the argument that socio-economic rights were no less important than civil and political rights. It held that:

“Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights, both civil and political rights and social and economic, generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here [in deciding the case] is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.”<sup>115</sup>

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<sup>110</sup> In 1996 however, a majority of the International Court of Justice declared that the Stockholm Declaration “is now part of the corpus of international law relating to the environment”, further illustrating that the principles of the Declaration had attained the status of international norms. See Dinah Shelton, “Stockholm Declaration (1972) and Rio Declaration (1992)”, Max Planck Encyclopedia of Public International Law [MPEPIL] at para. 22 online: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1608>>.

<sup>111</sup> Catarina de Albuquerque “Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights” (2010) 32 Human Rights Quarterly 144 at 145.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid* at 145 -146.

<sup>114</sup> SERAC Case, *supra* note 7.

<sup>115</sup> *Ibid* at paragraph 44.

The contention of this thesis is that environmental protection, reflected in the right to a healthy environment is a *hybrid* right. While it is often viewed as a socio-economic right, it has certain elements (such as the ability to violate a person's life and quality of life) that make it qualify as a civil and political right.<sup>116</sup> This position reflects one of the perspectives of the position of the right to a healthy environment in scholarly discourse. Boyle postulates that environmental protection is tied to civil and political rights and one cannot be divorced from the other.<sup>117</sup> Evidently, the right to healthy environment has elements of both socio-economic and civil and political rights. Focusing specifically on international human rights instruments we identify a few rights, in addition to the right to a healthy environment, significant to the achievement of environmental justice in the Niger Delta.

#### 2.6.1.1. The Right to Life

This right is guaranteed under a number of international human rights instruments. It is also guaranteed by the Nigerian Constitution. Specifically, article 6 of the International Covenant for Civil and Political Rights (ICCPR),<sup>118</sup> article 3 of the Universal Declaration of Human Rights (UDHR)<sup>119</sup> and article 6 of the Convention on the Rights of the Child (CRC)<sup>120</sup> all guarantee the right to life on an international plane.<sup>121</sup> Most significant to this thesis, are the comments of the United Nations Human Rights Committee on the right to life guaranteed under the ICCPR. They clarify that the right to life imposed by article 6, imposes an obligation on states to “take positive measures for its [right to life] protection”.<sup>122</sup> Evidently, states' failure to take positive measures to protect the right to right to life would amount to a failure to fulfill the obligations under the ICCPR and a violation of article 6 of the ICCPR. It can be argued that a failure of the Nigerian state to effectively regulate oil exploration which results in spills and threatens that right to life is a failure to take positive measures to protect and promote the right to life.<sup>123</sup>

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<sup>116</sup> A detailed discussion of this perspective is seen in Obiora, *supra* note 59.

<sup>117</sup> See Alan E. Boyle, “The Role of International Human Rights Law in the Protection of the Environment”, in *Human Rights Approaches to Environmental Protection* (Oxford/Clarendon Press, 1996) at 48.

<sup>118</sup> Adopted 16 December 1966, (entered into force 23 March 1976) 999 UNTS 171.

<sup>119</sup> UDHR, *supra* note 96.

<sup>120</sup> U.N. Doc. A/RES/44/25, 1989 (ratified by Nigeria, Apr. 1991)

<sup>121</sup> UN Climate Change Report, *supra* note 109. All three international instruments have been ratified by Nigeria.

<sup>122</sup> Human Rights Committee, general comments No. 6 (1982) on art. 6 (Right to life), para 1, and No. 14 (1984) on art. 6, para. 1 in UN Climate Change Report, *supra* note 109.

<sup>123</sup> The African Commission in the *SERAC Case*, upheld such argument and found Nigeria to be a violation of Article 4 of the *African Charter* relating to the right to life, see *SERAC Case*, *supra* note 7.

### 2.6.1.2. The Right to Health

While Article 16 (1) and (2) of the *African Charter* provide for a right to a healthy environment, other international instruments provide for the right to the highest attainable standard of health. Articles 7(b), 10 and 12 of the CDESCR, Article 25 of the UDHR, Article 24 of the CRC among other international instruments, enjoin states to provide “services and conditions which enable a person to live a healthy life”. The UN Committee on Economic, Social and Cultural Rights, responsible for monitoring the implementation of the CDESCR notes that: “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as...a healthy environment.”<sup>124</sup>

Evidently, constant environmental pollution that poisons the air, water and waterways, not only violates the right to a healthy environment, it also threatens the right to the highest attainable standard of health.<sup>125</sup>

### 2.6.1.3. Right to Water and Food

*If you want to go fishing, you have to paddle for four hours through several rivers before you can get to where you catch fish and the spill is lesser...some of the fishes we catch, when you open the stomach, it smells of crude oil.*<sup>126</sup>

#### *Local Fisherman in the Niger Delta*

The right to safe drinking water and the right to adequate food and being free from hunger are guaranteed in articles 11 and 12 of the CDESCR. The right to adequate food provides for “the fundamental right of everyone to be free from hunger”. Elements of the right include the possibility of feeding one’s self from the natural resources accessible to the individual. In the case of the Niger Delta, environmental pollution often damages farm lands, destroying crops in the ground and affecting the productivity of the soil.<sup>127</sup> Other impacts of oil pollution on the right to food include

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<sup>124</sup> CDESCR, General Comment No. 14 (2000) on the right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Rights, E/C.12/2000/4), para 4.

<sup>125</sup> The African Commission in the *SERAC Case* found the Nigerian government to be in violation of Article 16 of the *African Charter*. See *SERAC Case*, *supra* note 7 at paragraph 50. See also Amnesty Report, *supra* note 3 at 35.

<sup>126</sup> Interview with local fisherman reported in CEHRD’s, Report On the State of Human Rights Abuses and Violence in the Niger Delta Region of Nigeria, 2008, Online: [http://www.cehrd.org/files/Human\\_Rights\\_Report\\_2008.pdf](http://www.cehrd.org/files/Human_Rights_Report_2008.pdf) at p157.

<sup>127</sup> Amnesty Report, *supra* note 3 at 30-33.

damage to fisheries and creeks, killing or poisoning aquatic life local communities depend on for food.<sup>128</sup>

The right to water guarantees the right of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses, such as drinking, food preparation and personal and household hygiene.<sup>129</sup> The authors of the UNEP Report, had taken samples from 28 wells at 10 communities adjacent to contaminated sites in the Niger Delta and had found high levels of hydrocarbon contamination.<sup>130</sup> In some seven wells, the hydrocarbon levels in the samples were at least 1,000 times higher than the Nigerian drinking water standard of 3 ug/l.<sup>131</sup> Local communities were said to be aware of the level of contamination but continued to use the water for drinking, cooking and other domestic use because they had no alternative.<sup>132</sup>

Evidently the circumstances demonstrate another failure on the part of the Nigerian state to meet its obligations under the CESCRC. A situation where oil pollution threatens and impedes the right to life, health and a healthy environment, food and water of residents of local communities, clearly violates international obligations. The African Commission upheld such arguments in its decision in the SERAC Case. Finding the Nigerian government to be in violation of the right to food, it held:

“The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves.”<sup>133</sup>

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<sup>128</sup> *Ibid* at 14- 19.

<sup>129</sup> UN Climate Change Report, *supra* note 109.

<sup>130</sup> UNEP Report on Ogoniland, *supra* note 19 at 12.

<sup>131</sup> *Ibid*.

<sup>132</sup> *Ibid* at 11.

<sup>133</sup> SERAC Case, *supra* note 7 at paragraph 65.



Given that the situation has persisted without much change, and the significance of reforming the system to achieve environmental justice, the thesis proposes the use of the ECOWAS regional human rights enforcement mechanism to pursue the enforcement of these rights.

#### 2.6.2. The ECOWAS Court of Justice

As seen in the previous chapter, the ECOWAS is a regional community comprising 15 West African states including Nigeria. It was established in 1975 under the ECOWAS Treaty to garner regional and economic integration in member states.<sup>134</sup> The ECOWAS Court as an organ within the organization, was initially created under the Treaty to "ensure the observance of law and justice in the interpretation of the provisions of [the 1975] Treaty" and to "settle such disputes as may be referred to it" by the member states.<sup>135</sup> The growth and development of the ECOWAS Court however saw its jurisdiction growing to reach protection and promotion of human rights within member states of the ECOWAS region. The significance of the ECOWAS Court to this thesis lies in the applicability of its decisions to Nigeria and its "indeterminate human rights jurisdiction".<sup>136</sup>

While other courts may be restricted by a particular body of law which they serve to interpret and apply, the ECOWAS Court has no such body of law or charter and is at liberty to interpret and apply any number of international human rights instruments which member states have ratified.<sup>137</sup> Some have criticized this indeterminate human rights jurisdiction, insisting that rights guaranteed by international instruments might overreach especially in the rapidly evolving international scene.<sup>138</sup> Others however have charged the Court with being at risk of interpreting instruments that are directory and not legally binding on states.<sup>139</sup>

The Court however responds to this criticism by describing its indeterminate jurisdiction as an "opportunity to define and delimit the scope and legal parameters of its human rights mandate in its own image."<sup>140</sup> The Court has often underscored the primacy of the *African Charter*, noting the

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<sup>134</sup> Ekhaton, *supra* note 34 at 72.

<sup>135</sup> Articles 11 and 56 of Treaty of the Economic Community of West African States, May 28, 1975, 1010 UNTS 17, 14 ILM 1200.

<sup>136</sup> Karen J. Alter, Lawrence R. Hefler and Jacqueline R. McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013) 107 Am. J. Int'l L. 737 at 755 [Alter, Hefler and McAllister]

<sup>137</sup> See the ECOWAS Court Supplementary Protocol, *supra* note 106.

<sup>138</sup> Alter, Hefler and McAllister, *supra* note 136 at 755.

<sup>139</sup> *Ibid.*

<sup>140</sup> Tony Anene-Maidoh, "The Mandate of a Regional Court: Experiences from ECOWAS Court of Justice", paper

explicit reference to the *African Charter* in the Revised ECOWAS Treaty, and the significance of all ECOWAS states being parties to the Charter.<sup>141</sup> Significant to the thesis also is that ECOWAS judges have often applied the UDHR and UN human rights conventions that member states have ratified,<sup>142</sup> including the ICCPR, the ICESR, and the UN Convention Against Torture.<sup>143</sup>

The Court also consults and considers a wide range of sources when interpreting human rights norms, drawing inspiration from the 1991 Protocol's directive to "apply as necessary, the body of laws as contained in Article 38 of the Statute of the International Court of Justice."<sup>144</sup> The Statute of the International Court of Justice specifies that treaties, customs and general principles of law, as well as national judicial decisions and the teachings of highly qualified publicists, are all sources of international law.<sup>145</sup> The ECOWAS Court relies on this provision to interpret cases brought before it. Another significance of the ECOWAS Court is that there is no requirement for domestic remedies to be exhausted at a national level before approaching the court and private and individual litigants are free to approach the Court.<sup>146</sup>

Also on the subject of the Court's jurisdiction, the Revised ECOWAS Treaty of 1993 and the Protocol establishing the Court originally designed the Court as an inter-state court. The Court was to hear and decide matters between ECOWAS member states, its institutions and offer advisory opinions to the member states.<sup>147</sup> Subsequently however, the protocol of the Court was amended so that individual and corporate bodies could also approach the Court to seek reprieve from activities of states and other ECOWAS organs.<sup>148</sup> Through its jurisprudence however, the Court has further defined its jurisdiction, precluding suits between individuals and other individuals or even corporate bodies.<sup>149</sup> The Court held that such matters can be adequately addressed by

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presented at the Regional Colloquium on the SADC Tribunal, Johannesburg (Mar. 12-13, 2013) (statement by ECOWAS Court chief registrar) cited in Alter, Hefler and McAllister, *supra* note 136 at 755.

<sup>141</sup> *E.g.*, Alade v. Nigeria, Case No. ECWICCJ/APP/05/1 1, Judgment, para. 24 (June 11, 2012); Keita v. Mali, Case No. ECWICCIAPP/05/06, Judgment, para. 34 (Mar. 22, 2007).

<sup>142</sup> Alade v. Nigeria, Judgment, *supra* note 141, para. 25 (asserting the authority to interpret "UN Conventions ... acceded to by Member States of ECOWAS").

<sup>143</sup> Alter, Hefler and McAllister, *supra* note 136 at 755.

<sup>144</sup> Art. 19 ECOWAS Community Court of Justice Protocol 1999 (A/P.1/7/91)

<sup>145</sup> Article 38, *Statute of the International Court of Justice*, U.N. Doc. AJIL Supp. 215 (1945)

<sup>146</sup> Alter, Hefler and McAllister, *supra* note 136 at 756.

<sup>147</sup> Article 9 and 10 of the ECOWAS Court Protocol, *supra* note 106.

<sup>148</sup> *Ibid.*

<sup>149</sup> Peter David V. Ambassador Ralph Uwechue cited in Tony Anene-Maidoh, "The Mandate of a Regional Court: Experiences from the ECOWAS Court of Justice" Regional Colloquium on the SADC Tribunal, Johannesburg, South Africa 12<sup>th</sup> to 13<sup>th</sup> March, 2013.

domestic courts.<sup>150</sup> It also maintains that only cases involving allegations of human rights violations against states and ECOWAS institutions can be brought before the Court,<sup>151</sup> thereby excluding suits against TNCs.<sup>152</sup>

In specific reference to ECOWAS decisions in relation to TNCs, it is significant to discuss the *SERAP v. Nigeria*<sup>153</sup> case. As mentioned in the previous chapter, the case involved a claim by an environmental protection NGO on behalf of the people of the Niger Delta to hold the Nigerian state and Shell Nigeria (one of the TNCs in Nigeria) responsible for environmental pollution in the region. The Court declined jurisdiction over the TNC citing that they were not parties to the ECOWAS Treaty and therefore not subject to the jurisdiction of the Court.<sup>154</sup> While this can be viewed as a failing of the Court to hold TNCs accountable, the contention of this thesis is that in directing the Nigerian government to take immediate steps to remedy pollution in the Niger Delta, the Court showed significant promise. The Court's decision provided significant validation to the claims of the local communities and therefore mandated Nigeria to better regulate TNCs.

Admittedly, the inability of the Court to hold TNCs accountable for environmental pollution illustrates one of the limitations of the ECOWAS Court. In recognition of such challenge, the thesis then focuses on employing the ECOWAS framework to strengthen the regulatory capacity of Nigeria in order to better regulate TNCs. A detailed discussion of the framework proposed by the thesis for regulatory oversight is discussed in the fourth chapter of the thesis.

However, given that Nigeria is a party to the ECOWAS treaty<sup>155</sup> and the ECOWAS Court Protocol,<sup>156</sup> the ECOWAS Court can successfully adjudicate environmental protection claims under any of the international treaties identified in the thesis which Nigeria has ratified but failed

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<sup>150</sup> *Ibid.*

<sup>151</sup> *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. President, Federal Republic of Nigeria* ECW/CCJ/APP/08/09 Ruling of 10<sup>th</sup> December, 2010 [*Serap v. Nigeria*]

<sup>152</sup> However, Article 3(6) of the ECOWAS Court Supplementary protocol provides for parties to confer jurisdiction on the ECOWAS Court by agreement. In such case, the Court would have jurisdiction to hear the suit between two private parties. See *Petrostar v. Blackberry Nigeria Ltd* (Judgment No. ECW/CCJ/JUD/05/11) cited in Ibironke T. Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework", 2014, 15 *Melb. J. Int'l L.* 473 [Odumosu-Ayanu, Governments, Investors and Local Communities] at 507.

<sup>153</sup> *Serap v. Nigeria*, *supra* note 151.

<sup>154</sup> *Ibid.*

<sup>155</sup> See ECOWAS member states, online: <http://www.ecowas.int/member-states/>

<sup>156</sup> See ECOWAS Court Protocol, *supra* note 106.

to domesticate. Also, given that Nigerian courts are only bound to apply legislation which has been domesticated, these characteristics of the ECOWAS Court make it even more attractive to adjudicating environmental pollution claims. The Court's wide human rights jurisdiction means it is unhindered by constitutional provisions (such as Chapter II) and can therefore make binding findings of human rights violations against the Nigerian state under international human rights instruments.

### 2.6.3. Potential Challenges to employing the ECOWAS Court in the fight for environmental justice in the Niger Delta

Thus far, the thesis has identified the failures of the Nigerian judicial system, specifically focusing on the challenge of establishing a right to a healthy environment given constitutional restrictions and judicial obstacles. We have examined rights owed to individuals in local communities under international legal instruments and the potential of the ECOWAS Court to provide protection to local communities through international conventions ratified by Nigeria. This subsection examines the challenges to effective performance of such role by the ECOWAS Court and recommendations to mitigate those challenges.

#### 2.6.3.1. Funding and Access

As identified above, the challenges which constrain the effective litigation of human rights abuses in Nigeria are often related to funding. Local communities are often poor and can hardly afford to initiate proceedings against TNCs or the government in event of breach of their human rights. However, NGOs and Civil Society Organizations (CSOs) have been extremely helpful in providing dedicated legal representation and resources to local communities in a way that mitigates some of funding challenges which local communities might have.

Another challenge that potentially impedes the employment of the ECOWAS Court by local communities is accessing the Court. This challenge is closely related to the funding challenge, as local communities are often quite remote and the ECOWAS Court is located in the capital of Nigeria.<sup>157</sup> This challenge could also be mitigated by strong involvement of CSOs and NGOs, working with local communities to ensure justice. However, ultimately, the creation of a fund

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<sup>157</sup> See the location of the ECOWAS Court, online: [http://www.courtecowas.org/site2012/index.php?option=com\\_content&view=article&id=109&Itemid=19](http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=109&Itemid=19)

within the ECOWAS that perhaps provides for public interest litigation may ultimately reduce reliance on civil society.

#### *2.6.3.2. Enforceability of ECOWAS Court Decisions and its Limited Jurisdiction*

Perhaps, the biggest challenge to employing the ECOWAS Court is the enforceability of decisions of the Court. While jurisdiction of the Court stretches throughout the West African region, there seem to be conflicting views as regards enforceability of its decisions. The establishing protocol of the Court provides that its decisions of the Court “shall be final and immediately enforceable,”<sup>158</sup> however some scholars argue that decisions are advisory or persuasive; others argue that they are not enforceable while some others argue that they are directly enforceable.<sup>159</sup>

Some writers however argue that the genius of the Court is in employing strategies that encourage compliance by parties such as employing strict proof requirements when adjudicating rights claims, insisting that complainants “specify the particular human right which has been violated”.<sup>160</sup> The Court also attempts to make compliance easier for states in the manner of remedies it provides to complainants<sup>161</sup> as well as pressuring states to comply in the face of public international pressure. Some scholars, writing in relation to the court state that: “...The [ECOWAS] judges are also aware of ongoing concerns about noncompliance and are responding in their jurisprudence and actions outside the courtroom.”<sup>162</sup>

As discussed earlier, a significant challenge of the Court is its limited jurisdiction. Its inability to adjudicate claims against TNCs provides a significant challenge to environmental protection in Nigeria. Admittedly, the employment of the ECOWAS Court to provide environmental protection may not immediately remedy the problem of environmental protection in the Niger Delta, however it provides impetus to the struggle for environmental justice and vests a recognized right in addition to the *African Charter Act* in the hands of local communities. The pith of the argument therefore

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<sup>158</sup> Article 19(2) of the ECOWAS Court Supplementary Protocol, *supra* note 106.

<sup>159</sup> See Ekhaton *supra* note 34 at 75.

<sup>160</sup> Alter, Hefler and McAllister, *supra* note 136.

<sup>161</sup> See Hadijatou Mani Koraou v. Niger Case No. ECW/CCJ/APP/08/07, Judgment, paras. 74-75, 77 (Oct. 27, 2008), *unofficial translation available at* <http://www.refworld.org/pdfid/496b41fa2.pdf>. In that case the Court refused the applicants request to find fault with the laws, practices and customs that gave rise to modern slavery in the first place but found Niger liable for condoning modern forms of slavery, making it easier for Niger to abide the decision.

<sup>162</sup> Alter, Hefler and McAllister, *supra* note 136.

is that the jurisprudence of the ECOWAS Court can potentially affect and direct state behaviour into recognizing environmental protection cases as rights based claims.

## 2.7. Reviewing the Potential Contributions of the ECOWAS Court to the Development a Right to a Healthy Environment

This thesis situates the discussions relating to the right to a healthy environment within framework of the norm “life cycle” theory.<sup>163</sup> The theory draws from Finnemore and Sikkink’s work which argues that there are three main stages to a norm’s development: the norm emergence, the norm cascade and the norm internalization stage.

At the norm emergence, the norm entrepreneur (usually an NGO) creates a general consciousness about the norm and attempts to convince norm leaders (identified as a critical mass of states) to embrace these new norms.<sup>164</sup> The second stage is the norm cascade where these norm leaders attempt to socialize other states to become followers of the norm.<sup>165</sup> Finnemore and Sikkink speculate that states are convinced by norm leaders to accept new norms for a number of reasons including: pressure for conformity, desire to enhance international legitimation and perhaps a desire for states to enhance their self-esteem.<sup>166</sup> The final stage of the cycle is internalization, the authors posit that this is when the norm acquires a “taken-for-granted quality”<sup>167</sup> and is no longer a matter for broad public debate.<sup>168</sup> The third stage is particularly significant to this thesis because it is the stage at which the norm acquires a “taken-for-granted” quality. The theory also identifies a “tipping point”, described as a point between the first and second stage of the norm life cycle, when the norm receives acceptance from a sufficient number of states.

Situating the right to a healthy environment within the theory, it can be gleaned from the arguments made earlier in this chapter that the right is yet to achieve a fully legal nor normative “taken-for-granted” quality in the Nigerian legal system. The failure of the constitution to recognize the right as a substantive right and the uncertainty surrounding establishing the right as a justiciable right,

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<sup>163</sup> Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52 *International Organization* at Fifty: Exploration and Contestation in the Study of World Politics 887 at 895.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

as well as other barriers to access to justice suggest that a right to a healthy environment is not perceived as settled law which has achieved the “taken-for-granted” quality.

This chapter has suggested that the use of the ECOWAS Court to protect and promote the right to a healthy environment in Nigeria holds great potential for entrenching the right to a healthy environment. Given the reach and wide human rights mandate of the ECOWAS Court, it can make decisions that compel or encourage the Nigerian state to recognize the right to a healthy environment as a substantive right. Further, the ECOWAS Court as a supranational entity has jurisdiction over other ECOWAS states and therefore potentially influences other states in West Africa to also recognize the right to a healthy environment, further driving the “tipping point” and aiding the right to a healthy environment to achieve internalization.

The thesis presents the ECOWAS Court as both a “norm entrepreneur”, creating awareness about the right to a healthy environment as a norm and a “norm leader” as it has the power to directly influence a number of states to adopt the right to a healthy environment as a norm. The functioning of a supranational organization such as the ECOWAS as both “norm entrepreneur” and “norm leader” not only encourages Nigeria to accept new norms relating to the right to a healthy environment, but also possesses great potential for the promotion of the acceptance of new norms in other West African states.

It has been argued earlier in the thesis that at the core of this research is the drive towards better effective regulation in Nigeria in order to reduce environmental pollution. The potential contribution of the establishment of a right to a healthy environment as a substantive right is that it creates an obligation on the state to better regulate TNCs in order to ensure a healthy environment.

## 2.8. Conclusion

Thus far, the thesis has identified the effects of oil pollution on Niger Delta communities and state complacency towards the effects of oil pollution in the Niger Delta. This chapter has demonstrated that constitutional and judicial reform are fundamental to establishing a right to a healthy environment and creating an obligation on the state to ensure a healthy environment. Given the issues identified in the first chapter as potentially hampering the government’s willingness to undertake reform, this chapter identifies the potential of the ECOWAS Court to contribute to the

creation of an obligation on the Nigerian state to ensure a healthy environment and contribute to the process of the right to a healthy environment achieving a “taken-for-granted” quality. Also, given that the broader enquiry in this thesis is assessing the potential contributions of the ECOWAS to performing regulatory oversight over the Nigerian state, the identified potential contributions of the ECOWAS Court inspires confidence in the potential of the ECOWAS to provide oversight.



## CHAPTER 3: FRAMEWORK FOR REGULATION OF THE OIL AND GAS INDUSTRY IN NIGERIA

### 3.1. Introduction

As seen in the previous chapters, the argument that oil pollution in Nigeria (in the form of oil spills and gas flaring) persists as a result of ineffective regulation is central to this thesis. This chapter examines the reasons for ineffective regulation which are related to the legislative and institutional framework for regulation in Nigeria. In other words, it examines existing regulation as well as regulatory enforcement institutions with a view to identifying why oil pollution continues to persist in Nigeria and the barriers to effectiveness inherent in the regulatory framework. It commences with an examination of the effects of oil production in Nigeria, the chapter then identifies the series of regulation aimed at regulating oil exploration in Nigeria, making the argument for better enforcement of regulations which promise to curb oil pollution. Ultimately, the chapter identifies a need for regulatory reform which would further drive effectiveness.

In examining the effects of oil pollution and the need to end continued pollution, the chapter examines the implications of oil pollution on the health of local communities, the environment, its implications for climate change and global warming and incidentally implications of continued gas flaring on further economic growth in Nigeria.

The first section of this chapter, examines the impacts of dumping of waste, oil spills and gas flaring on the wellbeing, health and livelihood of local communities and the environment. The chapter then proceeds to examine regulatory framework for the oil industry, specifically focusing on regulation that have implications on oil pollution. The chapter identifies the inherent deficiencies of regulatory and institutional framework for regulation of the oil industry and makes recommendations for reform. After examining existing regulation however, the central argument in the chapter is not simply for regulatory reform but for better enforcement of existing regulation. In line with the central theme of the thesis, the chapter argues that regulatory reform such as the ones being advocated in this chapter might be difficult to implement in Nigeria, given the reasons discussed in the first chapter, to wit, the chapter proposes the use of ECOWAS regulatory oversight over regulatory institutions in Nigeria in order to drive increased effectiveness.

## 3.2 Oil Pollution in the Niger Delta

There are three main sources of oil pollution in Nigeria: oil spills, flaring of natural gas and dumping of waste generated during oil exploration in waterbodies. This section discusses the implications of each type of oil pollution on the environment, local communities and the economy of Nigeria.

### 3.2.1 Disposal of Waste

Oil exploration and production activities produce wastes of varying chemical compositions.<sup>1</sup> The disposal of this waste into rivers and the sea pollutes land, water and affects agriculture and damages fisheries.<sup>2</sup> According to a senior official from the Rivers State Ministry of Environment, “effluent and waste from the oil industry which should be treated is dumped and finds its way into the surface water of the Delta...”<sup>3</sup>

When oil is pumped out of the ground, a mixture of oil, gas and water emerges alongside the oil.<sup>4</sup> Treatment is supposed to follow the water that emerges with oil (known as “produced water” or “formation water”) before it is returned into the sea. Experts have questioned the amount of treatment such water receives before it is returned into the sea.<sup>5</sup> Some argue that only some of the oil can be removed from the water before it is discharged into the sea and such water may contain heavy metals and other dangerous substances.<sup>6</sup> While this thesis was not able to uncover any specific studies carried out in the Niger Delta to measure the effects of dumping on the environment, oil companies themselves concede that dumping of waste is not good practice.<sup>7</sup>

Another source of waste from oil exploration involves seismic surveys by oil companies, drill cuttings, drilling mud and fluid used for stimulating production as well as chemicals used during

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<sup>1</sup> Amnesty International Nigeria, “Petroleum, Pollution and Poverty in the Niger Delta” (2009) online: Amnesty International <http://www.amnestyusa.org/research/reports/nigeria-petroleum-pollution-and-poverty-in-the-niger-delta-report> at 17 [Amnesty Report]

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> World Bank, “Defining an Environmental Development Strategy for the Niger Delta”, 25 May 1995, Volume 2, Industry and Energy Operations Division West Central Africa Department, p35 which states “concentrations of dissolved petroleum hydrocarbons have been found to be elevated near refineries in the region (10-50 mg/l), which supports the inference that little or no wastewater treatment, is performed.”

<sup>6</sup> O. Obire and F. O. Amusan, “The Environmental Impact of Oilfield Formation Water on a Freshwater Stream in Nigeria”, (2003) 7 *Journal of Applied Sciences & Environmental Management* 61.

<sup>7</sup> See Amnesty Report, *supra* note 1 at 18.

seismic activities.<sup>8</sup> Olawuyi writes that when major constituents of drill cuttings such as barytes and bentonitic clays are dumped on the ground, they prevent local plant growth and can potentially kill aquatic life if dumped in the water.<sup>9</sup>

Waste is also generated when oil fields are decommissioned or abandoned as a result of the oil in that field becoming depleted. Decommissioning involves plugging, flushing or cementing oil wells to make them safe for rig removal and shutting down operations.<sup>10</sup> Because decommissioning is inevitable in oil exploration, the process of decommissioning, particularly of offshore oil exploration facilities, has raised significant questions regarding its impact on the environment. Studies have shown that deep sea disposal of oil facilities have potentially hazardous effects on the marine environment with uncertain long term impacts.<sup>11</sup> Human exposure to residual wastes through fishing or water consumption could have serious health consequences including effects on reproduction, immune systems, neurobehavioral disorders and cancers.<sup>12</sup>

Evidently disposal of waste generated as a result of oil exploration produces a number of risks to local communities as well as the environment. The next subsection discusses oil spills, which is a form of environmental pollution that has generated significant concern within the literature.

### 3.2.2 Oil Spills

Oil spills occur when there is an unsafe discharge or release of oil into the human environment, such as waterbodies like oceans, rivers and seas.<sup>13</sup> Such spills are often as a result of oil exploration and production, mainly due to accidental or negligent rupture or blow out from wellheads, flow stations, drilling rigs, pipelines and offshore platforms and facilities.<sup>14</sup> Oil facilities and pipelines often rupture due to poor maintenance, corrosion, age and in some cases vandalism, sabotage and poor installation.<sup>15</sup> They have also been known to occur as a result of transportation and or loading

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<sup>8</sup> Damilola S. Olawuyi, *The Principles of Nigerian Environmental Law* (Ado Ekiti, Nigeria: Afe Babalola University 2015) at 189 [Olawuyi].

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid* at 190.

<sup>11</sup> D. G. Gorman and June Nielson, *Decommissioning Offshore Structures* (New York: Springer 1997) cited in Olawuyi, *supra* note 8 at 189.

<sup>12</sup> L. Ritter et al, "Persistent Organic Pollutants" online: UNEP <http://www.pops.int/documents/background/assessreport/en/ritteren.pdf>

<sup>13</sup> Olawuyi, *supra* note 8 at 177.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

leakages.<sup>16</sup> The immediate effect of oil spills is the release of dangerous hydrocarbons such as benzene and polynuclear aromatic hydrocarbons into the soil and water sources.<sup>17</sup> Prolonged exposure to these dangerous hydrocarbons has adverse effects on the environment, health of local communities, drinking water, aquatic life, soil fertility and natural growth of plants and crops, which can last for decades.<sup>18</sup>

Since oil exploration began in Nigeria, incidences of oil spills have achieved increasing regularity. Between 1993 and 2007, there were 35 reported incidences of oil spills in Nigeria.<sup>19</sup> There are also speculations that some incidences of spills are unreported and perhaps unnoticed.<sup>20</sup> As a result of these alarming degrees of spills, the health and livelihood of local communities have often been severely compromised. Studies show that a year's supply of food can be destroyed by even a minor leak of oil, thereby frustrating food supply as well as livelihood of farmers who depend on such produce.<sup>21</sup> Other effects include contamination of drinking water as access to pipe borne water in these local communities is often unavailable and they are forced to drink from wells, rivers and creeks that have been contaminated by oil pollution.<sup>22</sup> It is estimated that over 3000 inhabitants of the Niger Delta have died from drinking contaminated water since oil exploration began.<sup>23</sup> Incidentally, health risks associated with oil spills also occur as a result of chemical used in cleaning up spills. It appears that many years after clean-up of spills, water contamination from spills still persist in the form of residual oil or the effects of chemicals used during clean ups.<sup>24</sup> Olawuyi writes that:

“Offshore spills, which are usually much greater in scale, taint coastal environments in the Niger Delta, causing decline in local fishing production. The rainforest, which previously occupied 7,400 km<sup>2</sup>, has disappeared. Similarly, oil spillage in the Niger delta has destroyed its mangrove forests. Estimates suggest that 5-10% of Nigerian mangrove

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid* at 178.

<sup>22</sup> *Ibid* at 178-179.

<sup>23</sup> *Ibid.*

<sup>24</sup> See Deborah Zabarenko, “Oil Clean-Up Chemicals Worry Environment Watchdogs” Reuters (4 May 2010), online: Reuters <http://www.reuters.com/article/idUSN04110283>. See also Olawuyi, *supra* note 8 at 183.

ecosystems have been wiped out by oil, which acidifies the soils, thus halting cellular respiration and starving plant roots of oxygen”<sup>25</sup>

In December 2011, Shell Nigeria (one of the leading TNCs in Nigeria) admitted to what it described as the worst spill in a decade.<sup>26</sup> Over 40,000 barrels of oil was spilled, contaminating waterbodies and coastal communities.<sup>27</sup> This event occurred shortly after the UNEP Report had described the effects of previous oil spills as “widespread and severely impacting many components of the environment”<sup>28</sup> and made several recommendations for the Nigerian government and TNCs to remediate the effects of oil pollution.<sup>29</sup> Specifically, the report identified the specific nature of the environment in the Niger Delta and the effects of oil spills in the region. An excerpt from the report reads:

As Ogoniland [one of the local communities in the Niger Delta] has high rainfall, any delay in cleaning up an oil spill leads to oil being washed away, traversing farmland and almost always ending up in the creeks. When oil reaches the root zone, crops and other plants begin to experience stress and can die, and this is a routine observation in Ogoniland. At one site, Ejama-Ebubu in Eleme local government area (LGA), the study found heavy contamination present 40 years after an oil spill occurred, despite repeated clean-up attempts.<sup>30</sup>

What can be gleaned from the above set of facts is that in spite of the desperate effect of oil spills on the environment and health of local communities, oil spills still seem to occur in alarming degrees. The UNEP Report cited above was conducted at the behest of the Nigeria government in an attempt to pervade the “seemingly intractable”<sup>31</sup> situation that described the relationship between the state and local communities.<sup>32</sup> Specifically, the study was intended to provide reliable

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<sup>25</sup> Olawuyi *supra* note 8 at 179.

<sup>26</sup> John Vidal, “Nigeria on Alert as Shell Announces Worst Spill in a Decade” *The Guardian* (22 December 2011), online: The Guardian <http://www.theguardian.com/environment/2011/dec/22/nigerian-shell-oil-spill> [Shell’s worst spill]

<sup>27</sup> Olawuyi, *supra* note 8 at 179.

<sup>28</sup> United Nations Environment Programme, “Environmental Assessment of Ogoniland Report” Online: <http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentofOgonilandreport/tabid/54419/Default.aspx> [UNEP Report] at 9.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Foreword of UNEP Report, *supra* note 28 at 6.

<sup>32</sup> *Ibid.*

information which could serve as a baseline for government and local communities to remediate the tensions between them, given the long bitter history of repression of local anxieties<sup>33</sup> and remedy the effects of oil pollution. The foreword of the UNEP report read:

The history of oil exploration and production in Ogoniland is a long, complex and often painful one that to date has become seemingly intractable in terms of its resolution and future direction.

It is also a history that has put people and politics and the oil industry at loggerheads rendering a landscape characterized by a lack of trust, paralysis and blame, set against a worsening situation for the communities concerned. The reality is that decades of negotiations, initiatives and protests have ultimately failed to deliver a solution that meets the expectations and responsibilities of all sides. In an attempt to navigate from stalemate to action, the Government of Nigeria, in consultation with many of the relevant actors, invited UNEP to consider undertaking an assessment of oil pollution in Ogoniland.<sup>34</sup>

The report was intended to serve as a catalyst to spur government into action. It was expected that a report from a credible and independent observer such as the UNEP would allay any concerns the government might have had regarding the degree of environmental pollution in the Niger Delta being exaggerated by local communities. It was further expected that educated recommendations made by UNEP would aid the government in identifying ways and means to remediate the degree of pollution in the Niger Delta.

However, not only did the worst spill of the decade occur shortly after the report was published,<sup>35</sup> rights groups allege that years after the report no progress has been made regarding implementing the recommendations of the report.<sup>36</sup> This chapter therefore seeks to examine how the existing

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<sup>33</sup> See for example the execution of Ken Saro-Wiwa where the Nigerian government executed activists fighting for the rights of one of the Niger Delta communities in Project Underground, "The Life & Death of Ken Saro-Wiwa: A History of the Struggle for Justice in the Niger Delta", Online:

<http://www.ratical.org/corporations/KSWlife+death.pdf>

<sup>34</sup> UNEP Report, *supra* note 28 at 6.

<sup>35</sup> Shell's worst spill, *supra* note 27.

<sup>36</sup> See generally, Amnesty International, "No Progress: An Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoniland, Three Years On" Online:

<https://www.amnesty.org/en/documents/afr44/013/2014/en/>

legislative and institutional frameworks potentially contribute to the persisting phenomenon of regulatory ineffectiveness evidenced by oil pollution.

However, before proceeding to examine regulatory and institutional framework in Nigeria, it is important to examine the effects of other forms of oil pollution such as flaring of natural gas.

### 3.2.3 Natural Gas Flaring

The discussion on natural gas flaring in Nigeria is particularly significant to this thesis because unlike oil spills which occur by accident or from neglect, gas flaring is a *deliberate* burning or release of natural gas into the atmosphere. The effects of gas flaring on the environment and the health of local communities is not difficult to discern as natural gas contains hydrogen sulfide (H<sub>2</sub>S) and carbon dioxide (CO<sub>2</sub>) which is harmful with prolonged exposure. The discussions in this subsection examine the effects of gas flaring on health and wellbeing of local communities, climate change and the economic growth of the country.

It is often the case that TNCs in Nigeria do not like finding natural gas alongside oil when mining.<sup>37</sup> Such gas is referred to as associated gas, and presents a challenge to TNCs as it becomes necessary to then dispose of such associated gas in order to profit from the oil, which is the primary motivation for their exploration.<sup>38</sup> The existence of large deposits of natural gas within Nigeria's oil fields has led a number of TNCs to resort to flaring natural gas in an attempt to dispose of this gas and preserve the oil.<sup>39</sup>

Gas flaring emits a number of toxic substances into the atmosphere and has been likened to "setting a match to an enormous container of lighter fluid".<sup>40</sup> It is said that flares are so hot that nothing can grow next to them.<sup>41</sup> Combustion of associated gas produces a mixture of smoke (more precisely referred to as particulate matter); combustion by-products such as sulfur dioxide, nitrogen dioxides and carcinogenic substances such as benz[a]pyrene and dioxin; and unburned fuel components including benzene, toluene, xylene and hydrogen sulfide.<sup>42</sup> The Canadian Public

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<sup>37</sup> The Climate Justice Programme, "Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity" (2005) online: [https://www.foe.co.uk/sites/default/files/downloads/gas\\_flaring\\_nigeria.pdf](https://www.foe.co.uk/sites/default/files/downloads/gas_flaring_nigeria.pdf) at 10 [Gas Flaring in Nigeria]

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid* at 24.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

Health Association identified over 250 toxins released into the atmosphere as a result of gas flaring.<sup>43</sup> They write:

“There have been over 250 identified toxins released from flaring including carcinogens such as benzopyrene, benzene, carbon di-sulphide (CS<sub>2</sub>), carbonyl sulphide (COS) and toluene; metals such as mercury, arsenic and chromium; sour gas with H<sub>2</sub>S and SO<sub>2</sub>; nitrogen oxides (NO<sub>x</sub>); carbon dioxide (CO<sub>2</sub>); and methane (CH<sub>4</sub>) which contributes to the greenhouse gases. Improper combustion of natural gas, as witnessed by visible smoke from a flare stack, contributes to increased hazardous chemicals being released into the environment including volatile organic compounds.”<sup>44</sup>

The effects of such gas flaring on local communities is also captured in reports by environmental and health agencies. The United States Environmental Protection Agency (US EPA), writes that “exposure to these substances [carcinogenic substances emitted during gas flaring] has been demonstrated to cause adverse health effects such as irritation to the lung, skin, and mucus membranes, effects on the central nervous system, kidney damage, and cancer.”<sup>45</sup> In another report, the US EPA having studied the effects of prolonged exposure to benzene wrote that:

“It has long been clearly established and accepted that exposure to benzene and its metabolites causes acute nonlymphocytic leukemia and a variety of other blood-related disorders in humans”<sup>46</sup>

Reports indicate that local communities in the Niger Delta having been exposed to gas flaring over several decades have been victims of premature death, respiratory problems among children, asthma attacks and cancer.<sup>47</sup> Evidently, oil pollution in Nigeria has gravely affected the life expectancy of residents of local communities.

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<sup>43</sup> The Canadian Public Health Association 2000 Resolutions and Motions, Background to 2000 Resolution No.3 Gas Flaring online: [http://www.cpha.ca/uploads/resolutions/2000\\_e.pdf](http://www.cpha.ca/uploads/resolutions/2000_e.pdf) at 2

<sup>44</sup> *Ibid.*

<sup>45</sup> United State Environmental Protection Agency, National Emission Standards for Hazardous Air Pollutants for Industrial/ Commercial/Institutional Boilers and Process Heaters online: US EPA <https://www3.epa.gov/ttn/atw/boiler/fr13ja03.pdf>

<sup>46</sup> United States Environmental Protection Agency, “Carcinogenic Effects of Benzene: An Update” (1997) online: US EPA <http://nepis.epa.gov/Exe/ZyPDF.cgi/3000293X.PDF?Dockey=3000293X.PDF> at 4

<sup>47</sup> Gas Flaring in Nigeria, *supra* note 37 at 25.



Equally disturbing is the effect that continued flaring portends for the environment and climate change. The production of sulfur oxides as a result of flaring of natural gas creates what is known as acidic precipitation.<sup>48</sup> The result of the combination of such toxins with atmospheric compounds such as oxygen and water produces acid rain which is detrimental to aquatic life, forests and vegetation, robs soils of essential nutrients and releases aluminium into the soil.<sup>49</sup> Gas flares also produce “soot”<sup>50</sup> which often rests at the roofs of houses in local communities as well as on other structures found within the communities.<sup>51</sup> This soot is often washed into drinking water, wells and the soil in local communities during rainfall, further affecting their health, the virility of the soil and the growth of crops and vegetation.<sup>52</sup>

In reference to climate change, the burning of fossil fuel, mainly coal, and oil and gas has led to the creation of greenhouse gases.<sup>53</sup> Greenhouse gases increase heat in the atmosphere and lead to global warming and climate change.<sup>54</sup> The significance of gas flaring to global warming is that gas flaring releases a considerable amount of carbon dioxide which is the most potent greenhouse gas, as well as methane which is another greenhouse gas.<sup>55</sup> According to the Nigerian government, temperatures in West Africa, and particularly the Sahel, have increased more sharply than the global trend, and the average predicted rise in temperature between 1980/99 and 2080/99 is between 3°C and 4°C, which is more than 1.5 times the average global trend.<sup>56</sup> While there is no evidence that gas flaring alone is responsible for this increased temperature in West Africa, reports indicate that gas flaring has contributed to more emissions of greenhouse gases than all other sources in sub-Saharan Africa combined.<sup>57</sup>

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<sup>48</sup> Olawuyi, *supra* note 8 at 188.

<sup>49</sup> National Geographic, Acid Rain: Effects Felt Through the Food Chain online: National Geographic <http://environment.nationalgeographic.com/environment/global-warming/acid-rain-overview/>

<sup>50</sup> Olawuyi, *supra* note 8 at 188.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> A greenhouse gas is any gaseous compound in the atmosphere that is capable of absorbing infrared radiation, thereby trapping and holding heat in the atmosphere. Online: <http://www.livescience.com/37821-greenhouse-gases.html>

<sup>54</sup> *Ibid.*

<sup>55</sup> Gas Flaring in Nigeria, *supra* note 37 at 20.

<sup>56</sup> Nigeria’s Second National Communication Under the United Nations Framework Convention on Climate Change (February, 2014) online: <http://unfccc.int/resource/docs/natc/nganc2.pdf>

<sup>57</sup> Gas flaring in Nigeria, *supra* note 37 at 21.

Climate change is particularly significant to developing countries and the African continent is regarded as highly vulnerable with a limited ability to adapt.<sup>58</sup> According to the United Nations Intergovernmental Panel on Climate Change (IPCC), there are six main areas which provide the most risk to Africa in the face of climate change.<sup>59</sup> They are: water resources, especially in international shared basins where there is potential for conflict and a need for regional coordination of water management, food security at risk from declines in agricultural production and uncertain climate, natural resources productivity at risk and biodiversity that might be irreversibly lost, vector and water-borne diseases, especially in areas with inadequate health infrastructure, coastal zones vulnerable to sea-level rise, particularly roads, bridges, buildings and other infrastructure that is exposed to flooding and other extreme events and exacerbation of desertification by changes in rainfall and intensified land use<sup>60</sup>

In the recently concluded 2015 United Nations Climate Change Conference, commonly referred to as the Paris conference, the Nigerian President said:

“like many countries, Nigeria continues to witness the adverse effects of climate change in all its ramifications. Presently, we are reeling under the challenges of climate change as the frequency and intensity of extreme events like floods and drought are on the increase. These challenges have resulted in the destruction of many economic and social structures and more worryingly, threatening our national food production and security.”<sup>61</sup>

Evidently, the threat of climate change is real, and the Nigerian President admits it. However, Nigeria alone is responsible for flaring 10.7 billion cubic meters of gas a year, equivalent to 11%, of the total volume of gas flared in 2012.<sup>62</sup> The country flares more natural gas than any other

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<sup>58</sup> *Ibid* at 19.

<sup>59</sup>Intergovernmental Panel on Climate Change (IPCC), Third Assessment Report, Working Group 2, Impacts, Adaptations and Vulnerability, Executive Summary, online: IPCC <https://www.ipcc.ch/ipccreports/tar/wg2/>

<sup>60</sup> *Ibid*.

<sup>61</sup> Statement by His Excellency Muhammadu Buhari, President of the Federal Republic Of Nigeria at the Leaders Event of The 21<sup>st</sup> Session of the Conference of Parties (COP-21) to the United Nations Framework Convention On Climate Change And The 11<sup>th</sup> Meeting Of The Parties To The Kyoto Protocol, Paris, France (30 November 2015) online: [http://unfccc.int/meetings/paris\\_nov\\_2015/items/9331.php](http://unfccc.int/meetings/paris_nov_2015/items/9331.php)

<sup>62</sup> OPEC Annual Statistical Bulletin, 50th Edition (2015) Online: Organization of the Petroleum Exporting Countries (OPEC), Vienna, Austria: [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/publications/ASB2015.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2015.pdf)

country in the world except Russia (Figure 3.1).<sup>63</sup> Evidently, Nigeria is complicit in contributing to global warming.

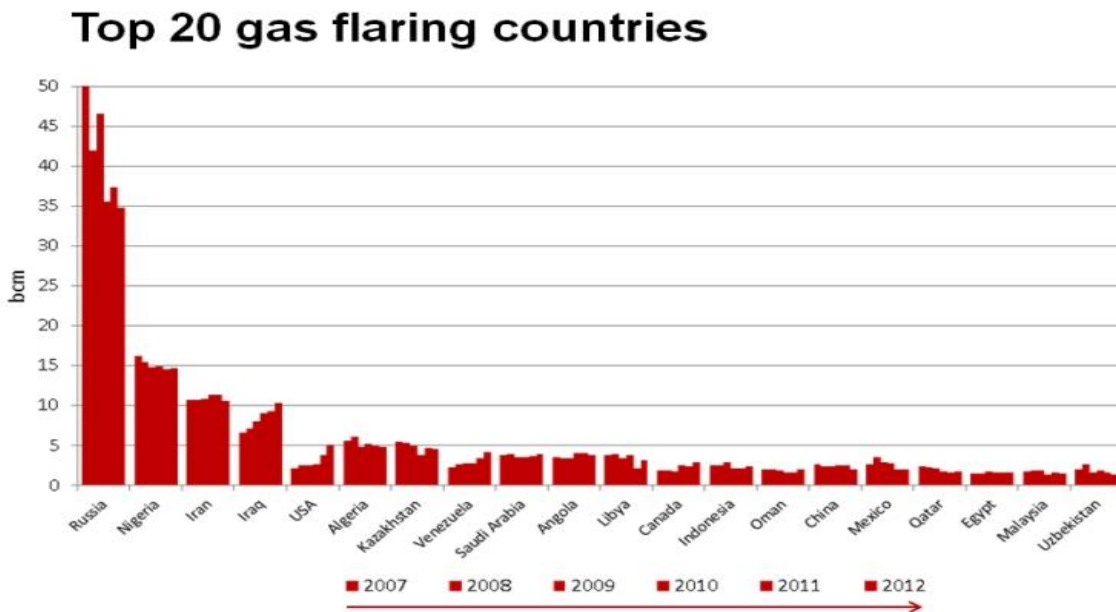


Figure 3.1: Top 20 gas flaring countries in the World (source: World Bank)

Continued gas flaring has implications not only for the health of local communities in Nigeria but also the rest of the world. Another argument for the elimination of gas flaring in Nigeria is its huge potential for energy generation. It is estimated that Nigeria has lost an estimated 575,563 Giga Watt hour (GWh) of electricity within the period 2005 – 2015 through flared gas alone (Figure 3.2). Increased energy generation in a country such as Nigeria holds potential for all aspects of the Nigerian economy. It is estimated that Nigeria lost revenues exceeding \$2.5bn per year from the year 1970 to 2006 as a result of flaring of natural gas.<sup>64</sup> Another implication for utilization of natural gas for electricity generation is its huge potential to drive industrialization and economic growth in the country. Bazilian et al note that:

“If developing economies are to follow the historical pattern of development through a path of industrialization, then the adequate provision of access to electricity is crucial. After all,

<sup>63</sup> World Bank, The Global Gas Flaring Reduction Partnership, February 2012 online: World Bank <http://www.worldbank.org/en/programs/gasflaringreduction>

<sup>64</sup> Morgan Bazilian et al, “Oil, Energy, Poverty and Resource Dependence in West Africa” (2013) 31 J. Energy & Nat. Resources L. 33 at 36 at 44 [Bazilian et al]

it was electricity that enabled the transition from small-scale batch production to continuous processing during the US ‘Second Industrial Revolution’; today, continuous processing technologies represent the standard technologies for bulk material manufacturing in a large number of industries. In this sense, energy – more specifically electricity – is one of the key channels through which oil wealth can fuel industrialization in small, hydrocarbon-rich, least-developed economies”<sup>65</sup>

Given that only 47% of the Nigerian population has access to electricity<sup>66</sup> which is often inconstant and unreliable, utilization of Nigeria’s natural gas is greatly advantageous to remedying the problem of power.

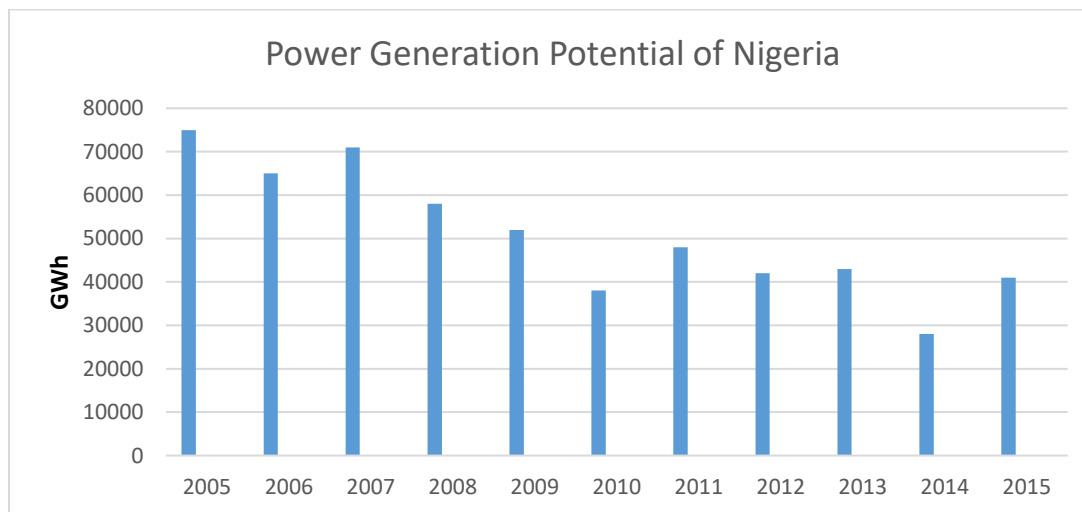


Figure 3.2 Analysis of Estimated Loss of Electricity Through Flared Gas (Source NNPC 2016)<sup>67</sup>

Oil pollution in Nigeria has grave impacts on human rights of local communities, on the health and well-being of local communities, on the environment, on climate change and on the economy of Nigeria. One has to wonder why such pollution continues to persist. The next subsection undertakes an analysis of regulatory framework for oil and gas production in Nigeria, identifying the abundance of regulation for oil extraction in Nigeria and the problems associated with enforcement of these regulations.

<sup>65</sup> *Ibid* at 43.

<sup>66</sup> *Ibid*.

<sup>67</sup> NNPC, Oil and Gas Statistics, 2016 online: [Nnpcgroup.com](http://www.nnpcgroup.com). *MPI Figures* <http://www.nnpcgroup.com/PublicRelations/OilandGasStatistics/MPIFigures.aspx>

### 3.3 Regulatory Framework for Environmental Protection in Nigeria

The regulatory framework being examined in this section places particular focus on regulation of oil production and its effects on the environment and local communities. We examine regulation that relates to pollution arising from gas flaring, oil spills and oil pipeline related spills as well as institutions responsible for enforcing existing regulation. The import of such analysis is to demonstrate that there is an abundance of regulation for oil pollution in Nigeria. This subsection explores the possible reasons for the ineffectiveness of regulatory framework in the oil and gas industry, identifying challenges and making recommendations for reform.

#### 3.3.1 Regulation Applicable to Oil Production in Nigeria

Regulation in the sense that it is used in this subsection includes legislation, subsidiary legislation (regulations) as well as guidelines provided by environmental protection agencies aimed at regulating oil production and incidental oil pollution Nigeria. We commence our inquiry with the Nigerian Petroleum Act.

##### 3.3.1.1. *The Petroleum Act of 1969*

The Petroleum Act<sup>68</sup> is the primary regulation for oil exploration and production in Nigeria. The Act vests ownership of petroleum resources in the Federal Government and provides for matters incidental to oil production.<sup>69</sup> Incidental to oil production is the issue of oil pollution. Section 9(1) of the Act empowers the Minister of Petroleum Resources to make regulations for safe working of petroleum operations; prevention of pollution of water courses and the atmosphere, the conservation of petroleum resources, among others.

Pursuant to the powers of the Minister of Petroleum Resources under the Act to make regulations, the Department of Petroleum Resources (DPR) undertakes regulation of oil extraction as it relates to environmental pollution as well as other aspects of petroleum exploration, production and processing.<sup>70</sup> Further to regulating oil extraction under the Petroleum Act, other subsidiary legislation including the Petroleum Refining Regulation, the Mineral Oil (Safety) Regulations, and the Petroleum (Drilling and Production) Regulations were enacted under the Act specifically targeted at regulation oil pollution.

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<sup>68</sup> *The Petroleum Act 1969* (as amended) Laws of the Federation of Nigeria 2004, cap P10.

<sup>69</sup> Preamble of the Petroleum Act, *Ibid.*

<sup>70</sup> Olawuyi, *supra* note 8 at 31.

a) The Mineral Oil (Safety) Regulations 1997 (MOSR)

The MOSR<sup>71</sup> was made pursuant to the powers of the Minister under Section 9 of the Petroleum Act.<sup>72</sup> The Regulation was designed to ensure safe handling of mineral oil. It contains provisions designed to ensure safety in all facets of oil extraction ranging from loading to transfer to storage of petroleum products. It specifically contains provisions relating to maintenance of oil pipelines, storage tanks and other apparatus as regards oil exploration which can lead to oil spills and contaminate the environment.

Olawuyi has criticised Regulation 6 of the MOSR, arguing that tying environmental best practices in Nigeria to international standards without adaptation to local environmental concerns is a key weakness of the regulation that has often resulted in ambiguities and difficulties in proper implementation. The regulation provides that every drilling, production and other operation which is necessary for the production and subsequent handling of crude oil and natural gas shall conform with good oil field practice. It provides that good oil field practice will be considered adequate if it conforms with the appropriate current Institute of Petroleum Safety Codes; or the American Petroleum Institute Codes, or the American Society of Mechanical Engineers Codes, or any other internationally recognized and accepted systems.

However, the argument being made in this chapter respectfully disagrees with Olawuyi's position. A failure to adapt regulations to local environmental concerns is not sufficient reason for TNCs to fail to uphold standards because TNCs by their nature have interests in other countries where they recognize and uphold international standards. Professor Steiner in carrying out research into what he terms "double standards" by Shell argues that internationally recognized "good oil field practice" globally, have followed the those developed in the United States,<sup>73</sup> proof perhaps is seen in the fact that Regulation 6 of the MOSR cites two American institutions as being competent to provide standards for good oil field practice. Steiner writes that "the US system called Integrity Management (IM), is required by law and is used around the world as international "best practice"

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<sup>71</sup> *Mineral Oil (Safety) Regulations to the Petroleum Act 1969 of 1997*, Laws of the Federation of Nigeria 2004, cap P10.

<sup>72</sup> Preamble of the *Mineral Oil (Safety) Regulations to the Petroleum Act 1969 of 1997*.

<sup>73</sup> Richard Steiner, "Double Standard: Shell Practices In Nigeria Compared With International Standards to Prevent And Control Pipeline Spills And the Deep Water Horizon Oil Spill", online: Friends of the Earth Netherlands <https://milieudefensie.nl/publicaties/rapporten/double-standard> at 4 [Steiner].

standard to meet.”<sup>74</sup> He writes that an example of such double standard was seen during the oil spill in the Gulf of Mexico. He argues that while there was prompt action by Shell to clean up the oil spill in the Gulf of Mexico following the oil spill in the summer of 2010, “most spills in the Delta are left unattended”.<sup>75</sup> Steiner’s report concluded that “Shell has conducted its petroleum operations far below commonly accepted international standards used elsewhere in the world”.<sup>76</sup> The argument therefore is that the challenge of regulatory effectiveness of the MOSR in Nigeria is not that it is tied to international best practices, but that it is hardly enforced.

*b) The Petroleum (Drilling and Production) Regulations*

The Petroleum Drilling and Production Regulations<sup>77</sup> were also made pursuant to the powers of the Minister under Section 9 of the Petroleum Act. The Regulations contain provisions relating to applications for oil prospecting licences, obligations, fees as well as regulatory restrictions to oil companies as regards drilling and production of oil. The most instructive regulation of the Drilling and Production Regulation in the context of environmental pollution is Regulation 25 which provides:

The licensee or lessee [of the oil prospecting license] shall adopt all practicable precautions, including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, watercourses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it.

Other relevant regulatory provisions contained in the Drilling and Production Regulations relate to preventing oil companies from interfering with fishing rights and obligating them to pay compensation in the event that their activities affect fishing rights.<sup>78</sup> Another regulation seeks to

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<sup>74</sup> *Ibid* at 4-5.

<sup>75</sup> *Ibid* at 4.

<sup>76</sup> *Ibid*.

<sup>77</sup> *The Petroleum (Drilling and Production) Regulations to the Petroleum Act 1969*, Laws of the Federation of Nigeria 2004, cap P10 [PDPR].

<sup>78</sup> *Ibid*, Regulation 23 of the PDPR.

protect “productive”<sup>79</sup> and “protected” trees from being cut or taken by oil companies in the course of their oil exploration.<sup>80</sup>

One of the criticisms of the Regulations within academic literature is that they fail to define what constitutes “all practicable precautions” or “prompt steps” required under the regulations to uphold environmental standards.<sup>81</sup> Coming to the defense of the Regulations, Oshionebo argues that their open-ended language creates room for evolution of regulatory practices as regulations created in 1969 may have allowed certain practices which today are deemed undesirable.<sup>82</sup> He however expresses some concern regarding the discretionary power the Regulations vest in the Director of Petroleum Resources arguing that such vast power may be influenced by bribes and suggests that perhaps such power be subject to scrutiny by an independent body such as a legislative committee.<sup>83</sup>

It can be gleaned from the provisions of the Petroleum Drilling and Productions Regulations that they are designed to not only protect the environment from oil pollution but to hold oil companies accountable for interfering with fishing rights and productive trees which oil pollution ultimately affects.

### 3.3.1.2 *The Oil in Navigable Waters Act of 1968*

The Oil in Navigable Waters Act<sup>84</sup> domesticates the *International Convention for the Prevention of Pollution of the Sea by Oil 1954 – 1962*.<sup>85</sup> Section 1 of the Act prohibits the discharge of crude oil, fuel, lubricating oil and heavy diesel from ships into Nigeria’s territorial waters or shorelines. Section 3 of the Act makes it an offence for a shipmaster, occupier of land, or operator transferring oil to discharge it into Nigerian waters. It also requires the installation of anti-pollution equipment

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<sup>79</sup> Productive trees are defined in the regulation as trees having commercial value. See Regulation 21 of the PDPR

<sup>80</sup> Ibid Regulation 21.

<sup>81</sup> See Emeka A. Duruigbo, *Multinational Corporations and International Law: Accountability and Compliance Issues in the Petroleum Industry* (Ardsley, New York: Transnational Publishers, 2003) at 170; Ambrose O.O. Ekp, “Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria” (1995) 24 Denv. J. Int’l L. & Pol’y 55 at 79.

<sup>82</sup> Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes*, (Toronto: University of Toronto Press, 2009) at 52 [Oshionebo].

<sup>83</sup> *Ibid* at 52-53.

<sup>84</sup> *The Oil in Navigable Waters Act of 1968*, Laws of the Federation of Nigeria 2004, cap 06.

<sup>85</sup> Opened for signature May 12, 1954, (1961) 1 U.S.T. 2987, T.I.A.S. No. 4900, 324 U.N.T.S. 3.



on such ships. Section 6 of the Act stipulates punishment for contravention, while section 7 requires that details of all occasions of oil discharge be kept.

The *Oil in Navigable Waters Regulations of 1968* implements the provisions of the Act and requires ships to install oily water separator equipment capable of preventing pollution of the navigable waters by oil. These Regulations also require that precautions be taken when loading, discharging or bunkering oil to prevent spills, and also that regular inspections of ships be carried out to prevent oil leakages.

Evidently, the Act and its implementing Regulations contain provisions that are designed to protect the marine environment from pollution as a result of oil spills. Proper enforcement of the provisions of the Act would greatly reduce incidences of oil spills into the sea.

### 3.3.1.3 *The Oil Pipelines Act of 1956*

The preamble of the *Oil Pipelines Act*<sup>86</sup> reads: “An Act to make provision for licenses to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining and for purposes ancillary to such pipelines.”<sup>87</sup> The Act contains provisions for applying for grants to survey routes for oil pipelines and obtaining licenses to construct oil pipelines. Section 11(5) (c) of the Act obligates holders of oil pipeline licenses to pay compensation “to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.” The Act further provides that “if the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part iv of this Act.” As seen in the previous chapter, access to justice for local communities provides a significant challenge to effectively litigating and obtaining justice for concerns relating to environmental justice. Section 17(4) of the Act however, requires that holders of oil pipeline licenses avoid interference with works of public utility and prevent pollution of land and water.

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<sup>86</sup> *The Oil Pipelines Act of 1956*, Laws of the Federation of Nigeria 2004, c 07 [OPA]

<sup>87</sup> *Ibid*, Preamble of the OPA

The *Oil Pipelines Regulations* made pursuant to the *Oil Pipelines Act* requires that environmental emergency plans be put in place by oil pipeline operators<sup>88</sup> and makes any contravention of the Regulations punishable with a fine and/or imprisonment.<sup>89</sup>

#### 3.3.1.4 *Environmental Impact Assessment Act (EIAA) 1992*

The Environmental Impact Assessment Act<sup>90</sup> enacted in 1992 provides a significant contribution to environmental protection in Nigeria. It requires oil and gas operators as well as project developers in other sectors, to consider the environmental impact of their activities at the early stages of project development except exempted by law.<sup>91</sup> TNCs or other project developers are required to undertake an environmental impact assessment (EIA) of the likely or potential environmental impact of their activities as well as measures available to mitigate its adverse environmental impacts.<sup>92</sup> The Act prohibits undertaking or embarking on projects which may significantly affect the environment without prior consideration of their environmental effects.<sup>93</sup> The schedule to the EIAA designates mining and petroleum industries as requiring Mandatory Study Activities and the implications of such is that the Federal Ministry of Environment (FME) is required to vet and approve the environmental audit undertaken by the corporation or other project developer.

The EIAA punishes non-compliance with fines or imprisonment.<sup>94</sup> It has however been applauded for adopting a “pluralist approach”<sup>95</sup> to regulation.<sup>96</sup> The Act enjoins the Federal Ministry Environment to receive comments from government agencies, members of the public, experts and interest groups who wish to make an intervention on any EIA submitted for approval.<sup>97</sup> Although it is unclear what weight the FME attaches to such interventions, it ought to take them into consideration at various stages, including the screening or mandatory study stage.<sup>98</sup> Concerns regarding the environmental effects of a project may prompt the FME to refer it to mediation or to

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<sup>88</sup> *Ibid*, Regulation 9(1) of the *Oil Pipelines Regulation* [OPR]

<sup>89</sup> *Ibid*, Regulation 25 of the OPR

<sup>90</sup> *Environmental Impact Assessment Act of 1992*, Laws of the Federation of Nigeria 2004 Cap E 12 [EIAA]

<sup>91</sup> *Ibid*, Section 2 (1) and (4) of the EIAA

<sup>92</sup> *Ibid*, Section 4 (d) and (e) of the EIAA

<sup>93</sup> *Ibid*, Section 2(1)-(3) of the EIAA

<sup>94</sup> *Ibid*, Section 62 of the EIAA

<sup>95</sup> Oshionebo, *supra* note 82 at 58

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid*.

the review panel.<sup>99</sup> Where it is found that the project is likely to result in unjustifiable, immitigable and significant adverse environmental effects, the agency will not permit the project to be carried out.<sup>100</sup>

While the contributions of the EIAA to curbing causes and effects of environmental pollution and degradation in Nigeria are commendable, one of the challenges of the Act are the exceptions that it creates. One of such exceptions is that EIAs are not required where (i) the President of Nigeria or the President of the Federal Environmental Protection Council determines that the environmental effects of a project are likely to be minimal; (ii) the project is to be carried out during a national emergency for which temporary measures have been taken by the government; and (iii) the FME is of the opinion that, given the circumstances, the project is in the interest of public health or safety.<sup>101</sup> Oshionebo writes that the first exception is particularly troubling because it can be used by persons with political connections to the President or Council to bypass the requirement for an EIA.<sup>102</sup> He argues further that the exception granted to the president seems to be intended to afford the president discretion over matters which he considers to be in the overall interest of Nigeria, although the discretion must be exercised reasonably where the project poses “minimal”<sup>103</sup> adverse effects to health and the environment.<sup>104</sup>

Evidently, vast discretionary powers of the president of Nigeria and the president of the Council afforded by the EIAA would perhaps benefit from some regulatory oversight. When discussing the Drilling and Productions Regulations, we had earlier discussed Oshionebo’s suggestion of review of a legislative body in order to curtail the vast discretionary powers of the Director of the DPR under those regulations. Clearly, independent oversight in relation to the discretionary powers of the president of Nigeria and the president of the Council would potentially allay some of the concerns regarding the effectiveness of the EIAA.

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<sup>99</sup> *Ibid* at 59

<sup>100</sup> Olawuyi, *supra* note 8 at 196.

<sup>101</sup> EIAA, *supra* note 93 at section 15 (1). The Federal Environmental Protection Council (the Council) was established under the now repealed the Federal Environmental Agency Act. Since being repealed, the Council is now established under section 3 of the National Environmental Standards Regulatory and Enforcement Agency (Establishment) (NESREA) Act of 2007, Laws of the Federation of Nigeria 2004, Cap N164

<sup>102</sup> Oshionebo, *supra* note 82 at 59.

<sup>103</sup> *Ibid*.

<sup>104</sup> *Ibid*.

### 3.3.1.5 Associated Gas Re-Injection Act 1984 (AGRA)

In principle, gas flaring has been prohibited in Nigeria since 1984 with limited exceptions. The Associated Gas Re-Injection Act<sup>105</sup> and the regulations enacted pursuant to the Act, prohibit the flaring of natural gas unless the Minister of Petroleum resources is satisfied that it is not feasible or appropriate to re-inject or utilize produced gas.<sup>106</sup> Upon satisfaction of the above requirement, the Minister may then issue a certificate to the oil company granting it permission to flare gas “specifying such terms and conditions as he may at his discretion choose to impose, for the continued flaring of gas in the particular field or fields;”<sup>107</sup> or “permitting the company to continue to flare gas in the particular field or fields if the company pays such sum as the Minister may from time to time prescribe for every 28.317 Standard cubic metre (SCM) of gas flared.”<sup>108</sup>

The *Associated Gas Re-injection (Continued Flaring of Gas) Regulations of 1984* requires however that the issuance of the certificate by the Minister for continued gas flaring shall be subject to one or more of the following conditions:

- (a) Where more than seventy-five percent of the produced gas is effectively utilized or conserved;
- (b) Where the produced gas contains more than fifteen percent impurities, such as N<sub>2</sub>, H<sub>2</sub>S, CO<sub>2</sub>, etc. which render the gas unsuitable for industrial purposes;
- (c) Where the on-going utilization programme is interrupted by equipment failure: provided that such failures are not considered too frequent by the Minister and that the period of any one interruption is not more than three months;
- (d) Where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or possible utilization point is less than 50,000 SCF/KM: Provided that the gas to oil ratio of the field is less than 3,500 SCF/bbl, and that it is not technically advisable to re-inject gas in that field;

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<sup>105</sup> *Associated Gas Re-Injection Act 1984*, Laws of the Federation of Nigeria 2004 Cap A 25.

<sup>106</sup> *Ibid*, Section 3(2)

<sup>107</sup> *Ibid*, Section 3(2)(a)

<sup>108</sup> *Ibid*, Section 3(1)(b)

(e) Where the Minister, in appropriate cases as he may deem fit, orders the production of oil from a field that does not satisfy any of the conditions specified in these Regulations.<sup>109</sup>

It is also significant to note that Regulation 2 of the *Associated Gas Re-Injection Regulations*, provide that: “the Minister may from time to time, review, amend, alter, add to or delete any provision of these Regulations as he may deem fit.”<sup>110</sup> This provision grants the Minister purely discretionary power to “review, amend, add to or delete any of the regulations” as he deems fit. The implication of this provision is that the Minister can decide to “delete” the provisions of the regulation that provide conditions for issuance of the ministerial certificate that permit continued flaring. It would seem that Regulation 2 undermines the effectiveness of the regulations by granting purely discretionary powers to the Minister to override the provisions.

Evidently, the *AGRA* and its supporting regulations are intended to promote re-injection and utilization of natural gas in Nigeria and prevent gas flaring. The Ministerial certificates are usually issued for a period of six months after which the DPR reviews the performance of the oil fields in order to determine whether they qualify for continued flaring or ought to be penalized for violation of the Act.<sup>111</sup> Regardless of these regulations however, gas flaring in Nigeria seems to be unabated for over two decades since regulation was put in place. Statistics show that in the first half of 2005, 116 oilfields were penalized for gas flaring while 75 others were given permission to flare.<sup>112</sup> Statistics from previous years showed what is described as a “blatant disregard for the Act by oil TNCs in Nigeria”.<sup>113</sup>

A number of concerns arise from the and its seeming disregard of the *AGRA* by oil TNCs. The concerns relate to the criteria for the grant of permits, compliance with the *AGRA* and consequences for non-compliance. Oshionebo argues that the criteria for the grant of the permit are skewed in favour of oil TNCs,<sup>114</sup> showing that the criteria for issuing the certificate are easy to meet. Another concern relates to the penalty for gas flaring without the Minister’s permission

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<sup>109</sup> Regulation 1 of the *Associated Gas Re-injection (Continued Flaring of Gas) Regulations of 1984*

<sup>110</sup> *Ibid*, Regulation 2.

<sup>111</sup> Oshionebo, *supra* note 82 at 54

<sup>112</sup> *Ibid*.

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid* at 53.

which is fixed at 10 Naira (about US\$0.05) per 1000scf of gas flared.<sup>115</sup> Some scholars have argued that the amount is so meagre that it is more economically prudent to pay the fines than to re-inject or utilize the gas.<sup>116</sup> Concerns raised by rights groups regarding the Ministerial certificates permitting flaring are that TNCs have often failed to disclose whether ministerial certificates have been issued to them which would legalize their continued flaring. Rights groups argue that such failure to disclose the existence (or lack) of these ministerial certificates makes it impossible to verify the legality of the issuance of those certificates.<sup>117</sup>

The problems relating to continued gas flaring in Nigeria are quite significant. While there is a need to review the *AGRA* in order to make the penalty for flaring without a permit more stringent, there is an equally important need to review the procedure for grant of permits for continued flaring. The attitude to be adopted regarding gas flaring ought to be a zero-tolerance attitude. As seen in the previous subsections, continued flaring has grave consequences on the health, human rights, the environment and the economy of Nigeria, it is unwise to continue to allow state institutions or officials to grant oil companies permission to destroy the environment and a potential source of wealth for the country. As regards gas flaring therefore, a review of existing regulation is required in order to make consequences of non-compliance more stringent.

Odumosu writes that gas flaring persists because of challenges to utilizing associated gas in Nigeria, such as inaccessibility of the markets, lack of infrastructure for utilization and the oil industry's unwillingness to invest in gas utilization.<sup>118</sup> Evidently however, the harm that results from natural gas flaring present cogent need for finding alternatives to gas flaring.

As discussed in previous chapters, the Federal High Court of Benin has declared the provisions of the *AGRA* allowing continued flaring, unconstitutional.<sup>119</sup> However, the decision has been appealed and the *AGRA* remains in force in Nigeria.<sup>120</sup> In a similar vein, the Petroleum Industry Bill of Nigeria was promoted as the Bill that would revolutionize the petroleum industry in Nigeria

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<sup>115</sup> *Ibid* at 54.

<sup>116</sup> *Ibid*, Ibironke T. Odumosu, "Transferring Alberta's Gas Flaring Reduction Regulatory Framework to Nigeria: Potentials and Limitations" (2006-2007) 44 *Alta. L. Rev.* 863 at 888 [Odumosu, Transferring Alberta's Gas Flaring Regulations].

<sup>117</sup> Gas flaring in Nigeria, *supra* note 37 at 31.

<sup>118</sup> Odumosu, Transferring Alberta's Gas Flaring Regulations, *supra* note 116 at 890.

<sup>119</sup> See Suit No: FHC/B/CS/53/05, Federal High Court of Nigeria (Benin Judicial Division), online: Climate Justice [www.climatelaw.org/media/media/gas\\_laring.suit.nov2005/ni.shell.nov05.judgment.pdf](http://www.climatelaw.org/media/media/gas_laring.suit.nov2005/ni.shell.nov05.judgment.pdf) [Gbemre]

<sup>120</sup> Odumosu, Transferring Alberta's Gas Flaring Regulations, *supra* note 116.

and eliminate gas flaring and other problems in the Nigerian oil industry.<sup>121</sup> The Bill has since suffered significant setbacks since it was introduced to the National Assembly in September 2008 and re-introduced in 2012.<sup>122</sup> It has been plagued by allegations of tampering by government officials in a bid to remove contributions of trade unions and NGO's to the Bill.<sup>123</sup> Perhaps unsurprisingly, the Bill as is currently worded speaks of enforcing environmental and air quality standards only "to the extent practicable".<sup>124</sup> Evidently, the reform the Bill sought to initiate in relation to gas flaring has been negated by the language of the Bill.

As the regulatory framework in Nigeria currently exists, independent oversight over the power of the Minister to grant permits for continued flaring of natural gas will greatly reduce incidences of blatant disregard of existing regulation.

#### 3.3.1.6 *The Environmental Guidelines for the Petroleum Industry in Nigeria (EGASPIN)*

The Environmental Guidelines for the Petroleum Industry in Nigeria<sup>125</sup> was issued by the DPR in an attempt to control pollution as a result of oil extraction and address the environmental concerns relating to petroleum operations. Originally issued in 1981 and reviewed in 2002, the EGASPIN sets out detailed guidelines and standards for the exploration, production, storage, refining, transportation, and marketing of petroleum products in Nigeria.<sup>126</sup> Specifically, it establishes industry-wide standards for pollution prevention, abatement and remediation; management, treatment, and control of oil related wastes; compliance monitoring; and sustainable decommissioning of oil and gas facilities.<sup>127</sup> The EGASPIN also restates the various obligations placed on oil corporations by law, including prohibition of discharges of oil related wastes such as drilling muds, produced water and produced sand and sludge into inland, coastal, or offshore waters, swamp, and pits.<sup>128</sup>

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<sup>121</sup> See Marc-Antoine Perouse De Montclos, "The Politics and Crisis of the Petroleum Industry Bill in Nigeria" (2014) 52 J. of Modern African Studies pp. 403-424 [Monclos]

<sup>122</sup> *Ibid* at 408.

<sup>123</sup> *Ibid*.

<sup>124</sup> Section 6(1) of the Petroleum Industry Bill, See Petroleum Industry Bill NNPC, Online:

<http://www.nnpcgroup.com/PetroleumIndustryBill.aspx>

<sup>125</sup> *The Environmental Guidelines for the Petroleum Industry in Nigeria (EGASPIN)* rev. ed. 2002 (Lagos: Department of Petroleum Resources, 2002) [EGASPIN]

<sup>126</sup> Oshionebo, *supra* note 82 at 55.

<sup>127</sup> EGASPIN, *supra* note 121 at 286 – 8, *Ibid*

<sup>128</sup> *Ibid* at 11.

Although the primary responsibility for enforcing the EGASPIN lies with the DPR, the EGASPIN also encourages self-enforcement within the industry.<sup>129</sup> It requires that oil companies perform certain acts at every stage of their operations. The overarching aim of EGASPIN is to ensure that “unforeseen, identified and unidentified environmental issues are contained and brought to an acceptable minimum.”<sup>130</sup> It requires that oil companies undertake audits to assess their compliance with environmental management systems and other regulatory requirements. These audits must be conducted by professionally competent auditors, independent of the activities being audited and registered with the DPR. In addition to the self-audits, oil companies are also required to undertake self-monitoring of discharge of oil related wastes, monitoring of gaseous point source emissions and monitoring of radioactive substances. Records and results of such monitoring activities are to be submitted to the Director of Petroleum Resources at prescribed intervals.

Markedly, the EGASPIN lays out a very elaborate scheme for prevention and control of environmental pollution in the oil industry. However, the requirement for industry self-monitoring and compliance with the standards potentially sabotages the process as it is susceptible to manipulation as TNCs may fail to report incidences of violations. More specifically, Steiner argues that the requirement of for an oil spill contingency plan<sup>131</sup> contained in EGASPIN is not being complied with by Shell as several requests to obtain a copy of such plans were ignored by the TNC and “their actual performance in responding to some large spills leaves no doubt that they are not in compliance with these EGASPIN requirements.”<sup>132</sup> Oshionebo identifies however that perhaps the reason for the requirement of industry self-monitoring and compliance by the EGASPIN is due to the technical nature of enforcing such standards, experience which is lacking at the DPR.<sup>133</sup> Following that line of argument, he writes that “indeed, it is unlikely that TNCs will take these duties [duties of self-regulation under EGASPIN] seriously because the of the lack of credible threat of enforcement by regulatory agencies...”<sup>134</sup>

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<sup>129</sup> Oshionebo *supra* note 82 at 55.

<sup>130</sup> *Ibid*, EGASPIN *supra* note 121 at 10, Article 1.1; at 64, Article 1.1; at 78, Article 5.1(i); at 92, article 5.1(i); at 102, Article 5.1(i); at 114, Article 1.1; at 121, Article 4.1(i).

<sup>131</sup> *Ibid* at 154, Article 2.3.1.

<sup>132</sup> Steiner, *supra* note 73 at 38.

<sup>133</sup> Oshionebo, *supra* note 82 at 56.

<sup>134</sup> *Ibid* at 95.



3.3.1.7. *National Environmental Standards Regulatory and Enforcement Agency (Establishment) Act 2007 (NESREA)*

The NESREA<sup>135</sup> is regarded as Nigeria's principal legislation on environmental protection.<sup>136</sup> It establishes an agency entrusted with the regulation and enforcement of environmental standards, regulations, laws, policies and guidelines.<sup>137</sup> The provisions of the Act however are not aimed at regulation of activities in the oil industry but at general environmental protection in Nigeria. The Act prohibits the discharge of "harmful quantities" of any hazardous substances into the air or upon the land and waters of Nigeria or at adjoining shorelines, except when permitted under any law.<sup>138</sup> Oil related wastes qualify as hazardous substances under the Act as they are defined in broad terms as "any chemical, physical or biological and radioactive material that poses a threat to human health and the environment."<sup>139</sup>

One of the greatest criticisms of the Act is that it is accused of undermining itself. Specifically, the Act prohibits wastes only in "harmful quantities". It is argued that such proviso presents difficulties in implementation as institutions will have to determine what constitutes "harmful quantities".<sup>140</sup> Deficiencies relating to institutional capacity, expertise and equipment at the NESREA, further undermine the effectiveness of this Act and the concern is that public health may be compromised as a result of these deficiencies.<sup>141</sup> Also the prohibition of discharge of hazardous materials is not absolute but subject to "any law in force in Nigeria" that permits such discharge.<sup>142</sup> This undermines the sincerity of the state's commitment to curb discharge of hazardous waste into the environment. The Act however empowers the Agency to impose fines on violators of the Act and the Minister of environment may impose certain obligations on violators of the NESREA Act.<sup>143</sup> It is important to note however that the Act excludes the Agency from investigating environmental audits relating to the oil and gas sector.<sup>144</sup> The exclusion is perhaps designed to avoid duplication

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<sup>135</sup> *National Environmental Standards Regulatory and Enforcement Agency (Establishment) Act 2007 (NESREA)*, Laws of the Federation of Nigeria 2004, cap N164.

<sup>136</sup> Olawuyi, *supra* note 8 at 195.

<sup>137</sup> Section 1 of the NESREA Act *supra* note 135.

<sup>138</sup> *Ibid*, Section 7 of the NESREA Act.

<sup>139</sup> *Ibid*, Section 37.

<sup>140</sup> Oshionebo, *supra* note 82 at 57.

<sup>141</sup> *Ibid*.

<sup>142</sup> Section 27 NESREA Act *supra* note 135.

<sup>143</sup> *Ibid*, Section 27(3) of the NESREA Act and Oshionebo, *supra* note 85 at 57.

<sup>144</sup> Section 2, 27(1) of the NESREA Act *supra* note 135.

of roles with the National Oil Spill Detection Agency which has the responsibility of detection and response to oil spillages in Nigeria.<sup>145</sup>

In spite of the express exclusion of the NESREA from undertaking environmental audit as regards oil and gas related concerns, oil pollutants meet the definitions of hazardous waste as contained in the Act. Secondly, the Agency is responsible for setting standards for the protection and enhancement of Nigeria's air, the provisions of the Act are however "subject to any law in Nigeria".<sup>146</sup> It is the argument of this chapter that the proviso subjecting the provisions of the NESREA Act to any law in Nigeria, was created to further excuse continued flaring of natural gas which compromises air quality. These circumstances further demonstrate the unwillingness of the Nigerian government to adopt a zero-tolerance approach to environmental pollution.

#### *3.3.1.8. National Oil Spill Detection and Response Agency (Establishment) Act 2006 (NOSDRA Act)*

The NOSDRA Act<sup>147</sup> establishes an agency for detecting and responding to oil spills in Nigeria.<sup>148</sup> Section 5 of the Act sets out the objectives of the Agency to include coordinating and implementing the National Oil Spill Contingency Plan, ensuring a safe, timely, effective and appropriate response to major or disastrous oil pollution,<sup>149</sup> identifying high-risk areas as well as priority areas for protection and clean up,<sup>150</sup> establishing the mechanism to monitor and assist or where expedient direct the response, including the capability to mobilize the necessary resources to save lives, protecting threatened environment, and clean up to the best practical extent of the impacted site,<sup>151</sup> ensuring funding and appropriate and sufficient pre-positioned pollution combating equipment and materials, as well as functional communication network system required for effective response to major oil pollution<sup>152</sup>.

The functions of Agency include surveillance and ensuring compliance with existing environmental legislation. Section 6(2) of the Act prescribes a penalty for failure to report oil spill in writing, no later than 24 hours after the spill occurred. Section 18 of the Act establishes a

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<sup>145</sup> Oshionebo, *supra* note 82 at 58.

<sup>146</sup> See section 27 of the NESREA Act, *supra* note 135.

<sup>147</sup> *National Oil Spill Detection and Response Agency (Establishment Act) 2006 (NOSDRA)*.

<sup>148</sup> *Ibid*, Preamble of the Act.

<sup>149</sup> *Ibid*, Section 5 (a).

<sup>150</sup> *Ibid*, Section 5(b).

<sup>151</sup> *Ibid*, Section 5(c).

<sup>152</sup> *Ibid*, Section 5(e).

National Control and Response Center responsible for receiving and processing reports of all spills within Nigeria and serves as the command and control center for monitoring all existing legislation on environmental control, surveillance for oil spill detection and monitoring and coordinating responses.<sup>153</sup>

The responsibilities of the NOSDRA, while clearly designed to detect and responds to spills in Nigeria, seems to be a duplication of effort the EGASPIN and the role of the DPR in upholding regulatory standards. The function of the Agency as regards surveillance and ensuring compliance with regulatory standards is already being carried out by the DPR. The other functions outlined in the Act refer to receiving reports of oil spillages and coordinating oil spill response activities throughout Nigeria;<sup>154</sup> coordinating the implementation of the Plan (oil spill contingency plan) as may be formulated, from time to time, by the Federal Government;<sup>155</sup> and coordinating the implementation of the Plan for the removal of hazardous substances as may be issued by the Federal Government.<sup>156</sup> While these functions are laudable, their existence duplicates the efforts of the EGASPIN in achieving industry wide regulation and therefore presents TNCs with two sets of regulation with no clear precedence of one over the other. While the EGASPIN is enforced through the DPR, NOSDRA also seeks to enforce the same standards through its own agency. This situation creates a lack of coherence in the regulation of the industry and also creates an opportunity for TNCs to play government agencies against each other and avoid meeting standards.

#### 3.4 Barriers to Efficient Regulation: The Case for Regulatory Oversight

Discussions in the previous subsection outlined a number of legislation and regulations aimed at curbing oil pollution in Nigeria. We identified some criticisms of the regulations and legislation as presently constituted and briefly highlighted the institutions responsible for enforcement of such regulation. This subsection summarizes some of the challenges of regulatory effectiveness in Nigeria identifying the specific challenges of regulatory institutions, and other external factors such as the government's involvement in the oil industry that further hinder regulatory

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<sup>153</sup> *Ibid*, Section 18 (1)(c).

<sup>154</sup> *Ibid*, Section 6 (b).

<sup>155</sup> *Ibid*, Section 6 (c).

<sup>156</sup> *Ibid*, Section 6 (d).

effectiveness in Nigeria. Ultimately, the subsection argues the merits of employing an oversight mechanism for regulatory institutions which would serve to further regulatory effectiveness.

A recurring concern that pervades the literature on regulation and legislation in the oil industry is the vast discretionary powers given to specific office holders which tend to undermine the effectiveness of regulation. This was seen in specific relation to the Drilling and Production Regulations, the Environmental Impact Assessment Act, the Petroleum Act and the Associated Gas Re-Injection Regulation. The lack of provision for audits of these vast discretionary powers further undermines the effectiveness of regulation. The adoption of a mechanism that can review and audit decisions of office holders in specific reference to oil and gas regulation would have great implications for increased effectiveness.

From the previous subsection, it can be gleaned that there are a number of institutions responsible for enforcing regulatory standards in Nigeria. We have seen the functions of the Minister of Petroleum Resources who acts through the DPR, the FME, NESREA and the NOSDRA and their role under the various enabling legislation. The DPR exercises the powers of regulation granted to the Minister of Petroleum under section 9 of the Petroleum Act.<sup>157</sup> The research indicates that a number of concerns further stifle the effectiveness of these institutions in carrying out their mandates.

Firstly, there are concerns relating to lack of capacity, resources and expertise within regulatory agencies in Nigeria. A report states that “most states and local government institutions involved in environmental resource management lack funding, trained staff, technical expertise, adequate information, analytical capability and other pre-requisites for implementing comprehensive policies and programs.”<sup>158</sup> The World Bank also reports that regulatory agencies in Nigeria are constrained by limited funding, lack of monitoring equipment, lack of expertise and inadequacy of properly trained staff.<sup>159</sup> In the face of these significant deficiencies, it is perhaps not surprising that regulatory effectiveness is such a challenge in the oil industry. Other challenges to regulatory

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<sup>157</sup> Omorogbe has criticized the role of the DPR in regulation of the industry arguing that no law specifically empowers the DPR to perform that function as the Nigerian National Petroleum Corporation Act empowers the Petroleum Inspectorate (which was the precursor to the DPR) to perform such function. See Yinka Omorogbe, *Oil and Gas Law in Nigeria* (Lagos, Nig.: Malthouse Press, 2003) at 141 [Omorogbe].

<sup>158</sup> Environmental Resource Managers Ltd., *Niger Delta Environmental Survey Final Report Phase 1*, Vol. 1 at 263 in Oshionebo, *supra* note 82 at 72.

<sup>159</sup> World Bank report, *supra* note 5 at 52-61.

effectiveness relate to allegations of corruption. Officials of regulatory institutions have been accused of being compromised in effectively carrying out their duties. For example, the director of Nigeria's DPR was reportedly dismissed on allegations of corruption, following allegations that the director allocated an oil prospecting license to an undeserving company.<sup>160</sup>

Another concern regarding regulatory effectiveness is the multiplicity and lack of cooperation among regulatory institutions. As seen above, the DPR and the NOSDRA have similar mandates when it comes to enforcing regulatory standards, and the NESREA is frustrated by its inability to enforce environmental standards in the area of oil and gas or if any other law in Nigeria permits the activity it seeks to regulate. The existence of a number of these agencies with similar mandates is quite significant because it dissipates already scarce funds amongst a number of regulatory agencies as opposed to simply strengthening just one or two institutions to carry out regulation. Another challenge is that it has a tendency to create conflict or inaction on the part of these agencies and sends confusing signals to the oil companies which these agencies seek to regulate.

Given these significant challenges to effective regulation in Nigeria, there is clearly a need for an intervention that would boost regulatory effectiveness. This thesis proposes the adoption of an independent regulatory oversight framework that provides a system for coordination within existing regulatory institutions and also provides much needed resources to boost capacity for regulatory effectiveness. The proposed framework will be discussed in greater detail in the fourth chapter of the thesis. The proposed framework is designed in part to be able to review decisions of office holders who are given vast discretionary powers under legislation. It is also designed to provide technical support as well as build capacity within staff of regulatory institutions in Nigeria. The existence of the proposed regulatory oversight potentially curbs problems of corruption as oversight subjects all decisions of regulatory institutions to review.

#### *3.4.1 Other Barriers to Effective Regulation in Nigeria*

The thesis suggests that the most significant challenge to regulatory effectiveness in Nigeria is the country's heavy reliance on the proceeds of the oil industry to sustain its economy, and its involvement in oil extraction.<sup>161</sup> The government operates joint venture agreements (JVAs) with

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<sup>160</sup> Oshionebo, *supra* note 82 at 73.

<sup>161</sup> In 2015, Nigeria's total export were valued at \$83,897million, petroleum exports accounted for \$76,925million of the total value of export. See Organization of Petroleum Exporting Countries (OPEC), Nigeria Facts and Figures online: OPEC [http://www.opec.org/opec\\_web/en/about\\_us/167.htm](http://www.opec.org/opec_web/en/about_us/167.htm)

TNCs through the state-owned oil company, the NNPC. The two issues identified, though separate are related because they are tied to Nigeria's political will to enforce regulations against TNCs and the NNPC. An imposition of fines or other sanctions in pursuance of regulation affects not only TNCs but also the government's bottom line as government earnings from the oil sector are affected.<sup>162</sup>

The significance of the government's reliance on the oil industry can be explained through the theory of the resource curse. Studies of the resource curse suggest that positive wealth shock from natural resource sectors drives up exchange rates and higher wages in that sector than in other sectors which in turn reduces profits in manufacturing and other non-primary export sectors.<sup>163</sup> The subsequent decline of manufacturing and other sectors in turn slows down economic growth, leading to what is termed "the Dutch Disease".<sup>164</sup> The term is derived from the Dutch experience following the discovery of large fields of natural gas in the Netherlands in the late 1950s. When the country witnessed a huge inflow of revenues due to the rapid development when it became a gas exporter, the initial result was an increase in overall welfare, but soon the manufacturing sector declined as a result of a large inflow of foreign currency that made manufacturing exports less competitive on international markets and increased production costs internally.<sup>165</sup>

The phenomenon of the resource curse suggests that large and newfound resource endowments can both directly and indirectly result in poor forms of governance that incite violent conflict, political instability and graft and weak institutions.<sup>166</sup> Other studies of the resource curse suggest that large windfalls from natural resources contribute to rising income gaps between the rich and the poor, institutionalize corruption and enable oppressive regimes to maintain political power.<sup>167</sup>

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<sup>162</sup> Unless the NNPC is able to establish that the fines were imposed due to an act of negligence on the part of the operator (the TNC).

<sup>163</sup> *Fuelling the World - Failing the Region? Oil Governance and Development in Africa's Gulf of Guinea* (Abuja, Nigeria: Friedrich-Ebert-Stiftung, 2011) cited in Bazilian et al *supra* note 64 at 36.

<sup>164</sup> Bazilian et al, *supra* note 64 at 37.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> Terry Lyn Karl, "State Building and Petro Revenues", in Marc Garcelon, Edward W Walker, Alexander Patten-Wood and Aleksandra Radovich (eds), *The Geopolitics of Oil, Gas, and Ecology in the Caucasus and Caspian Sea Basin* (Berkeley: Berkeley Institute of Slavic, East European and Eurasian Studies, 1998), 3-14.

In the case of Nigeria, the country is described in many texts as one beset by the resource curse.<sup>168</sup> Other studies into the resource curse show that resource abundance has been linked to rent seeking behaviour and political corruption which weakens political institutions.<sup>169</sup> While there is not much empirical certainty surrounding the process of the resource curse, the existing findings are suggestive that resource abundance has contributed to crippling state institutions in Nigeria and perpetuated corruption and rent seeking behaviour that weaken regulatory effectiveness. Oil is the country's only major export and accounts for a significant amount of the country's GDP.<sup>170</sup> Oil exports have dwarfed all other sectors of the economy.<sup>171</sup> The significance of the resource curse to this discourse reveals the precarious nature of the Nigerian state; it reveals the significance of oil to its economy and exposes some of the motives behind its relations with the oil industry and local communities. The oil industry can be described as the country's "cash cow" and the government is perhaps unwilling to enforce any sanctions that may be detrimental to its primary source of income.

This subsection has shown that Nigeria suffers two challenges: the resource curse and regulatory ineffectiveness. It has been suggested that diversifying the economy could potentially reverse the effects of the resource curse in Nigeria. However, there is no proof that diversifying the economy will address concerns relating to regulatory ineffectiveness in the oil industry. The literature on the resource curse emphasizes the significance of strong political institutions in order to effectively undertake economic reforms in a resource-rich country.<sup>172</sup> In agreement with the literature, this thesis suggests strengthening state institutions in order to undertake economic, legislative and institutional reforms in the Nigerian oil industry. The thesis therefore suggests the adoption of a framework that will strengthen regulatory institutions in Nigeria and ultimately drive reforms.

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<sup>168</sup> Annegret Mahler "Nigeria: A Prime Example of the Resource Curse? Revisiting the Oil Violence Link in the Niger Delta" (2010) 120 GIGA Working Papers at 5. [Mahler] See also Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (London: Routledge 1993), Paul Collier and Anke Hoeffler, *Greed and Grievance in Civil War* (Washington DC: World Bank 2001), Phillipe Le Billon, "The Political Ecology of War: Natural Resources and Armed Conflict" (2010) 20 Political Geography 561-584, Jeffery D. Sachs and Andrew M. Warner, "The Curse of Natural Resources" (2001) 45 European Economic Review, Elsevier 827-838.

<sup>169</sup> James A. Robinson, Ragner Torvik and Theiry Verdier, "Political Foundations of the Resource Curse" (2006) 79 Journal of Developmental Economics 447 at 448 [Robinson et al].

<sup>170</sup> The oil and gas sector accounts for about 35% of gross domestic product, and petroleum exports revenue represents over 90% of total exports revenue. See OPEC, *supra* note 161.

<sup>171</sup> *Ibid.*

<sup>172</sup> See Halvor Mehlum, Karl Moene and Ragnar Torvik, "Institutions and the Resource Curse" (2006) 116 The Economic Journal at 1 [Mehlum et al].

Recently Michael Ross opined that “perhaps the problem is not that oil states have exceptionally weak institutions and need normal ones; perhaps they already have normal institutions but need exceptionally strong ones.”<sup>173</sup> Evidently, the government’s involvement in oil extraction, the inherent challenges within the regulatory framework, and the resource curse hinder the development of strong regulatory institutions and effective regulation of oil pollution in Nigeria. Regulatory oversight over the regulatory institutions in Nigeria, has the potential to strengthen these institutions, drive better regulatory effectiveness and garner political will towards enforcing regulation and perhaps diversifying the economy.

### 3.5 Conclusion

The pith of the arguments being made in the chapter can be summarized thus: that terrible oil pollution persists in the Niger Delta and there is a need for better enforcement of existing regulations to curb it. To quote Oshionebo on this point, “...the crisis of environmental protection in Nigeria’s oil and gas industry lies not so much with the defects in Nigerian laws as with their non-enforcement.”<sup>174</sup> The case for better regulation of the oil industry has implications for human rights and health of local communities as well as the environment, climate change and the Nigerian economy.

Discontinuing natural gas flaring for example, has the potential to increase energy generation in Nigeria which would in turn give rise to other sectors of the Nigerian economy. It is important to note that following the initial mismanagement of Dutch resources in the 1950s and the subsequent decline of the Dutch economy, the Dutch government started to build gas reserves and other physical infrastructure which led to higher economic growth.<sup>175</sup> This phenomenon was regarded as the “Dutch cure”.<sup>176</sup> The argument therefore is that discontinuing deliberate oil pollution in the form of natural gas flaring has the potential to not only “cure” some of the challenges in Nigeria’s oil industry, but also benefits local communities, climate change and the environment. Oil spills and disposal of wastes can be regulated using the numerous regulations for environmental protection currently in force in Nigeria, provided there is the will to enforce them.

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<sup>173</sup> Michael L. Ross, *The Oil Curse: How Petroleum Shapes the Development of Nations*, (U.S.A.: Princeton University Press 2012) at 215.

<sup>174</sup> Oshionebo, *supra* note 82 at 60.

<sup>175</sup> Bazilian etal, *supra* note 64 at 43.

<sup>176</sup> *Ibid*



In addition, given the government's involvement in the oil industry and its heavy reliance on revenue from the oil industry, it has a conflict of interest and may not be able to fully enforce regulations against TNCs or undertake sincere reforms of the regulatory framework of Nigeria. This thesis therefore recommends the employment of the Economic Community of West African States (ECOWAS) to provide oversight over regulatory institutions in order to drive regulatory effectiveness. The adoption of regulatory oversight from an independent regional body such as the ECOWAS promises much needed review into vast discretionary powers given to office holders under a number of regulations (as seen earlier in the chapter) and has the potential to address challenges relating to institutional capacity and effectiveness of regulatory institutions in Nigeria. A detailed analysis of the ECOWAS and its potential for oversight is undertaken in the next chapter and proposes a framework for regulatory oversight of the mechanisms for regulating Nigeria's oil industry. Oversight has the potential to remedy challenges relating to regulatory effectiveness and ultimately protect local communities and the environment.

## CHAPTER FOUR: PROPOSED OVERSIGHT OF THE NIGERIAN OIL INDUSTRY BY THE ECOWAS

### 4.1. Introduction

Thus far, this thesis has demonstrated the failure Nigeria's regulatory framework to effectively regulate the oil industry and protect the rights of local communities affected by oil pollution and other oil mining related activities and has argued the need for regulatory oversight in order to foster effective regulation. Central to this thesis is the potential role of the ECOWAS in providing such regulatory oversight.

The hypothesis of this chapter is that regulatory oversight will provide much needed supervision to regulatory institutions in Nigeria in order to drive effectiveness. The chapter presents a framework for oversight under the ECOWAS. The proposed framework is designed to address certain concerns regarding lack of capacity or resources within regulatory institutions in Nigeria thereby driving effectiveness. The chapter suggests that the ECOWAS and the ECOWAS Court can play a significant role in regulatory oversight (in addition to its role in protecting human rights identified in the second chapter of this thesis) and delineates certain responsibilities for it.

Ultimately, the chapter examines the ECOWAS, its growth, development and its potential for regulatory oversight over Nigeria. Following discussion establishing that the ECOWAS has the potential to provide regulatory oversight over the framework for regulation of the Nigerian oil industry, it proposes a framework for the said regulatory oversight.

The chapter is divided into six sections. The first is the just concluded introductory paragraphs, reiterating the need for regulatory oversight over the Nigerian oil industry and highlighting the implications of the use of the ECOWAS to provide such oversight. The second section undertakes a brief but sufficient history, background, structure and evolution of the ECOWAS. This analysis highlights the growth and evolution of the organization, inspiring confidence in the potential of the ECOWAS to develop and undertake oversight functions. The third section introduces the concept of supranationality as a significant factor in the proposal of ECOWAS for regulatory oversight. The section interrogates the supranationality of the ECOWAS, the concept of

supranationality and specific challenges to the ECOWAS as a supranational organization. This analysis underscores the legitimacy of the ECOWAS to perform oversight over a sovereign state such as Nigeria. The next section identifies a specific role for the ECOWAS in the proposed regulatory oversight, outlines a framework under which the ECOWAS can perform oversight and identifies the prospects and proposed challenges that face the adoption of such a framework. Reviewing the potential contributions of the framework through the optics of the norm “life cycle” theory, the chapter argues suggesting that the adoption of the framework ultimately aids transposition of new norms relating to regulatory effectiveness in the oil industry in Nigeria. The chapter concludes on an optimistic note, identifying certain issues seen while conducting research into this thesis that require further research, while maintaining optimism that the ECOWAS is well suited to implement the framework being proposed and provide regulatory oversight to Nigeria.

## 4.2. The ECOWAS

### 4.2.1. Background to the Development of the ECOWAS

The region of West Africa extends from Mauritania in the northwest to Niger in the northeast, Nigeria in the southeast and the Gulf of Guinea in the south and the southwest.<sup>1</sup> These 6.1 million square kilometers originally included 16 countries including the landlocked Mali, Niger, Burkina Faso, the island of Cape Verde and 12 other coastline states.

It is necessary to acknowledge the colonial history of West Africa in a discussion regarding the ECOWAS and resource extraction as it provides some context into part of the motivation for economic integration amongst West African states and ultimately the creation of the ECOWAS. West Africa was one of the first regions south of the Sahara to have contacts with Western Europe.<sup>2</sup> Slave trade had initially characterized relations between the West and Africa and subsequently colonialism defined the relations. Scholars have argued that early contacts, which were initially slave trade motivated, frequently interrupted the orderly development of the people’s socio-economic life.<sup>3</sup> They argue that early economic activities and development of West African people were interrupted and even arrested by European influence seeking the trade of slaves.<sup>4</sup> Slave trade

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<sup>1</sup> Julius Emeka Okolo “Integrative and Cooperative Regionalism: The Economic Community of West African States” (1985) 39 Int’l Org. 121 at 123 [Okolo].

<sup>2</sup> Uka Ezenwe, *ECOWAS and the Economic Integration of West Africa*, (London: C. Hurst & Company, 1983) at 1 [Ezenwe].

<sup>3</sup> Rene Dumont, *False Start in Africa*, (USA: Frederick A. Praeger, 1969) at 34 and 35 [Dumont].

<sup>4</sup> *Ibid*, Ezenwe *supra* note 2.

encouraged internal wars which were profitable to feed the trade, further diminishing the economic development of the African people and denigrating the fabric of society.<sup>5</sup>

The advent of colonization replaced the trade of slaves with the exploitation of raw materials in West African forests.<sup>6</sup> A significant event in the history of West Africa was the Berlin Conference, said to be responsible for the “initial carve up of Africa”.<sup>7</sup> Portugal called for the Conference and it was organized by Otto von Bismarck, first Chancellor of Germany. The outcome of the Conference was the General Act of the Berlin Conference (seen as the formalization of the Scramble for Africa) which saw European powers agreeing on the principles to guide the partition of Africa.<sup>8</sup> There was subsequently a Convention between Britain and France for the delimitation of their respective possessions to the West of the Niger and their respective possessions and spheres of influence to the East of the River Niger. It involved Britain and France staking claims to particular territories in West Africa and agreements by the other country to waive any claims to such identified territories.<sup>9</sup> Britain and France exerted their influence on the region through political policies aimed at administering their territories.<sup>10</sup> The agreement between European powers granted the colonial powers unhindered access to raw materials in West Africa.<sup>11</sup> It is interesting to note that in some instances, formal administrative responsibilities were not directly assumed. For example, Britain in 1885, constituted the territories between Lagos and the Cameroons, together with the banks of the Niger up to Lokoja and of the Benue up to Ibi, into the Niger Coast Protectorate and conveniently relinquished the administration of that region of Nigeria to the National African Company “as the cheapest and most effective way” of discharging the obligations to maintain free navigation which had been accepted at the Berlin Conference.<sup>12</sup> Company rule even then had many faults and weaknesses, but the British were still content to leave their major West African interest beneath “this light administrative umbrella”.<sup>13</sup> This perhaps

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<sup>5</sup> Dumont, *supra* note 3 at 35.

<sup>6</sup> Ezenwe, *supra* note 3 at 2.

<sup>7</sup> Kwame Nkurmah, *Challenge of the Congo* (New York: International Publishers 1967) p. x [Nkurmah] cited in Adekunle Ajala, “The Nature of African Boundaries”(1983) 2 *Africa Spectrum*, 177 at 178 [Ajala].

<sup>8</sup> Ajala, *supra* note 7 at 178.

<sup>9</sup> *Ibid* at 179.

<sup>10</sup> Ezenwe, *supra* note 3 at 3-4.

<sup>11</sup> *Ibid*.

<sup>12</sup> John D. Hargreaves, *Prelude to the Partition of West Africa*, (London: Macmillan, 1963) at 338.

<sup>13</sup> *Ibid* at 339.

provides some insight into the history of plunder and exploitation that characterized the relationship between the region and TNCs.

The colonial history of West Africa is relevant to this thesis as it aids understanding of the background to the creation of the ECOWAS and the need for economic integration. Years of exploitation of both human and natural resources as a result of colonization created a significant degree of underdevelopment and arrested development within the region. Slave trade had encouraged wars which further divided already weak communities and exploitation of raw materials did not encourage the economic growth of the region.<sup>14</sup> Upon gaining independence, there was a need for states which were already disadvantaged to band together to lift themselves out of the already precarious situation.

Economic integration within West African states post colonization would be valuable to the economically disadvantaged region as it was designed to open up borders, encourage free movement of goods and services and bolster economic activities between states. There was also a need to have a West African institutional instrument for bargaining with the industrialized world and a need to pry control of the West African economy and political terrain from the continued influence of colonial powers.<sup>15</sup> However, states were reluctant to embrace such ideas perhaps afraid to cede any part of their newly acquired sovereignty in the name of regionalism.<sup>16</sup> Other concerns involved the influence of France over its former territories, rivalry and suspicion between Francophone and Anglophone West African states, the rivalry between Nigeria and Ghana and fear of “Nigerian domination”<sup>17</sup> especially within Francophone countries.<sup>18</sup>

#### 4.2.2. Origin and Development of the ECOWAS

The inspiration for the ECOWAS was drawn from the groupings of the United Nations Economic Commission for Africa (ECA) in the mid-1960s, which had divided Africa into regions for the purposes of economic development.<sup>19</sup> Fourteen West African countries were included in the projected West African grouping with the exclusion of Guinea-Bissau and Cape Verde because

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<sup>14</sup> See Dumont, *supra* note 3 at 36.

<sup>15</sup> Olatunde J.B. Ojo, “Nigeria and the Formation of the ECOWAS” (1980) 34 *International Organization*, 571 at 600 [Ojo].

<sup>16</sup> Ezenwe, *supra* note 2 at 6.

<sup>17</sup> Ojo, *supra* note 15 at 580.

<sup>18</sup> See Ojo, *supra* note 15.

<sup>19</sup> Okolo, *supra* note 1 at 124.

they were still under colonial rule.<sup>20</sup> The ECA held specialized meetings which led to the signing of an Article of Association of the proposed Economic Community of West Africa and the formation of an interim Council of Ministers. A subsequent summit led to the establishment of the West African Regional Grouping but this initiative recorded disappointing results as only nine out of the fourteen countries attended the meeting and signed the treaty and a subsequent conference to sign the West African Common Market Treaty never came to fruition.<sup>21</sup> Professor Adedeji, the Nigerian Commissioner for Economic Development, referred to as the Father of ECOWAS,<sup>22</sup> claimed that the “initiatives were frustrated by the agents of imperialism and colonialism who concentrate on what divides us rather than what unites us”.<sup>23</sup> It was highly speculated that France and Francophone countries which were largely loyal to France were the targets of his comments.<sup>24</sup>

The formal launching of ECOWAS came at the end of an April 1972 visit to Togo by General Yakubu Gowon, Nigeria’s head of state. Gowon and President Eyadema of Togo issued a communique announcing their decision to create an economic grouping, “an embryonic West African Economic Community,” between their two countries.<sup>25</sup> A commission of experts was set up and areas such as transport and communications, trade, industry, money payments and the abolition of transit tax were considered by the experts.<sup>26</sup> Within about a year and a half of its first meeting, the Commission produced a draft treaty which was signed by the original fifteen ECOWAS member states at Lagos on 28 May 1975.<sup>27</sup>

#### 4.2.3. *The 1975 ECOWAS Treaty*

The main aims of the ECOWAS were to promote cooperation and development in industry, telecommunications, energy, agriculture, commerce, monetary and financial issues and the social and cultural matters.<sup>28</sup> Cooperation was designed to raise the living standards of people in the Community, maintain economic stability, foster closer relations among Community members and

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Alhaji Sarjoh Bah, “ECOWAS and the Legitimacy Question: A Normative and Institutional Approach”, ed by Dominik Zaum, *Legitimizing International Organizations* (United Kingdom: Oxford University Press 2013) at 90

<sup>23</sup> Ojo, *supra* note 15 at 576.

<sup>24</sup> *Ibid.*

<sup>25</sup> See Okolo, *supra* note 1 at 128 and Ojo, *supra* note 15 at 591.

<sup>26</sup> Okolo, *supra* note 1 at 128.

<sup>27</sup> *Ibid.*

<sup>28</sup> Kofi Oteng Kufuour, *Institutional Transformation in The Economic Community of West African States* (Great Britain: Ashgate 2006) at 23 [Kufuour, *Institutional Transformation*].

contribute to the progress and development of Africa.<sup>29</sup> Member states were to enhance access to markets for goods and services in the Community, to be achieved through the progressive elimination of customs tariffs and other such barriers. The ECOWAS treaty of 1975 aimed to create a customs union, enhance free movement of persons and capital within the Community, and establish harmonization programs as well as common community programs.<sup>30</sup>

Article 4 of the ECOWAS Treaty of 1975<sup>31</sup> entrusted governance to a set of Community institutions. It established the Authority of Heads of State and Government (AHSG), the Council of Ministers, the Executive Secretariat, the Tribunal of the Community, and the Technical and Specialized Commissions (TSC).<sup>32</sup> The Authority of the Heads of State and Government was the supreme policy-making body composed of the heads of the member states.<sup>33</sup> It was to meet at least once a year and had the responsibility for the Community's executive functions.<sup>34</sup> Next in the hierarchy was the Council of Ministers which met twice a year and was composed of two ministers from each member state.<sup>35</sup> It was responsible for monitoring the functioning of the community, making recommendations to the AHSG,<sup>36</sup> giving direction to the community's subordinate institutions<sup>37</sup> and exercising such other powers conferred on it and performing such other duties assigned to it by the Treaty.<sup>38</sup>

The Treaty established the Executive Secretariat, headed by an Executive Secretary,<sup>39</sup> responsible for servicing and assisting the institutions in the Community, keeping the Community under continuous examination, and submitting a report of the activities to all sessions of the Council of Ministers and all the meetings of the AHSG. It was also to undertake work and studies to perform such services relating to the community as assigned to it by the Council of Ministers.<sup>40</sup> The Treaty also established TSCs made up of representatives from each member state. They were to submit

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<sup>29</sup> Kufuor, *Institutional Transformation* *ibid*, Article 2, 1975 Treaty of ECOWAS reprinted in XIV *International Legal Materials* (1975) pp. 1200-09 [The 1975 Treaty]

<sup>30</sup> Kufuor, *Institutional Transformation*, *supra* note 28 at 23; the 1975 Treaty

<sup>31</sup> 1975 Treaty of ECOWAS *supra* note 28.

<sup>32</sup> *Ibid*.

<sup>33</sup> Okolo, *supra* note 1 at 137, Article 4 (1)(a) of the 1975 Treaty.

<sup>34</sup> Kufuor, *Institutional Transformation* *supra* note 28 at 23, Article 5 (4) and (2) of the 1975 Treaty.

<sup>35</sup> *Ibid*, Article 4 (1)(b) of the 1975 Treaty.

<sup>36</sup> *Ibid*, Article 6 (2)(b) of the 1975 Treaty.

<sup>37</sup> *Ibid*, Article 6 (2)(c) of the 1975 Treaty.

<sup>38</sup> *Ibid*, Article 6 (2)(d) of the 1975 Treaty.

<sup>39</sup> *Ibid* at 24, Article 8 (1)-(2) of the 1975 Treaty.

<sup>40</sup> *Ibid*, Article 8 (10)(a-d) of the 1975 Treaty.

periodic reports and recommendations through the Executive Secretary to the Council of Ministers. They could also perform any function assigned to them pursuant to the Treaty.<sup>41</sup> Judicial power was granted to the tribunal of the Community to interpret provisions of the Treaty and settle disputes in accordance with Article 56 of the Treaty.<sup>42</sup> The willingness of the ECOWAS states even then to limit their sovereignty to some degree by establishing a body that would authoritatively interpret the Treaty and ensure the “observance of law and justice”,<sup>43</sup> is particularly significant to note. The specific provisions of the tribunal were later set out in the Protocol of the Community Court of Justice.<sup>44</sup>

Other provisions of the 1975 Treaty were elaborated through a number of protocols and decisions. They include the Protocol Relating to Free Movement of Persons, Residence, and Establishment,<sup>45</sup> Protocol on Non-Aggression,<sup>46</sup> Protocol Relating to Mutual Assistance on Defense,<sup>47</sup> and the Community Trade Liberalization Scheme (TLS) among others. The TLS was aimed at the total removal of tariffs on all unprocessed goods and handcrafts to be followed by the progressive elimination of tariffs on all industrialized products from 1981 to 1989.<sup>48</sup>

Although the 1975 Treaty had the advantages of great craftsmanship and the benefit of drawing from the European Economic Community (EEC) and CEAO<sup>49</sup> Treaties before it,<sup>50</sup> it had a number of failings. Kufour writes that a major failing of the Treaty was the failure of the TLS.<sup>51</sup> Another flaw of the Treaty was the vagueness of the article defining the powers of the AHSG. It was seen

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<sup>41</sup> *Ibid*, Article 9 (4) (a)-(b) of the 1975 Treaty.

<sup>42</sup> *Ibid*, Article 11 (1) of the 1975 Treaty.

<sup>43</sup> Article 11 (1) of the 1975 Treaty, Okolo *supra* note 1 at 138.

<sup>44</sup> Protocol on the Community Court of Justice, 19 *Official Journal of the Economic Community of West African States* (July 1991).

<sup>45</sup> *Ibid*, Protocol of Free Movement of Persons is reprinted in the Protocols annexed to the Treaty of the ECOWAS, *supra* note 28 at 87-95. The Protocol on free movement was an elaboration of Article 27 of the 1975 Treaty entitling Visa and Residence of Member states as Community citizens.

<sup>46</sup> *Ibid*, Protocol on Non-Aggression reprinted in Protocols annexed to the Treaty of ECOWAS, *supra* note 28 at 81-86. The Protocol was designed to guarantee regional peace and obligated Member states to refrain from the threat or use of force or aggression in their relations with one another.

<sup>47</sup> *Ibid*, Protocol Relating to Mutual Assistance on Defense, reprinted in 3 *Official Journal of the Economic Community of West African States*, (June 1981) at 9-13

<sup>48</sup> *Ibid*.

<sup>49</sup> CEAO is the acronym for the Communauté Economique de l'Afrique de l'Ouest comprising seven Francophone West African states. It was also an economic integration union whose treaty was signed in June 1972. See Kunle Amuwo, “France and the Economic Integration Project in Francophone Africa” (1999) 4 *Afr. J. Pol. Sci.* 1 at 8

<sup>50</sup> Ojo, *supra* note 15 at 597.

<sup>51</sup> Kufuor, *Institutional Transformation supra* note 28 at 26.



that responsibility for general direction and control for progressive development<sup>52</sup> was quite ambiguous and a specific and definitive statement of the role of the AHSG would better serve the integration process.<sup>53</sup> Others also criticized the Council of Ministers' lack of power to give directions in connection with the task of harmonizing socio-economic policies of the Community.<sup>54</sup> Another problem that went to the effectiveness of the ECOWAS was that there seemed to be no binding force to the decisions of the Community. Except for sanctions regarding non-payment of budgetary contributions under Article 54(3), no other decisions of the Community had binding force.<sup>55</sup>

The shortfalls of the Treaty led to the establishment of the Committee of Eminent Persons (CEP)<sup>56</sup> mandated to undertake a review of the 1975 ECOWAS Treaty in order to “adjust itself to the dramatic changes taking place in West Africa and other parts of the World”.<sup>57</sup> The report of the CEP culminated in the creation of a new treaty for the ECOWAS, designed to create a new regime of legal obligations for members, outline a new set of policy objectives and increase the number of powers of regional institutions.<sup>58</sup> The most significant recommendation of the CEP in the context of this thesis was the introduction of supranationality to the ECOWAS. The CEP advised that the ECOWAS adopt a new approach to its governance and move away from an intergovernmental agency to a supranational agency. The 1975 Treaty had adopted an intergovernmental approach to governance, based on national sovereignty and non-interference in affairs of members.<sup>59</sup> However, the CEP advised that the ECOWAS replace the intergovernmental approach and turn the ECOWAS into a supranational entity.<sup>60</sup> The arguments made by the CEP included arguments about the modern day reconceptualization of the concept of national sovereignty especially in the face of globalization and technological advances. It argued for

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<sup>52</sup> Article 5 (2) of the 1975 Treaty, *supra* note 28.

<sup>53</sup> Kofi Oteng Kufuor, “Law, Power, Politics and Economics: Critical Issues Arising Out of the New ECOWAS Treaty” (1994) 6 Afr. J. Int’l & Comp. L. 429 at 432 [Kufuor, New ECOWAS Treaty]

<sup>54</sup> *Ibid* at 433.

<sup>55</sup> *Ibid*.

<sup>56</sup> Findings of the Committee of Eminent Persons of the ECOWAS Treaty, located in the Draft Report of the CEP, ECW/CEP/TREV/VI/2, Lagos, 1992 [CEP Report] cited in Kufuor, New ECOWAS Treaty, *supra* note 53 at 433.

<sup>57</sup> CEP report, *supra* note 56 at 1

<sup>58</sup> Kufuor, New ECOWAS Treaty, *supra* note 53 at 430.

<sup>59</sup> Jadesola O. Lokulo-Sodipe & Abiodun J. Osuntogun, “The Quest for a Supranational Entity in West Africa: Can the Economic Community of West African States Attain the Status?” (2013) 16(3) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regbald* 255 [Lokulo-Sodipe & Osuntogun].

<sup>60</sup> *Ibid*.

example that issues of human rights abuses were no longer restricted to national intervention but were concerns for the entire international community.<sup>61</sup> Ultimately it argued that the best strategy for the growth of economic power had to involve at least a partial transfer of sovereignty to a supranational body.<sup>62</sup>

Thus far, the chapter has discussed the background to the creation of the ECOWAS, highlighting the need for economic integration in the region, the challenges to its realization and most significantly the challenges to ECOWAS under the 1975 Treaty. The next subsection examines the 1993 ECOWAS Treaty, identifying the remedies it presented to the problems that had plagued the 1975 treaty, evidencing the evolutionary tendencies of the ECOWAS.

#### 4.2.3 *The ECOWAS TREATY of 1993*

The new ECOWAS Treaty was signed at Cotonou, Benin Republic on 24 July, 1993.<sup>63</sup> The ECOWAS adopted the recommendations of the CEP and created a new regime of legal obligations for member states, developed a new set of policy objectives, increased the number and powers of regional institutions and set a new legal framework for intra-Community relations.<sup>64</sup> The new treaty sought to strengthen the ECOWAS and established, in addition to the existing institutions, an ECOWAS Parliament, Economic and Social Council (ECOSOC) and an ECOWAS Court of Justice and significantly, it introduced the concept of supranationality of the ECOWAS.<sup>65</sup>

Part of the problems that had plagued the previous ECOWAS Treaty was that decisions of the AHSB were not binding on member states. In this Treaty, therefore, the CEP recommended that decisions of the AHSB be binding on member states and automatically enter into force, sixty days after their publication in the Official Journal of the Community.<sup>66</sup> In addition, the Community was also given power under the Article 7(c) of the new Treaty to enforce its decisions using the Community Court of Justice in instances where “it confirms that a Member State or Institution of the Community has failed to honor any of its obligations or an institution has acted beyond its authority or has abused its powers.” The CEP, however, recommended that legal action be an

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<sup>61</sup> Kufuor, *New ECOWAS Treaty*, *supra* note 53 at 430.

<sup>62</sup> CEP Report, *supra* note 56

<sup>63</sup> *ECOWAS Doc. ECW/LEX/IV/2A/Rev.3*, Lagos, October 1992, signed at Cotonou, 24 July 1993. It is reprinted in *International Legal Material* No.14, 1975, p.1200 cited in Kufuor, *New ECOWAS Treaty*, *supra* note 53 at 430.

<sup>64</sup> Kufuor, *New ECOWAS Treaty*, *supra* note 53 at 430.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid* at 441.

option of last resort, and subtler means of compliance be pursued with member states first, such as regular submission of status reports on their implementation.<sup>67</sup> Another significant innovation of the Treaty was that the decision-making process of the AHSG which had previously been based on unanimity would now involve, depending on the subject being considered, consensus and two-thirds majority of member states.<sup>68</sup>

The advent of the new Treaty inspired confidence in the ECOWAS in some quarters and skepticism in others. Evidently, the new Treaty had acknowledged the problems of the old Treaty and had provided innovative solutions to such problems. However, skeptics were uneasy about the possibility of the ECOWAS successfully implementing the changes created under the new Treaty which would make it a more formidable force in the field of integration.<sup>69</sup> This thesis, however, argues that the changes under the new Treaty have recorded modest success in establishing the ECOWAS as a medium of integration within the region. While discussions regarding the promise of the ECOWAS will be undertaken in the fourth subsection of this chapter, discussions regarding the supranationality of the ECOWAS form the focus of this next section. Firstly, the subject of supranationality flows from discussions regarding the new treaty as it was introduced by the new Treaty and secondly, it provides the argument under which regulatory oversight such as the one being proposed by the thesis rest.

#### 4.3. The Supranationality of the ECOWAS

The question of supranationality of the ECOWAS has been a source of concern amongst skeptics. In his earlier work, Kufuor described the need for supranationality of the ECOWAS as “problematic”; he argued that there was insufficient evidence of economic relations between member states of the ECOWAS to warrant a supranational state [the ECOWAS] acting as a regulator or an umpire.<sup>70</sup> He further argued that it was obvious that the new treaty sought to “unravel the web of laws that prevent free flow of goods within the Community”, however, the resultant effect was that it had superimposed a new legal framework on a virtually non-existent base as economic conditions did not exist for the establishment of a supranational regime.<sup>71</sup> In his

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<sup>67</sup> CEP Report, *supra* note 56 at 20 in Kufuor, New ECOWAS Treaty *supra* note 52.

<sup>68</sup> Kufuor, New ECOWAS Treaty, *supra* note 53 at 442.

<sup>69</sup> See Kufuor, New ECOWAS Treaty, *supra* note 53.

<sup>70</sup> *Ibid* at 443.

<sup>71</sup> *Ibid*.

later work, Kufuor maintains his position arguing that the CEP's recommendations were informed by the need to mimic the successes of the European Union (EU) even where the forces responsible for the transformation of the EU were not applicable in West Africa.<sup>72</sup> He undertakes an analysis of the factors responsible for the EU emerging as a supranational entity such as cross-border capital flows and the threat posed by the Soviet Union and its allies after the Second World War which led to states relinquishing control of their respective armed forces to a regional body, the North Atlantic Treaty Organization.<sup>73</sup> He argues that no such circumstances existed in West Africa both at the time of adopting the new Treaty and now; intra-ECOWAS capital flows are "infinitesimally small" and there is no evidence to support the need for a supranational organization to safeguard the capital of the Community's industrial-commercial class.<sup>74</sup> Kufuor's argument regarding the absence of the factors present in Europe in West Africa are certainly not misplaced. His theoretical analysis of the motivations of the CEP in recommending supranational status for the ECOWAS supports the premise that the growth of the organization must be gradual.<sup>75</sup> Perhaps, attempting to "copy" a "successful" organization's structure or treaty or form<sup>76</sup> would propel such an organization to achieve such success. While admitting to the veracity of Kufuor's assessment regarding the current state of the ECOWAS' supranationality, the thesis expresses significant optimism about the potentials of ECOWAS' supranationality. The chapter undertakes an analysis of the reasons for such optimism when discussing the promise of the ECOWAS in the fourth subsection.

For the purposes of this chapter, we adopt Kufuor's definition of supranational organization. He defines a supranational organization as one that is empowered to pierce the surface of its members' national jurisdictions and bind the decision makers to the laws that it promulgates.<sup>77</sup> One scholar undertakes the definition of a supranational organization by distinguishing a supranational union from a Federation or a Confederation and arguing that the reach of a supranational union extends to having:

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<sup>72</sup> Kufuor, *Institutional Transformation*, *supra* note 28 at 37.

<sup>73</sup> *Ibid* at 56-57.

<sup>74</sup> *Ibid*.

<sup>75</sup> See Kufuor, *Institutional Transformation* generally *supra* note 28.

<sup>76</sup> *Ibid* at 35.

<sup>77</sup> *Ibid* at 54.

“supranational sovereign competences, albeit such competences are conferred upon it by the sovereign member states. The Union can only act within the bounds of the competences conferred upon it, and any competences not conferred upon it remain with the member states. Any competences delegated can be revoked. A member state is also entitled to revoke its commitment and secede from the Union. Supranational decision-making does not require unanimity; qualified majority is used, yet decisions so taken are binding upon the member states and directly affect their legal system.”<sup>78</sup>

Another scholar notes that supranationality is a difficult term to define but there are contexts to it.<sup>79</sup> The first context of supranationality proposes the existence of a system which involves institutionalization of a mode of problem-solving that is unavailable to nation-states acting on their own.<sup>80</sup> The second involves a system of “taming”<sup>81</sup> nation-states to a “new discipline of solidarity”,<sup>82</sup> mitigating tensions between state actors and between state actors and the Community.<sup>83</sup> In other words, supranationality exists to solve problems related to decision making and tackles concerns which states cannot handle when acting alone.<sup>84</sup>

Central to the arguments in this thesis, is the need for the ECOWAS to provide oversight over the regulatory framework in the Nigerian oil industry. As a supranational organization, decisions of the ECOWAS are of a supranational nature, therefore, capable of legally binding Nigeria and other ECOWAS Countries despite their sovereignty.

In summary, the supranationality of the ECOWAS provides two main advantages to the framework being proposed by this thesis. Firstly, as a supranational organization, member states are immediately legally bound by the decisions of the ECOWAS and there will be no need to subject deliberations regarding the adoption of the framework to lengthy ratification processes within states.<sup>85</sup> Secondly, a framework that proposes oversight by an international organization over the

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<sup>78</sup> Kimmo Kiljunen, *The European Constitution in the Making*, (Brussels: Centre for European Policy Studies 2004) at 22

<sup>79</sup> Alexander Somek, “On Supranationality” (2001) 5 *European Integration Online Papers* (EIoP) at 3 [Somek]

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid* at 5, Joseph Weiler, “Federalism and Constitutionalism: Europe’s Sonderweg” (2000) 10 *jean Monnet Working Paper*

<sup>82</sup> Somek, *supra* note 79 at 3.

<sup>83</sup> *Ibid.*

<sup>84</sup> See Kufuor, *Institutional Transformation*, *supra* note 28 at 55.

<sup>85</sup> ECOWAS New Legal Regime, online: ECOWAS <http://www.ecowas.int/ecowas-law/find-legislation/>

affairs of a state offends the concept of sovereignty. A supranational organization avoids allegations of such infringements on state sovereignty as it is empowered by the states to make such interventions on their behalf. As seen in Kijunen's definition of a supranational organization, such organization possesses sovereign competencies over member states.<sup>86</sup> The import of sovereignty of the supranational organization to the framework being proposed by this thesis is that it provides competence to the ECOWAS to adopt and implement the framework and lends legitimacy to the process. Evidently the supranationality of the ECOWAS provides a huge advantage to the framework for oversight being proposed in this chapter and makes ECOWAS well suited to provide oversight.

#### 4.4. The Proposed Role of the ECOWAS

The choice of the ECOWAS to provide regulatory oversight is inspired in part by its supranational nature. Given that the ECOWAS is a supranational organization whose decisions are immediately binding on member states, the adoption of the framework being proposed will not be subjected to ratification or domestication by Nigeria and will in fact be immediately binding on Nigeria. This thesis proposes a framework for oversight over regulation of the Nigerian oil and gas industry that delineates not only the scope of oversight but also the mode of such oversight.

Another factor supporting the proposal of a framework for oversight under the ECOWAS is the decision of the ECOWAS Court in the case of *SERAP v. Nigeria*,<sup>87</sup> delivered in December 2012. In that case, the ECOWAS Court found the Nigerian government responsible for failing to effectively regulate TNCs. The court then ordered Nigeria to "take all measures" to restore the environment, prevent future damage, and hold the perpetrators accountable.<sup>88</sup> However, the Court failed to specify a means of implementation for the said judgment.<sup>89</sup> This thesis seeks to help bridge such gaps. Given the arguments demonstrating a clear need for oversight in the regulation of the Nigerian oil industry, and a judgment of the ECOWAS Court finding the Nigerian state

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<sup>86</sup> *Ibid.*

<sup>87</sup> *Socio-Economic Rights and Accountability Project v. Nigeria*, Case No. ECW/CCJ/APP/08/09, Judgment (Dec. 14, 2012) [SERAP Niger Delta Judgment].

<sup>88</sup> *Ibid* at paras 121.

<sup>89</sup> See Karen J. Alter, Lawrence R. Hefler and Jacqueline R. McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013) 107 Am. J. Int'l L. 737 at 767 [Alter, Hefler and McAllister]

responsible for ineffective regulation of TNCs, this thesis proposes a more definitive role for the ECOWAS in effecting change in the regulation of the Nigerian oil industry.

#### 4.4.1. *The Proposed Framework under the ECOWAS*

The framework proposed in this thesis is inspired in part by Penelope Simons and Audrey Macklin's work in *The Governance Gap*.<sup>90</sup> However, while Simons and Macklin focus on home state regulation, this thesis focuses on regulation by strengthening host state regulatory capacity. Lessons drawn from the work include what is described by the authors as the concept of "Carrots, Nudges, and Sticks".<sup>91</sup> They describe the "carrots" as the public incentives which home states would offer to TNCs (considered citizens of the home states) in order to encourage TNCs to respect human rights of local communities. The "nudges" refer to mechanisms that allow and encourage private actors and individuals to comply with best practices and respect human rights. The "sticks" then refer to sanctions which home states can resort to in the event that TNCs fail to comply.

Adopting a similar concept for the ECOWAS in the context of providing oversight to host states, the thesis anticipates a framework that will offer "carrots" in the form of incentives to states that avail themselves of regulatory oversight. These proposed incentives will come in the form of priority placement for compliant states when it comes to situating developmental projects in states in order to grow amenities such as energy, transport, water and telecommunications in states. The consequences of such regional integration development projects are that they provide amenities which serve to encourage economic growth and development.

Given the background of the ECOWAS, this thesis is more confident in its gaining compliance in Nigeria through the use of redress mechanisms conceptualized by Simons and Macklin as "nudges". While the authors saw the use of "nudges" as criminal responsibilities for TNCs, this thesis advances the argument that the nudges can take the form of a regulatory oversight framework.

The ECOWAS has a number of specialized agencies focused on relevant areas of development such as the ECOWAS Regional Electricity Regulatory Authority (ERERA), the ECOWAS Centre for Renewable Energy and Energy Efficiency (ECREEE) and the West African Power Pool

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<sup>90</sup> Penelope Simons and Audrey Macklin, *The Governance Gap* (New York: Routledge 2014).

<sup>91</sup> *Ibid.*

(WAPP).<sup>92</sup> The thesis proposes that the framework be implemented through a specialized agency<sup>93</sup> such as the ones identified. It is proposed that the agency will be responsible for receiving complaints from local communities or persons acting on behalf of local communities and will be empowered to review decisions and activities of existing regulatory agencies in Nigeria in order to ensure that such decisions and activities are in the best interest of local communities and the environment.

Funding for the agency will be derived from the treasury of the ECOWAS. However, an internal fund could be created within this agency to receive funding from NGOs, other ECOWAS institutions, donor institutions, and foreign governments. The funds can be directed towards operational costs of the agency as well as specific projects aimed at environmental remediation which may be carried out in collaboration with Nigeria's regulatory agencies. Brown for example suggests that regulatory agencies derive funding through two major approaches; the regulator may receive funding through formal allocation from the government's budget<sup>94</sup> or collect monies from the industry through fees, penalties or contributions<sup>95</sup> or the regulator may elect to combine both approaches.<sup>96</sup> Given that the proposed agency is designed for regulatory oversight, this thesis proposes the agency receive funding through formal allocation from the ECOWAS and receive funds from NGOs, CSOs, donor institutions and even foreign governments. Further, the agency will be empowered to perform on-site inspections of local communities and areas of alleged oil pollution. It will be able to direct relevant regulatory agencies to enforce necessary sanctions against relevant TNCs in event of oil pollution. In order to be able to prove oil pollution or responsibility of TNCs, there is a need for the agency to have the technical knowledge regarding the oil industry and its activities. The thesis therefore anticipates that the agency will be assisted by a body made up of civil society organizations (CSOs) and non-governmental organizations

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<sup>92</sup> ECOWAS Institutions, online: ECOWAS <http://www.ecowas.int/institutions/>

<sup>93</sup> While this thesis proposes the implementation of the proposed framework through a specialized agency, given the wide scope of responsibilities it would assume towards regulatory agencies in Nigeria, TNCs and local communities, the author also acknowledges that other methods of implementing potentially similar frameworks are perhaps through specialized ad hoc committees and I am grateful to Professor Evaristus Oshionebo for directing me towards the work of specialized ad hoc committees. This thesis adopts the use of a specialized agency to implement the proposed framework given the number of actors (regulatory agencies, TNCs, local communities) and range of responsibilities it is designed to cater to.

<sup>94</sup> Ashley C Brown, "The Funding of Independent Regulatory Agencies", online: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.696.7010&rep=rep1&type=pdf> at 1.

<sup>95</sup> *Ibid* at 7.

<sup>96</sup> *Ibid*.



(NGOs). A coalition of CSOs and NGOs provides a pool from which the framework can draw in order to provide financial, technical and capacity building resources to the framework for regulatory oversight. In the event that CSOs and NGOs are not able to provide technical expertise to the agency, their combined resources enable them hire consultants that will be able to provide technical knowledge. Although executed through an agency under the ECOWAS, the framework proposes that civil society form an integral part of the agency. This *hybrid* nature of the framework is advantageous because the agency through which the framework is implemented might be perceived as an agency of the state by local communities and CSOs and NGOs can provide valuable credibility to the process as they mostly enjoy neutrality and independence from relevant actors.<sup>97</sup> The proposed role of CSOs and NGOs is particularly significant as it provides resources which address concerns regarding resources (financial and technical) which might threaten the implementation of the framework. Another factor that supports this coalition of civil society is its reach. Several civil society organizations have coalitions with other organizations in the West, where they have great reach as regards shaming TNCs into compliance and affecting investments. The evidence is seen in a number of campaigns against TNCs by CSOs attempting to shame TNCs into compliance and discourage investors from investing in particular TNCs who have a poor record of human rights protection.<sup>98</sup> Civil society can also shame states into compliance by campaigning against them within the international community.

The proposed agency can also provide technical advice to both local communities and government agencies in the event of negotiations regarding siting of oil wells or relocating persons in the community that need relocation as a result of oil extraction. The agency will be responsible for providing technical advice to local communities in the event of negotiations with the Nigerian government or TNCs and will accept mandatory reports from regulatory agencies in order to ensure best practices. It is expected that this hands-on approach of regulatory oversight and

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<sup>97</sup> See Cecelia Albin, "Can NGOs Enhance the Effectiveness of International Negotiations" (1999) 4 International Negotiation 371-387, Sheila Jasanoff, "NGOs and the Environment: From Knowledge to Action" (1997) 18 Third world Quarterly pp. 579-594.

<sup>98</sup> An example is the current Amnesty International Campaign called "Shell: Clean up the Niger Delta" encouraging the TNC Shell Development Corporation to clean up oil spills in the Niger Delta. It also has a similar campaign discouraging investors from investing in the TNC as a result of its poor human rights record. See online: <https://www.amnesty.org/en/latest/campaigns/2015/11/shell-clean-up-oil-pollution-niger-delta/> and <http://www.amnesty.ca/our-work/issues/business-and-human-rights/invest-your-values>

directing state institutions to perform their duties ought to “nudge” states into better regulating extractive industries and also provide a buffer between states and local communities

It is significant to note that certain initiatives such as the *African Commission Working Group on Extractive Industries and Natural Resource Governance* (WGEI) exist under the African Union (AU) to make recommendations on issues relating to resource extraction.<sup>99</sup> The WGEI was established by the African Commission on Human and Peoples’ Rights, under the African Union, in November 2009. The mandate of the Commission includes examining the impact of extractive industries in Africa within the context of the African Charter on Human and Peoples’ Rights, undertaking research into violations of human and peoples’ rights by non-state actors in Africa, and formulating recommendations and proposals on appropriate measures and activities for the prevention and reparation of violations of human and peoples’ rights by extractive industries.<sup>100</sup> The work of the WGEI is instructive in advising relevant African states as well as the African Union on human rights based approaches to resource governance.<sup>101</sup> The recommendations of the WGEI seek to inform policy and may become an incentive for states to address their behaviour. Evidently regional groupings such as the AU have also recognized the need to address challenges relating to resource extraction in African states.

In the event that these “carrots” and “nudges” fail, the thesis proposes the use of “sticks”. There are various mechanisms through which the ECOWAS has expressed its displeasure with member states. An example is the suspension of Niger Republic, Cote d’Ivoire, and Guinea<sup>102</sup> from the ECOWAS for engaging in military coups contrary to the Protocol on Democracy and Good Governance. The ECOWAS Court can be utilized as a tool in seeking reform in extractive industries. Article 15 of the Revised Treaty establishes the ECOWAS Court,<sup>103</sup> and by virtue of Article 15(4), the “judgments of the Court are binding on all [ECOWAS] member states,

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<sup>99</sup> African Commission Working Group on Extractive Industries, Environment and Human Rights Violations and Natural Resource Governance Online: <http://www.achpr.org/mechanisms/extractive-industries/>

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Guinea has been reintegrated following elections in 2010. See African Development Bank, Annual Report 2010 in African Development Bank/African Development Fund, “Regional Integration Strategy Paper for West Africa 2011 -2015” (2011) [AFDB RISP] at 11

<sup>103</sup> The Community Court of Justice was created pursuant to the provisions of Articles 6 and 15 of the 1993 Treaty of the ECOWAS. See ECOWAS Court Protocol, *supra* note 44.

Community institutions, and on individuals and corporate bodies.” Article 15 establishes the Court and sets out its functions:

- (1) There is hereby established a Court of Justice of the Community.
- (2) The status, composition, powers, procedure and other issues concerning the Court of Justice shall be as set out in a Protocol relating thereto.
- (3) The Court of Justice shall carry out the functions assigned to it independently of the Member States and the institutions of the Community.
- (4) Judgments of the, Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.

The ECOWAS Court Protocol requires that member states shall, in accordance with their constitutional processes, “take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary” for the implementation of the provisions of the revised ECOWAS Treaty.<sup>104</sup> However, despite the existence of this Protocol from 1991, an actual court was not established until November 1996 when supplementary Protocol entered into force establishing the ECOWAS Court.<sup>105</sup>

The new court was created by the ECOWAS to settle disputes between member states inter-se, or between member states and the Community, or between ECOWAS nationals and either an ECOWAS Member State or an institution of the Community. Article 9(4) of the supplementary Protocol authorizes the ECOWAS Court to hear and determine “cases of violation of human rights that occur in any Member State,” and Article 10(d) allows access to the court to “individuals on application for relief for violation of their human rights.” The fact that the court possesses this competence has now been affirmed in a long line of cases,<sup>106</sup> and is not at all controversial.

Admittedly, the Court has already decided on the culpability of the Nigerian state as regards ineffective regulation of TNCs in its oil industry.<sup>107</sup> However, the argument of this thesis is that the failure of the ECOWAS Court to prescribe sanctions for failure to implement its decisions or prescribe a means for the Nigerian state to remediate ineffective regulation hampers the

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<sup>104</sup> Art. 5(2), Revised Treaty, *supra* note 63.

<sup>105</sup> Alter, Hefler and McAllister, *supra* note 89 at 747-748.

<sup>106</sup> See Hadijatou Mani Koraou v. Republic of Niger ECW/CCJ/APP/08/08, Amouzou Henri v. Republic of Cote D’Ivoire ECW/CCJ/JUD/04/09 and Serap v. Nigeria, *supra* note 87.

<sup>107</sup> SERAP v. Nigeria, *supra* note 87.

effectiveness of the judgment. The framework being proposed remedies the failings of the decisions as it prescribes a means for the Nigerian state to better regulate TNCs.

There is a great deal of optimism within scholarly circles regarding the potential of the ECOWAS Court.<sup>108</sup> Its emergence as a reputable human rights court within the ECOWAS has been a source of inspiration for most observers.<sup>109</sup> Given the political climate, civil unrest and weak legal and other domestic institutions within member states, it was expected that a Court under the ECOWAS would be restricted by national governments in the exercise of jurisdiction over human rights and if at all it was given a human rights jurisdiction, political checks would be put in place to restrict such.<sup>110</sup> However, contrary to popular opinion the Court was given a broad human rights jurisdiction by member states<sup>111</sup> which has not been restricted despite several opportunities to do so.<sup>112</sup> Scholars note that major challenges to the Court's jurisdiction have left the Court "largely unscathed and arguably strengthened."<sup>113</sup> However, a significant challenge facing the Court lies in improving member states' compliance with decisions of the Court. While there is some promise as regards state implementation of decisions of the Court, there remains considerable challenge regarding the lack of implementation of ECOWAS Court decisions.<sup>114</sup> The Court is, however, aware of this challenge of implementation and responds by adopting strategies that promote compliance. It appeals to public sentiments through public statements and engages civil society as well as tailors remedies provided to litigants in a way that encourages state actors to comply with the said judgments.<sup>115</sup> The Registrar of the Court remarked that, "although the record of enforcement of the decisions of the Court is not impressive, we have never been told by any

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<sup>108</sup> Alter, Hefler and McAllister, *supra* note 89 at 738.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> Article 3(4) of the Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Protocol.

<sup>112</sup> Challenges to the Court's jurisdiction were seen when the Court intervened in a contested election in Nigeria triggering a backlash from Nigerian politicians, jurists and lawyers and also when the Gambian President proposed that the human rights jurisdiction of the Court be curtailed. For detailed discussion see Alter, Hefler and McAllister, *supra* note 87 at 758-765.

<sup>113</sup> Alter, Hefler and McAllister, *supra* note 89 at 758.

<sup>114</sup> See Tony Anene-Maidoh, "The Mandate of a Regional Court: Experiences from ECOWAS Court of Justice", paper presented at the Regional Colloquium on the SADC Tribunal, Johannesburg (Mar. 12-13, 2013) (statement by ECOWAS Court chief registrar) [Anene-Maidoh]

<sup>115</sup> Alter, Hefler and McAllister, *supra* note 89 at 765-768.

Member State that it will not enforce the judgment of the Court.”<sup>116</sup> In further expression of its great potential, scholars note that “the ECOWAS Court’s status as a human rights court is far more settled than that of sub-regional community courts elsewhere in Africa.”<sup>117</sup>

In summary, the Court does have some potential to serve as a stick. However, this thesis does not ignore the limitations of the Court in strictly enforcing decisions. It is expected that a combination of the “carrots”, the “nudges” and the threat of the “stick” would encourage states to adopt the proposed framework in order to respond to challenges regarding regulation of TNCs and resource extraction in a way that protects local communities from oil pollution. This approach finds support in recommendations of the CEP when advising on the revision of the ECOWAS Treaty and expanding the powers of the AHSG to compel compliance of member states. It notes:

Legal proceedings against member states should however be a weapon of last resort for obvious reasons. As a rule, the Community should seek accountability from Member states through subtle means as regular submission of reports by Member states on implementation of Community decisions and regulations...The Executive Secretariat [now a Commission] may also be authorized to invite status reports on implementation from Member states on a regular basis and also bring to the attention of Council or the Authority breaches of Community laws by Member states.<sup>118</sup>

Having outlined the scope and framework of the proposed regulatory oversight, the chapter undertakes an analysis of the prospects and challenges of implementing the said framework under the ECOWAS.

#### *4.4.2. Prospects and Challenges of Adopting the Proposed Framework Under the ECOWAS*

The ECOWAS has been described as “strong developers and weak implementers of governance standards”.<sup>119</sup> While some of its protocols have received a greater measure of adoption and

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<sup>116</sup> Anene-Maidoh, *supra* note 89 at 40.

<sup>117</sup> *Ibid* at 768.

<sup>118</sup> CEP Report, *supra* note 56.

<sup>119</sup>Christoff Hartmann, “Governance Transfer by the Economic Community of West African States (ECOWAS)” (2013) 47 SFB-Governance Working Papers Series at 7 [Hartman].

implementation, other protocols of the ECOWAS have not received the desired level of implementation.<sup>120</sup>

Scholars have attributed the poor performance of the ECOWAS regarding the implementation of its protocols to the structure of the organization.<sup>121</sup> In 1993, when the current Treaty was adopted, the AHSG which is the supreme decision-making body had no supranational organization to implement its decisions. However, the conversion of the Secretariat to a Commission has now remedied this failing. Another criticism of the ECOWAS is that the ECOWAS Parliament also has no power to make decisions and is only an avenue for debating issues.<sup>122</sup> Another significant challenge to the ECOWAS process is the duplication of similar Regional Economic Communities (RECs) in West Africa and the commitment of several member states (particularly the Francophone countries) to other similar RECs.<sup>123</sup> This situation creates a duplication of commitments on the part of member states to the ECOWAS, as well as duplication of financial commitments member states make to these RECs. This lack of commitment often undermines the functioning of the ECOWAS as uncommitted member states only pay lip service to decisions taken with little intention to commit to implementation.<sup>124</sup> The duplication of commitment from member states who are members of other RECs within Africa poses the biggest challenge to the realization of a number of the ECOWAS' ambitions. Achieving compliance within member states will require some leverage on the part of the ECOWAS and this can be achieved through the creation of a strong economic union between compliant member states that will not only attract compliance but will incentivise already compliant states. A major failing of the 1975 Treaty was the lack of actualization of the Trade Liberalization Scheme (TLS) which would have opened up borders,

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<sup>120</sup> For example, the Democracy and Good Governance protocol has received far wider implementation under the ECOWAS than the ECOWAS Energy Protocol, See Hartmann *Ibid*.

<sup>121</sup> Lokulo-Sodipe and Osuntogun, *supra* note 59 at 257.

<sup>122</sup> *Ibid*.

<sup>123</sup> A particularly significant REC providing a strong competition to the ECOWAS for loyalty of member states is the West African Economic and Monetary Union (WAEMU). The WAEMU is comprised of Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo, seven of the 15 member states of the ECOWAS. All WAEMU states (with the exception of Guinea Bissau) share a common French heritage in their legal and administrative systems as well as a common currency, also a result of their colonial heritage. WAEMU states have a common monetary policy, implemented through the *Banque centrale des Etats de l'Afrique de l'Ouest* (BCEAO). The French Treasury guarantees the convertibility of the common currency. As a result of a number of these commonalities, the WAEMU REC has achieved greater integration than ECOWAS as a whole and has often led to a duplication of commitment to the ECOWAS particularly among WAEMU states. See AfDB RISP, *supra* note 99 paper at 2.

<sup>124</sup> For further discussions on multiple commitment of Member states see Lokulo-Sodipe and Osuntogun, *supra* note 59.

increased intra-regional trade and empowered the ECOWAS Economic Fund responsible for compensating states that lost revenue as a result of tariff reduction.<sup>125</sup> A number of factors, some not unrelated to ideological differences between Anglophone and Francophone countries, contributed to the failure of the TLS.<sup>126</sup> However given present day trends of globalization, and as evidenced in the European Union, intra-regional trade as well and the creation of a strong central economic union lends credibility to a supranational entity. There is a need for the ECOWAS to dedicate itself to creating a strong economic union if it is to overcome many of its challenges going forward.

There is, however, some indication that the ECOWAS is learning from its experiences. This can be seen from the move to redefine the TLS in 1992 which removed restrictive conditions relating to origins of firms (particularly foreign firms) that could take advantage of the scheme.<sup>127</sup> Further indications are seen in the ECOWAS restructuring of 2007 which transformed the Secretariat into a Commission and adopted a new legal regime addressing a number of concerns surrounding the organization.<sup>128</sup> The transformation of the Secretariat to a Commission created an implementing organ for decisions of the AHSG as well as monitoring framework of member state compliance and the new legal regime translated all protocols adopted by the AHSG to Supplementary Acts, thereby adhering such Acts to the ECOWAS treaty.<sup>129</sup> This eliminated the challenges that faced ECOWAS as regards waiting for states to ratify protocols adopted by the AHSG, thereby rendering a number of its decisions redundant. These circumstances create optimism that the ECOWAS has the potential to overcome its internal challenges and therefore help states strengthen their political institutions. Kufuor writes:

The evidence supports this presumption of gradualism as an explanation for ECOWAS' institutional change. The ECOWAS system as a whole has undergone gradual changes and elaborations...the essence of this perspective on ECOWAS is that it will most probably continue to evolve gradually.<sup>130</sup>

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<sup>125</sup> Kufuor, *Institutional Transformation*, *supra* note 28 at 26-28.

<sup>126</sup> For detailed discussions regarding the reasons for the failure of the TLS, see Kufuor, *Institutional Transformation* *supra* note 28.

<sup>127</sup> Kufuor, *Institutional Transformation* *supra* note 28 at 36.

<sup>128</sup> ECOWAS New Legal Regime, *supra* note 85.

<sup>129</sup> Kufuor, *Institutional Transformation*, *supra* note 28 at 36

<sup>130</sup> *Ibid.*

The discussions above have identified a number of criticisms of the ECOWAS as well as the reasons why the thesis is optimistic that the organization is poised to overcome its challenges and able to adopt and implement the framework being proposed by the thesis. The next section discusses in greater detail the promise of the ECOWAS. It analyzes the successes of the organization while making a case for why it is well suited to provide regulatory oversight to Nigeria's oil industry.

#### 4.5. The Promise of the ECOWAS

As seen in the previous section, the ECOWAS faces significant challenges regarding implementation of its decisions. There is a tendency in scholarly work to focus on the challenges of a process and not the promise. One scholar writes that “the scholarly tendency toward criticism can be a matter of habit as much as an appropriate intellectual stance.”<sup>131</sup> Without dismissing the scholarly criticism that has trailed the ECOWAS as simply habit, this chapter attempts to chart a distinct course, focusing on the promise of the ECOWAS. This section highlights a number of policies and projects of the ECOWAS that have enjoyed compliance and support among member states, and then identifies successes of the ECOWAS in affecting political action, institutional action and economic integration initiatives, arguing that these successes of ECOWAS are great indicators of the immense potential the ECOWAS has to implement the proposed framework.

At a political level, the ECOWAS Protocol Relating to Free Movement of Persons, Residence, and Establishment of 1979 demonstrates the success of an ECOWAS policy. One scholar writes in relation to the Protocol that “if one asked ordinary ECOWAS citizens which ECOWAS policy has mattered most in their lives, they would probably answer by naming the 1979 Protocol Relating to Free Movement...”<sup>132</sup> The significance of the success of this protocol lies in the fact that national legislation within member states had to be amended in order to allow citizens of member states free movement within the ECOWAS pursuant to the protocol. Further to that, eight member states of the ECOWAS, in demonstration of their political will to respect and promote this policy,

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<sup>131</sup> Adrienne Stone, “A Comment on Professor Finnis’ Praise of Australia High Court” online: [http://blogs.unimelb.edu.au/opinionsonhigh/2015/11/16/stone-finnis/?utm\\_source=twitterfeed&utm\\_medium=twitter](http://blogs.unimelb.edu.au/opinionsonhigh/2015/11/16/stone-finnis/?utm_source=twitterfeed&utm_medium=twitter)

<sup>132</sup> Hartman, *supra* note 119 at 103.



adopted a regional passport enhancing free movement of citizens across national borders.<sup>133</sup> Interstate roads have also been constructed in order to aid free movement of persons.<sup>134</sup>

Another initiative that speaks to the promise of the ECOWAS is the African Peer Review Mechanism (APRM) launched under the New Partnership for Africa's Development (NEPAD) which the ECOWAS coordinates. The APRM has gained some traction since its launch as eight ECOWAS countries have acceded to become parties to it. Acceding to the APRM entails "undertaking to submit to periodic peer reviews, as well as to facilitate such reviews, and be guided by agreed parameters for good political governance and good economic and corporate governance."<sup>135</sup> The APRM review covers four areas: democracy and political governance, economic governance and management, corporate governance, and socio-economic development. The review seeks to oblige participating states to "provide what assistance they can, as well as to urge donor governments and agencies also to come to the assistance of the country reviewed" provided that the "Government of the country in question shows a demonstrable will to rectify the shortcomings".<sup>136</sup> The significance of the APRM to this thesis is that it demonstrates the willingness of African states to submit themselves to scrutiny and review, in order to overcome some of their challenges.<sup>137</sup> The willingness of states to submit to periodic review under the APRM being coordinated by the ECOWAS inspires confidence that member states would be willing to adopt the oversight framework proposed in this thesis.

In responding to challenges regarding governance standards of member states, the ECOWAS takes very seriously its role in resolving conflicts and preventing conflicts capable of destabilizing member states. The ECOWAS Protocols on conflict prevention, and democracy and good governance led to its suspension of Guinea, Niger and Cote d'Ivoire following coups and repression of dissent in the countries.<sup>138</sup> Democratic elections held in Guinea in 2010 led to the

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<sup>133</sup>The eight countries are Benin, Burkina Faso, Cote d'Ivoire, Ghana, Liberia, Nigeria, Senegal and Togo. See AFDB RISP, *supra* note 102 at 11.

<sup>134</sup> Lokulo-Sodipe & Osuntogun, *supra* note 59 at 264.

<sup>135</sup> See African Peer Review Mechanism (base document) [www.nepad.org/documents/49.pdf]. See also the African Union, Assembly of Heads of State and Government, AHG/235 (XXXVIII), Annex II in Ravi Kanbor, "The African Peer Review Mechanism: An Assessment of Concept and Design" (2004) 31:2, *Politikon* 157 at 158

<sup>136</sup> *Ibid.*

<sup>137</sup> As of 2010, 29 Countries have acceded to the APRM, See Adotey Bing-Pappoe, "Reviewing African Peer Review Mechanism: A Seven Country Survey" (2010) Partnership Africa Canada online:

[http://www.pacweb.org/Documents/APRM/APRM\\_Seven\\_countries\\_March2010-E.pdf](http://www.pacweb.org/Documents/APRM/APRM_Seven_countries_March2010-E.pdf)

<sup>138</sup> AFDB RISP, *supra* note 102 at 3.

reintegration of the country into both the ECOWAS and the AU.<sup>139</sup> The ECOWAS used sanctions to force President Faure Gnassingbe to step down as the President of Togo and allow elections to hold as he was installed by the military after the death of his father.<sup>140</sup> Although President Faure Gnassingbe was still re-elected following the elections, the sanctions forced elections in Togo, after which the country was readmitted into the ECOWAS.

A further indicator of the immense potential of the ECOWAS is the ECOWAS Monitoring Group (ECOMOG). Though contentious,<sup>141</sup> the work of the ECOMOG has contributed to peace within the region. A military force from five countries was constituted by the ECOWAS Mediation Committee in 1990 pursuant to the Protocols on Non-aggression and Mutual Assistance with a view to intervening in the Liberian civil war.<sup>142</sup> The ECOMOG not only fought to end the war in Liberia but also monitored the resulting cease-fire.<sup>143</sup> The ECOMOG was instrumental in overthrowing a military government that had dispossessed a democratically elected government in Sierra Leone and reinstating the previously overthrown government.<sup>144</sup> Before intervening in Liberia in 1990, ECOMOG sought and received endorsements from the Organization of African Unity (now the African Union) and the United Nations often using the theme “an African solution to an African problem”.<sup>145</sup> One scholar notes that the ECOMOG:

...became the first sub-regional military force in the third world since the end of the cold war with whom the United Nations agreed to work as a secondary partner. Liberia was one of the first conflicts where both the United Nations and the major regional organization the OAU, redefined traditional concepts of sovereignty in order to permit external intervention.<sup>146</sup>

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<sup>139</sup> *Ibid.*

<sup>140</sup> Lokulo-Sodipe & Osuntogun, *supra* note 59 at 264.

<sup>141</sup> Scholars, observers and rights groups have debated the legitimacy of humanitarian interventions such as those carried out by the ECOMOG. See for example the Human Rights Watch Report “Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights” online: <https://www.hrw.org/reports/1993/liberia/>

<sup>142</sup> Herbert Howe, “Lessons from Liberia: ECOMOG and Regional Peace Keeping” (1996-1997) 21 *International Security* 145 at 151.

<sup>143</sup> Thomas V. Greer, “The Economic Community of West African State: Status, Problems and Prospects for Change”, (1992) 9 *International Marketing Review* 25 at 35 [Greer]

<sup>144</sup> See generally Andrew McGregor, “Quagmire in West Africa: Nigerian Peacekeeping in Sierra Leone” (1998-1999) 54 *Int'l J.* 482

<sup>145</sup> Greer, *supra* note 143 at 35.

<sup>146</sup> Howe, *supra* note 142 at 146.

Military interventions were undertaken by the ECOMOG in Guinea-Bissau in 1998-1999, in Cote d'Ivoire in 2003-2004 and again in Liberia in 2003.<sup>147</sup> With each attempt, the ECOWAS seemed to have learned from mistakes made in the past and it was observed that its intervention in Liberia along with UN supervision “laid a better foundation for peace making”.<sup>148</sup>

The significance of highlighting the achievements of the ECOMOG serves to demonstrate and perhaps exemplify that in the past ECOWAS has superimposed on the sovereignty of member states in order to “restore law and order...”<sup>149</sup> which ultimately served to protect human lives. The framework proposed in this thesis is debatably less controversial than a military intervention on states. The proposed framework is nuanced and comprises actions and incentives that are designed to encourage compliance as opposed to brazen impositions on national sovereignty, further inspiring confidence that member states will consider the merits of such a framework.

At an institutional level, the reform of the ECOWAS Secretariat into a Commission demonstrates the evolution of the ECOWAS. Decisions of the AHSG will now have a vehicle for implementation as well as one for monitoring implementation within states. Indicators of progress are seen in regional trade facilitation through the establishment of joint border posts, the creation of an observatory for bad practices in order to monitor, report and shame practices that are contrary to the spirit of integration in regional trade facilitation.<sup>150</sup> The emergence of such implementation strategies at an institutional level inspires confidence in the process of the ECOWAS. Further indicators are seen in the response of the international community to this change in the ECOWAS as a number of countries are now establishing permanent missions with the ECOWAS in order to facilitate trade and economic cooperation between their countries and the ECOWAS.<sup>151</sup>

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<sup>147</sup> Hartmann, *supra* note 119 at 33.

<sup>148</sup> *Ibid.*

<sup>149</sup> “ECOWAS Standing Mediation Committee,” Decision A/DEC, August 1, 1990, on the Cease- fire and Establishment of an ECOWAS Cease-fire Monitoring Group for Liberia, Banjul, Republic of the Gambia, August 7, 1990 in Howe, *supra* note 138 at 152. See also, Mark Weller, ed., *Regional Peace-Keeping and International Enforcement: The Liberian Crisis*, Cambridge International Document Series, Vol. 6 (Cambridge: Cambridge University Press, 1994), p. 68.

<sup>150</sup> AFDB RISP, *supra* note 102 at 13.

<sup>151</sup> See “ECOWAS President Accredits Eight Envoys” online: ECOWAS <http://news.ecowas.int/presseshow.php?nb=032&lang=en&annee=2013>, Lokulo-Sodipe & Osuntogun, *supra* note 59 at 270.

A further indicator is seen in the confidence reposed in the ECOWAS Court by the international community. The Court has undergone a transformation with the amendment of its enabling protocol now including human rights in its jurisdiction and allowing individuals to access the Court.<sup>152</sup> The ECOWAS is also in the process of transforming the ECOWAS Parliament from an advisory body to one with power to be able to fulfil the objectives of the Parliament as set out in its Supplementary Protocol.<sup>153</sup> The “new legal regime” of the ECOWAS is another extremely significant indicator of the promise of the ECOWAS.<sup>154</sup> That protocols and conventions will no longer be subject to inordinate delay and lengthy ratification process in member states and will immediately apply to states indicates that the ECOWAS is demonstrating a serious commitment to better implementing its decisions.<sup>155</sup>

Finally, the long list of programs and initiatives aimed at advancing regional integration encourages faith in the ECOWAS. The range of integration initiatives involves infrastructure development, private sector development, education, health, information and communication technology among others, all at various levels of implementation.<sup>156</sup> However, the most significant in the context of extractive industries is perhaps the West African Gas Pipeline Project (WAGP). It involves a Public Private Partnership where Chevron and Shell partnered with government-owned entities in Nigeria, Benin, Togo and Ghana to construct a pipeline to supply natural gas from Nigeria to the other three countries.<sup>157</sup> The WAGP, being an initiative of the ECOWAS, indicates that ECOWAS recognizes the immense potential of integration in resource extraction. Evidently, a case can then be made for the regulatory oversight being proposed in this thesis.

#### 4.6. Potential Challenges to the Proposed Framework

Having discussed both the failures and the promise of the ECOWAS, this section anticipates challenges that the framework (as currently) proposed might encounter in adoption and in practice.

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<sup>152</sup> Lokulo-Sodipe and Osuntogun, *supra* note 59 at 265.

<sup>153</sup> *Ibid.*

<sup>154</sup> ECOWAS New Legal Regime, *supra* note 85.

<sup>155</sup> *Ibid.*

<sup>156</sup> AFDB RISP, *supra* note 102 at 13.

<sup>157</sup> *Ibid.*, See also West African Gas Pipeline, Online:

[http://www.wagpco.com/index.php?option=com\\_content&view=article&id=46&Itemid=78&lang=en](http://www.wagpco.com/index.php?option=com_content&view=article&id=46&Itemid=78&lang=en)

In identifying such potential challenges, it remains confident that such challenges are not intractable.

The first issue relates to state sovereignty. When a state surrenders part of its sovereignty to an international organization for oversight or control, it offends the Westphalian concept of sovereignty which professes that a state should not take orders from outside it or from another authority.<sup>158</sup> In the context of potential challenges to the proposed framework, state sovereignty presents a challenge both in the case of states *submitting* to oversight of regional institutions, as well as in the context of the West African leaders *conceding* to adopt such a policy. Even given the supranational status of the ECOWAS, it would prove both ambitious and naïve to expect states to be eager to further concede some part of their sovereignty to an international organization. As Lokulo-Sodipe and Osuntogun write:

It is difficult to see why a country would consent to surrender even a part of its sovereignty, particularly in the case of West African States, most of which fought bloody wars for years to gain their independence – their sovereignty.<sup>159</sup>

However, the same scholars argue that perhaps the concept of state sovereignty is outdated. While making a case for supranationality, they argue that “a supranational institution is in a position to strengthen national governments by helping them to solve their problems”.<sup>160</sup> Further buttressing their argument, they cite Fukuyama, who states that, “weak nations can be helped by strong nations, that is philanthropic but it is the responsibility of supranational institutions to do that as *a matter of duty*”<sup>161</sup> (emphasis added)

Given the example of the APRM, there is some indication that states are able to look beyond what one writer when speaking of the concept of sovereignty, described as “rules and commands issued by distant strangers”.<sup>162</sup> This thesis is confident that states would be willing to further concede part of their national sovereignties in order to adopt the proposed framework.

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<sup>158</sup> Lokulo-Sodipe and Osuntogun, *supra* note 59 at 272.

<sup>159</sup> *Ibid* at 274.

<sup>160</sup> *Ibid*.

<sup>161</sup> Francis Fukuyama, *State Building: Governance and World Order in the 21<sup>st</sup> Century* (Ithaca: Cornell University Press, 2004) cited in Lokulo-Sodipe and Osuntogun, *supra* note 59.

<sup>162</sup> Jay Lawrence Westbrook, “Legal Integration of NAFTA Through Supranational Adjudication” (2008) 43 *Tex. Int’l L.J.* 349 at 7.

Perhaps, however, the best way to incentivize the adoption of the framework being proposed by this thesis under the ECOWAS is to deliver an appealing “carrot”. As presently constituted, the ECOWAS faces great challenges in the area of financial resources. The duplicity of commitment of member states discussed earlier takes its toll on the organization as member states are often reluctant to pay membership fees.<sup>163</sup> While the organization has adopted a strategy aimed at financial independence by placing a levy on import taxes into ECOWAS Countries, this strategy has not earned it the financial weight it had hoped.<sup>164</sup> The international community is therefore often responsible for funding a number of its initiatives.<sup>165</sup> This challenge affects both the “carrot” being the incentive that will be given to member states for cooperating with the process as well as the process of implementing the framework.

Having anticipated this challenge, however, the proposed framework is designed to receive both financial and technical resources from donor agencies, CSOs and other governments and NGOs willing to invest in the process. The creation of a Fund within the agency that is designed to receive contributions from NGOs, the ECOWAS and other institutions, which can be directed towards operational costs of the agency, as well as remediating environmental pollution within local communities in collaboration with Nigeria’s regulatory agencies, also alleviates potential funding challenges. The overarching goal of the proposed framework impacts local communities, state institutions, and the environment. The thesis is confident therefore that donor agencies, CSOs, NGOs and foreign governments will be interested in investing in a framework that has such far reaching ramifications.

There also exists the potential challenge of implementation and the challenge of compelling compliance. While they are separate challenges, both challenges are related and so will be addressed together. The proposed framework anticipates member state cooperation through state institutions. It is quite possible that state officials might resent the process of oversight and resist changes which might frustrate the process. This concern is the reason why implementation is paired with compelling compliance as a related challenge. Given that the framework proposes encouraging compliance and only proposes the use of sanctions as a last resort, a situation where

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<sup>163</sup> Hartman, *supra* note 119 at 11.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

state officials deliberately frustrate the process of oversight might severely slow down the process and frustrate all parties. In this instance, public shaming of uncooperative agencies through the civil society coalition and public support from ECOWAS institutions might compel uncooperative agencies to cooperate, thereby restricting the use of sanctions to the last resort.

#### 4.7. Reviewing the Potential Contributions of the Framework through the Optics of the Norm “Life Cycle” Theory

As demonstrated in the first and second chapters of this thesis, the theoretical framework through which the author seeks to review the contributions of the thesis is the theory of the norm “life cycle” theory.<sup>166</sup> As seen earlier, Finnemore and Sikkink posit that there are three main stages to the development of a norm. This section uses the optics of the norm “life cycle” theory to demonstrate the potential contributions of the framework to influencing the internalization of the effective regulation of oil and gas industry in Nigeria. Essentially, the thesis argues that better regulation of the oil industry leads to better protection of the environment from oil pollution. As such, the thesis is interested in what contributions the proposed ECOWAS framework can make to entrenching better regulation of TNCs and in turn environmental protection from oil pollution.

As seen in the previous chapters, the norm “life cycle” theory posits that there are three main stages to a norm’s development, norm emergence, norm cascade and the norm’s internalization.<sup>167</sup> Finnemore and Sikkink posit that internalization occurs when the norm assumes a “taken-for-granted quality” and is no longer a matter for broad public debate.<sup>168</sup>

The norm being put forward by the thesis is the effective regulation of TNCs and environmental protection. As demonstrated in the thesis, there has been a failure of the regulatory framework to effectively regulate TNCs and a failure of the legal and political framework to remedy this failure. The thesis therefore argues that the proposed contributions of the ECOWAS through proposed framework and the ECOWAS Court, can serve to influence better regulation of TNCs and ultimately lead to the internalization of effective regulation. Presenting the ECOWAS as a norm leader and a norm entrepreneur, this thesis identifies the potential of the ECOWAS to create

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<sup>166</sup> Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52 *International Organization* at Fifty: Exploration and Contestation in the Study of World Politics 887 at 895

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

awareness regarding the new norm also influence states (Nigeria and other West African states) to internalize the new norm. Finnemore and Sikkink speculate that states are convinced by norm leaders to accept new norms for a number of reasons including pressure for conformity, desire to enhance international legitimation and perhaps a desire for states to enhance their self-esteem.<sup>169</sup> If the proposed framework is adopted, states will be thrust towards accepting these new norms based on the supranationality and influence of the ECOWAS.

Viewed through the optics of the norm “life cycle” theory, this thesis expresses confidence that the proposed framework executed through the ECOWAS can encourage the internalization of the norm of effective regulation of the Nigerian oil and gas industry. When effective regulation becomes internalized norm, it achieves a “take-for-granted” quality which prioritizes the protection of the rights of local communities and the environment over any other political interests.

#### 4.8. Conclusion

Three important conclusions can be drawn from the discussions in the thesis. The first main one is that the Nigerian constitution does not provide robust protection for the environment. In this context, local communities and those affected by pollution face increased challenges when attempting to vindicate a right to a healthy environment. The second conclusion is that there is an urgent need for regulatory reform to the framework that addresses the activities of TNCs in the extractive industry. The discussions in the thesis, have illustrated that constitutional and regulatory failures, justify the need for a regulatory oversight framework. The third conclusion would be essentially that the ECOWAS system can be deployed as an external oversight mechanism to guarantee environmental protection in Nigeria and promote a right to a healthy environment.

Specifically, the thesis demonstrates a failure of the Nigerian constitution to provide a substantive right to a healthy environment and the implications of such failure. It also highlights further challenges to the protection of human rights of local communities, making recommendations for reform as well as identifying the potential of the ECOWAS Court to address some of the challenges to protection of rights of local communities.

Further, this thesis demonstrates the failures of the Nigerian framework for regulation of TNCs. It identifies the numerous legislation and regulations which provide for regulation of the Nigerian

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<sup>169</sup> *Ibid.*



oil and gas industry, arguing that if effectively enforced, these regulations could greatly reduce oil pollution in Nigeria. The thesis however identifies inherent weaknesses of these statutes and regulations and other challenges to the institutional framework for enforcement of regulation. It concludes that the framework for regulation of TNCs in Nigeria can achieve greater effectiveness if reformed and proposes the use of a regulatory oversight mechanism to drive further effectiveness.

The thesis proposes a framework for oversight which the ECOWAS can adopt in performing regulatory oversight over resource extraction in member states. However, the thesis does not define a specific institutional mechanism for the implementation of such framework under the ECOWAS. The lack of a suggestion is deliberate as it is informed by the methodology adopted for the research. Given that the research is library and internet-based, it would prove speculative to suggest an institutional mechanism for the implementation of the ECOWAS framework as access to information regarding the ECOWAS is limited when conducting library and internet based research. Further research with an expanded methodology that includes visits to the ECOWAS and interviews with ECOWAS officials as well as CSOs and NGOs (given their integral role in the proposed framework) is necessary in order to develop an institutional mechanism for the proposed framework. Such work is however beyond the scope of the present research.

It is important to acknowledge that if the framework being proposed by the thesis is adopted by the ECOWAS, issues regarding ownership of resources, free prior and informed consent (FPIC) and rights of local communities to self-determination are likely to be encountered when dealing with natural resources and local communities. While this thesis does not anticipate the use of the proposed framework to address such issues, it is confident that the reprieve that the proposed framework avails local communities and governments will assuage tensions between both parties and perhaps encourage the evolution of a framework that will address those concerns.

The arguments being made in the thesis are designed to advance the protection and promotion of human rights, the health of local communities and the environment. Incidentally the proposals appeal to economics as well because the elimination of gas flaring can lead to such natural gas being utilized to generate power. The arguments therefore appeal to humanity, prudence, economics and sound judgment.

The framework being proposed in this thesis also fits into the vision of the ECOWAS.<sup>170</sup> Under its regional strategic plan of 2011-2015, the need for the ECOWAS to reinforce institutional capacity is identified as the fifth strategic pillar for operation.<sup>171</sup> Evidently, the research undertaken in the writing of this thesis demonstrates that there is both need and means for the adoption of the framework being proposed and the ECOWAS is well suited to provide the proposed oversight.

Ultimately, this thesis has argued that environmental pollution as a result of activities of TNCs has had devastating effects on the environment, human rights of local communities and the Nigeria economy. It has demonstrated the need for regulatory oversight over Nigeria's regulatory framework and proposed the use of the ECOWAS to perform such oversight function.

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<sup>170</sup> The ECOWAS Vision 2020 has as its vision statement, "To create a borderless, peaceful, prosperous and cohesive region, built on good governance and where people have the capacity to access and harness its enormous resources through the creation of opportunities for sustainable development and environmental preservation" in AFDB RISP, *supra* note 102 at 11.

<sup>171</sup> AFDP RISP, *supra* note 102 at 11.

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