# Improving the human rights accountability of multinational corporations in the oil and gas industry: a case study of Nigeria.

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2021

# IMPROVING THE HUMAN RIGHTS ACCOUNTABILITY OF MULTINATIONAL CORPORATIONS IN THE OIL AND GAS INDUSTRY – A CASE STUDY OF NIGERIA

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A THESIS IS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE ROBERT GORDON UNIVERSITY FOR THE DEGREE OF DOCTOR IN PHILOSOPHY

THE LAW SCHOOL
ROBERT GORDON UNIVERSITY

JUNE 2021

## Declaration

I Amedemoiku Ebanehita Orieso, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work, nor any part of it has been, is being or is submitted for another degree in this or any other university.

Student Number…….

Signature……..

## Dedication

This thesis is dedicated to my loving parents Prof. Dr. Michael A. Orieso and Mrs. Felicia Orieso. Thank you for your love.

**Acknowledgement**

I thank God for his blessings and grace during this journey. I wish to express my sincere gratitude to my principal supervisor, Dr Paul Arnell for his dedication, encouragement, support, motivation and guidance throughout my research and writing of my thesis, and thank you to my second supervisor Dr Femi Illesanmi for his support as well.

Also, I thank the Robert Gordon University Staff for their help and support throughout the journey, especially Alison Orellana who was just amazing with her tremendous support.

I wish to acknowledge the support of all my siblings, Ogho, Edewede, Aide, Adesua and Eromosele as well as my brother in laws and other members of my family, for their support. Finally, I will like to appreciate friends, colleagues and others who supported me during the journey, particularly Dr Eghosa.

Huge thank you to my parents who have been my rock.

**Abstract**

If we think that the environment is less important than the economy, then we should try holding our breath while we count our money.

This thesis examines the legal framework governing the oil and gas industry in Nigeria. The oil and gas industry in Nigeria is beset by many institutional ills, including a lack of political will by regulators to be accountable for enforcing laws and regulations, to be accountable for environmental degradation in the Niger Delta, and an inadequate compensation regime, amongst other mishaps. This thesis contends that a regional approach to holding multinational corporations accountable for human rights violations is the preferable alternative to improving the institutional ills currently affecting the current framework governing the oil and gas industry.

The thesis considers the impact of the voluntary framework but avers that a regional approach and institution holding multinational corporations (MNCs) to account is the preferable approach to addressing human rights violations by MNCs in Nigeria. It, therefore, advocates the strengthening of the African Charter. This is because the current regulation models have not recorded significant successes in holding MNCs accountable in Africa and Nigeria specifically. The void created in the regulatory sector by the non-performance of government regulatory bodies and the non-implementation of existing legal enactments is gradually being filled by the African Commission in Nigeria. The regional institution has proven by their antecedents that they have a major role to play in the accountability paradigm in the oil and gas industry.

This thesis will demonstrate how legal and policy-making institutions in the African Union (AU) can add a regional accountability layer and strengthen solutions within the continent, including providing effective corporate accountability and oversight within Nigeria. Furthermore, it argues that remedies to victims of corporate human rights violations in Africa may be found at the regional level. Africa needs to be the leading character in its affairs and move away from its continuous feature in international relations. This means having to take the lead in making decisions that will affect the lives of millions living in Africa.

**Keywords:** Human rights, accountability, human rights accountability, environmental pollution, multinational oil corporations, African Union.

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Petroleum Industry Bill 2018

## List of Abbreviations

| | |
|---|---|
| ACJ | African Court of Justice |
| APRM | African Peer Review Mechanism |
| ATCA | Alien Tort Claims Act |
| AU | African Union |
| CAC | Corporate Affairs Commission |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CFRN | Constitution of the Federal Republic of Nigeria |
| CSO | Civil Society Organisation |
| ECCJ | ECOWAS Court of Justice |
| ECOSOCC | Economic, Social and Cultural Council |
| ECOWAS | Economic Organisation of West African States |
| EIA | Environmental Impact Assessment |
| EITI | Extractive Industries Transparency Initiative |
| EU | European Union |
| FOI | Freedom of Information Act |
| FREP | Fundamental Rights Enforcement Rules |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICPC | Independent Corrupt Practices and Other Related Offences Commission |
| ILO | International Labour Organization |
| LUA | Land Use Act |

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|---|---|
| MNCs | Multinational Corporations |
| MOSOP | Movement for the Survival of the Ogoni People |
| NEITI | Nigeria's Extractive Industries Transparency Initiative |
| NEPAD | New Partnership for Africa's Development |
| NESREA | National Environmental Standards and Regulations Enforcement Agency |
| NGOs | Non-Governmental Organizations |
| NNPC | Nigerian National Petroleum Corporation |
| NOSCP | National Oil Spill Contingency Plan |
| NOSDRA | National Oil Spill Detection and Response Agency |
| NSAs | Non-State Actors |
| OAU | Organisation of African Unity |
| OECD | Organisation for Economic Co-operation and Development |
| PIB | Petroleum Industry Bill |
| SERAC | Social and Economic Rights Action Centre |
| SRSG | Special Representative of the Secretary-General |
| UK | United Kingdom |
| UN | United Nations |
| UNCTAD | United Nations Conference on Trade and Development |
| UNDP | United Nations Development Programme |
| UNEP | United Nations Environmental Programme |
| UNGP | United Nations Guiding Principles |
| US | United States |

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|---|---|
| VPSHR | Voluntary Principles on Security and Human Rights in the Extractive Sector |

# Chapter One

# Introduction

## 1.1 Introduction

There are several factors shaping the contemporary world today. Globalization is one of them. A multinational corporation is a business organization with its business activities located in more than two countries and these MNCs often provide foreign direct investment.[1] Multinational corporations have expanded into the global market and their nature and power is one of the pertinent aspects of globalization today. Multinational corporations have become crucial for industrial and economic growth, especially in developing societies.

States and multinational corporations are the backbones of businesses in the world joined together by globalization.[2] MNCs, a category of non-state actor (NSA), are known for their driving force in the process of globalization.[3] They are seen by the world, often rightfully so, as the controlling factor behind industrial and economic development.[4] Multinational corporations must have their origins in a particular country. This is where the corporation was incorporated. They generally have no limit as to where they can operate. A large multinational corporation

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[1] Arnold Lazarus, < https://www0.gsb.columbia.edu/faculty/bkogut/files/Chapter_in_smelser-Baltes_2001.pdf > accessed 11 June 2020.

[2] Grazia Ietto-Gillies , 'The Role of Transnational Corporations in the Globalisation Process', in Jonathan Michie (ed.), *Handbook of Globalisation* ( Edward Elgar Publishing, 2003), 139 at144.

[3] Ibid.; see also Karsten Nowrot, 'Reconceptualising International Legal Personality of Influential Non-state Actors: Towards a Rebuttable Presumption of Normative Responsibility' (2006), 80 *Philippine Law Journal* 563.

[4] Emmanuel Bruno Ongo Nkoa, 'Does Foreign Direct Investment Improve Economic Growth in CEMAC Countries' (2013), 8 *EJBE* 43 at 48; Abimbola Babatunde, 'Trade Openness, Infrastructure, FDI and Growth in Sub-Saharan African Countries' (2011), 12 *JMPP* 27 at 33; United Nations Conference on Trade and Development (UCTAD) World Investment Report (ST/CTC/143)< http://unctad.org/en/docs/wir1992overview_en.pdf >accessed 16 June 2020.

may operate in 100 countries located outside its home country.[5] Indeed, there are corporations in different parts of the world that render services on land, sea and through aviation. Countries need them to boost their economies, hence they seek their presence, even when they are incorporated outside their jurisdiction. They seek countries that are rich in natural resources to explore, and are drawn to areas where they can make enormous profit, afford cheap labour, and most times there is weak governance, which is known as "race to the bottom".[6] The perspective that some multinational corporations are more economically powerful than many states is self-evident, as they are considered a major phenomenon of the international economy today.[7]

The issue of human rights accountability of corporations during international operations gives rise to a number of challenges which this study will address. Firstly, conceptual challenge is an issue. By their very nature, corporations are a business concept designed to promote business.[8] Secondly, we have a challenge which relates to the nature and function of international law.[9] Historically, international law has been understood to be a system of rules designed to govern inter-state relations.[10] The concept of wanting corporate accountability in international law is seen by some scholars as being misplaced and is therefore contested.[11] A portion of the contest is as a result of the fact

[5] Ibid.
[6] Sergio D Briquets and Jorge P Lopez: Corruption in Cuba: Castro and Beyond (University of Texas Press 2010) 303.
[7] Nowrot (n3) 32.
[8] Freddy D. Mnyongani, 'Accountability of Multinational Corporations for Human Rights Violations Under International Law' (2016) <http://uir.unisa.ac.za/bitstream/handle/10500/21071/thesis_mnyongani_fd.pdf?sequence=1&isAllowed=y> accessed 21 June 2020.
[9] Ibid.
[10] Ibid.
[11] Ibid.

that international law is an actor-centred law, operating through its subjects. [12] They argue that corporations are not subjects of international law and therefore are not obligated through the legal system.[13]

International relations have brought about new challenges to the phenomenon of globalization. In the period of globalization, non-state actors such as multinational corporations (MNCs)[14]have increased in records, stature and power. The development of these bodies is a challenge to the traditional approaches to accountability in international law.

Non-state actors, a structure put in place to tackle the abuse of power by the state and its agents, are faced with power that arises from private entities such as MNCs.[15] Theoretically, it is created to have a gap within the structure of accountability in international law and MNC power.[16] For it to be a bridge in the gap, a paradigm shift is essential.[17] Clapham states that:

*"trying to squeeze international actors into the state-like entities box is, at best, like trying to force a round peg into a square hole, and at worst, means overlooking powerful actors on the international stage."[18]*

Within the last 40 years, the global community has not been reasonably effective in trying to tackle the issues raised by MNCs. Multinational corporations needs to be held accountable under regional institutions,

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[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Dinah Shelton, 'Protecting Human Rights in a Globalized World' (2002) 25 *Boston College International and Comparative Law Review* 314.
[17] Nowrot (n3) 33.
[18] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) 80.

particularly in relation to human rights.

Andrew Clapham[19] rightly states that:

*"The emergence of new fragmented centres of power, such as associations, pressure groups, political parties, trade unions, corporations, multinationals, universities, churches, interest groups, and quasi-official bodies has meant that the individual now perceives authority, repression, and alienation in a variety of new bodies, whereas once it was only the apparatus of the state which was perceived in the doctrine to exhibit these characteristics. This societal development has meant that the definition of the public sphere has had to be adapted to include these new bodies and activities."*[20]

The spread of non-state actors and the encounters they stance so as to protect human rights has redirected attention to the state-centric approach of international law.

The lack of national laws in order to hold MNCs accountable, as well as the absence of accountability in the international legal structure, have the tendency to be a refuge to those MNCs who do not respect human rights.[21] Deva is of the opinion that, if a corporation wanted to respect and uphold human rights standards, there are no existing universal international standards to adhere to.[22]

While states remain the principal actor in international law, it is becoming more evident that the presence of non-state actors has effects

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[19] Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press/New York: Oxford University Press, 1993) 137; Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (eds), Non-State Actors and Human Rights (Oxford 2005) 23

[20] Ibid.

[21] Mnyongani (n8) 54

[22] Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here' (2003) Connecticut Journal of International Law 19.

for the state-centric system, to protect human rights.[23]

Since Nigeria is rich in natural resources and amongst one of the global actors in oil and gas, it has become an investment destination for many multinational corporations all over the world. Therefore, it is not surprising that large corporations have their presence in Nigeria, while they engage with subsidiaries of their parent companies abroad. They have expanded their business operations into segments of production and marketing activities, including joint ventures with states or other local business entities and foreign direct investments in manufacturing or exploration of mineral resources.[24] In addition, they engage in consultancy and market their products through a complex multi-network process in order to reach world markets.[25]

Exploration of natural resources should bring about an economic development in that area, as well as a better life for the people in that territory.[26] There seems to be little or no benefit accruing to Nigeria compared with its vast natural and mineral resources in terms of development.[27] Kofi Annan[28] argues that natural resources, which are in

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[23] Mnyongani (n8) 54.; see also L.C. Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37 Columbia Human Rights Law Review, 294.

[24] See Sumantra Ghoshal and Christopher A. Bartlett, 'The Multinational Corporation as an Interorganizational Network' (1990), 15 *Academy of Management Review* 603 at 604 < http://gul.gu.se/public/pp/public_courses/course40530/published/1298469899850/resourceId/15964758/content/Goshal%20%20Bartlett%201990%20-%20Theme%201.pdf >accessed 19 May 2020.

[25] Organization for Economic Cooperation and Development (OECD), 'Supply Chains and the OECD Guidelines for Multinational Enterprises', OECD Roundtable on Corporate Responsibility (2002) <http://www.oecd.org/daf/inv/mne/2089098.pdf >accessed 15 May 2020.

[26] African Development Bank (ADB) and African Union (AU) 'Oil and Gas in Africa' (2009) 92 < http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Oil%20and%20Gas%20in%20Africa.pdf > accessed on 20 July 2020.

[27] Claude Kabemba, 'Myths and Mining: The Reality of Resource Governance in Africa' (2014) OSISA< http://www.osisa.org/open-debate/economic-justice/regional/myths-and-mining-reality-resource-governance-africa > accessed 14 May 2020.

[28] Kofi Annan, 'Momentum Rises to Lift Africa's Resource Curse' *The New York Times* (4 September 2012) <http://www.nytimes.com/2012/09/14/opinion/kofi-annan-momentum-rises-to-lift-africas-resource-curse.html?_r=0 > accessed 12 May 2020.

abundance in Africa, could have led to sustainable economic growth, including the provision of innovative jobs and investments in health, education and infrastructure – unfortunately, that is not the case. On the contrary, the consequences of resource goldmines, according to him, are conflict, strengthening inequality, corruption and environmental disasters.[29] He concludes that the situation in Africa confirms the truth of the cliché that unusual oil is not just a blessing but a curse.[30]

Nigeria, with a population of over 140 million people, is currently the world's sixth largest oil producer and the eighth largest country to export crude oil. Nigeria's oil and gas sector provides 40% of the gross domestic product (GDP), with 95% of the country's entire exports and about 80% of budgetary revenues that all tiers of government greatly depend on.[31] Regardless of the billions of dollars made from oil exploration, the Niger Delta – which is the oil and gas-rich wetland in southern Nigeria and which to a large degree gained Nigeria recognition as a major world producer of oil – has largely faced the negative effects of this oil exploitation.[32] With more than 50 years of oil exploitation, massive bits of the region have poor water quality; pollution, disruption and degradation of farmlands and fishing ports, destruction of wildlife and biodiversity, and loss of fertile soil continue to be problems.[33] Furthermore, there has been no provision of a satisfactory planned justification policy for the areas affected.[34] The response from people in this region, in the form of protest and campaigns against the activities of the extractive industries, has led, and continues to lead, to violations

[29] Ibid.
[30] Ibid.
[31] Niger Delta Human Development Report (2006) <http://www.ng.undp.org/publications/nigeria-delta-hdr.pdf > accessed 11 May 2020.
[32] Ibid.
[33] Ibid.
[34] Ibid.

of their civil, political, economic, social and cultural rights in the form of extra-judicial executions, arbitrary detentions and unlawful restrictions on their rights to freedom of expression, association and assembly.[35]

Should home states withdraw in the quest for corporate accountability against home of origin of corporations who set up business and do business abroad, the outcome may be unfortunate for human rights in Nigeria's oil sector. Then again, in the event that they don't, we are not sure of the way that all corporate human rights issues in Nigeria will be settled through home state endeavours. The solution additionally lies in Africa itself, which will offer ascent to the issue regionally. This is what this thesis addresses.

Although home state efforts should not be totally set aside, however, complete dependence on home state jurisdiction for corporate accountability can be likened to attempting to discover something that does not exist.

Thus, this thesis will examine the idea of a regional approach to corporate accountability for human rights violations, through the African Union instrument.

The thesis will contend that implementing an accountability framework in the African Union (AU) is one of the alternatives that can be utilized in ameliorating the institutional ills entrenched in the present situation in the oil and gas industry. It contends that the accountability paradigm has been weak in Nigeria and advocates for a new accountability paradigm, although this does not imply that the AU alone can solve the problems of corporate human rights violations.

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[35] Human Rights Violation Investigation Commission Report (Oputa Panel Report) vol. 3 <http://www.nigerianmuse.com/nigeriawatch/oputa/ > accessed 10 May 2020.

Since the issue of corporate abuse continues in Nigeria, Africa must make rigorous, realistic and complementary efforts to address the problem as well.

## 1.2 Background

As a result of the issue in the Niger Delta, Nigeria attracted the eyes of the world, because of the part that corporations played in the overt violation of human rights in Ogoniland, where mineral resources were being explored.[36] The general population of the Niger Delta in Nigeria appears to have endured the most at the hands of multinational corporations in Africa.

The unfair treatment meted out to them by the extractive industries include the severe abuse of mineral resources, the formation of environmental debacles in the Niger Delta, intrigue and complicity with the administration in power to carry out violations against the host community and individuals of Nigeria, and support of militants to commit criminal acts within the region.[37]

A report highlighting the consistent environmental degradation due to exploration of oil over a period of more than 50 years was published in August 2011 by the United Nations Environment Program (UNEP); the report stated that the degradation in the Niger Delta is profoundly established, and as such it would take 25 to 30 years to tidy up the

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[36] Jena Martin Amerson, 'What's in a Name? Transnational Corporations as Bystanders to the Rule of Law in a Globalized Society' (2011) 85 *SJLR* 1, 3–4, describing the role of Shell in Nigeria as that of a bystander; Larisa Wick, 'Human Rights Violations in Nigeria: Corporate Malpractice and State Acquiescence in the Oil Producing Deltas of Nigeria' (2003), 12 *MSJIL* 63, 67–74; Human Rights Watch, 'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' (1999< https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf > accessed 9 June 2020.
[37] Ibid.

contamination and actuate a feasible recuperation[38] – a lot more oil spills, with crushing impacts, have happened since that time.[39] Neither the Federal Government of Nigeria nor the MNCs have made any solid endeavour to actualize the UNEP report, regardless of the new spills.

There is no closure to the issue of corporate human rights violations in the Niger Delta, as a result of the lethargy present. The MNCs are not prepared to pursue the way of human rights commitments over the span of their extraction business in the Niger Delta. What other proof is needed to demonstrate that the government may not withdraw from the way of complicity with MNCs to the aggregate disregard of its kin? Without a doubt, on 14 December 2012, the Community Court of Justice (CCJ) of the Economic Community of West African States worried in its judgement that the issue of corporate human rights infringement in the Niger Delta of Nigeria is a consistent problem.[40]

The realization internationally that MNCs can violate corporate human rights is conceived by essential worldwide debates on the activities of corporate power, particularly its relationship with claims of human rights violations, either single-handedly or in complicity with states. The means by which to urge corporations to obey human rights commitments and to make them accountable for the infringement of human rights would prove to be quite a task.

Attempts were made in the past, at the international level, towards the creation of a multilateral regulatory regime for corporations; however there was no success.[41] Respecting the legal and regulatory framework

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[38] UNEP, *Environmental Assessment of Ogoni Land* ( UNEP Report, 2011) <http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf > accessed 16 June 2020.
[39] <http://platformlondon.org/2012/01/04/shells-bonga-oil-spill-hits-nigerian-communities/>accessed 7 May 2020.
[40] *SERAP v. The Federal Government of Nigeria* (2009) ECW/CCJ/JUD/18/12
[41] Carolin F. Hillemanns, 'UN Norms on the Responsibilities of Transnational Corporations and Other

concerning their exploration activities is what corporate accountability entails. There are plenty of laws and regulations relating to the environment in Nigeria.[42] They have not been extremely compelling for various reasons, as they are obsolete laws, include legitimate escape clauses and are lagging behind on enforcement. For example, NESREA (National Environmental Standards and Regulations Enforcement Agency) does not accommodate corporate restorative measures in instances of natural contamination. Under these laws people don't have the right to sue organizations for harm. The person who has endured the harm does not file for liability; rather NESREA does.[43]

There is no evidence to prove that NESREA – or its predecessor association, the Federal Environmental Protection Agency (FEPA) – has filed for civil liability in instances where the depositing of dangerous waste was involved.[44] The chief purpose behind the confinements to corporate responsibility is the staggering reliance of the administration on oil incomes and its complicity with multinational oil corporations. The association between the government of Nigeria and the oil corporations makes it hard to assign accountability regarding issues. The government

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Business Enterprises with Regard to Human Rights' (2003) 10 GLJ 1065–1080, 1066.

[42] Oil Pipeline Act 1956 (amended in 1965); Oil in Navigable Waters Act 1968; Oil Terminal Dues Act 1969; Petroleum Act 1969; Associated Gas Reinjection Act of 1979; Harmful Wastes Act (HWA) of 1988; Federal Environmental Protection Agency Act 1988; Environmental Impact Assessment Act 1992; National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007; Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 1991; Gas Flaring (Prohibition and Punishment) Bill of 2009 and section 20 of the Constitution. Public regulatory bodies on environmental issues include: Federal Ministry of Environment, Housing and Urban Development (also known as Federal Ministry of Environment); National Environmental Standards and Regulations Enforcement Agency (NESREA); National Oil Spill Detection and Response Agency (NOSDRA); and Department of Petroleum Resources.

[43] National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007.

[44] It is only the National Environmental (Pollution Abatement in Mining and Processing of Coals, Ore and Industrial Minerals) Regulations of 2009 that provide for the right to sue in order to prevent, stop or control a breach of its provisions.

and MNCs point fingers at one another so as to extenuate themselves of their obligations.[45]

In Nigeria, in addition to the government, the MNCs' most remarkable partner remains its investors. In this way, while corporations may be compelled by global standards to embrace a specific forepart, their advantaged association with the Nigerian government alleviates them from the related duties in Nigeria.

The use of regulations and rules is jeopardized, as it would influence oil corporations as well as the government. This circumstance isn't made easy by the way that national civil society has transcendentally kept on clamouring for self-determination and control of resources as opposed to corporate accountability. It clarifies the reason why sanctions have not been upheld or have been intended to have negligible effect. The Economic Community of West African States (ECOWAS) Court of Justice featured the complicity between government and oil corporations.[46]

In relation to the aforesaid, unfortunate victims rather prosecute corporations who violate human rights in courts in developing areas, where there are relaxed regulations and they have higher chances of getting favourable results. In the wake of attempting unsuccessfully for more than quite a while to get a reasonable remuneration from Shell for oil pollution in Nigeria, the Bodo people group took its case to the High Court in London in 2012.[47] In 2012, with the assistance of two NGOs, Environmental Rights Action and Friends of the Earth, four farmers

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[45] For example, Shell declares its readiness to reduce emissions but insists that the Nigerian government, its partner, does not support such measures because they would reduce production levels.
[46] ECOWAS is a regional grouping of 16 countries to which Nigeria belongs.
[47] Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta* (London: Amnesty International, 2009). See also John Vidal, 'Shell Nigeria Oil Spill 60 Times Bigger than It Claimed', *The Guardian* (23 April 2012) < https://www.theguardian.com/environment/2012/apr/23/shell-nigeria-oil-spill-bigger >accessed 12 May 2020.

documented a claim against Shell in the Netherlands for the loss of jobs following the natural harm caused by the activities of Shell somewhere in the range of 2005 to 2008.[48] Additionally, the utilization of extraterritoriality is being endangered by the hesitance of nations to straightforwardly encroach on different nations' national power.[49]

In Nigeria, wilful self-determination by oil corporations has not positively affected their conduct in the areas of human rights and the environment. For example, regardless of its interest in the VPSHR (voluntary principles of security and human rights), human rights violations in the Niger Delta have been associated with corporations such as Shell and Chervon. Shell was associated with 27 clashes which occurred due to its activities in Nembe[50] between 2000 and 2006; and between 2007 and 2009, Shell spent no less than 383 million US dollars on security in Nigeria: 33% of the cash was spent on government security powers and equipping militants with ammunitions which they used to create unrest and human rights infringement in the Niger Delta,[51] as they threatened indigenes who protested against the mistreatment.

Shell was ensnared in an assault on the indigenes of Odioma in Bayelsa state in 2005: about 17 individuals were slaughtered by members of the joint task force, and over 100 indigenes were made homeless after the community was burnt down.[52]

Shell was associated with five human rights violations which occurred in indigenous communities between 2009 and 2010; likewise, in 2005 and

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[48] 'Shell on Trial in Netherlands over Pollution in Nigeria', *Vanguard* (12 October 2012) <http://www.vanguardngr.com/2012/10/shell-on-trial-in-netherlands-over-pollution-in-nigeria/>
[49] Ibid.
[50] Felix Tuodolo, 'Corporate Social Responsibility: Between Civil Society and the Oil Industry in the Developing World' (2009) ACME: An International E-Journal for Critical Geographies, 8(3): 530.
[51] Platform, *Dirty Work: Shell's Security Spending in Nigeria and Beyond* (London: Platform, 2012)
[52] Kenneth Omeje, 'High Stakes and Stakeholders: Oil Conflict and Security in Nigeria' (2006) Hampshire and Burlington, VT: Ashgate.

2008 Chevron asked a team of armed men to manage challenges with local communities protesting against them.[53] Shell recorded in excess of 3,000 episodes of oil spills, and day-by-day gas flaring of around 604 million standard cubic feet of gas was emitted between 1995 and 2006.[54]

Two leading recent works, one by Clapham and another by Alston, address the issue of accountability of non-state actors. Clapham's work examines the use of human rights by non-state actors in its entirety; it sees a human rights methodology which rises above state-driven human rights and proceeds to lay out the human rights duties of non-state actors.[55] It proceeds to suggest manners by which the non-state actors could be considered accountable.

Fundamentally, Clapham asserts that human rights accountability should rest on states, individuals, as well as non-state actors (NSAs). Alston further expresses that international law ought to be modified to accommodate the activities of MNCs.[56]

The past decade has seen a growing literature on MNCs and human rights which has averred that states should be accountable for MNCs' activities, while another school asserts corporate accountability through human rights instruments and codes of conduct. Schutter has said that states are the primary responsible actors for the human rights activities of MNCs and that codes of conduct should not be seen as an alternative way to state responsibility, but as harmonious.[57] However, there is still

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[53] Earthrights International, The Centre for Environment, Human Rights and Development, 2013.
[54] Tuodolo (n50) 537.
[55] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (New York and Oxford: Oxford University Press, 2006).
[56] Peter Alston, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005).
[57] O De. Schutter, 'Towards a new treaty on business and human rights' (2016) *Business and Human Rights* Journal, 1(1): 77

limited research on a regional approach to holding MNCs accountable.

### 1.3 Aims and Objectives

The main purpose of this study is to analyze:

i. How to improve corporate human rights accountability in Nigeria through the African Union, therefore strengthening states' human rights duties to hold multinational corporations accountable.

This is crucial because the fight to shift responsibility for protection of human rights to multilateral or international institutions, or to enact a global regulatory regime that will solve the problems of corporate human rights violations despite the incapacity of weak states like Nigeria to meet their obligations, has been a long time coming.

In that situation, the solution to the problem, some scholars argue correctly, may lie at the regional level.[58] However, as argued above, some scholars have expressed their dissatisfaction with the performance of the AU in monitoring corporate accountability in Africa. They argue that although Africa is a continent where abuses of corporate human rights are numerous, the AU has done nothing significant to solve these problems.[59] Unfortunately, there is a lack of research in this area. While research on corporate governance and accountability is high, specific focus on implementing the guiding principles through a regional instrument and national institutions in Nigeria is rare and inadequate.[60]

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[58] Alice D. Jonge, Transnational Corporations and International Law Accountability in the Global Business Environment (Edward Elgar Publishing, 2011) 149; also Peter T. Muchlinski, *Multinational Enterprises and the Law* (2nd edition, The Oxford International Law Library, 2007) 118.
[59] Ibid.; Daniel Aguirre, 'Corporate Social Responsibility and Human Rights Law in Africa' (2005) 5 *AHRLJ* 239, 265; see also Emeka Duruigbo, 'Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry' (2001), 7 ASICL 101, 126.
[60] Aguirre (n59) 255.

Most researchers in this area concentrate on the study of home-state jurisdiction without a sufficient nexus to the study of host-state jurisdiction and in particular the regional legal jurisprudence. Thus, this thesis is important as it aims to fill the gap by engaging in that study.

It is also significant because it is triggered by a response to the call of the Special Representative of the Secretary-General (SRSG) for more research in the area of corporate accountability in order to facilitate implementation of the framework in this part of the globe.[61] Ruggie lays the premise by arguing that there is bound to be future debate on the UN Guiding Principles (UNGP), but at least we now know what the foundations are and how to frame the future debate.[62] This thesis will engage in an inquiry as part of this future debate on how the AU conventions and mechanisms can be improved to hold MNCs accountable, and also to ascertain if we can use the foundational principles of the guiding principles to confront corporate human rights violations regionally, using Nigeria as a case study.

Aside from the major objective of the thesis, other aims and objectives have emerged within the central objective that must be addressed. Nigeria is a weak state and could not perform its obligations under the guiding principles. In such a situation, how can it implement the guiding principles? This thesis also aims, therefore, to explore the reasons why Nigeria is unable to stand up to its responsibilities in this regard and suggests possible ways of remedying this situation.

Of course, the whole discourse still centres on the major objective. A critical look at the voluntary codes, national laws and regional

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[61] Peter Muchlinski, 'Implementing the New UN corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 Business Ethics Quarterly 1,146
[62] Ibid.130

instruments reveals that they attempt to solve this problem of weakness of states by suggesting complementary efforts from other states and host states alike, in accordance with the principle of international law.[63] Among other things, it prescribes that where states are unable to protect human rights adequately,[64] because MNCs are involved, the home states have roles to play in ensuring that businesses are not involved in human rights violations.[65] It also calls for combined efforts from civil society and co-operation among states to resolve the issue of human rights responsibility and accountability by corporations. In fact, the use of extra-territorial jurisdiction is also supported for the attainment of that purpose.[66] In that regard, the AU as a regional organization has a vital role to play in this matter, to use its institutional structure and mechanism to evolve a legal regime of corporate accountability in the continent. The inquiry of how the AU can fit into this challenge is the main engagement of this thesis.

Another objective is to examine how corporations can be liable, together with states, for their complicity for human rights violations under the African human rights system. In order to do this, it is important to examine the state of the current level of the regulatory, normative and corporate accountability framework for corporations doing business in Nigeria. In doing this, it is important to note that Western notions and concepts of international law dictate the AU's legal jurisprudence,[67] with few modifications to reflect an African perspective. Therefore, even

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[63] Note that the UNGP also call for complementary efforts from corporations.
[64] United Nations Human Rights, 'Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) New York and Geneva 3.
[65] Ibid.
[66] Ibid.
[67] Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing, 2000) 50; Nsongurua J. Udombana, 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' (2004) 40 SJIL 105,121.

though most of the AU treaties can be violated by states with the complicity of corporations, or vice versa, the existing legal structure of the AU does not hold corporations directly accountable for violations of human rights.

This is due to the fact that only states are parties to the African human rights treaty regime. It thus means that the African human rights system follows the state-centric view of international law that seeks to protect human rights through the instrumentality of the states alone, on the premise that only states are the primary bearers of human rights obligations.[68] As a result, the state, and not corporations, has four important duties to give effect to the provisions of regional and international human rights treaties.

The first is the duty to respect human rights, and the purpose is to prevent the government itself from trampling on the rights of the people. The second is the duty to protect human rights; this places obligation on the state to protect its citizens from human rights violations by third parties. The third is the duty to promote human rights, which is a unique duty in the African treaty regime[69] because it places a further obligation on the state to showcase its human rights record. The last is the duty to fulfil human rights, which is a mandatory injunction to states to implement and realize the purports and intents of human rights.

As a result of these obligations, a state can be held liable for failure to discharge its obligations under the African human rights regime, as it is clear that the state is the mechanism of enforcement of the human

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[68] Martin Dixon, *International Law* (7th edn, Oxford University Press 2013) 174.

[69] This is the African [Banjul] Charter on Human and Peoples' Rights (African Charter), an African treaty adopted in Nairobi, Kenya, by the Organization of African Unity (now African Union) Assembly of Heads of State and Government on 27 June 1981, OAU doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) which entered into force on 21 October 1986 and was ratified by all member states of the African Union including Eritrea, which acceded to the Charter in January 1999. See Article 1 of the African Charter.

rights regime in Africa. Unfortunately, most states are complicit in corporate human rights violations in Africa, as this study has shown earlier.

The deficiency of the AU's legal structure with regard to corporate accountability was seen in the case of SERAC and CESR v Government of Nigeria[70] where the African Commission on Human and Peoples' Rights (ACHPR, or the African Commission) rendered a decision holding the Nigerian government liable for complicity in the violation of human rights perpetuated by corporations on the grounds of state responsibility without attributing any blame to the corporations involved. The African Commission found Nigeria to have breached its four-fold obligations guaranteed by the African Charter on Human and Peoples' Rights (Charter), and was therefore found to have violated the right to enjoy Charter-guaranteed rights and freedoms without discrimination,[71] the right to life,[72] the right to property,[73] the right to health[74] (Article 16), the right to housing,[75] the right to food,[76] the right of peoples to freely dispose of their wealth and natural resources,[77] and the right of peoples to a general satisfactory environment favourable to their development.[78] The implication of that case is that if the state fails to perform its four-fold obligations to protect, respect, promote and fulfil human rights,

[70] Communication 155/96; Decision handed down at the 30th Ordinary Session of the Commission held in The Gambia. For text, see Bernard H. Oxman, 'International Decisions' (2002), 96 *AJIL* 677–684. The case will be discussed in Chapter 4.
[71] African Charter on Human and Peoples Rights (1982) 21 l.L.M 58, Article 2.
[72] Ibid., Article 4.
[73] Ibid., Article 14.
[74] Ibid., Article 16.
[75] Ibid., Article 18(1).
[76] Ibid., implicit in Articles 4, 16 and 22.
[77] Ibid., Article 21.
[78] Ibid., Article 24.

there can be no remedy under the present African legal jurisprudence to hold corporations accountable.

According to Joe Oloka-Onyango, the main focus of condemnation by the African Commission was the government of Nigeria; little attention was given to the obligations and responsibilities (in human rights terms) of the companies that were intimately involved in many of the human rights violations that occurred there.[79] At the end, the decision of the African Commission was biased, making the Nigerian government responsible for all the atrocities that happened.

In truth, the position of the African Commission is understandable. The Commission could not have focused on the corporation involved (Shell Petroleum Development Company, SDPC) when the African human rights system, like all other regional human rights systems, is in fact state-based. The problem lies with the state-based structure, and it would be unfair to expect the African Commission to condemn the structure that ensures its legitimacy. As such the responsibility to change the structure lies with the AU, not with the African Commission. However, this study is of the view that the African Commission's decision could have been better if it had considered corporate law and human rights theory together with international law. According to Steven Ratner[80] human rights theory does not accept efforts to limit duty holders to states or to those administering state policy. He further argues correctly that corporate law provides direction to international law on the need to see corporations, and not just those working for them,

[79] Joe Oloka-Onyango, 'Who's Watching "Big Brother"? Globalisation and the Protection of Cultural Rights in Present-day Africa' (2005) 5 AHRLJ 1–26,25.
[80] Steven R. Ratner, 'Corporations and Human Rights: A Theory of Responsibility' (2001) 111 YALE LJ 461.

as duty holders.[81] Consequently, this study interrogates the question of corporate liability for their complicity for human rights violations under the African human rights system. It rests on the conceptual underpinning that international law is not static; it is shifting and adjusting itself to meet the challenges of human rights protection by moving from the era of strict construction of states as duty bearers to include individuals and now to non-state actors.[82]

The reasons behind the inclusion of non-state actors are the inadequacy of state responsibility and individual responsibility to meet the challenges of corporations. [83] This study therefore proves that corporations are duty bearers who should be saddled with obligations to protect human rights. Thus, human rights responsibility refers to obligations of corporations to respect human rights. However, accountability helps in questioning the crack of that obligation by the corporation. The whole idea of accountability is to prevent and remedy the arbitrary use of power.[84] In the Corfu-Channel case, the conception of accountability as a check in the use of power by questioning the conduct of people, states or institutions was adopted.[85] Consequentially, the court observed rightly that a state on whose territory an act contrary to international law has occurred may be called upon to give an explanation.[86] The concept of corporate accountability as used in this study refers to the entrenchment of corporate binding obligations,

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[81] Ibid.
[82] Ibid.
[83] Oloka-Onyango (n79) 25.
[84] Webster's Third New International Dictionary (1981).
[85] Nils Rosemann, 'New Perspectives of Accountability: The Merging Concept of Corporate Responsibilities with Regard to Human Rights' (2004) paper delivered at the Florence Founding Conference of the ESIL1–14 at 8 < http://www.esil-sedi.eu/sites/default/files/Rosemann_0.PDF >accessed 17 May 2020.
[86] Corfu-Channel case, ICJ Reports (1949), para. 8.

imposition of penalties in cases of non-compliance and the right of victims to seek redress.[87]

Indeed, this enquiry has come at the most appropriate time. A regional institution like the EU has been taking proactive steps to ensure that its home-based corporations do not violate human rights abroad.[88] Certainly, the AU must learn from the EU but it is difficult to compare the two regional institutions because they have different historical backgrounds, focus and levels of growth. Nonetheless, the recent move by the AU to extend the jurisdiction of the proposed African Court of Justice and Human Rights (ACJHR) to cover corporate liability[89] indicates its preparedness to take the issue of corporate accountability seriously. Article 46C of the Protocol on the Statute of the African Court of Justice and Human Rights (Protocol) seeks to invest the ACJHR with power to try legal persons for criminal corporate liability.[90] Notwithstanding the criticism of some scholars that the motive behind the ACJHR[91] is a ploy to settle a score with the International Criminal Court (ICC) by providing an escape route for the trial of African leaders by the ICC,[92] the establishment of the ACJHR with jurisdiction on

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[87] Peter Utting, 'The Struggle for Corporate Accountability in Development and Change' (2008), 39 DAC 959– 997,965–966.

[88] Joshua M. Chanin, 'The Regulatory Grass Is Greener: A Comparative Analysis of the Alien Tort Claims Act and the European Union's Green Paper on Corporate Social Responsibility' (2005) 12I JGLS 745,778. Note that the EU Framework too is not perfect but it 'is a sound initial step towards a very worthwhile end'.

[89] Franny Rabkin , 'African Human Rights Court Could Cover Criminal Offences' *Business Day* (29 January 2014) <http://www.bdlive.co.za/national/law/2014/01/29/african-human-rights-court-could-cover-criminal-offences >accessed 18 May 2020.

[90] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' adopted by AU Heads of State and Governments on 27 June 2014< http://www.au.int/en/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf>accessed 20 May 2020.

[91] Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/ AU/Dec.366 (XVII), adopted at the 17th Ordinary Session of the AU Assembly, 30 June to 1 July 2011 in Malabo, Equatorial Guinea (para. 8).

[92] Stephen Arthur Lamony, 'African Court Not Ready for International Crimes', African Arguments< http://africanarguments.org/2012/12/10/african-court-not-ready-for-international-crimes-–-by-steven-lamony/ > accessed 11 June 2020; Chidi Anselm Odinkalu, 'Concerning the Criminal Jurisdiction of the

corporate liability will go a long way to address the issue of corporate human rights accountability. In fact, Vincent Nmehielle argues that it is easy for any commentator or observer to view the move as indeed reactionary due to a perceived "Africa backlash" on the ICC.[93]

In addition, the capability of the ACJHR as it is presently constituted by the Draft Protocol to handle a wide array of cases which include genocide, crimes against humanity, war crimes, piracy, terrorism, corruption, illicit exploration of natural resources, and criminal corporate liability, among others, is doubtful. With respect to corporate criminal impunity, the idea to extend the jurisdiction is commendable. Currently, on the issue of corporate human rights responsibility, the component of reform in any nation or region of the world should be the best practices. As such this thesis asserts that a regional institution intending to make complementary efforts that will adequately address the issue of corporate accountability must start from a critical examination of the regional mechanisms and then begin research on how to implement it to the AU. The issue of access of individuals to the ACJHR is not even guaranteed. Yet, the hope of attaining a society free from corporate abuse in Africa is not lost.

The question for consideration is whether focusing on regional mechanisms is an adequate compliance and if that can ensure corporate accountability? The answer may be negative, but it is the beginning of the process of corporate accountability in Africa. Consequently, this thesis seizes this opportunity to fill the missing link. It interrogates how

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African Court – A Response to Stephen Lamony', African Arguments < http://africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-–-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu/>accessed 13 May 2020.

[93] Vincent Nmehielle, 'Taking Credible Ownership of Justice for Atrocity Crimes in Africa: The African Union and the Complementarity Principle of the Rome Statute', in Vincent Nmehielle (eds), Africa and the future of International Criminal Law (EIP 2012) 240.

the present potential in the AU can be projected to live up to the demands of the widely acclaimed internationally recognized principles of corporate accountability recognized by the UNGP and how the hydra-headed problems of corporate human rights violations can be resolved. This is a crucial issue for two reasons. One, the failure of the states to protect always leads to violations of human rights treaties of the AU itself; and two, research in this area is rare, as noted earlier.[94] Thus, this thesis is important as it aims to fill the gap by engaging in that enquiry.

In addition, this study, if completed and published, will facilitate effective and efficient regulatory mechanism on corporate accountability in African states; it will also motivate the AU to evolve a complementary regulatory and normative framework that will help the states to meet their expectation in the UN framework and serve as an instrument of advocacy at the hands of law firms, NGOs and international organizations interested in corporate human rights accountability. Ultimately, the study will also be useful to various stakeholders such as students, legal practitioners, policy-makers, states, regional institutions in Africa, international institutions, corporations, academics, researchers and a host of others who have a stake or interest in corporate human rights obligations and accountability in Africa.

## 1.4 Research Questions

As noted earlier, the guiding principles have provided us with a template to address the issue of human rights and accountability. According to Ruggie, the framework is not a toolkit because it does not provide a

[94] Aguirre (n59).

ready-made solution to the problems at hand. It calls for a thorough research before implementation. In fact, the truth is that if a thorough research is done as contemplated by Ruggie, a new framework will emerge. The beauty of that new framework is not that it will be in conflict with the general principles enunciated but that it will take care of the peculiar history, experience and unique environmental differences of each nation, state or continent. This study will consider one main question and other sub-questions. The main research question is:

i. How to improve the human rights accountability of multinational corporations in the oil and gas industry in Nigeria?

Subsidiary questions that are addressed are:

ii. What are the reasons in favour of human rights accountability by multinational corporations in Nigeria?
iii. What is the nature, extent and history of human rights violations by corporations in Nigeria?
iv. What is the current level of regulatory, normative and corporate accountability framework for corporations doing business in Nigeria?
v. Is the current level satisfactory?
vi. Are soft laws enough to hold MNCs accountable?
vii. How do and can AU mechanisms hold corporations accountable?

## 1.5 Research methodology and Approach

It is essential to note that methods used for data collection and analysis be precise.[95] Chynoweth posits that there would not be any significance

[95] Jan Jonker and Bartjan Pennick, *The Essence of Research Methodology: A Course Guide for Master and PhD Students in Management Science* (Springer –Verlag, 2010).

in inserting a methodology section in a doctrinal research writing as it does not entail data collection but analysis.[96] While this statement may be true for published research journals, it may not necessarily apply to a PhD thesis. This is so because if the nature of the method and methodology used are unknown, evaluating and synthesising this thesis with other related studies will be difficult.[97]

This section of work describes the various reasons for the selection of the methodology taken. A research methodology is "a technique for collecting data which could involve specific instruments such as self-completion questionnaires, structured interviews or participant observation".[98] Also, it can simply be "a strategy or plan of action that leads methods to actions".[99] In order words, a research methodology is a justification for using a particular research method.[100]

### 1.5.1 Legal Research methods

Legal research is ideally through either doctrinal legal method or non-doctrinal legal method.[101]

#### 1.5.1.1 Non- doctrinal legal research

Non-doctrinal research, also known as social-legal research, involves methods taken from other disciplines to generate empirical data that answers research questions.[102] It can be a policy, problem, or a reform

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[96] Paul Chynoweth, 'Legal Research in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley- Blackwell, 2008) 37.
[97] Ibid.
[98] Alan Bryman and Emma Bell, *Business Research Methods* (Oxford: Oxford University Press, 2003) 32.
[99] John Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches*, 2nd edition (Thousand Oaks, CA: Sage, 2003), 5.
[100] C.R. Kothari, *Research Methodology and Techniques* (2nd edn, New Age Publishers 2004) 26.
[101] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2012).
[102] Salim Ali, Zuryati Yusoff and Zainal Ayus, 'Legal Research of Doctrinal and Non-Doctrinal (2017) International Journal of Trend in Research and Development, 4,1.

of the existing law.[103] A legal non-doctrinal finding can be qualitative or quantitative, and a dogmatic non-doctrinal result can be part of a large-scale project.[104] The non-doctrinal approach lets the researcher conduct research that analyses the law from some other science disciplines and employ those disciplines in drafting the law.[105] Simply put, non-doctrinal helps in understanding how other disciplines influence law and legal research.[106]

#### 1.5.1.2 Doctrinal legal research

Doctrinal or library-based research is a common methodology employed by those researching law. Doctrinal research seeks to find, what is the law in a particular case.[107] It is interested in the analysis of the legal doctrine and how it developed and applied.[108] This is mainly theoretical research,[109] that involves simple research to find a specific statement of the law or legal analysis with more complex logic and depth.[110] Simply put, it is library-based research that seeks to find the "one right answer" to specific legal issues or questions. Thus, this type of methodology aims to make particular inquiries to identify particular pieces of information.[111] All inquiries will have specific answers to particular questions that can be easily discovered and verified, and these are the keys to doctrinal or

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[103] Ibid.
[104] Ibid.
[105] Ibid
[106] Susan Mcvie, 'challenges in socio-legal empirical research' < https://www.create.ac.uk/methods/methodological-challenges/socio-legal-empirical-research/ > accesses 18 April 2021.
[107] Salim Ali, Zuryati Yusoff and Zainal Ayus, 'Legal Research of Doctrinal and Non-Doctrinal ( n102).
[108] Ibid.
[109] Geoffrey Wilson, 'Comparative Legal Scholarship' in Mike McMconville and Wing Hong Chui, *Research Methods for Law* (Edinburgh university press, 2012) 164.
[110] Salim Ali, Zuryati Yusoff and Zainal Ayus, 'Legal Research of Doctrinal and Non-Doctrinal ( n102).
[111] Ibid.

library-based research.[112] These steps include analysis of legal issues to determine the need for further research, which is qualitative in nature and doesn't necessarily employ statistical analysis of data.[113] The qualitative characteristics indicate that this research is not a field or laboratory research that will involve any primary collection procedure such as mass observation, telephone survey, or small group study behaviour.[114] This stage often involves a great amount of reading on a subject using sources such as dictionaries, primary textbooks, treatises, and journals accompanied by footnotes. Definitions of Terms are provided in these sources, that help the researcher understand and summarise the legal principles involved in law understudy.[115]

This study will primarily entail library-based research. It will involve a critical analysis of human rights instruments and literature on MNCs accountability and the relevant norms, ethics, and codes dealing with MNCs accountability at both regional and international levels.

This thesis utilises a library-based research method. The research method adopted was heavily influenced by the research questions/objectives explored in the thesis.

This thesis adopted the library-based research method due to the difficulties encountered in adopting other research strategies. For example, this thesis jettisoned reliance on interviews with stakeholders due to the problems encountered during the research. For example, this research encountered difficulties in conducting interviews, especially

[112] Ibid.
[113] Paul Chynoweth (n 96).
[114] Mike McConville and Wing Hong Chui, *Research Methods for Law* (n 101).
[115] Salim Ali, Zuryati Yusoff and Zainal Ayus, 'Legal Research of Doctrinal and Non-Doctrinal ( n102).

amongst high-ranking officials of MNCs and NGOs operating in Nigeria who declined an interview. Notwithstanding the potential challenges of the strategy adopted in this thesis, its findings are ultimately reliable, as this thesis reviewed all relevant data found in various literature on the internet.

Consequently, the thesis will rely significantly on primary and secondary sources relevant to the study. The primary sources to be used include international and regional human rights instruments, the domestic laws of Nigeria regulating the activities of MNCs, and the judgements of international, regional and domestic courts. This thesis will also examine the Nigerian Constitution to see its impact on the proposed legal framework for human rights and accountability. Furthermore, this thesis will also investigate UNGP and AU treaties, documents and declarations relevant to the study. The secondary sources to be relied on include journal articles, law textbooks, and records and reports collected by government agencies, human rights bodies/commissions and other electronic sources relevant to the study.

### 1.5.2 Rights-based approach

The research adopts the rights-based approach. It is based on a legal premise of universal entitlement. Also, a rights-based approach provides a basis for holding relevant actors accountable and can generate law and policy reform.[116] The acknowledgement of the fundamental basis of procedural rights is the importance of a rights-based approach concerning the oil-producing communities of Nigeria to give the people

[116] Olubayo Oluduro, 'Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities' (2012), *Afrika Focus*, 25(2), 161 <http://www.afrikafocus.eu/file/19> accessed 19 May 2020.

a starting point for obtaining information concerning environmental matters that affect them.[117] Rather than confining them to the role of passive onlookers to environmental matters that affect them, it also facilitates their participation in the decision-making process as a matter of right.[118] If within this framework, the government fails, it can legally be held accountable by the people. As noted by UNICEF, a rights-based approach seeks to raise levels of accountability in the development process by identifying the rights holders and corresponding duty-bearers and enhancing the capacities of these duty-bearers to meet their obligations.[119] A rights-based approach requires the development of laws, administrative procedures, and practices and mechanisms to ensure the fulfilment of entitlements, as well as opportunities to address denials and violations.[120]

A human rights-based approach grounded in the international human rights framework.[121] It is a value-based approach, which works for the ethical inclusion of all people, without discrimination, building a fair, just and non-discriminatory society. [122] Therefore, it is necessary to understand the full context of people's lives: their geographical, social, political, cultural, and economic circumstances. [123] With this understanding, a rights-based approach works to increase people's access to, and power in, decision-making which affects their lives and work.[124]

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[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Rights as defined by the 1948 Universal Declaration of Human Rights and after that in covenants and treaties known as the international framework for human rights.
[122] 'Impact of Rights-Based Approaches to Development'< at http://www.crin.org/docs/Inter_Agency_rba.pdf> accessed 14 June 2020.
[123] Ibid.
[124] Ibid.

## 1.6 Scope of Study

The focus of this research is an inquiry into the possibility of putting corporations in Africa under a normative framework that will ensure their accountability in the conduct of their business in Africa, using Nigeria as a case study. Examples will also be provided from other developed and developing countries, in order to learn from other experiences. The research is interested in analyzing business-related aspects of human rights that are suitable for transnational business in Africa in order to propose uniform corporate human rights obligations. Consequently, only relevant literature suitable for a discourse on corporate human rights responsibility and accountability will be considered.

## 1.7 Thesis Structure

This study is divided into seven chapters, as well as an introductory chapter and a concluding chapter. Chapter 1 is the introduction, which provides a general introduction, explaining the link between corporation and business, using Nigeria as a case study, and the ensuing governance gap resulting in corporate human rights violations. It also explains the background on which the discussion of the remaining chapters is based.

Chapter Two looks at the history of oil and gas in Nigeria, as well as the history of oil pollution in Nigeria. Chapter Three defines concepts

relating to this research, and provides an overview of multinational corporations and the concept of human rights.

Chapter Four analyzes the national legal standards dealing with the protection of the right to environment. It also looks at several cases which have been filed in Nigerian courts and the manner in which the Nigerian judiciary has interpreted the laws governing the oil industry and decided on the legality or otherwise of the actions of the oil companies and the Nigerian government; the concept of accountability and human rights is discussed as well. Chapter Five looks at current existing international regulatory frameworks for holding multinational corporations accountable for human rights violations land also looks at voluntary instruments that have attempted to hold MNCs accountable.

Chapter Six looks at the guiding principles. It examines the tripartite framework for corporate accountability, widely known as the United Nations Protect, Respect and Remedy Framework for Business and Human Rights, the concept of "due-diligence" and extra-territorial jurisdiction within its framework. It discusses the nature and extent of the human rights obligations protected and articulates the usefulness of the guiding principles and their implications for the AU.

Chapter Seven examines the role of the AU and others in ensuring corporate accountability for human rights in Nigeria. The chapter therefore examines the African Charter and its institutional and regulatory mechanism for the protection of human rights regionally.

Chapter Eight examines how the AU mechanisms can help hold MNCs accountable. The chapter discusses the emergence of corporations as new duty bearers, the role that law and institutions can play in addressing the issue of corporate human rights responsibility and accountability in Africa, and the reasons behind the quest for legal and

institutional frameworks for accountability in Nigeria. It identifies frameworks for the AU that address corporate human rights violations and accountability from an African perspective, with a further study on the guiding principles. The proposed framework deals with how the widely acclaimed internationally recognized principles of corporate accountability, as recognised by the guiding principles, can be used by the AU to help a state like Nigeria not only effectively perform its international obligations but also solve the problems of corporate human rights violations. Therefore, it examines how some legal and policy-making institutions in the AU can be rejuvenated. It considers possible problems that can be encountered in implementing the framework, and discusses how to overcome such problems.

# Chapter Two

## History of the oil industry in Nigeria

### 2.1 Introduction

The previous chapter introduced the subject of the research and provided a background of the study. This chapter discusses the history, nature and extent of corporate human rights violations in Nigeria. Oil in Nigeria generates about 40% of the Gross Domestic Product and 70% of government revenues and up to 90% of all what the government receives.[1] MNCs in the form of colonial companies have been present in Nigeria for over a hundred years.[2] The earliest MNCs entered Nigeria during the colonial regime under the British[3] and some of these companies were established in the 19th century after the slave trade was abolished. The companies were expected to deal in legitimate trade such as palm oil trade.[4]

Nigeria is currently the largest producer of oil in Africa, and it holds the largest natural gas reserves in the African continent.[5] In June 2020, British Petroleum (BP) released a full energy report with statistical data, which stated that, as of the end of 2019, Nigeria had the 11th largest

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[1] Somina Varrella, Oil Industry in Nigeria –Statistics & Facts, December 1, 2020. < https://www.statista.com/topics/6914/oil-industry-in-nigeria/ > accessed 12 April 2021.
[2] Ojo, G.U. 'Towards a Non-Oil Economy: Resolving the Resource Curse Crisis in Nigeria' in Ojo, G.U (ed) Envisioning *a Post-Petroleum Nigeria: Leave the Oil in the Soil* Benin City: (ERA/FoEN 2010).
[3] Olufemi Amao, 'Corporate Social Responsibility, Multinationals and the Law in Nigeria: Controlling Multinationals in Home State" (2008) 52 (1) Journal of African *Law* 89-113.
[4] Ako Rhuks & Okonmah Patrick 'Minority Rights Issues in Nigeria: A theoretical Analysis of Historical and Contemporary Conflicts in the Oil-Rich Niger Delta Region' (2009) 16 (1) *International Journal on Minority and Group Right*s 53-65.
[5] U.S energy information administration, on Nigeria, December 2013< http://www.eia.gov/countries/analysisbriefs/Nigeria/nigeria.pdf > accessed June 10 2020.

proven oil reserve in the world, which totals approximately 37.0 billion barrels.[6] The same 2020 BP report on world oil production shows that Nigeria is the 11th largest oil producer in the world, with a production rate of 2.2 million barrels per day (bpd),[7] and the sixth-largest exporter of oil, with a 2015 exportation rate of 2.2 million bpd.[8] Nigeria has the largest natural gas reserves in Africa,[9] with estimated proven gas reserves of 180.5 trillion cubic feet,[10] making it the ninth-largest concentration in the world.[11]

As of 2015, Nigeria moved up to become the eighth largest oil-exporting country to the United States of America,[12] and is responsible for approximately 30% of the total oil produced in Africa. In October 2014, Nigeria became the first country to completely stop selling oil to the United States of America, for the first time since 1973, due to the impact of the shale revolution.[13]

Nigeria's Finance Minister, Ngozi Okonjo-Iweala, announced in November 2014 that a 6% drop in its oil revenue would pressurise the government into cutting non-essential spending, raise more revenue and spend half of its $4.1 billion sovereign wealth fund, down from $11.5 billion at the start of 2013, to cover budgetary shortfalls. Daniel Yergin, an energy researcher with IHS Cera and author of *The Quest*, a history of oil and geopolitics, said that two of Nigerian' biggest issues are, firstly,

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[6] BP Statistical Review of World Energy June 2020 69th edn. < https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2020-full-report.pdf > accessed 09 April 2021.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] <http://www.thisdaylive.com/articles/as-us-shuts-its-door-on-nigeria-s-oil-exports/190455/> accessed April 10 2020.

the loss of its biggest market in the U.S, and secondly, the price decline which had really hit them.[14]

John Campbell, who was a previous U.S ambassador to Nigeria, was of the view that the country could incline into disarray if the price of oil falls beyond its current $78-per-barrel price because its finances have already been pushed to breaking point by oil bunkering or theft by Nigerian officials, which he estimates represents around 10% of Nigerian production.[15]

Revenue derived from oil provides 95% of foreign exchange earnings for Nigeria, and the Nigerian government gets over 80% of its revenue from oil exports. Nigeria earned $196 billion from oil and gas exports in the four years from 2007 to 2010.[16] Between 1960 and 2000, oil worth more than $300 billion was extracted from the Niger Delta region of Nigeria.[17] In light of this fact, it is clear to see that oil is invaluable to the Nigerian economy and to the people of the country.

Despite the natural resources that the country benefits from, Nigeria flares almost 75% of the gas that it produces and re-injects only 12% to enhance oil recovery.[18] It is estimated that about 800 million standard cubic feet of gas are flared daily in Nigeria.[19] – the highest

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[14] Robert Windrem, 'Needle on Zero: Nigerians' Economy Tanking as U.S. Oil Exports Dry Up' (Nbc News, November 29 2014)< https://www.nbcnews.com/news/investigations/needle-zero-nigeria-s-economy-tanking-u-s-oil-exports-n256236 >accessed April 11 2021.
[15] Ibid.
[16] John Donovan, 'Nigeria Oil Revenue Rose 46% to $59bn in 2010 on Improved Security' (2011) < http://royaldutchshellplc.com/2011/04/18/nigeria-oil-revenue-rose-46-to-59bn-in-2010-on-improved-security/ > accessed 12 April 2020.
[17] Daniel Agbiboa, 'Corruption in the Underdevelopment in the Nigeria Delta in Nigeria' (2012) Journal of Pan African Studies 5,8< http://www.jpanafrican.com/docs/vol5no8/5.8Corruption.pdf > accessed April 12 2020.
[18] Ibid.
[19] Ishaya Amaza, 'Nigeria: The Nigerian Gas Flare Commercialization Programme: A Win-Win Situation? '(Aelex, 5 April 2018) < http://www.aelex.com/wp-content/uploads/2018/03/THE-NIGERIAN-GAS-FLARE-COMMERCIALIZATION-PROGRAMME.pdf > accessed 12 April 2021.

amount of gas flared by any member of the Organization of the Petroleum Exporting Countries (OPEC) – and from a high standard, gas flaring has sky-rocketed in Nigeria since 1996.[20] Despite this, Nigeria remains the second-largest flaring country in the world and emits about $1.8 billion worth of gas annually.[21] But what is more shocking than the economic loss is the fact that so much gas is wasted, despite the country's rampant energy poverty, because gas flared could have been converted into energy. Until 2002, Nigeria accounted for approximately 25% of all gas flared worldwide.[22] This figure has dropped, however, and currently, Nigeria accounts for about 20% of the total amount of gas flared globally.[23] The amount of gas flared by Nigeria would provide about 40% of Africa's gas consumption.[24] and perhaps meet the needs of the West African sub-region.[25]

## 2.2 History of Oil in Nigeria

Currently, oil is said to account for 53% of the world energy supply.[26] Just before oil was discovered in commercial quantities, agriculture was a major source of the Nigerian economy, contributing more than 70% of GDP and the majority of Nigeria's exports.[27]

MNCs in Nigeria has been around for more than a hundred years as colonial companies. During the colonial era under the British, the first

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[20] Ibid.
[21] E. Zoheir and F. Jorg, 'Gas Flaring: The Burning Issue' (2013)< http://www.resilience.org/stories/2013-09-03/gas-flaring-the-burning-issue/ > accessed May 14 2020.
[22] Ibid. n14.
[23] Ibid.
[24] Ibid(n1).
[25] Ibid.
[26] Shell World Energy Supply Projections (1995-2050). Cited in Nlerum, F.E. 'Reflections on Participation Regimes in Nigeria's Oil Sector (2007-2010) Nigerian Current Law Review 145 -162,145
[27] Ibid.

MNC was already in Nigeria.[28] and in the 19th century, after the abolition of the slave trade, some of the companies were already established. These companies were expected to deal in trade such as palm oil trade.[29] The British colonial companies were the recipient of the beneficial colonial laws. For example, in 1900, all mineral resource rights were nationalised and vested in the British crown and in 1907, all landholding rights were vested in the British crown.[30] In Nigeria, prior to the discovery of oil, the most important natural resource exploited by the colonial companies was tin.[31]

There is no majority opinion amongst academics on the exact year oil exploration started in Nigeria.[32] However, some authors have stated that oil exploration began in Nigeria in 1906.[33] According to the Nigerian National Petroleum Corporation (NNPC) website, the Nigerian Bitumen Co. & British Colonial Petroleum commenced operations around Okitipupa in the present-day Ondo State of Nigeria in 1908,[34] When the Nigerian Bitumen Corporation, owned by a German element, initiated a business in the Araromi zone in the western part of Nigeria.[35]

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[28] Olufemi Amao, 'Corporate Social Responsibility, Multinationals and the Law in Nigeria: Controlling Multinationals in Home State' (2008) 52 (1) Journal of African Law 89-113.
[29] Ako Rhuks & Okonmah Patrick, 'Minority Rights Issues in Nigeria: A theoretical Analysis of Historical and Contemporary Conflicts in the Oil-Rich Niger Delta Region' (2009) 16 (1) International Journal on Minority and Group Rights 53-65.
[30] Phia Steyn, 'Oil politics in Ecuador and Nigeria: a perspective from environmental history on the struggles between ethnics minority and national governments' (PhD thesis University of the Free State, Bloemfontein, South Africa 2003, 148).
[31] Amao (n27).
[32] Chilenye Nwapi, 'A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' (2010) 52 (2) *Journal of African Law* 184 -211.
[33] Phia Steyn, 'Oil politics in Ecuador and Nigeria: a perspective from environmental history on the struggles between ethnics minority and national governments' (PhD thesis University of the Free State, Bloemfontein, South Africa 2003,148).
[34] NNPC History of Nigerian Petroleum Industry <http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx >accessed June 20 2020.
[35] Nigerian National Petroleum Corporation< http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/DevelopmentoftheIndustry.aspx > accessed 11 May 2020.

However, with the beginning of the First World War in 1914, its spearheading endeavours came to an end unexpectedly.[36] However, in order to prevent non-British companies and others from exploring for oil in colonial Nigeria, the British Colonial administration enacted the Mineral Ordinance of 1914.[37] This law expressly prohibited non-British nationals or companies from obtaining mineral rights in colonial Nigeria.[38]

A business agreement was sealed between the Nigerian Bitumen Corporation and the Southern Protectorate of Nigeria and prevailing with regards to acquiring prospecting rights, soon after convincing the administration as well as the Colonial Office that, in view of their insight into the district's geography, oil existed in southern Nigeria and that their organisation (the Nigerian Bitumen Corporation) was capable of discovering it. [39] Consequently, in 1908, the Nigerian Bitumen Corporation made its investigation for oil in the Araromi zone between Ijebu Ode in the present Ogun State and Okitipupa in the present Ondo State.[40] All investigation exercises stopped in 1914 as a result of the First World War, as there were no remarkable discoveries made, in spite of the fact that investigation proceeded for around six years.[41]

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[36] Ajomo, M, 'Law and Changing Policy in Nigeria's Oil Industry' in Omotola, J. & Adeogun, A.A. (eds.) *Law and Development* Lagos: (University of Lagos Press 1987)
[37] Mineral Oil Ordinance No. 17 of 1914 (amended in 1925, 1950 and 1958) cited in Ajomo (n35)
[38] NAI, Mineral Ordinance 1907/c80 1290
[39] N.K. Obosi, 'The Structure of the Nigerian Government' (2002) < http://www.onlinenigeria.com/links/adv.asp?Blurb=493 > accessed May 12 2020.
[40] Ayodele-Akaakar F.O, 'Appraising the Oil and Gas Laws: The Search for Enduring Legislation for the Niger Delta Region' (2001) <http://montrose.ckan.io/dataset/dd5a3107-5788-42eb-8efd-1345bb4906c9/resource/e11a3fd1-286e-423e-a3fa-9112c716239c/download/data-item-39.-appraising-the-oil-and-gas-laws---a-search-for-enduring-legislation-for-the-niger-.pdf > accessed May 16 2020.
[41] The Times, October 16 1911, 19e., December 11 1912, 9; June 24 1913, 17c; Confidential letter from the Petroleum Department, November 12 1936, BP 44063, BPA; Carland, The Colonial Office and Nigeria, 193-6. See also NNPC (n 33).

After Shell D'Arcy was granted solitary concession rights over Nigeria in 1938, around 20 years after the end of the First World War, fresh extraction tasks were carried out.[42] However, it was not until 1947 that Shell D'Arcy's activities completely continued.[43] The license granted to Shell to explore oil encompassed mainland Nigeria, and the area was 357,000 square miles.[44]

Extractive activities were extended to different indigenous areas of Nigeria throughout the years. In spite of the fact that Shell D'Arcy had found its first oil in 1953 in a well in Akata, it still did not manifest any profit.[45] After Mobil Exploration, Nigeria was granted concessionary rights over the entire of northern Nigeria in 1955,[46] it was incorporated to do business and soon after began extraction activities in Nigeria.[47] In January 1956, a short while after Mobil's activities began, an oil rig drilled by Shell D'Arcy inside the Agbada territory at Oloibiri, situated in the Niger Delta area of Nigeria, brought about the primary disclosure of oil, which led to the oil business in Nigeria.[48] Two years after the disclosure, oil continued to be drilled from the rig, which later resulted in Nigeria's first oil exportation in 1958.[49] As noted by Jide Osuntokun, Shell D' Arcy operated:

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[42] The Times, October 16 1911, 19e., December 11 1912, 9; June 24 1913, 17c; Confidential letter from the Petroleum Department, November 12 1936, BP 44063, BPA; Carland, The Colonial Office and Nigeria, 193-6
[43] Ibid.
[44] Manby Browen, The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities, Human Rights Watch: (1999) New York. Cited in Amao (n33).
[45] Ayodele-Akaakar (n39).
[46] NNPC (n33).
[47] Ayodele-Akaakar (n39).
[48] Legislative Council, March 1956: Question no 52 by the Hon. the Member for Egba Division regarding owners of mining land at Agbada and Oloibiri areas and the export of minerals extracted there from, CSE 1/85/8834 – EP 18247/3, NNAE.
[49] Ibid. Also Ayodele-Akaakar (n39).

*"….under Mineral Oil Ordinance No.17 of 1914 and its amendment of 1925 and 1950, which allowed companies registered in Britain or any of its protectorates the right to explore for oil in Nigeria, and equally provided that the principal officers of those companies must be British subjects…"*[50]

The reincorporation of Shell BP in Nigeria, after Nigeria's independence in 1960, was to conform with Nigerian domestic legislation.[51]

The Nigerian government thereafter chose to survey the concession rights which had been granted over the whole of Nigeria and finalised that different corporations should have exploration rights.[52] Following that decision, somewhere around 1961/1962, the Nigerian government further expanded oil exploration in Nigeria by approving licences to explore oil to Agip, Mobil Exploration Nigeria Incorporated, Saftrap (currently known as Elf), Amoseas (currently known as Chevron), Tenneco (currently known as Texaco) and Nigerian Gulf Oil.[53] Offshore and onshore exploration was within the provisions of the licences. Additionally, in 1961, the Nigerian government authorised the only oil refinery. [54] Subsequently, Nigeria proceeded to become the 11th member nation of the Organization of the Petroleum Exporting Countries (OPEC) in July 1971, when it joined the institution.[55]

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[50] Jide Osuntokun, Oil and Nigeria Development, *Development Outlook* 1, No. 3,40(1986).
[51] Petroleum Act 1969, Sections 2 and 3, provide that only companies incorporated in Nigeria will participate in the industry.
[52] Ibid.
[53] NNPC (n33).
[54] Ibid.
[55] Organization of the Oil Exporting countries < http://www.opec.org/opec_web/en/about_us/25.htm > accessed 17 May 2020; see also< http://www.beg.utexas.edu/energyecon/new-era/case_studies/Nigerian_National_Petroleum_Company.pdf >accessed 17 May 2020.

By virtue of Decree No. 18 of 1971, the Nigerian National Oil Corporation (NNOC) was established on April 1 of the same year.[56] The right to manage all parts of the Nigerian oil industry, from exploration rights through to oil marketing, was given to the NNOC.[57] Just before the end of 1971, income generated from oil exportation resulted in approximately 55% of the profit generated from remote trade.

The Nigerian Enterprises Promotion Decree (NEPD) was promulgated in 1972.[58] The purpose of the NEPD (which is additionally referred to as the Indigenization Decree) was to enhance the power of Nigerians in the Nigerian economy so as to reduce cooperation and a decline in investment by foreigners.[59] This strengthened the Nigerian economy because there was an expansion of public-sector dominance. Enterprises were classified into two categories under the decree. The first category was kept only for Nigerians, while under the second category, foreigners were entitled to participate (depending on a few conditions being met).[60] Enterprises were later divided into three categories as a result of the NEPD extending the categories in 1977. The first category was reserved primarily for Nigerians with some participation from foreigners, while the second and third categories were confined to a limit of 40% and 60%, respectively.[61] The Nigerian government procured 35% of the value of the oil corporations operating in Nigeria following the passing

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[56] Center for Energy Economics < http://www.beg.utexas.edu/energyecon/new-era/case_studies/Nigerian_National_Petroleum_Company.pdf > accessed 13 May 2020.
[57] Ibid.
[58] NEPD 1972, Decree No. 4, Federal Military Government, Supplement to Official Gazette Extraordinary No. 10, Vol. 59, February 28 1972, Part A. This was followed by the NEPD 1977, Decree No. 3, Federal Military Government, Supplement to Official Gazette No.2, Vol. 69, January 13 1977, Part A.See also, D.O. Adeyomo and A. Salami, 'A Review of Privatisation and Public Enterprises Reform in Nigeria' (2008), *Contemporary Management Research*, 4(4).
[59] Ibid.
[60] Ibid.
[61] Ibid.

into law of the NEPD.[62] The primary participation agreement was drawn up between the Nigerian government and the oil companies.[63] Under the agreement, the government acquired 35% of the joint venture.[64]

About 21 years after the discovery of oil in commercial quantities in Olobiri, the Nigerian government, in April 1977, by virtue of Decree No. 33, formed the Nigerian National Petroleum Corporation (NNPC) through a merger of the Nigerian National Oil Corporation and the Ministry of Petroleum Resources.[65]

Two years after the enactment of the 1977 NEPD, in 1979 the NNPC decided to expand the shareholding of its organisation working in Nigeria to 60%, thereby ensuring that there was a third investment agreement between the Nigerian government, which was well represented by the NNPC, and the oil industries, and this immensely expanded the value of Nigeria.[66] Later in 1979, during the nationalisation period in Nigeria, the Nigerian government made a notable impact by nationalising the resources of British Petroleum (BP).[67] The NNPC, therefore, acquired all BP's assets after the nationalisation, leading to an increment of up to 80%.[68]

As the situation started to become threatening for foreign companies who were investing, it led to Nigeria witnessing a great number of withdrawals by foreign investors because of the trend of

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[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Center for Energy Economics (n56).
[66] Ibid.
[67] Ann Genova, 'Nigeria's Naturalization of British Petroleum' (2010) The International Journal of African Historical Studies 3,1.
[68] NNPC, History of Nigerian Petroleum Industry <http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx > accessed 11 November 2020.

indigenisation.[69] As a result of the hesitance of foreign companies to put resources into Nigeria, the Nigerian government endeavoured to make a progressively ideal investment place, which led to it deciding, in 1986, to give increasingly appealing financial terms for investment in the private sectors of the oil and gas industry.[70] Nigeria made an edge of two dollars per barrel on all oil production in return for expansion of investment and extraction and improved recuperation responsibilities by involved organisations, which was guaranteed by a Memorandum of Understanding (MOU) executed by the administration.[71]

### 2.2.1 History of Pollution in the Nigerian Oil Industry

As stated in the previous section, exploration of oil for business purposes in Nigeria began in 1956. Which is to say that as of the 1950s, before oil production commenced, there was basically a pollution-free environment in Nigeria.

As the Nigerian oil industry commenced its operations for business, oil pollution was inevitable.[72] A 2006 scoping report conducted by the Nigerian Federal Ministry of Environment, the Nigeria Conservation Foundation, the World Wildlife Fund UK[73] and the International Union for the Conservation of Nature and Natural Resources (IUCN)[74] concluded that:

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[69] Genova (n67).
[70] Ibid.
[71] Ibid.
[72] 'Gas Flaring in Nigeria' <http://www.foe.co.uk/sites/default/files/downloads/gas_flaring_nigeria.pdf > accessed 19 October 2020.
[73] Niger Delta Natural Resources Damage Assessment and Restoration Project, Phase 1 – Scoping Report. Federal Ministry of Environment, Abuja; Nigeria Conservation Foundation, Lagos; WWF, UK; CEESP-IUCN Commission on Environmental, Economic and Social Policy, 31 May 2006.
[74] The International Union for the Conservation of Nature and Natural Resources is now known as the World Conservation Union.

"*Oil and gas activities have caused damage in several forms to the Delta. In exploration, seismic lines have cleared significant forest areas, and seismic crews have generated thousands of tons of waste, all disposed untreated directly into the ecosystem. In production, there is a considerable amount of dredging and filling of the water ways, siltation, sulfidic dredge spoils leading to acidification of water bodies, erosion, spills (well blowouts and facility failures), pollution from gas and associated oil flaring, discharge of huge amounts of production water containing significant quantities of hydrocarbons, and drilling mud discharges. In transportation, laying of several thousand miles of oil and gas pipelines across Delta habitats has resulted in significant habitat damage and loss, pipeline and tanker spills, and storage tank spills. And in refining, toxic sludge discharges and process spills pollute waterways, flaring and stack emissions pollute the atmosphere, and refined products (particularly petrochemicals) further enter the ecosystem.*"[75]

It was reported that there were legitimate records which uncovered the fact that the gas flaring which occurred within the oil industry while Nigeria was still a province of Great Britain was at that time known to the British government. While it recognized the fact that the practice was unsatisfactory, it was reluctant to bring to an end the unfaltering misuse of a portion of Nigeria's significant oil resources.[76] It was, however, transcendentally ascribed to the remarkable benefits made by the oil corporations.[77] The issue of gas flaring was officially addressed just before Nigeria got its independence in 1960, and the Secretary of State for the Colonies, Lord Home, was requested to address the issue of wastage of energy and resources, so that, at some point, the British,

[75] Scoping Report (n71).
[76] 'Gas Flaring in Nigeria (n72).
[77] Ibid.

who were offering counsel to the Nigerians, might be rebuked.[78] The Secretary of State for the Colonies reacted by stating that until there was an advantageous commercial arena and facilities, particularly British Petroleum pipelines and storage tanks, were in place to utilize the gas, then flaring off the by-products from the oil refineries was seen as typical practice.[79]

In 1963, J.S. Sandler, the British Trade Commissioner in Lagos for the UK Foreign Office, composed a private note stating that Shell and BP had to proceed, possibly inconclusively, to flare off a huge extent of the related gas created, and were aware that it would probably cause problems with Nigerian government officials who, as a result of their greed, failed to realize the dangers of exploiting the nation's natural resources, but blamed Shell/BP for misusing Nigeria's riches, rather than acknowledging the fact that the widespread uncontrolled flaring of gas should be addressed.[80] Sandler, likewise, criticized the using of funds on uneconomic strategies for utilizing gas, and expressed that it was fascinating to see the degree to which the oil organizations perceived it to be important.[81]

The note from Sandler went further to state that:

"*in the long run, Shell/BP was going to have to consider very carefully how it would explain publicly the large outflow of capital that is likely to take place towards the end of the decade ... it will no doubt come as something of a shock to Nigerians when they find that the company is remitting large sums of money to Europe. The company will have to*

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[78] See Memorandum of 21st June 1960, given to the Secretary of State, Mr Edmund de Rothschild, of the banking family: 'Natural Gas in Nigeria', file DO 35/10500, UK National Archives.
[79] Nigerian Oil and Natural Gas Industry, file DO 177/33, UK National Archives.
[80] < http://saction.org/home/saction_image/flames_of_hell.pdf >accessed 19 July 2020.
[81] Ibid.

*counter the criticisms which will very probably be made to the effect that the company is exploiting Nigeria by stressing the very large contribution it is making to Nigeria's export earning."*[82]

By only flaring gas, Nigeria was uniquely responsible for the emission of more ozone-depleting substances into the environment than every other source in sub-Saharan Africa put together, as per the World Bank report of 2002.[83] As expressed by the United States Department of Energy, gas flaring in Nigeria led to a total of 300 million metric tonnes of atmospheric carbon being released into the environment between 1963 and 2001.[84] It was determined that in 2001 alone, 12 million metric tonnes of atmospheric carbon was discharged into the atmosphere in Nigeria.[85]

An examination supported by the World Bank characterized the flaring of gas as the inefficient outflow of ozone-harmful substances which leads to global warming.[86] In light of appraisals made in 2000, the yearly overall volume of gas which is being flared sums up to around 110 billion cubic metres.[87] This is sufficient to bolster the yearly utilization of South and Central America.[88]

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[82] J.S. Sandler, 'Gas and Flaring in Nigeria: a human right, an environmental and economic monstrosity' <https://www.foei.org/wp-content/uploads/2014/04/gasnigeria.pdf > accessed 20 May 2020.
[83] Ibid.
[84] 'Natural Gas Burns: In Nigeria, Market Defines Policy'< http://newsdesk.org/2002/11/12/natural_gas_bur/ > accessed 20 May 2020.
[85] Garba Malumfashi, 'Phase-out of Gas Flaring in Nigeria: The Prospect of a Multi Win Project'( Review of the Regulatory, Environmental and Social-Economic Issues 2008) <http://phase1.nccr-trade.org/images/stories/publications/IP6/Nig_GasFlaring_Petroleum%20Training%20Journal%20(PTJ)%20Vol%5B1%5D.%204%20No.%202%20July%202007.pdf >accessed 20 June 2020.
[86] Defining the Environmental Development Strategy for Niger Delta' (1995), 14266, 2 <http://documents1.worldbank.org/curated/en/506921468098056629/pdf/multi-page.pdf >accessed 12 April 2021.
[87] Malumfashi (n85).
[88] Franz Gerner, Bent Svensson and Sascha Djumena, 'Gas Flaring and Venting: A Regulatory Framework and Incentives for Gas Utiliazation' (World Bank 2004)

Around 1,000 standard cubic feet of associated gas is created for every barrel of oil produced in Nigeria, which promotes a day-to-day generation of roughly 2.8 billion standard cubic feet of gas.[89] This makes up about 10% of the entire amount of gas flared globally, as indicated by some sources.[90] As per the Nigerian Federal Ministry of Environment, the Nigeria Conservation Foundation, the World Wildlife Fund UK and the International Union for the Conservation of Nature and Natural Resources (IUCN), the Niger Delta is among the 10 most important wetlands and eco-frameworks on the planet and is one of the five most extremely polluted biological communities being harmed by oil exploration in the world,[91] with spilled oil which could be approximated to nine to 13 million barrels and a region where gas flaring has been continuously allowed.[92]

Records demonstrate that as regards the flaring of gas on the United Kingdom's Continental Shelf in the North Sea, a vastly improved methodology was undertaken during the 1970s, contrary to the frame of mind shown by the British in regard to gas flaring in Nigeria.[93]

Notwithstanding gas flaring in Nigeria, several great mishaps bringing about the release of oil into the environment had occurred. These mishaps have included the emission of a large number of gallons of oil in a few spill occurrences.[94] There have been records gathered for the years from 1976 to 1988 for spillage of oil which has been accounted

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<http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/279gerner.pdf > accessed 21 May 2020.
[89] Franz Gerner (n88).
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.

for by the oil companies;[95] spills involving the release of about 2.1 million barrels (or 88.2 million gallons)[96] of petroleum oil in the Niger Delta area of Nigeria were accounted by the companies in about 2,696 spill incidents over this period,[97] having recorded the most astounding amount of oil spills in the 1978 to 1980 yearly record.[98]

As demonstrated by several reports between 1970 and 1982, more than 1,500 episodes of oil spills were recorded in Nigeria.[99] However, it would be safe to presume that the amount of oil that was spilled over this period was a lot higher, in light of the incorrect information usually provided and the rareness with which it was provided.[100]

Additionally, in oil spills which involved just a single oil company over the 10-year time frame between 1982 and 1992, 27 separate occurrences brought about the emission of about 1.6 million gallons of oil into the environment, but under 30% of the oil spilt was retrieved.[101] According to records 40% of the total number of spills recorded by Shell, which operated in more than 100 nations, were in Nigeria.[102]

The generous measure of oil that is being discharged onshore in local communities is in no doubt the fault of oil companies exploring the region. They have continuously asserted that numerous inland spills are

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[95] Ibid.
[96] Michelle Leighton, Naomi Roht-Arriaza and Lyuba Zarsky, 'Beyond Good Deeds: Case Studies and a New Policy Agenda for Corporate Accountability'(2002) < http://oldsite.nautilus.org/archives/cap/BeyondGoodDeedsCSRReportNautilusInstitute.pdf > accessed 20 May 2020.
[97] Ibid.
[98] Adati A. Kadafa, 'Oil exploration and Spillage in the Niger Delta of Nigeria' (2012) Civil and Environmental Research 2(3) 42.
[99] Emmanuel Nnadozie, 'The Curse of Oil in Ogoniland' < http://www.umich.edu/~snre492/cases_03-04/Ogoni/Ogoni_case_study.htm >accessed 21 May 2020.
[100] Ibid.
[101] Leighton, Roht-Arriaza and Zarsky (n96).
[102] Shell in Nigeria: What Are the Issues?' < http://www.essentialaction.org/shell/issues.html > accessed 22 June 2020.

the result of the treachery of oil pipelines, and sometimes as a result of militants vandalizing oil pipelines. Regardless, it became obvious that oil companies were unable and even reluctant to fix the loopholes throughout the years.[103]

The circumstances in the Nigerian oil industry have turned out to be a worldwide scandal, so much so that Diane Abbott – the first black, female Member of Parliament (MP) in Britain, representing the Hackney North and Stoke Newington constituency – stated on 9 April 2006, in *The Jamaica Observer* newspaper, that the finding of oil has been an ecological catastrophe for the Niger Delta, where the oil is extracted.[104] The continuous contamination of water by petroleum has made the water undrinkable for the indigenes, even as Shell and other Western oil corporations have conspired with successive military tyrannies to assault the local area.

The lands that indigenes cultivate have all been destroyed by the continuous flaring of gas in the Niger Delta region, which is known to be the greatest source of ozone-depleting petroleum substances in Africa. The petroleum by-product is simply scorched in mammoth flares which cause limitless ecological harm, and this is symbolic of the mercilessly exploitative nature of the oil extractive industry in Nigeria.[105]

Throughout the years, the attitude of the framework of the oil industry in Nigeria has not improved and the pollution being emitted has not diminished. Information concerning episodes of spillage of oil have been incorrect, and conformity with established laws has been exceptionally

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[103] Ibid.
[104] Dianne Abbott, 'Think Jamaica is Bad? Try Nigeria', *The Jamaica Observer* (9 April 2006) < https://www.theguardian.com/politics/2006/may/14/uk.labour1 > accessed 15 April 2021.
[105] Abbott (n104).

negligible, with corporations doing what they need without having regard for the soul and intent of various acts/regulations, and depending on inadequacy in the law to avoid responsibility regarding the displeasing practices they choose to adopt – and obviously the debasement of the Nigerian government throughout the years has not improved the situation.[106]

The report by members of a US delegation trip – which was non-governmental and took place from 6 to 20 September 1999 – expressed the view that there has been a long and horrible record of environmental degradation and violations of human rights in the areas in Nigeria where petroleum is being produced, with a gross dimension of environmental degradation caused by oil exploration and extraction in the Niger Delta which had gone unsupervised for 30 years.[107] It further stated that evidence demonstrated that the oil corporations have acted in complicity with the military, by the oil corporations neglecting their duties towards the environment, but rather conspiring with the military to intimidate Nigerian citizens.[108] It proceeded to state that it has cost numerous lives, and the steadiness of the oil-producing community keeps on been compromised due to the conspiracy between multinational oil corporations in Nigeria only to make profits.[109]

The extractive industries in operation in the Niger Delta have demonstrated double standards by not utilizing either the leading accessible innovations available or the practices used in other countries,

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[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] 'Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impurity in Niger Delta' (a US non-governmental delegation trip report, 6–20 September 1999) < https://www.essentialaction.org/shell/Final_Report.pdf >accessed 15 April 2021.

for environmental degradation can be reduced by upgrading to new technological advancements.[110]

## 2.3 Oil Spills

**a) The Ebubu Ochani Spill** – In the early 1980s, a spill of petroleum covering around 10 hectares of land was found in a thick, occasionally swamped forest in Ebubu land near the Ejamah village. Petroleum was some metres down and was said to have begun amid the Nigerian civil war which was fought between 1967 and 1970.[111] For several days there was a fire which was ignited on the site with the oil spill. Due to the war, Shell had closed down production and pulled back from the area, which led to no move being made; however, Shell claimed that it owned the broken-down equipment which caused the oil spill.[112]

Thirteen years after the civil war ended and long after Shell had restored its image in the Niger Delta, there was no action taken with regard to the oil spill; neither was the devastation that it had caused to the environment cleaned up, and because of this, in 1983 the ruler of Ejamah-Ebubu filed a claim against Shell seeking compensation. Shell did not initiate a clean-up until 1990 – by then it was 20 years after the end of the war and perhaps 20 years after the spill first occurred – even though it had promised to clean up the oil spill earlier. Unfortunately when Shell pulled out of Ogoniland, the clean-up was deserted.

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[110] Ibid.
[111] Ibid.
[112] Akuro Adoki, 'Petroleum Hydrocarbon Profile of Ochani Stream in Ejamah Ebubu, Eleme Local Government Area of Rivers State, Nigeria (2011) J.Appl.Sci.Envionmental Management 15, 4. Also < https://tspace.library.utoronto.ca/bitstream/1807/51861/1/ja11090.pdf >accessed 14 April 2021..

**b) The Texaco Oil Well Burst –** A faulty piece of machinery in the oil field in Funiwa was the reason for the Funiwa village oil well burst, which affected around 5,000 kilometres off the Niger Delta coast on 17 January 1980. The Nigerian National Petroleum Corporation, the Chevron Oil Company and the Texaco Overseas (Nigeria) Petroleum Company were all joint ventureres of the field at that time. The incident lasted for close to 13 days, which led to a fire outbreak that caused grievous harm as the fire didn't cease for two days. 400,000 barrels of crude oil was released into the environment as a result of the incident, which had an adverse effect on land and water. Due to the obliteration of more than 800 acres of mangrove forest and the contamination of rivers and creeks, close to five towns were affected indirectly,[113] and as a result of the contaminated water, seafood in the water was either killed or adulterated by oil spillage.[114] Indigenes of the local communities were deprived of basic rights to clean water because of the contamination; their means of survival was basically taken away from them because most of the locals were fishermen.[115] After assessing the extent of the damage caused by the spill, foreign experts suggested that the victims be compensated with the sum of roughly US$60,000,000. The operator of the Funiwa field, Texaco, agreed to pay US$6,000,000 to the affected communities, however, which was one tenth of the proposed compensation. This was not taken well by the communities, and so caused a stand-off between the communities and the oil company, which moved the Nigerian government to intercede. After an inquiry tribunal requested further recommendations, Texaco was advised to pay

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[113] S.O. Aghalino and B. Eyinla, 'Oil Exploitation and Marine Pollution: Evidence from the Niger Delta, Nigeria' (2009) J.Hum Ecol 28,3. Also < http://www.krepublishers.com/02-Journals/JHE/JHE-28-0-000-09-Web/JHE-28-3-000-09-Abst-PDF/JHE-28-03-177-09-1964-Aghalino-S-O/JHE-28-03-177-09-1964-Aghalino-S-O-Tt.pdf > accessed 23 December 2020.
[114] Ibid.
[115] Ibid.

compensation to the communities to the total of US$12,000,000. The Nigerian government ordered that Texaco pay the compensation granted to the Rivers State government, rather than directly to the affected communities, and as expected the funds were diverted by the corrupt Rivers State government, instead of being handed out to the victims who were impacted.[116]

A legal action was eventually brought against Texaco for refusal to pay compensation for damages due to victims of the spill; this led to disappointed victims deciding to withdraw a considerable number of their cases as they were disappointed at the way the entire issue was overseen.[117]

**(c) The Idoho Spillage** – A ruptured pipeline, running between the Idoho production platform and the Qua Iboe terminal, in Akwa Ibom State in Nigeria, led to the environment being polluted by 40,000 barrels of crude oil. On 12 January 1998, Mobil Producing Nigeria Unlimited claimed that the faulty pipeline, which was installed in 1971, had been certified on 1 May 1991 until 2011, which was a period of 20 years.[118] On 21 January 1998, Mobil Producing Nigeria Unlimited, after having started an oil-spill clean-up, claimed that over 90% of the oil had evaporated – which was what brought it to the knowledge of the public – while the remaining had naturally disseminated, although some oil had been retained due to the clean-up; however, there were no solid figures given with regards to the measure. In Nigeria on 2 February 1998, five states[119] reported that their water was contaminated due to the oil spread, which contradicted Mobil, who claimed that oil was driven by

[116] Ibid.
[117] Ibid.
[118] Guardian Art, 'Idoho Oil Spill' *The Guardian* (Akwa Ibom, 16 January 1996)
[119] These states were, Cross Rivers, Delta, Bayelsa, Rivers and Lagos.

wind and wave actions. Communities made claims for compensation and individuals claimed that they had lost their means of survival, alongside the pollution of their water and destruction of equipment, as Mobil depicted the oil spill as a major disaster.

**(d) Other More Recent Spills**

**(i)** In October 2004 several thousand barrels of oil were released into the environment, due to a pipeline which was owned by Shell and located near the Goa community in Ogoniland being damaged, causing a fire outbreak which was devastating to the people in the community, as their canoes and palm trees were destroyed. The local residents were denied of their means of livelihood but also of their source of water supply, as severe pollution was additionally inflicted on the surrounding mangroves and lakes, which supplied drinking water to the community and was a fish habitat.

**(ii)** Facilities belonging to Shell in the Ogbia territory of Bayelsa State experienced an oil spillage in June 2005. This spill led to a leakage of oil into the rivers in the region. Shell sent a team to investigate the matter, but did not take any action for some time thereafter.

**(iii)** On 14 August 2006, an oil well[120] owned by Shell leaked oil which polluted the environment, leading to a subsequent fire incident. Shell did not succeed in putting out the fire until after three months of trying, and tried to exonerate itself from responsibility for the outbreak by claiming that the oil well was vandalized by angry indigenes.

**(iv)** The first oil ever exported from Nigeria was from Bodo, in 1958. One of the supervisors on Bodo's maritime facility claimed that in August 2008 significant changes were made to the lives of 69,000 people who

[120] Yorla well 13, in Ogoni land.

live in the region when a greasy sheen was discovered in Bodo swamp, five miles away from the houses in Bodo.[121] As much as 3,000 barrels a day was said to have been spilled into the water, and the spill was not stopped until 7 November 2008, although Shell first questioned the validity of the dispute. Just a month after the November spill, in December 2008, the pipeline in Bodo swamp was damaged again. On this occasion Shell did not take responsibility by investigating or trying to fix the damage immediately, but waited until 19 February 2009. An excess of 280,000 barrels may have been spilled, as indicated by oil spill assessment experts who analyzed both physical evidence and videos of the two spills. According to Nenibarini Zabby, Head of Conservation at the Centre for Environment, Human Rights and Development in Port Harcourt, this was the most serious oil spill, as Bodo was a major meeting point of many other pipelines that collected oil from nearly 100 wells in the Ogoni district, and a lot of minor spills within the communities have been recorded over the years.

This inflicted grievous hardship on indigenes of the community, as they lost their means of survival, so began leaving the community in large numbers, looking for a better settlement Almost 80% of the indigenes in the Bodo community were fishermen and they had no clean water to survive on.[122]

Many cases have been filed against Shell with regards to oil spillage which has polluted the community; fines have been given to Shell many

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[121] John Vidal, 'Shell Oil Spills in the Niger Delta: Nowhere and No One Has Escaped' *The Guardian* (Bodo, August 2011) 3. < https://www.theguardian.com/environment/2011/aug/03/shell-oil-spills-niger-delta-bodo
>accessed 5 April 2021.
[122] *Bodo Community v Shell Petroleum Development Co of Nigeria Ltd* [2014] EWHC 1973 TCC

times; compensation has been made without communities ever receiving payments most of the time; and even when compensation is eventually given, it will have been after years and years of appeals in court in Nigeria.

On 7 January 2015, a monetary agreement was reached between Shell and the Bodo community for a sum of £55 million, which was to be disbursed to victims who had been affected by the oil spills in one way or the other, and whatever was remaining was to be used to further develop the Bodo community[123] and clean up the mess made. We can only hope that the money will be used for the purpose for which it was allotted.

Industry watchers have concluded that on average, there are at least three major oil spills recorded in the Niger Delta region of Nigeria each month, as Shell has been accused of having a leaking pipeline from which over 800,000 barrels of oil has been leaking out continuously for several months in the Niger Delta.[124]

Sometimes these oil spills are not just accidents but deliberate attempts by oil companies to dispose of drilling waste, thereby harming the land and water.

In Nigeria, oil companies do not follow proper pollution-reducing techniques[125] but frequently discard waste from oil drilling directly into fresh-water bodies. US environmental regulations, for instance, totally

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[123] Shell Global, 'Shell's Nigerian Subsidiary Agrees £55 Million Settlement with the Bodo Community'( 7 January 2015) < https://www.shell.com/media/news-and-media-releases/2015/shells-nigerian-subsidiary-settlement-with-bodo-community.html >
accessed 13 April 2021.
[124] Alfredo Quarto, 'Third World Traveller – In a Land of Oil and Agony' ( Earth Island Institute, Summer 2000) < https://thirdworldtraveler.com/Africa/Nigeria_Land_Oil_Agony.html >accessed 2 April 2021.
[125] Ted Studies, 'Ogoni and Oil – Nigeria Petroleum Pollution in Ogoni Region, Case No. 149. < http://www1.american.edu/ted/OGONI.HTM > accessed 3 May 2020.

forbid the dumping of produced water or drilling mud from onshore facilities into surface-water bodies; produced water has to be re-infused for recovery or infused into disposal wells, while drilling muds are to be landfilled. The Nigerian government has been under overwhelming criticism for permitting oil companies to dump waste in a way that would be unlawful in the United States.

Multinational corporations in the oil industry in Nigeria give an unmistakable, well-recorded record of the environmental degradation caused by oil multinationals and the impact of that degradation in the community.[126] The examples mentioned above show the need to adapt a legal avenue through which multinational corporations can be held accountable for violating the environment.

It is important to broaden the scope of national, regional and international law so as to ensure that human rights and the environment are protected, as environmental degradation done by multinational oil corporations and its impact on health have not been addressed, and the victims have had no alternative legal recourse through which to pursue their claims.

## 2.4 Conclusion

This chapter looked at the history and development of the oil industry and pollution in Nigeria, as well as the current environmental problems associated with oil exploration and production activities in Nigeria. We have been able to understand the history and development of the oil industry in Nigeria, as well as the current environmental problems associated with oil exploration and production activities in Nigeria, in the

[126] *Wiwa v. Royal Dutch Petroleum Co* [2000] 226 F.3d 88 Cir. 2d

form of oil spills and gas flaring. We can see the reliance placed on oil by the Nigerian government, as the revenue derived from this industry forms the bedrock of the Nigerian economy. Despite the economic benefits resulting from the discovery of oil in Nigeria, the subsequent exploitation of the oil has had a negative effect on the people who live within the Niger Delta region of Nigeria and on the environment in general. The next chapter looks at concepts.

# Chapter Three

# Conceptual Framework

## 3.1 Introduction

In the previous chapter, we looked at the history and development of the oil industry in Nigeria, as well as the current environmental problems associated with oil exploration and production activities in Nigeria.

This chapter focuses on concepts or terms which are relevant to the analysis in the thesis. It identified human rights as a cause of action, while stating the connection between human rights and environmental rights, because when the air is polluted with toxins from oil industries, it adversely affects members of the communities. It is almost impossible to talk about one without talking about the other. Thus, the chapter attempts a conceptual analysis of some terms or concepts including accountability, human rights and MNCs, amongst others. It focuses on MNCs, highlighting the MNCs regulatory framework, accountability, the importance of improving human rights in the activities of MNCs will be highlighted. Here, the definition of MNCs will be in focus as well as focuses on human rights as a concept.

## 3.2 Defining Corporation

The legal status of corporations is often identified as a threshold for settling responsibility issues. [1] We are referring to multinational corporations, a term which usually refers to a legal person that owns or

[1] Viljam Engstrom, 'Who Is Responsible for Corporate Human Rights Violations' (Abo Akademi University, Institute for Human Rights January 2002) < https://www.abo.fi/wp-content/uploads/2018/03/2002-Engstrom-Who-is-responsible.pdf > accessed 12 April 2021.

controls production, distribution or service facilities outside the country in which it is based.[2] A corporation is qualified as an MNC if it has a certain minimum size, if it controls production or service plants outside its home state and if it incorporates these plants into a unified corporation strategy.[3] Operating in different countries puts corporations outside the effective control of domestic and international law, which can amount to a lack of legal accountability for human rights violations by MNCs.

MNCs have the freedom to have many operations in different states at the same time.[4] The structure of an MNC creates a corporate veil, which depicts that the corporate structure hides a variety of relationships, especially between legal and natural persons. Establishing direct responsibility on corporations is an important element of corporate veil.[5]

The doctrine of international legal personality is a crucial component for corporations to known their rights and duties that under international law. The definition used and the elements by which the definition is considered conclusive would determine if an entity is eligible to have legal personality. Even though it is asserted that, while examining the status of corporations with regard to the traditional concept of legal personality, the conclusion that corporations are not subject to international law is no longer valid, it could be inferred that no essential

[2] Ibid. The term 'transnational corporations' is mostly preferred by the United Nations, which is linked to the 1970s movement for a new international economic order (NIEO).
[3] Ibid. See Luzius Wildhaber, 'Some Aspects of the Transnational Corporation in International Law'(1980) 27 Netherlands International Law Review 79–88, 80. On defining the term, see also Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell, 1995) 12–13; and Ignaz Seidi-Hohenveldern, *International Economic Law* (Springer 1992) 13–20.
[4] Ibid. A TNC is a complex entity; because of its nature, the OECD guidelines for transnational enterprises do not undertake any precise legal definition, and it may be contended that any such attempts will confine the scope of corporations and will likely be arbitrary. Engstrom (n1).
[5] Muchlinski (n3).

conceptual reason exists why corporations should not be weighed down with international human rights obligations.[6]

### 3.3 Multinational Corporations

MNCs are strong entities in developing and developed countries. UNCTAD's 2009 World Investment Report estimates that there are about 82,000 transnational firms around the world, about 810,000 foreign associates and millions of suppliers.[7] As indicated by Anderson and Cavanagh, out of the biggest 100 economies in the world presently, 51 are MNCs and the other 49 are states.[8] They also stated that the top 200 corporations' total sales are larger than the combined economies of considerable numbers of countries, excluding the biggest 10. Large MNCs have outcomes bigger than many states, sufficient to set up their guidelines and evade state regulations,[9] so they are said not to be accountable to anyone but are a law unto themselves.[10] As a result of the widespread characteristics of their activities and procedures for decision-making, a regulatory challenge for national governments was created by them.[11]

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[6] Nicola Jagers, *Corporate Human Rights Obligation: In search of Accountability* ( Oxford: Intersentia 2002) 246; see also< https://www.abo.fi/wp-content/uploads/2018/03/2002-Engstrom-Who-is-responsible.pdf >accessed 27 November 2020.

[7] UNCTAD Investment Report 2009, cited in A. Jonge, 'Transnational Corporations and International Law: Bringing TNCs out of the Accountability Vacuum'(2011) Critical Perspectives on International Business 7(1) 66–89, 66.

[8] Sarah Anderson and John Cavanagh 'Top 200*:* The Rise of Corporate Global Power' (Institute for Policy Studies 2000)< https://www.iatp.org/sites/default/files/Top_200_The_Rise_of_Corporate_Global_Power.pdf > accessed 11 April 2021.

[9] Ibid.

[10]Ibid.

[11] Emeseh, Engobo, Ako, Rhuks Temitope, Okonmah Patrick and Obokoh Lawrence Ogechukwu, 'Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?' (2009) 11 German Law Journal 2, 234.

Different countries have subsidiaries of MNCs; every subsidiary, as a general principle, is regulated by the state's national laws where the subsidiary company is domiciled, with every subsidiary independent of the other. Nonetheless, it has been contended that, despite the size of activities undertaken globally by MNCs, they function as a piece of the corporate body and are determined based on the commitments made to the body.[12] As such, corporate bodies are single monetary units in light of the fact that the subsidiary acts in the best interests of the body. Commitments and liabilities are distributed amongst the subsidiaries to lessen the dangers and for tax assessment purposes. As a solitary financial unit body, the debts or liabilities of the subsidiary accrue to the holding company, the holding company usually would reimburse the subsidiaries in such circumstances. Despite the fact that subsidiaries are situated and registered in various jurisdictions, they are liable to the holding company in the host state, which is outside the host state where they are registered,[13] meaning the subsidiaries are said to be subject to the control of the holding company.[14]

Seemingly, MNCs depend on their incorporated form to avoid liability under municipal law. Thus, MNCs could depend on "the fact of their municipal registration and regulation to avoid liability under other regimes such as when a suit is brought against them in their home countries".[15] This is particularly important in human rights violation cases brought in the USA under the Alien Torts Claim Act 1789 (ATCA). Under an ATCA suit, most MNCs insist that the municipal law of the host state is the applicable law in light of the fact that the subsidiaries are

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[12] Christopher Tugendghat, *The Multinationals* (The Book Service Ltd 1971) 65.
[13] Stephen Tully, 'Corporations and International Law Making' (PhD Thesis, London School of Economics and Political Science 2004).
[14] Ibid.
[15] Emeseh (n11).

independent of the holding companies in the home country. Potentially, there are gaps whereby MNCs can avoid liability for their activities in developing countries. Hence, the home jurisdictions in defenceless territories are weak with regards to the control of multinational corporations.[16]

### 3.4 Accountability and Human Rights

Accountability is a vague concept and so it might be difficult to have a precise definition. Although accountability is widely believed to be a good thing, the concept is exceedingly unique and is often used in a very rife way. [17] Shearer views accountability as an intersubjective relationship whereby one is committed to exhibit the sensibility of one's activities to those to whom one is accountable.[18] Accountability implies numerous things to numerous individuals, for instance, administrative accountability, professional accountability, financial accountability, social accountability, political accountability and legal accountability.[19] The focus of this thesis will be on legal accountability, which requires adherence to formal regulations and willingness to justify one's activities.

Accountability is a particular, mind-boggling and focal component of human rights. With regards to human rights, accountability is concerned with the need of the state to completely conform with its commitments under the international and regional human rights treaties to which it is

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[16] Olufemi Amao, 'Corporate Social Responsibility, Multinationals and the Law in Nigeria: Controlling Multinationals in Home State' (2008), Journal of African Law, 52(1), 89–113.
[17] David Hulme and Nimal Sanderatne, *The Toothless and the Muzzled: Public Accountability, Public Expenditure Management and Governance in Sri Lanka* (Manchester: University of Manchester, 2008) 76.
[18] Teri Shearer, 'Ethics and Accountability: From the For-itself to the For-the-other' (2002) *Accounting, Organizations and Society*, 27(6), 541–573.
[19] Helen Potts, Accountability and the Highest Attainable Standard of Health (Colchester, UK: University of Essex/O Society Institute, 2008), 5; also< http://repository.essex.ac.uk/9717/1/accountability-right-highest-attainable-standard-health.pdf > accessed 12 April 2021.

a party. Solid instances of people and groups seeking accountability by the government demonstrate that the genuine test is converting the lawful commitment of implementation of certain measures.[20]

The thought of accountability is an indistinct concept that is hard to characterize in exact terms,[21] although, comprehensively, there is said to be accountability when there is a relationship between an individual or body, and the execution of tasks or capacities by the individual or body are subject to another's mistake, course or request that they provide data or justification for their actions.

Accountability is a foundation of the human rights framework. Human rights are basically an arrangement of norms and practices that govern the connection between the individual and the state or those in authority.[22] Human rights models set out the rights and opportunities to which all are entitled by virtue of being human, and the corresponding duties of those who exercise authority or power.

Acknowledging accountability as it is comprehended in a human rights framework entails both monitoring and error by both government authorities and individuals impacted; such accountability requires access to data and transparency, and an active popular participation. It is not sufficient to have access to dependable data and indicators; genuine accountability requires forms that enable and activate typical individuals to become occupied in political and social activity. [23]

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[20] Ibid.

[21]<https://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf > accessed 10 July 2020.

[22] United Nations Human Rights Office of the High Commissioner 'Who Will Be Accountable?' (Human Rights and the Post 2015 Development Agenda) < https://www.ohchr.org/Documents/Publications/WhoWillBeAccountable_summary_en.pdf accessed 21 March 2021.

[23] < https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2013/07/2-Yamin3.pdf > accessed 10 June 2020.

Globalization means that it is increasingly hard for only the state to hold corporations accountable.[24]

Accountability from a human rights point of view alludes to the relationship of government legislators and other duty bearers to the right holders impacted by their decisions and activities.[25] Accountability has a remedial capacity; hence it is conceivable to address individual or aggregate complaints, and place penalties on bad behaviour by the people as well as the institutions responsible.

Albeit integral to human rights practices, there has been major concern in governance, politics, law and business when it comes to accountability. Several disciplines have different meanings and functions of accountability; in the context of most public policy, accountability refers to those in power taking responsibility for their actions, responding in due order regarding their actions, disclosing and justifying them to those impacted, and being liable to some form of enforceable sanction if their lead is flawed.[26]

Attempts to increase accountability can be accomplished by illustration on human rights norms and mechanisms to reinforce the three components of accountability known as responsibility, answerability and enforceability.[27]

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[24] Robert O. Keohane, 'Global Governance and Democratic Accountability' (Duke University, 2002) 19. < https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.610.6432&rep=rep1&type=pdf > accessed 11 May 2020.
[25] Ibid.pg.20.
[26] John M. Ackermann, 'Social Accountability in the Public Sector: A Conceptual Discussion', Social Development Working Paper, No. 82 (Washington DC: World Bank, 2005).
[27] Peter Newell and Shaula Bellour, 'Mapping Accountability: Origins, Contexts and Implications for Development', IDS Working Papers, No.168 (Brighton: Institute of Development Studies, 2002); Andreas Schedler, 'Conceptualizing Accountability', in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds), *The Self-restraining State: Power and Accountability in New Democracies* (Boulder, CO: Lynne Rienner Publishers, 1999).

Under international human rights law, states are primarily accountable for respecting and protecting the rights of those within their jurisdiction. Weakness in accountability of state actors stems from a wide range of factors, including corruption, weak governance, lack of political will, etc.[28] The ability of states to respect, protect and satisfactorily carry out their human rights obligations is formed and constrained by a global political economy whereby many of non-state actors have taken up dominant roles, of which the actors include multinational corporations. While these actors have made progress in developing policies and systems of accountability, their voluntary and self-regulatory nature means that significant gaps in accountability remain unaddressed.[29] Accountability in a human rights mechanism also needs an effective and available mechanism for redress if violations occur.

According to Grant and Keohane, accountability infers that some actors have the right to hold other actors to certain standards, to be able to determine if they have carried out their responsibilities in light of these standards, and to see that sanctions are imposed if it is determined that these obligations have not been met.[30] Accountability implies a relationship between those in authority and those holding them accountable, where they generally acknowledge the legitimacy of the standard for accountability and the authority of the parties to the relationship, i.e. one party to exercise specific powers and the other to hold them accountable.[31] It is therefore inferred that the concept of accountability means that actors being held accountable have a duty to

[28] Ibid.
[29] UNCTAD Investment Report 2009.
[30] Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics' (2005) American Political Science Review 99, 1. < https://www.princeton.edu/~rkeohane/publications/apsr_abuses.pdf >accessed 11 June 2020.
[31] Ibid.

act in ways that conform with recognized standards of behaviour, and if they fail to adhere, they will be sanctioned.[32]

### 3.4.1 Who Should Be Accountable?

It would not make sense and it is rather ineffective to lay total emphasis on government accountability for something they cannot control. To institute accountability, we have to determine what states are reluctant to do, incapable of doing, and just do not know how to do, and most importantly in developing countries like Nigeria. Most times, states' policies can be lifted to promote economic, social and cultural (ESC) rights, and also health; states must find their ability to fulfil their ESC rights obligations, including their health obligations, to also include multinational corporations, who are often the ones calling the shots in the scope of a global political economy.[33] How to hold multinational corporations accountable for human rights violations they commit has been a continuous debate, which does not seem to have an end.

Deciding on which framework should be used to hold multinational corporations accountable has been one of the main focuses of the debate: should it be international mechanisms? Regional mechanisms? Should the home states or host states be held accountable? Or through soft laws? Or through strengthening existing national mechanisms? Multinational corporations are intricate entities and a single approach may be insufficient to hold multinational corporations accountable.

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[32] Ibid.
[33] Alicia Ely Yamin, 'Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health'(2013) Health and Human Rights Journal, 10(2) 4.< https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2013/07/2-Yamin3.pdf> accessed 12 July 2020.

Since international human rights law rules do not directly address holding corporations accountable, this study will argue that there is a need for a paradigm shift so as to hold multinational corporations accountable. The lack of direct binding obligations for MNCs under international human rights law has been a significantly criticized subject. A protection gap has been one of the main causes of concern,[34] if the protection of human rights is left entirely for the states to handle: firstly, because the status of recognition of human rights instruments in the various jurisdictions is uneven; secondly, because of their contrasting enforcement, which is similar to the strength of the domestic legal system and the reliance on foreign investment of the different states.[35] Another notable ground for criticism is the governance gap,[36] which results from the disparity which exists between the power of MNCs to significantly harm human rights and domestic legislators' inadequacy to take efficient measures in this regard. The unfair nature of international human rights law which grants MNCs purposeful rights and benefits, without holding them liable for abuses, has been criticized by some scholars.[37]

Legal ways to hold MNCs liable and to compensate victims for environmental damage, which are known to exist, are significantly important. As a fact, though, at the moment those alternatives exist at

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[34] UNHRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (2008), UN Doc A/HRC/8/5 para. 84.
[35] John Ruggie, 'Prepared Remarks at Clifford Chance' (2007) Harvard University United Nations 4.< https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf >accessed 13 April 2021.
[36] UNHRC (n34) para. 3.
[37] Anna Grear, 'Challenging Corporate "Humanity': Legal Disembodiment, Embodiment and Human Rights' (2007) 7 *Human Rights Law Review* 511, 514; Jan Wouters and Anna-Luise Chane, 'Multinational Corporations in International Law' (2013) Working Paper 129/2005. < https://core.ac.uk/download/pdf/80807979.pdf > accessed 2 April 2021.

the international and national level, but with no similarity in the level of rigidness and enforcement. The structure does not seem to be preferable at the national stage. In developing host states, even with the fact that most of them have established a legal environmental framework, the success at holding MNCs liable is vastly limited due to a lack of efficient enforcement and the pressure placed on the host states by MNCs. Contrarily, developed home states do not account for a greater or lesser extent of the environmental damage resulting from the activities of their companies, which has its consequences at some point. In other words, they are not keen to adopt regulations to reduce environmental impact by having control over extra-territorial industrial activities.

Also, the claims made for environmental damage which are held in domestic courts are a continuous issue with hasn't been solved. Compensation should be given to victims for environmental damage and environmental corporate behaviour could be amended in such a way as to avoid harm to the environment in the future.[38]

The Extractive Industry Transparency Initiative (EITI) is seen as a mechanism to promote accountability and transparency.[39] All MNCs in the Nigerian oil industry signed up to this initiative which requires them to publicly disclose their payments to the government. It is directed primarily at promoting the accountability of the government towards its

[38] Daniel Iglesias Márquez, 'Legal Avenues for Holding Multinational Corporations Liable for Environmental Damages in a Globalized World', ARACÊ – Direitos Humanos em Revista | Ano 2 | Número 3 |Setembro 2015.

[39] Caitlin Corrigan, 'Breaking the Resource Curse: Transparency in the Natural Resource Sector and the Extractive Industries Transparency Initiative' (2014) Resources Policy, 40, 17–30; Shirley Smith, Derek Shepherd and Peter Dorward, 'Perspectives on Community Representation within the Extractive Industries Transparency Initiative: Experiences from South-East Madagascar' (2012) *Resources Policy*, 37(2), 241–250.

citizens, irrespective of profits or revenues brought in by corporations.[40] EITI could be seen not as a direct mechanism; to this end, accountability should also be demanded by stakeholders from their government. Where there is good governance in existence and commitment to institutional reform, EITI can become efficient at holding governments accountable.[41]

For EITI to promote accountability and transparency, the corruption in government and institutional mechanisms has to be addressed as it incapacitates the ability for EITI to perform efficiently.

Idemudia argues that EITI, which is a Western concept, requires refinement suitable for local utility.[42] Mainly, it is recommended that accountability in the Nigerian public sector and corporate institutions is controlled by the impact of stakeholders that are significantly important.[43]

The EITI is an efficient mechanism, just like other soft laws. There is no reason why international mechanisms should not hold corporations accountable for human rights violations, considering the fact that corporations benefit immensely from international law.

The right to justice and the right to effect remedy and reparation are the basis upon which accountability is established.

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[40] Gavin Hilson and Roy Maconachie, 'Good Governance" and the Extractive Industries in Sub-Saharan Africa' (2008) Mineral Processing and Extractive Metallurgy Review, 30(1), 52–100.
[41] Ibid.
[42] U. Idemudia, 'The Extractive Industries Transparency Initiative in Nigeria: Sifting Rhetoric from Reality Resource Governance' in A.K. Nord, J. Luckscheiter and A. Harneit-Sievers (eds), *The Challenges of Change: Improving Resource Governance in Africa* (Cape Town, South Africa: Heinrich Böll Foundation – Africa, 2010), 12–19.
[43] Ibid.

### 3.4.2 Non-governmental organisations (NGOs) and accountability

A rapid increase in civil society groups in environmental and human rights NGOs in Nigeria, who are concerned about the violations by multinational oil corporations. Civil society organisations (CSO) have been defined as the:

*"vast array of public-oriented associations, not known as formal parts of the governing institutions of the State: everything from community associations to religious institutions, trade unions, and non-governmental organisations, operating to promote the interests and perspective of a particular sector of society, but not all issues for all sectors."*

Today global public policies are the product of negotiations between states, business and civil society or NGOs, and as such, NGOs have become an accepted form of civic expression. NGOs have become a de facto partner in establishing global norms and standards, negotiating, influencing, and proposing policy solutions to public social problems, especially with regards to the environment and human rights violations. Part of the changing governance reality is that civil society has replaced some functions carried out by the state. In this and other ways, the NGOs have grown to a size and scale to rival the very government or intergovernmental agencies with which they interact with. In Nigeria, NGOs have been able to expose some degradations as a result of oil activities.

NGOs do not often have established governance mechanisms whereby their members and supporters can hold them accountable for their

activities."[44] It is highly ironic that NGOs who are the forerunners ensuring companies and government are held accountable for their violations, as they do not have governance mechanisms or good democratic. Hence, a vital limitation of many NGOs in the absence of democratic ideology in their governance mechanism. An important issue is: who are NGOs accountable to? Incorporate boards or democratic countries leaders are accountable to voters, and corporate leaders are accountable to boards of directors or stakeholders.[45] Jarvik argues that "NGOs are by definition unrepresentative and undemocratic since the population of the countries where they operate, do not elect them nor pay them."[46]

In addition, it can be contended that NGOs are not exactly independent. The drive behind the argument is that the independence of such NGOs decreases, and as such, they cannot criticise the governments or MNCs when they are in the wrong with regards to various issues. Thus, if governments, through their foundations or agencies, make a considerable available amount of funds to the NGO, a member or supporter of that particular NGO will exert little or influence.[47] Therefore, such an NGO will be accountable to the states or organisation rather than its ordinary members. Several criticisms on NGOs involve lack of transparency, abandonment of original goals, lack of legitimacy, inefficiency, misconduct in the NGO sector and inadequate state regulatory control of NGOs, amongst others.[48]

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[44] Weidenbaum Murray, 'Who will Guard the Guardians? The Social Responsibility of NGOs' (2009) 87 *Journal of Business Ethics* 147-155
[45] Ibid.
[46] Jarvik Lanrence, 'NGOs: A ''New Class'' in International Relations' (2007) *Orbis* 51(2) 217-238, 220.
[47] Weidenbaum(n44).
[48] Argandona Anthonio, 'Ethical Management Systems for Not-For-Profit Organisations' (2007) IESE Business School Working Paper 693/2008. <http://www.iese.edu/research/pdfs/DI-0693-E.pdf >(assessed 20 December 2020)

Notwithstanding the above weaknesses of NGO participation in international public regulation, major roles in holding MNCs accountable for their activities have been played by NGOs, especially in developing countries, and as well as their activities which have led to improved transparency in the international governance model.

Furthermore, NGOs are seen as being representatives of the interests of stakeholders they identified with and been accepted by those communities confer legitimacy on the activities of NGOs.[49] Mujih argues that "democratic elections are not the only way of giving legitimacy to persons or entities advocating for others. Indeed, they are not suitable in many cases outside the political sphere." [50] Nevertheless, the communities represented by NGOs have the power to hold back their mandate or legitimacy if a reason to believe that the NGOs have not been adequate in achieving their (constituencies) aspirations.

### 3.5 The Concept of Human Rights

The preamble enshrines that the Universal Declaration of Human Rights (UDHR) states that human rights are fundamental to human beings, so consequently they cannot be granted and no authority can take it away from them. Until human rights became involved in the international concern of states, it was seen as a matter of domestic law. Thus, through diverse international human rights instruments, enforceability and legitimacy, human rights have been acknowledged legally.

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[49] Mujih Edwin, *Regulating Multinationals in Developing Countries: A Case-study of the Chad-Cameroon Oil and Pipeline Project* Farnham (Gower Publishing 2012) 165.
[50] Ibid. Pg. 161.

Amid other things, the first initiative on international human rights law was established in 1946 with a directive which was made available to the United Nation Commission on Human Rights (UNCHR) to formulate a Universal Declaration, moved by the desire to establish a well understood system in order to promote and protect human rights, as well as for a generally improved acceptable meaning.[51] Within two years the international community came to an agreement on the basics of human rights, and came up with the UDHR.[52]

The UDHR is made up of a basic list of fundamental rights and freedoms, and is an authoritative understanding of the term 'human rights' in the UN Charter.[53] The UDHR as a declaration is a non-binding instrument, even if several provisions of the UDHR have achieved the status of customary international law and so all states are bound by them.

Human rights as a term in this research refers to a legal concept applying to civil, political, economic, social, cultural and collective rights laid down in international human rights instruments.[54]

Over the past 50 years, human rights, globally known to be the only system of contemporary standards, have developed progressively and been defined by all states in a comprehensive international legal framework.[55]

The international human rights system is linked to development, international peace and security, and leads to a pluralist democracy, which is a global movement, good governance and the rule of law.

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[51] Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff Publishers 2003).
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.

After the end of the Cold War, international humanitarian and criminal law, which were seen as specific aspects of international human rights law, became progressively complex and harder to control.[56]

The focus of this research on human rights is not based on opinion, but a notable characteristic of human rights which is justified, and leads to an enjoyable human right which is free to all human beings, and this includes the communities in the Niger Delta area of Nigeria.

### 3.5.1 The Basic Characteristics of Human Rights

Even if the international community has reached an agreement on the basics of human rights within two decades, it took 40 years to recognize the characteristics.[57] At the 1993 Vienna World Conference human rights were declared as universal, indivisible, interdependent and interrelated.[58] Based on these basic characteristics, human rights are deducted and serve as additional distinguishing factors, because of their fundamental and inalienable natures.[59] Although these characteristics are been criticized, they are still relevant.[60] They are:

#### 3.5.1.1 The Universality of Human Rights

This simply means that human rights are equally owned by all human beings as provided for in the UDHR, that people are entitled to all the rights and freedoms written in this declaration, without discrepancy of any kind, such as race, colour, sex, language, religion, political or other

[56] Ibid.
[57] Ibid.
[58] Vienna Declaration and Programme of Action, 1993, Article 5.
[59] Nowak (n51).
[60] Ibid.

opinion, national or social origin, property, birth or other status.[61] Alternatively, the universality principle is a reflection of the universal normative values recognized by roughly 200 countries of the world which participated at the Vienna World Conference.[62]

### 3.5.1.2 The Indivisibility, Interrelatedness and Interdependency of Human Rights

This simply means that human rights are so linked in nature, and abandoning one category of those rights is disadvantageous to the others. Consequently, attention is needed for a fair and equal handling of all human rights, without bias, and with the same importance.[63]

*The Fundamental Nature of Human Rights*

Human rights are fundamental because they are a basic need – which is contrary to ordinary wants – which no institution or person can deny.[64] They establish only minimum standards, which makes them fundamental and should be met by all.[65]

### 3.5.1.3 The Inalienable Nature of Human Rights

Independent of a codification by a specific state, human rights exist, and this characteristic sets them apart from positive laws, which are subject to the wills of the legislator to exist.[66] In addition, the inalienable

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[61] UDHR, 1948, Article 2. Currently the universality of human rights is challenged by the theory of 'cultural relativism', according to which human rights should be culture-specific rather than universal.
[62] Nowak (n51).
[63] Vienna Declaration and Programme of Action, 1993, Article 5.
[64] Rory Sullivan, *Business and Human Rights: Dilemmas and Solutions* (Sheffield: Greenleaf Publishing, 2003), 71–72.
[65] Ibid.
[66] Ibid.pg.73–74.

nature of human rights has two practical consequences so that no authority can take away these rights from their bearers, and as such no bearer of such rights can legally give them away by consent.[67]

This set of basic characteristics sets human rights apart from other values and justifies their instituting power. In general, human rights are vital claims that every human being can fairly claim from other people, social institutions or governments as a matter of justice.

### 3.6 Human Rights and the Environment

All human beings depend on the environment in which they exist or live. A safe, clean, healthy and sustainable environment is essential to fully enjoy a wide range of human rights, including the rights to life, health, food, water and sanitation.[68] We are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity without a healthy environment.[69] Protecting human rights connects to protecting the environment. When people are able to learn about, and participate in, the decisions that affect them, they can help to ensure that those decisions respect their need for a sustainable environment.[70]

In recent years, recognition of the links between human rights and the environment has greatly increased.[71] The number and scope of international and domestic laws, judicial decisions and academic studies

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[67] Ibid.
[68] < https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx > accessed 18 July 2020.
[69] Ibid.
[70] Ibid.
[71] <https://www.aworldofhumanrights.com/environment/why-we-are-demanding-the-colombian-government-halt-deforestation >accessed 21 July 2020.

on the relationship between human rights and the environment have developed fast.[72]

Some states now incorporate a right to a healthy environment in their constitutions. Many questions about the relationship of human rights and the environment remain unanswered, and require further examination.[73]

Attempts to maintain a linkage between human rights and the environment have been made on several occasions in various international fora. [74] These attempts have resulted in numerous attempts to put forward a right to a healthy or clean environment, thereby leading to a healthy academic debate about whether a right to a clean or healthy environment exists under international law.[75] So far there are only a few conventions that endorse a right to a clean and healthy environment.[76]

Africa has not been left out in the attempt to promote a linkage between human rights and the environment. This region – where the state of underdevelopment makes environmental protection, in real terms, less significant than in developed states – has in its regional treaty, the

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[72] Ibid.
[73] Independent Expert on Human Rights and the Environment (2012) <http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEenvironmentIndex.aspx, accessed 17 April 2020.
[74] United Nations Conference on the Human Environment at Stockholm (Stockholm Declaration), 5–16 June, 1972; United Nations Conference on Environment and Development at Rio de Janeiro (Rio Declaration), 3–14 June, 1992; Johannesburg World Summit on Sustainable Development (Johannesburg Declaration), 26 August – 4 September 2002.
[75] E. Egede, 'Human Rights and the Environment: Is There a Legally Enforceable Right to a Clean and Healthy Environment for "Peoples" of the Niger Delta under the Framework of the 1999 Constitution of the Federal Republic of Nigeria?' (2007) *Sri Lanka JIL*, 19(1) 51.
[76] African Charter, 1981, Article 24; the ILO Convention No.169 on Indigenous and Tribal Peoples' Rights, 1989.

African Charter, declared the right of people to a general satisfactory environment advantageous to their development.[77]

The treaty recognizes that the right to a clean or healthy environment is a necessary prerequisite for the healthy development of the peoples within a society. The Protocol to the African Charter on the Rights of Women in Africa, in Article 18(1), also provides that women will have the right to live in a healthy and sustainable environment. In addition, by the 1999 Grand Bay (Mauritius) Declaration and Plan of Action, the defunct Organisation of African Unity (OAU)[78] Ministerial Conference on Human Rights affirmed that the right to a generally satisfactory healthy environment is a universal and inalienable right and forms an integral part of fundamental human rights.[79] This declaration went on to state, in paragraph 8(n), that violations of human rights in Africa are caused by environmental degradation, and other issues as well.[80]

The African Charter, along with the Protocol on the Rights of Women and the Grand Bay Declaration, emphasized the need for African states to put forward the vital and required linkage between human rights and the environment. African states ought to take steps towards domestic implementation of a right to a clean and healthy environment by incorporating the right into their municipal law and the constitution, which is fundamental. Quite a number of African states – especially those which adopted their constitutions in the 1990s when awareness of the need to protect the environment started to grow – specifically

[77] African Charter on Human and Peoples' Rights 1981, article 24.
[78] The O.A.U. has, since 2001, been replaced by the African Union (AU), established by the Constitutive Act of the African Union, which was adopted 2 July 2000 and came into force on 26 May 2001.
[79] Paragraph 2 of Declaration and Plan of Action of the First OAU Ministerial Conference on Human Rights, meeting from 12 to 16 April 1999 in Grand Bay, Mauritius.
[80] Ibid.

included a legally enforceable human right to a clean and healthy environment in their constitutions.[81]

### 3.6.1 Human Rights, the Environment and Nigeria

*1. Relevant Municipal Laws*

The 1999 Constitution of the Federal Republic of Nigeria

The awareness of the importance of the protection of the environment is suggested in the fundamental objectives and directive principle of state policy of the Constitution of the Federal Republic of Nigeria 1999.[82] Section 20 of the constitution states that: "The State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria."

Also, Section 17(2)(d) of the constitution states that exploitation of human or natural resources in any form, other than for the good of the community, shall be avoided. However, although this is embedded in an obligatory manner, the constitution makes it clear that this provision is not enforceable in court.[83]

Is there therefore a legally enforceable right to a clean and healthy environment under the 1999 Constitution? Chapter IV of the Nigerian Constitution provides for fundamental human rights, which are

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[81] Article 24 of the 1992 Angolan Constitution (a right to a 'healthy and unpolluted environment'); Article 24(a) of the 1996 South African Constitution (a right to 'an environment which is not detrimental to a person's health or well-being'); Article 46 of the 1992 Congo Constitution (a right to 'a healthy, satisfactory and enduring environment'); Article 44(1) of the Ethiopian Constitution (a right to 'a clean and healthy environment'); Article 39 of the 1992 Madagascar Constitution (imposing a duty for 'everyone to respect the environment'); Article 39 of the 1995 Ugandan Constitution (a right to 'a clean and healthy environment').

[82] Chapter 2 of the 1999 Constitution.

[83] Section 6(6)(c) of the 1999 Constitution.

enforceable in the courts.[84] The rights, which are the traditional civil and political rights, are the right to life,[85] to dignity of human person,[86] to personal liberty,[87] to fair hearing,[88] to privacy and family life,[89] to freedom of thought,[90] to conscience and religion,[91] to freedom of expression and the press,[92] to peaceful assembly and association,[93] to freedom of movement,[94] to freedom from discrimination[95] and to freedom from compulsory acquisition except in a manner prescribed by law.[96]

Nnaemeka–Agu JSC, of the Supreme Court of Nigeria, clarified the incorporation of fundamental human rights in the Nigerian Constitution in the following words:

"*Human Rights mark a standard of behavior which we share with all civilized countries of the world since the United Nations Universal Declaration of Human Rights in 1948, though it still left for various member nations to determine which rights from the plethora of rights then declared they would wish to incorporate into their domestic laws*."[97]

While the recent Nigerian Constitution was adopted on 29 May 1999, it does not explicitly incorporate the right to a clean environment under Chapter IV, because the Constitution, though adopted in 1999, is simply

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[84] Section 6 (6)(b).
[85] Section 33.
[86] Section 34.
[87] Section 35.
[88] Section 36.
[89] Section 37.
[90] Section 38.
[91] Section 39.
[92] Section 40.
[93] Section 41.
[94] Section 42.
[95] Section 43.
[96] Section 44.
[97] *V. Kim v The State* [1992] 4 NWLR. Part 233, 17, 37.

a repeat of the traditional civil and political rights provisions of the previous Nigerian Constitutions, to the omission of social and economic rights, as well as solidarity rights.[98] African constitutions, such as the 1996 South African Constitution, have included the right to a clean environment. Section 24(a) of the South African Constitution says that people shall have the right to an environment which is not detrimental to his or her health or well-being. Also, the 1992 Angolan Constitution, in Article 24, provides for the right to a clean environment, as it expressed that all citizens shall have the right to live in a healthy and unpolluted environment.

However, although the right to a clean and healthy environment is not expressly stated in the Nigerian Constitution, it can be concluded from definite fundamental rights stated in Chapter IV. For example, it can be inferred from the right to life.[99]

Judge Christopher Weeramantry, rightly in this writer's view, noted that:

"*The protection of the environment is likewise a vital part of contemporary human rights doctrine. For it is a sine qua non for numerous human rights such as the right to health and the right to life itself."*[100]

The degradation of the environment, as a result of great pollution of the land, water and air in the Niger Delta, led to the continuous death of people in that region. There is nothing stopping the people of the Niger Delta from claiming on violation of their right to a clean environment, which has a tremendous impact on their health and life, which denies them their right to life. Recently, in the case of Jonah Gbemre v. Shell

[98] The 1999 Constitution is a reproduction of the 1979 Constitution of Nigeria.
[99] Section 33 of the 1999 Constitution.
[100] The Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Rep. 1997, 7 at 97.

Petroleum Development Corporation & 2 Ors,[101] the Federal High Court of Nigeria examined the issue of a right to a clean and healthy environment against the traditional civil and political rights contained in the constitution. In this case the applicant, on behalf of himself and as a representative of the Iwherekan community in Delta State, Nigeria, tendered an application in court to enforce his fundamental human rights in respect of the gas-flaring activities of the Shell Petroleum Development Corporation. The court made an affirmation that the applicant's constitutionally guaranteed right to life and dignity of human person included the right to a clean, poison-free, pollution-free and healthy environment.[102] In this case the court founded its decision on the constitutional basis of rights to life and human dignity, as well as the provisions of the African Charter, including the solidarity right to a clean environment under Article 24 of the African Charter.[103] The court held that the provisions of legislation that permitted continued gas flaring were not in accordance with the applicant's rights to life and/or dignity of a person as enshrined in Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and Articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, and are therefore unconstitutional, null and void.[104] This decision appears to be a rather isolated decision of a Nigerian court on this issue. Furthermore, it is the decision of the appellate courts; the courts would adopt a liberal interpretation of the

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[101] *Jonah Gbemre v. Shell Petroleum Development Corporation & 2 Ors* [2005] AHRLR Suit No. FHC/B/CS/153/05.
[102] Ibid., para. 3.
[103] Ibid.
[104] Ibid., para. 6; the relevant legislation referred to by the judge as being null and void are the Associated Gas Re-injection Act, A25, Vol. 1, Laws of the Federation of Nigeria 2004 and the Associated Gas Re-injection (Continued Flaring of Gas) Regulations, Section 1.43 of 1984, which permitted gas flaring during exploitation subject to the payment of financial penalty into the coffers of the Federal Government of Nigeria.

various civil and political rights in Chapter IV of the constitution and infer a right to a clean and healthy environment. The Supreme Court of Nigeria has encouraged such a liberal approach to the interpretation of the Nigerian Constitution, to suit the recent needs of citizens. Udoma JSC, at the Supreme Court, stated at the court of first instance, that:

*"it is the duty of this court to bear constantly in mind the fact that the present Constitution has been proclaimed the Supreme Law of the Land: that it is a written, organic instrument meant to serve not only the present generation but also several generations yet unborn, it is my view that the approach of this court to the construction of the Constitution should be, and so has been one of liberalism ..."*[105]

Courts in some other jurisdictions where no explicit inclusions of the right to a clean environment in their Bill of Rights exist are of the opinion that such a right could be deduced from certain traditional civil and political rights, provided for in such a Bill of Rights, and are justiciable. For example, although in India there is no specific provision in the fundamental human rights chapter of the constitution conferring a right to a clean environment, this right has been inferred as a result of judicial activism.[106] The Supreme Court of India, in the case of Subhash Kumar v. Bihar,[107] ruled that the right to life contained in Article 21 included the right to enjoyment of pollution-free water and air.

Additionally, the European Court of Human Rights, in certain recent cases, has gone ahead in interpreting other traditional civil and political

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[105] *Nafiu Rabiu v. the State* [1980] NSCC 291 at 300–301.
[106] Michael Anderson, 'Individual Rights to Environmental Protection in India', in A. Boyle and M. Anderson (eds), Human Rights Approaches to Environmental Protection (Oxford: Oxford University Press, 1996)
[107] *Subhash Kumar v. Bihar* [1991] AIR 1 SC 420, 424.

rights, such as the right to a private and family life, as being affected when there is environmental degradation.[108]

In Lopez Ostra v. Spain,[109] a waste treatment plant was built next to the applicant's house. During its operation, the plant emitted fumes and smell, causing health problems to the local residents, including Mrs Lopez Ostra and her family. The European Court of Human Rights, upon an application by Mrs Ostra against the Spanish government, held that the severe environmental pollution from the plant was a breach of the applicant's right to private and family life, under Article 8 of the European Convention on Human Rights (ECHR). Also, in the case of Hatton & Ors v. United Kingdom,[110] the applicants, who lived near Heathrow Airport, complained, amongst other things, that with the introduction of a new scheme in 1993 by the United Kingdom government, night-time noise got worse, especially in the early morning, and this violated their right under Article 8 of ECHR. The Chamber of the European Court of Human Rights held that the increased night-time noise, especially in the early morning, was a violation of the applicants' right under Article 8. While this decision has been put aside by the Grand Chambers on the peculiar facts of the case, the Grand Chamber agreed in principle that a claim against noise pollution could be brought under Article 8, in appropriate cases, as an intrusion of the right to private and family life.[111]

The environmental pollution in the Niger Delta, with its related health implications, could thus be said to be a violation of the right to life of

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[108] Article 8(1) of the Convention provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'. See S.377 of the 1999 Constitution of the Federal Republic of Nigeria, which gives the right to privacy and family.
[109] *Lopez Ostra v. Spain* [1995] 20 EHRR. 277.
[110] *Hatton & Ors v. United Kingdom* [2002] 34 EHRR 1.
[111] Ibid.

the individuals living there under Section 33 of the Constitution. In addition, the gas flaring emitting unhealthy gases into the atmosphere, and again its severe unfavorable health implications for the residents of the area, could be inferred to be a violation of the residents' right to privacy and family life under Section 37 of the Nigerian Constitution. The right to privacy and family life could also be said to be violated by the recurrent use of explosives and vibrator trucks causing sound pollution and cracks and damage to homes.

There is no reason, in the light of the practice in other jurisdictions, why more Nigerian court decisions would not deduce a right to a clean and healthy environment from the provisions of Chapter IV of the constitution and therefore hold multinational corporations accountable when there is a breach.

### 3.7. MNCs Human Rights Violations and States

The struggle behind MNCs human rights violations in developing countries, mostly in African states, is that it often carries with it the complicity of states. The violation of human rights by corporations works in a way that makes states associates in the crime.[112] As noted earlier, states have a responsibility under international law to protect their citizens from violation of human rights by non-state actors such as MNCs.[113]

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[112] On complicity, see Special Rep. of the Secretary-General, 'Guiding Principles on Business and Human Rights (UNGP): Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc. A/HRC/17/31 (21 March 2011). In commentary to Principle 17, it provides that 'the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime'.

[113] See Chapter One.

The same state which is responsible for safeguarding people in its territory from violation of human rights has become the means by which those rights are violated. The violation of human rights by states takes different shapes; sometimes, human rights are violated individually by the states in direct form, and at other times, they are violated with combined efforts of corporations.

The International Law Commission (ILC) has contributed tremendously to international law in this respect. It has separated the principle of state responsibility into two: the primary rules, which deal with duties and obligations of states; and the secondary rules, which set boundaries to determine when states breach those duties.[114] The secondary rules developed by the ICC (International Criminal Court) are moored by the attribution doctrine, which tries to make states liable for failure to perform their duty and to make them accountable for the unlawful conduct of their agents.[115]

Once the conduct of the private parties that is comparable to a breach of international law can be attributed to a state, then the state is deemed to have breached its obligation under international law.[116]

The case of SERAC and CESR v. Government of Nigeria is the most cited example of state complicity in corporate human rights violations. The argument of this thesis is that the complicity of states in corporate human rights violations in Nigeria, and the failure of regional and international legal jurisprudence to address it positively, will lead to a

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[114] *Report of the International Law Commission* [1991] 2 Y.B. Int'l L. Comm'n, pt. 2 at 1, U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (1991 Draft Articles); *Report of the International Law Commission* [1980] 2 Y.B. Int'l L. Comm'n, pt. 2, at 30–34, U.N. Doc. A/CN.4/SER.A/1980/ Add.1 (1980 Draft Articles). On definition of secondary rules, see H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).
[115] Steven Ratner, *International Law: The Trails of Global Norms* (Arts & Jervis publishers 1998) 443.
[116] Under ICC, it is difficult to prove that the conduct of private parties is that of the states unless it can be proved that they are acting under the instruction and control of states. See Article 11(1), 5 and 8 of the ICC.

state of unending breach of international obligations, that is, gross violations of human rights without remedies contrary to the universally acceptable maxim of law: *ubi jus ibi remedium* (where there is a right, there is a remedy).

To justify this argument, let us consider a similar case with respect to the Ogoni people decided by ECOWAS in 2012. In SERAP v. The Federal Government of Nigeria [117] the plaintiff claimed that the federal democratic government of Nigeria was liable for the violation of the rights to health, adequate standard of living and economic and social development of the people of the Niger Delta by a consortium of corporations[118] because of its failure to enforce laws and regulations to protect the environment and stop pollution.[119]

The court held that the government of Nigeria violated Articles 1 and 24 of the African Charter on Human and Peoples' Rights and was therefore liable for human rights violations by the corporations in the Niger Delta. So, a thorough examination of this case, along with the history of the Ogoni people's travails at the hands of corporations in Nigeria, will show either the inability or reluctance of the government of Nigeria to address corporate human rights violations within its territory and the failure of regional judicial frameworks with respect to the issue of corporate human rights responsibility and accountability in Africa.

It should be noted that Nigeria is not the only country to be guilty in terms of complicity in corporate human rights violations. Several states

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[117] ECW/CCJ/JUD/18/12.
[118] Ibid. The corporations are the Nigerian National Petroleum Company, the Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil. They were sued together with the federal government of Nigeria, but in a preliminary objection by the corporations, their names were struck out as the court held that it has no jurisdiction over them.
[119] n 117

in Africa are guilty of this crime, which is due to poor human rights standards in the continent.[120] Though their participation varies, however, if the same, it is not of the same magnitude. Instead of protecting their citizens against corporate human rights violations, some rather stand by and fail to act, some are actively violating the human rights of their people with the complicity of corporations, while some go beyond their territories to become entangled in human rights violations in other developing countries.

The vigorous support by the government for the policy of the oil companies in Ogoniland – which polluted land, destroyed houses, food crops and other means of livelihood and ultimately lost people their homes – was condemned by the African Commission. The African Commission notes that the government gave the go-ahead to private actors, and the oil companies in particular, to devastatingly affect the well-being of Ogonis[121] and therefore called upon the government to take steps to resolve the problems created by them. Sadly, in 2012, after about 11 years, the ECOWAS court echoed the same statement to the government of Nigeria when it noted that:

*"In the instant case, what is in dispute is not a failure of the Defendants to allocate resources to improve the quality of life of the people of Niger Delta, but rather a failure to use the State authority, in compliance with international obligations, to prevent the oil extraction industry from doing harm to the environment, livelihood and quality of life to the people of that region."*[122]

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[120] Amnesty International, *Amnesty International Report 2008 – The State of the World's Human Rights* (2008), 3, noting 'human rights promised in the Universal Declaration [of Human Rights] are far from being a reality for all the people of Africa'.
[121] *SERAC v CESR* [2002] ACHPR 155/96 [58].
[122] Ibid.para.33.

## 3.8 Conclusion

This chapter identified human rights as a cause of action, while stating the connection between human rights and environmental rights, because when the air is polluted with toxins from oil industries, it adversely affects members of the communities. It is almost impossible to talk about one without talking about the other, for the protection of the environment is likewise a vital part of contemporary human rights doctrine. It also linked NGOs and accountability.

This chapter has so far revealed that states not only have the potential to violate human rights, but they actually do, either singlehandedly or in concerted efforts with MNCs. As a result of this complicity, most, if not all, human rights have been breached. Such human rights include the right to economic, social and cultural development,[123] the right to a clean and healthy environment,[124] the right to redress and justice,[125] the right to human dignity,[126] and the right to life.[127]

In view of the unreliability of states to guarantee human rights, due to their frequent complicity in human rights violations, the question that calls for interrogation is how do we hold MNCs accountable for human rights in such states?

The next chapter will look at legal and institutional framework for oil operation in Nigeria and their inadequacy.

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[123] African Charter (n77) Article 22.
[124] Ibid., Articles 16 and 24.
[125] Ibid., Article 7.
[126] Ibid., Article 5.
[127] Ibid., Article 4.

# Chapter Four

# Institutional Frameworks Regulating MNCs in Nigeria

## 4.1 Introduction

The previous chapter focused on concepts which were relevant to the analysis in this thesis. Thus, it attempted a conceptual analysis of some terms or concepts including accountability, human rights and MNCs, amongst others.

The continuous increase in environmental devastation and human rights violations forces human rights law to be extended to include environmental protections as a way to improve the lives of the people through protection of the environment. So, to accentuate human rights and environmental protection, national legislations were also enacted. While there exists a growing link between human rights law and environmental law, it will strengthen both fields by increasing national and international focus on accountability for environmental destructions resulting in human rights violations, most especially by multinational oil corporations (MOCs), as well as strengthen environmental standards and human rights laws. Ironically, in Nigeria, although laws have been enacted, they are not implemented or adequate enough. The Niger Delta region records large casualties from oil spillage and fire; individuals and communities are not spared from the damage caused by its natural resources.[1] Hence, this chapter will analyze the national legal standards dealing with the protection of the environment, and will also look at several cases which have been filed in Nigerian courts and the manner in which the Nigerian judiciary has interpreted the laws governing the

[1] Steve Azaiki, *Oil, Gas and Life in Nigeria* (Ibadan: Y-Books, 2007), 150–151.

oil industry and decided on the legitimacy or otherwise of the actions of the oil companies and the Nigerian government.

## 4.2 Framework of Nigerian in the Oil Industry

Guaranteeing an equilibrium between economic development and the right of the people of Nigeria to a healthy and clean environment became crucial as it raised grave concern.[2] This sub-section addresses the adequacy or otherwise of the existing laws and the effectiveness of the enforcement mechanism in preventing human rights violations by multinational corporations.

Compared to operations in developed countries which maintain and apply higher standards, in Nigeria the case is the opposite, which has been a great concern in the Niger Delta region. The oil companies, however, state that their operations are legal as they follow local laws which established the minutest legal standards that regulate their activities.

The Petroleum Act,[3] sets the framework for oil operations in Nigeria and is the main framework that regulates Nigeria's oil industry. It provides that oil companies' operations have to conform in a manner that is in accordance with good oil field practices. Other significant legislation includes the Oil in Navigable Waters Act,[4] the Oil Pipelines Act,[5] the Associated Gas (Reinjection) Act[6] and the Petroleum (Drilling and

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[2] Dinah Shelton, 'Problems in Environmental Protection and Human Rights: A Human Right to the Environment' (2011), GW Law Faculty Publication and Other Works, paper 1048, available at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2050&context=faculty_publications, accessed 24 June 2020.
[3] Petroleum Act P.10 L.F.N 2004
[4] Cap 06 L.F.N 2004
[5] Cap 07 L.F.N 2004
[6] Cap 25 L.F.N 2004

Production) Regulations of 1969, made under the Petroleum Act.[7] From 1988, the Federal Environmental Protection Agency Act (Decree no. 58 of 1988) was bestowed with the authority to issue standards for water, air and land quality in a Federal Environmental Protection Agency (FEPA), and regulations made by FEPA under the decree administered environmental standards in the oil industries.[8] The Department of Petroleum Resources (DPR) had also issued established environmental guidelines and standards for the petroleum industry in Nigeria (1991), which were sometimes similar to or different from those issued by FEPA. These standards are similar to those in force in Europe and the US.[9]

According to Nigerian law the federal government owns all the country's natural resources.[10] Thus, under the Petroleum Act a licence has to be acquired from the Ministry of Petroleum Resources before any oil operation, exploration, drilling, production, storage, refining or transporting is allowed to commence.[11] Nigerian citizens or companies incorporated in Nigeria are the only ones permitted to apply for a licence.[12] All practicable precautions ought to be adopted by oil companies, as well as the provision of updated equipment to avert pollution, and they must take prompt steps to control and, if possible, end any pollution that may happen.[13] They must maintain all

[7] Human Rights Watch, The Price of Oil, Corporate Responsibility and Human Rights Violation in Nigeria's Oil Producing Communities' (1 January 1999).< https://www.refworld.org/docid/3ae6a82e0.html >accessed 13 April 2021.
[8] Ibid.
[9] Ibid.
[10] Article 40(3) of the 1999 Constitution; Article 42(3) of the 1999 Constitution. The Petroleum Act also provides in section 1 that the entire ownership and control of all petroleum in, under or upon any lands to which this applies ( i.e., land in Nigeria, under the territorial waters of Nigeria or forming part of the continental shelf) shall be vested in the state.
[11] Petroleum Act 2004.
[12] Ibid.
[13] Petroleum (Drilling and Production) Amendment Regulations 2019, Regulation 25..

installations in good condition in order to prevent the release waste of petroleum and to cause the minimum possible damage.[14]

Oil companies are also expected to conform to all local planning laws, such as not going into areas that are sacred to the community or destroying any object of worship by the indigenes, and they must allow local inhabitants access to roads constructed in their operating area.[15] Specific rules on how to go about claiming compensation when there is violation of their land are provided.

The Environmental Impact Assessment Act (Decree no. 86 of 1992) requires an environmental impact assessment (EIA) to be carried out where the scope, nature or location of a proposed project or activity are likely to affect the environment significantly.[16] The EIA is essential in certain cases, including oil and gas field development, and construction of oil refineries, some pipelines, and processing and storage facilities.[17] Undergoing an EIA is a policy of the Federal Environmental Protection Agency and the state Environmental Protection Agencies. Like the other regulatory framework to protect the environment in Nigeria, there is, in practice, little enforcement of the requirements to carry out EIAs, either by FEPA or by the DPR's regulatory arm, the petroleum inspectorate, and essentially no quality control over the assessment is carried out.[18]

### 4.2.1 The Constitution of the Federal Republic of Nigeria

The constitutional provisions of Nigeria do not impose human rights obligations directly on companies. They protect their citizens from

[14] Ibid., Regulation 36.
[15] Ibid., Regulations 17, 19 and 22.
[16] Environmental Impact Assessment Act 2004, Cap E12 LFN.
[17] Ibid.
[18] Petroleum Act (n3).

human rights violations through the enactment of general provisions in the Nigerian Constitution for human rights protection.[19]

Law and other methods of environmental protection that recognize the social, economic and political aspects of environmental control are still advancing in Nigeria.[20] Section 20 of the Constitution of the Federal Republic of Nigeria, 1999 acknowledges the importance of the environment and it provides that: "The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria."[21]

The Niger Delta people, by being denied these rights enshrined in the constitution, fail to meet up to the citizens of the Federal Republic which holds a 60% share of the joint venture interest with the translational oil companies.[22] In Nigeria, all oil, gas and minerals are settled in the Federal Government of Nigeria. Section 44 sub-section 3 of the constitution states:

"*Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the*

[19] Chapter II of the 1999 Constitution, headed 'Fundamental Objectives and Directive Principles of State Policy', contains ESR rights, while Chapter IV, from sections 33 to 45, contains protection of rights such as right to life (33), right to dignity of human persons (34), right to personal liberty (35), right to fair hearing (36), right to private and family life (37), right to freedom of thought, conscience and religion (38), right to freedom of expression and the press (39), right to peaceful assembly and association (40), right to freedom of movement (41), right to freedom from discrimination (42) and right to acquire and own immovable property (43).

[20] Mosope Fagbongbe, 'Criminal Penalties for Environmental Protection in Nigeria: A Review of Recent Regulation Introduced by Nigeria' (2012), NIALS Journal of Environmental Law, 2, 151.

[21] Constitution of the Federal Republic of Nigeria, 1999 (as amended), Section 20, Cap. C23 LFN, 2004.

[22] Centre for Petroleum Information< http://www.petroinfonigeria.com/fag.html> accessed 20 April 2020.

*Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."*[23]

Although the application and enforcement of environmental regulations by Nigeria would have been in the best interest of its citizens, especially those in the oil-producing communities, however, in practice this is not always the case because the provision of Section 20, under Chapter II, dealing with Fundamental Objectives and Directive Principles of State Policy, is not justiciable subject to section 6(6)(c) of the Constitution of Nigeria, 1999.[24] The Nigerian government has devised and promulgated a comprehensive system of laws on environmental regulation and protection.[25] However, these regulations and policies are rarely enforced; in most cases, they are deliberately disregarded due to fears that tough environmental regulations to control the activities of the oil companies would cause reduction in profit and these companies to leave Nigeria.[26]

Critically, it's apparent that environmental pollution continues to occur in Nigeria and this is contrary to the human rights principle of reasonable living conditions and the development of human personality, as advocated in many human rights instruments, along with the fact that the interruption of the fundamental ecological balance is harmful to physical and moral health.[27] However, it should be noted that there is a

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[23] Section 44(3) of the Constitution, note 21.
[24] Section 6(6)(c) of the Constitution states that: 'the judicial powers vested in accordance with the foregoing provision of this section shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or 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'. For debates on the justiciability of the Fundamental Objectives Provision, see B.O. Nwabueze, *Ideas in Constitution Making* (Ibadan: Spectrum Books Ltd, 1993).
[25] Joshua P. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997), *Boston University International Law Journal* 15, 261, 297.
[26] Ibid.
[27] Ibid.

central connection concerning the right to a healthy environment and other human rights. The continuous degradation of the environment affects the right to life, health, work, dignity of human person, privacy of the home, education and other human rights.[28]

Several avenues by which Nigeria adopted the concept of corporate accountability are through specific legislation on the environment[29] and other sectors of the economy.[30]

### 4.2.2 The Petroleum Act

This Act provides for the exploration of petroleum from the earthly waters and the continental projection of Nigeria and to vest the ownership of the natural resources, as well as all on-shore and off-shore revenues from petroleum resources derivable from the federal government and for all matters related.[31] General Yakubu Gowon's regime promulgated the Petroleum Decree No. 51 in 1969; (now Cap 10 L.F.N 2004) this decree placed ownership and control of all petroleum resources in Nigeria under the control of the federal government, meaning that lands containing natural resources which were owned by

[28] Brown E. Umukoro, 'Gas Flaring, Environmental Corporate Responsibility and the Right to a Health Environment: The Case of Niger Delta', in Festus Emiri and Gowon Deinduomo (eds), *Law and Petroleum Industry in Nigeria: Current Challenges*, Essays in Honour of Justice Kate Abiri (Lagos: Malthouse Press Limited, 2009), 67.
[29] Section 7 of the Harmful Waste (Special Criminal Provisions) Act, Cap H1 LFN 2004; Section 6 of the Oil in Navigable Waters Act, Cap 06 LFN 2004; Section 3(1) and 4 of the Associated Gas Re-injection Act, Cap 08 LFN 2004; Section 27(2) of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007; Section 62 of the Environmental Impact Assessment Act, Cap E 12 LFN 2004.
[30] For other sectors in Nigeria, see, for example, trafficking in human persons, Section 28(2) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of 2003, Sections 65–67 of the Companies and Allied Matters Act of 2004, Laws of the Federation of Nigeria.
[31] Petroleum Act, L.N 69 of 27 November 1969, Cap. P10 LFN, 2004.

individuals, communities, local governments and even states were denied their rights to the natural resources.[32]

Under the Act, the Petroleum (Drilling and Production) Regulations[33] made provisions for sanctions against environmental pollution by MOCs, and in Section 25 it provides that:

*"the licensee or lessee 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 steps to control and, if possible, end it."*[34]

Unfortunately, measures are not only taken to control pollution when it occurs, as there exist no other obligations on the oil company, or any criminal penalty against the oil company in affected communities. It has been established that MOCs in the Niger Delta do not comply with best practices in the oil industry as some of the equipment used during the process of extraction is outdated. Best practices require that the equipment should usually have a lifespan of 15 years, but in Nigeria, the records showed that MOCs' equipment could last as long as 25 years and their operational failures and faulty equipment lead to oil spillage in the neighbouring communities, which diminishes the rights of the people to a safe and healthy environment.

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[32] United Nations Development Programme, *Niger Delta Human Development Report* (Abuja: UNDP, 2006), Chapter 1, 2.
[33] Petroleum Act, P 10 L.F.N 2004.
[34] Section 25 of the Petroleum (Drilling and Production) Amendment Regulations 2019.

It is important to emphasize that Paragraphs 35(a) and 36 of the first Schedule of the Petroleum Act, which were enacted pursuant to Section 2(3) of the Act, provide for necessary acquisition subject to payment of fair and adequate compensation for the infringement of apparent or other rights to any person who owns or is in lawful occupation of the licensed or leased land. By these provisions MOCs are liable to pay adequate compensation in the event of oil and gas pollution, although in practice these MOCs hardly pay sufficient compensation as provided by the law.[35] There is no provision under the Act for penalty for the license holder for any environmental damage, or for compulsory clean-up and restitution of the environment in case of acts resulting in hostile impact on the environment such as oil and gas pollution.[36] Possibly, this would make MOCs committed to environmental protection, as for now they pay little or no damage for crops, economic trees and other property; they leave the environment contaminated and useless after exploration, such as in Ogoniland.[37] The Petroleum Act has failed to provide the necessary environmental guidelines for the control of these MOCs that operate in joint ventures with governments, owning 60% of the investment.[38] The provisions of this Act are obsolete and therefore need to be amended to give land owners control of their resources, and also to raise the standards of operation to safeguard the environment effectively.[39]

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[35] Simon Warikiyei Amaduobogha, 'The Legal Regime for Petroleum activities in Nigeria' in Tina Hunter (eds), Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems (Edward Elgar Publishing 2015) 263.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid.

### 4.2.3 Minerals and Mining Act

The Minerals and Mining Act of 1992 was enacted to amend and strengthen all existing legislation relating to mines and minerals, conferring ownership of mineral resources on the federal government.[40]This Act relates to oil mining activities and general growth in the oil industry.[41] Section 99 pertains to the prevention of pollution of the environment and it provides that:

"*the holder of a mining title shall, in exercise of its right under the license or lease, have regard to the effect of the mining operations on the environment and take steps as may be necessary to prevent pollution of the environment resulting from the mining operation of the oil company."*[42]

This provision tends to strengthen similar provisions in the Petroleum Act discussed above as it places obvious legal obligation on the oil company to protect the environment from the effects of oil mining. The Act took a step further by providing offences against pollution by the oil companies engaged in oil mining activities and provides in Section 115 that: "a person who pollutes the environment or uses water contrary to sections 65, 69, 71 and 99 of this Act, commits an offence under this Act." Section 65, dealing with prohibition on pollution of watercourse, provides that: "no person shall, in the course of mining or prospecting for minerals, pollute or cause to be polluted any water or watercourse in the area within the mining lease or beyond that area."[43] Where both pieces of legislation would have further halted the degradation of the environment is by making provision for the protection of "Protected and

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[40] The Minerals Oil Ordinance No. 17 of 1914 and No. 1 of 1924.
[41] Minerals and Mining Act 1992, Cap. M12 LFN 2004.
[42] Ibid., s99.
[43] Petroleum Act, L.N 69 of 27 November 1969, Cap. P10 LFN, 2004. See s 155 and 65.

Productive Trees" under Section 21 of the Petroleum Act and "Saving of Sacred Trees Trees and Other Objects of Veneration" under Section 8 of the Minerals and Mining Act, respectively. The law also made provision for the payment of adequate compensation but did not make provision for the enforcement of such payment; again, these provisions fall short of an enforceable law because they only state the offence without any corresponding penalty, which would have served as the basis for diligent prosecution. So, these provisions are voidable as you cannot place something on nothing.

### 4.2.4 Niger Delta Development Commission (NDDC) Act

The Act establishes the Commission[44] which among its functions is to confront ecological and environmental problems derived from the exploration of oil and minerals in the Niger Delta area, to have a dialogue with the federal government and member states on the prevention and control of oil spillages, gas flaring and environmental pollution,[45]and to interact with the various oil, mineral and gas prospecting and producing companies on all matters of pollution prevention and control.[46]

The provision of the NDDC Act is not a very impressive legal framework, and the government's lack of will to enforce environmental regulations against erring oil companies, coupled with the restricted access to justice for those who may be adversely affected by the activities of the MOCs, make effective control of these MOCs at the national level near illusion.[47]

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[44] Niger Delta Development Commission (Establishment Act No. 6) was passed into law by the National Assembly on 12 July 2000. NDDC Act, Cap. N86, LFN 2004.
[45] Ibid., s 7(1)(h) NDDC Act, Cap. N86 LFN 2004.
[46] Ibid., s7(1)(i).
[47] Simon Warikiyei Amaduobogha (n35).

### 4.2.5 Associated Gas Reinjection Act

The Associated Gas Reinjection Act[48] was enacted to basically make oil companies submit preliminary programmes for gas re-injection and a thorough plan for the implementation of gas re-injection.[49] It became effective on 28 September 1979. By the provision of Section 2, companies were bound to submit comprehensive plans for gas re-injection by 1 October 1980, while gas flaring was to cease by 1 January 1984; thus, flaring was declared illegal except with the written permission of the Minister for Petroleum. Any flaring without the requisite certificate from the minister is illegal and the company shall forfeit the concession granted in the particular field.[50]

Further, the Associated Gas Re-injection (Continued Flaring of Gas) Regulations were enacted with a commencement date of 1 January 1985. The regulations are to the effect, inter alia, that a certificate for continued gas flaring will be issued only where more than 75% of the produced gas is effectively utilized or converted. According to the regulations, the minister has the power to review, mend, alter, add or delete any of the provisions of the regulations.[51] Despite the obvious provisions of the law since 1985, MOCs in the oil sector in Nigeria have continued to be free to flare gas without sanctions. Nigeria is one of the greatest gas-flaring countries in the world and it is estimated that over 70% of its associated gas is being flared. 31 December 2012 was one out of several extended dates set by the Federal Government of Nigeria, but this set date has not been met by the government as MOCs continue

[48] Associated Gas Reinjection Act 2004, Cap. A25, LFN.
[49] Ibid.
[50] Ibid., s3 and 4.
[51] See s1 and 2 of the regulations.

to claim that it is not possible to end the flaring of associated gas in Nigeria. This means that MOCs will continue to impair the environment in the Niger Delta through gas flaring since the government is not committed to ending the iniquitous actions of the MOCs in the region.

### 4.2.6 National Environmental Standards and Regulation Enforcement Agency (NESREA) Act

This agency is specifically charged with responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology, which includes co-ordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.[52] The function of the agency includes the enforcement of compliance with policies, standards, regulations and guidelines on water quality, environmental health and sanitation, including pollution abatement; the agency has the responsibility under its mandate to enforce compliance with the guidelines and legislation on sustainable management of the ecosystem, biodiversity conservation and the development of Nigeria's natural resources.[53]

Also, the agency is empowered to enforce compliance with regulations on the importation, exportation, production, distribution, storage, sales, use, handling and disposal of hazardous chemicals and waste. But it is sad to observe that the Act excludes such enforcement in the oil and

[52] Note that Section 36 of the NESREA Act repealed the Federal Environmental Protection Agency Act, Cap. F10 LFN 2004. See s (1)(1) of the NESREA Act 2007.
[53] See Section 7 of the NESREA Act 2007 dealing with the functions of the agency.

gas sector.[54] The reason is not far-fetched, because the oil and gas sector accounts for the greatest source of environmental degradation in the Niger Delta region,[55] and any law that affects the production of oil and gas will definitely affect the government and economy of Nigeria because over 90% of foreign revenue to the government comes from tax and royalties levied on oil production by the MOCs.[56]

### 4.2.7 National Oil Spill Detection and Response Agency (NOSDRA) Act 2006

The National Oil Spill Detection and Response Agency Act was established in 2006 and the responsibility of the agency is to prepare, detect and respond to all oil spillages in Nigeria.[57] It also manages and implements the National Oil Spill Contingency Plan for Nigeria.[58] The agency's responsibility is to survey and ensure compliance with all existing environmental legislation and the detection of oil spills in the petroleum sector, as well as receive reports of oil spillage and co-ordinate oil spill response activities throughout Nigeria.[59] The agency is

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[54] See Section 7(g) (h) (j) and (k) of the NESREA Act 2007.
[55] S.G. Ogbodo and O.J. Ogbodo, 'Environmental Democracy, Public Participation and the Niger Delta Crisis: A Critique of the Nigerian Experience' (2012), *NIALS Journal of Environmental Law*, 2, 312–316.
[56] The NESREA Act, with its regulations, is the most recent law imposing criminal sanctions for environmental protection. Sections 20–27 create offences for the violation of the regulations made on air quality, ozone layer protection, noise, water quality, effluent limitations, environmental sanitation, land resources and water quality. Generally, penalties for individual violators of offences under the Act vary from fines not exceeding N50,000 to N200,000 and an additional fine of N5,000 to N200,000 for every day that an offence subsists, for a maximum term of imprisonment of two years, or both a fine and imprisonment, with the exception of Section 27. In cases of an offence committed by a body corporate, penalties range from a minimum fine of N500,000 and a maximum of N2,000,000 and an additional fine of N10,000 to N200,000 for every day that the offence subsists. Section 27(1) of the Act criminalizes the discharge of hazardous substances thus: the discharge in such harmful quatities of any hazardous substance into the air or upon the land and the waters of Nigeria or at the adjoining shoreline is prohibited, except where such discharge is permitted or authorised under any law into force in Nigeria.
[57] Section 1 of the NOSDRA Act, 2006.
[58] Ibid.
[59] Ibid.

also burdened with the task of undertaking surveillance, reporting, alerting and other activities as they relate to oil spillages.[60] The mandate of the agency is entirely administrative and does not specify the rights of victims of oil pollution and the extent of compensation which would be given to oil pollution victims.[61]

### 4.2.8 Nigerian National Petroleum Corporation (NNPC)

NNPC is the state-owned oil corporation. At the start of the oil industry in Nigeria, there was slight regulation by the Government of the activities of the oil MNCs.[62] During this period, oil MNCs operated concessions and paid taxes and their supervision was granted on a one-man unit at the Mines Division of the Ministry of Lagos Affairs, later part of the Ministry of Mines and Power.[63] The NNPC was established in 1977 by the NNPC Decree (now Act).[64] NNPC was formed as result of the merger between the Ministry of Petroleum Resources, and the Nigerian National Oil Corporation (NNOC) which was first established in 1971. The repeal of the NNOC was to engage in the prospecting, mining and marketing of oil and all other activities with the petroleum industry.[65] Due to the various problems encountered by the NNOC during the

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[60] NOSDRA Act 2001, s 5, 6(a) and (b) and 7.
[61] Ibid.
[62] Nwokeji Ugo, 'The Nigerian National Petroleum Corporation and the Development of the Nigerian Oil and Gas Industry: History, Strategies and Current Directions' (2007) The James A. Baker III Institute for Public Policy and Japan Petroleum Energy Centre, Rice University.1-138.< http://bakerinstitute.org/media/files/page/9b067dc6/noc_nnpc_ugo.pdf >accessed 20 March 2021.
[63] Gboyega, A. et al "Political Economy of the Petroleum Sector in Nigeria". (2011) A World Bank Policy Research Working Paper. < http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5779 > accessed 20 December 2020.
[64] Cap.N1O, LFN 2004.
[65] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1) 30–68.

course of its operations, it was terminated. NNPC then combined commercial functions of the NNOC with the regulatory functions of the Ministry of Mines and Power.[66]

The functions of the NNPC in the oil and gas sector, is encapsulated in Section 5 of the NNPC Act. Some of these functions include exploring and prospecting for oil, refining, providing and operating pipelines, purchasing and marketing of petroleum, and constructing and equipping farms. The NNPC controls or regulates upstream and downstream activities in the oil and gas industry in Nigeria.[67] The downstream sector includes the movement and distribution of petroleum products to the final consumers, while the upstream sector of the oil and gas industry in Nigeria includes exploration and production activities. The NNPC is a very large organization with over 9,000 employees and more than 12 subsidiaries in various sectors, which includes, research, refineries, oil trading companies and petrochemical plants.[68] The most important subsidiary of the NNPC is said to be the National Petroleum Investment Services (NAPIMS) which acts as the oil and gas industry concessionaire, entering into contracts with oil MNCs on behalf of the Federal government.[69]

The operations of the NNPC has been marked by power struggles by political elites over what the NNPC controls and who controls it[70]

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[66] Ibid.
[67] Ibid. However, this is no longer the case. The DPR is now the main regulatory agency in the oil and gas sector in Nigeria.
[68] Ibid.
[69] Ibid.
[70] Nwokeji (n62).

preventing it achieving its primary objectives. Also, the NNPC has been known for a widespread of corruption. Nigerian governments have still not granted NNPC full organizational autonomy, and as such Government officials see the NNPC as a means of enriching themselves.

The NNPC has been re-organized several times, to attempt to rectify decades of inefficiency in the oil and gas industry by the NNPC,.[71] For example, was the Oil and Gas Sector Reforms Implementation Committee (OGIC) in 2000 by the former president Obasanjo to produce a National Oil and Gas Policy.[72] However, the recommendations made by the committees were disregarded. In 2007, the President Yar'adua's administration constituted the OGIC under the chairmanship of Rilwanu Lukman with a mandate to transform the provisions of the National Oil and Gas Plan (NOGP) into better and more efficient structures to improve the oil and gas industry.[73] The OGIC report was submitted to the Government in August 2008. A landmark highlight of the report is to make NNPC independent of governmental control and be run as a business enterprise.[74] The OGIC report recommended the creation of new regulatory agencies in the oil and gas sector of Nigeria. Some of these new bodies include, the National Petroleum Assets Management Agency (NAPAMA), Nigerian Petroleum Directorate (NPD), National Petroleum Oil Company (NPOC Ltd) and the National Petroleum Research Centre (NPRC). These new agencies are encapsulated in the new Petroleum Industry Bill.

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[71] Ibid.
[72] Iledare Wumi,'An Appraisal of Oil and Gas Industry Reform and Institutional Restructuring in Nigeria'(2008)IAEEEnergyForum23-26.< https://www.iaee.org/documents/newsletterarticles/408wumi.pdf> accessed 20 March 2021.
[73] Ibid.
[74] ibid.

### 4.2.9 The Environment Impact Assessment (EIA) Act

The Environmental Impact Assessment (EIA) Act of 1992[75] is also an accountability mechanism that endeavours that sound environmental practices are fostered in Nigeria. The EIA acts prevent a likely negative impact of a project, either private or public, on the environment. Also, the various states in Nigeria have distinct environmental sanitation laws regulating environmental practices or sanitation in the states.[76] The EIA is one of the few statutes in Nigeria that encourages public participation in Nigeria's oil and gas industry. The EIA is a landmark in the Nigerian environmental protection system because it is the first statute that allows public participation in the decision-making processes relevant to development.[77] Thus, public members can retrieve information on projects and participate in the decision-making process on negative or positive) impacts on their immediate environment.[78]

Under the EIA, oil MNCs and other key project developers shall not take part in projects without considering the potential environmental impacts at the early stages except permitted by law.[79] Under section 2 (2) & (3) of the EIA, "where the extent, nature or location of a proposed project is likely to affect the environment significantly", oil MNCs are expected to undertake an environmental impact assessment of the intended project. Under section 4(d) &(e) of the EIA, an environmental impact

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[75]CAP E12, LFN 2004.
[76] Olubayo Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Cambridge: Intersentia Publishing Ltd, 2014) 399.
[77] Yinka Omorogbe 'The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless,' in Zillman, D.N et al. (eds) (2002) Human *Rights in Natural Resource Development: Public Participation in Sustainable Development of Mining and Energy Resources.* Oxford: Oxford University Press 565-77.
[78] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1) 30–68.
[79] Section 2(1) (4) of the EIA

assessment shall include a description of the proposed activities, evaluation of the proposed activities, a review of the likely environmental impacts and alternatives to mitigate any adverse effects project others. In the activities or industries listed in the schedule to the EIA as mandatory study activities, environmental impact assessment must be by Government. The industries deemed required to study under the EIA include mining, petroleum, transmission, and power generation. In respect of mandatory study activities, the EIA provides in section 23 that:

Where the Agency believes that a program is in the mandatory study list, the Agency shall –

(a) ensure that there is a mandatory study conducted, and a mandatory study report is prepared and submitted to the Agency, following the provisions of this Decree; or

(b) refer the project to the Council for a referral to mediate or review section 25 of this Decree.

Projects designated as mandatory study activities vetted and approved by the Federal Ministry of Environment.[80] However, under section 40(1) (b) of the EIA, the Federal Ministry of Environment has the powers to refuse the approval of a project if it is "likely to cause significant adverse environmental effects that cannot be mitigated and cannot be justified in the circumstances".

[80] Eghator (n 78).

Section 7 of the EIA allows public participation in environmental impact assessment in Nigeria. Section 7 provides:

Before the Agency decides on an activity to which an environmental assessment has produced, the Agency shall give government agencies, public members, experts in any relevant discipline, and interested groups to comment on the environmental impact assessment of the activity.[81]

Under section 25 of the EIA, in mandatory study activities projects, EIA reports shall be published and made available to the public in selected places. Any person or individual can file comments on the conclusions and recommendations of such statements. Under section 57, a public registry should be established by the Federal Ministry of Environment containing information and records for enhanced public participation and access to justice.[82] Furthermore, public participation in environmental assessment pronounced in the review panel stage. Under section 17 (1) (c), comments filed by private individuals are taken into consideration in the review panel. Here, public concerns about the potential environmental impacts may prompt the Federal Ministry of Environment to refer to a review panel or mediation.[83] The Review Panel accentuates public participation in environmental impact assessment in Nigeria. Under section 37 (b), proceedings in the review panel stage expected to be conducted in public "in a way that offers the public an opportunity to participate in assessment".

[81] Eghator (n78).
[82] Ibid.
[83] Sections 22(1) (b) (ii), 26(a) (ii) & 27) b) of the EIA.

Under section 8 of the EIA, the adequate period expected to elapse, where comments by the public expected to scrutinise before any proposed project is approved or authorised. Also, under sections 9(1) (2), the decisions reached must be written form and made available to interested persons or groups. Under section 9(3), if no interested person or group requested the report, the Agency can publish it in any form wherein members of the public or interested parties interested in the project shall be notified. The provisions above are not strictly adhered to in the EIA process, and it is often at the discretion of the project developer.[84]

For example, Shell Nigeria will also bolster the assertions that some oil MNCs deliberately avoid engaging in environmental impact assessment of their projects.[85] Shell, the Nigerian Liquefied Natural Gas Project (NLNG) operator at Bonny, allegedly failed to undertake an EIA of the project's potential impacts. The company's decision not to embark on an EIA of the NLNG project was challenged in court by well-known Niger Delta environmental activist Mr Oronto Douglas. In Oronto Douglas v. Shell Petroleum Development Company Ltd[86] the court held that the plaintiff lacked the standing to sue Shell regarding Shell's failure to observe the provisions of the EIA.

An inherent weakness in the EIA is that in some instances, EIA can be jettisoned. The Act creates some exceptions. These exceptions can be

[84] Rhuks Ako, 'The Judicial Recognition and Enforcement of Rights to Environment: Differing Perspectives from Nigeria and India' (2010) 3 NUJS Law Review 423–445
[85] Ibid
[86] Suit No. FHC/L/CS/573/96 [Unreported]

found in section 15(1). The section states thus an environmental impact assessment would not be required when-

(a) in the opinion of the Agency, projects which the President, Commander-in-Chief of the Armed Forces or the Council believes that environmental effects of the project are likely to be minimal;

(b) the project should be carried out during a national emergency for which the Government has taken temporary measures;

(c) the project was done in response to situations that, in the opinion of the Agency, the project is in the interest of public health or safety

The above provisions are against the purpose of the EIA. For example, despite protest to a proposed project, the President of Nigeria is within his powers to avoid the statutory requirements for an EIA in oil and gas projects.[87]

In the oil sector, where environmental degradation is most prevalent, the influence of the oil companies and the paternalistic attitude of judges towards them in matters relating to environmental hazards created by companies have made the enforcement of environmental laws ineffective and holding MNCs accountable difficult.[88]

[87] Eghator (n 78).
[88] Ako (n 84).

### 4.2.10 The Petroleum Industry Bill (PIB)

In a bid to control resources, specifically petroleum, oil-rich states have created legislatures that help foster effective regulatory and governance structures and resolve various energy-related concerns like energy security, transparency, local participation, and related social tensions. Unfortunately, despite several attempts, the Nigerian government has not created effective regulatory and governance reforms, notwithstanding numerous attempts despite some of its African counterparts.

The PIB has touted as the panacea to the ills affecting Nigeria's oil and gas sector. On 25 May 2017, the Senate of the Federal Republic of Nigeria passed the Petroleum Industry Governance Bill. The PIB has undergone many transformations. The government first presented it to the National Assembly in 2009. Still, its passage has been hampered by "vested interests, politicization of the legislative process, intense political intrigues, and inadequate consultation, compounded by the lack of adequate information for active citizens' participation."[89] Presently, there are different versions of the PIB in circulation due to the inherent political intrigues present in the National Assembly. In January 2012, a senate committee reviewed the 2009 version of the PIB due to the widespread civil disobedience orchestrated by a plethora of civil society organizations protesting against the lack of transparency and endemic corruption in the country's oil and gas sector.[90] The Bill is the first in a series of long-awaited petroleum industry laws designed to reform the

[89] Victoria Ohaeri, 'PIB Resource Handbook, An Analysis of the Petroleum Industry Bill's Provision on Community Participation & the Environment' (Space for Change, April 2013) 7. < https://issuu.com/spaces.for.change/docs/spaces_for_change._pib__resource_handbook._final._ > accessed 13 February 2021.
[90] Ibid.

Nigerian oil and gas industry. The PIB, an omnibus law, meant to provide a new legal and regulatory framework for the oil and gas (petroleum) industry in Nigeria, had struggled to see the light of day despite its introduction to the National Assembly years ago. Subsequently, the National Assembly decided to break down the PIB into several different pieces of legislation guiding specific aspects of the industry. Two principles which the Bill addresses are;

#### 4.2.10.1 Clarity and Responsibility

To have effective regulatory governance in the petroleum sector, clarity of goals is essential. Lack of clarity can lead to conflicting plans, repetition of efforts and weak policies. Clarity ensures that roles and responsibilities, adequately allocated, that the boundaries between policy and strategy appropriately set, and regulatory functions are well-defined.[91] It further entails that the National Oil Company (NOC) has a clear commercial purpose. The relationship between the NOC and the state-defined adequately with no conflict of interest.[92]

Having well-defined petroleum legislation is likely to relieve adjudication of judicial disputes and make stakeholders take responsibility for their obligations. This can ensure that investors foresee commercial expectations and reduce the possibility of conflict between the host communities and the host government. Clarity and responsibility is a criterion which the new PIB meets. The objectives of the Bill are set out clearly in Section 2 of the Bill.[93] Firstly, the Bill creates efficient and

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[91] Okechukwu C. Ahohu & Wifa, 'Regulatory Governance: The Petroleum Industry Bill 2020 and Nigerian's Oil Future' (2020) African Natural Resources and Energy Law Network Research Paper 1/2020.< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730659 >accessed 20 January 2021.
[92] Ibid.
[93] Petroleum Industry Bill (2020) s 2

effective governance institutions with separate roles for the petroleum industry.[94] Secondly, it sets out to establish a commercially sustainable National Oil Company (NOC) framework. [95] Thirdly, to promote transparency, good governance and accountability in the administration of petroleum resources. [96] Finally, it seeks to foster a business environment suitable for petroleum operations.[97]

The Bill creates a two-tier Regulatory system that separates regulatory functions upstream, midstream and downstream to assign responsivities.[98] Two regulatory agencies and a commercial enterprise have been created and assign different responsibilities. Section 4 of the Bill makes the Nigerian Upstream Regulatory Authority (the Commission), Section 6 provides for upstream petroleum operations with clear objectives and Sections 7,8 and 9, creates technical and commercial regulatory functions. Section 29 (1)- (3) makes the Nigerian Midstream and Downstream Petroleum Regulatory Authority (the Authority) with similar technical and commercial regulatory functions covering midstream and downstream operations in the petroleum industry. Finally, the Bill creates the Nigerian National Petroleum Company Limited (NNPC Limited) in Section 53 (1) as a limited liability company with a clear commercial obligation bereft of government finance. There is a concern about limiting the effectiveness of regulators in the Bill, notwithstanding the commitment of the PIB. [99] Both regulators combine technical and commercial functions in Sections 7, 8 and 32 (a) and (b). Uniting these functions in one regulator could

[94] Ibid. s 2(a)
[95] Ibid. s2(b)
[96] Ibid. s2(c)
[97] Ibid. s2(d)
[98] Okechukwu C. Ahohu & Wifa, footnote 91.
[99] Ibid.

negatively affect transparency, enforcement and best practice standards within the Nigerian oil and gas industry.

#### 4.2.10.2 Accountability in Decision Making

Without accountability, good practices are left unidentified, and harmful practices can strive. The new PIB proposes some channels for accountability. The Bill creates institutions like the Commission and the Authority and establishes apparent Authority, enforcement, delegation, and monitoring pathways. Regarding channels of Authority, the Bill creates a governing board and the position of Chief Executive for both regulatory agencies. In Section 33, both regulatory agencies have the powers to issue a regulation. More specifically, in Section 211 (1) -(3), the Authority can regulate anti-competitive behaviours. [100] This provision has the prospects of addressing market monopolies and manipulations. As stated in Section 231 (1) -(6), they also have powers to issue administrative penalties where there is a breach. These regulatory powers are critical to the performance of their omitted responsibilities.[101] Concerning the delegation of duties, Section (3) (1) (i) assigns the Minister of Petroleum Resources the power to delegate in writing to the Chief Executive of the Commission or the Authority any power conferred on the Minister. This provides assurances to investors and other stakeholders that matters concerning the interest of stakeholders for which regulation needed cannot be left unattended. About monitoring, the Minister has powers in Section 2 (4) to give general policy directives to both regulators on matters concerning upstream petroleum operations, midstream petroleum operations and

[100] Petroleum Industry Bill 2020, s211 (1)-(3)
[101] Okechukwu C. Ahohu & Wifa, footnote 91.

downstream petroleum operations, which both institutions have to obey. While this power can help resolve regulatory frictions and help bring local legislation in harmony with international commitments, it also offers the possibility for regulatory matters to come under ministerial leniency. The latter case may not gain the trust of potential investors.

The PIB is the first of several bills (the Petroleum Industry Fiscal Bill and Host Community Bill are currently before the Senate), which the National Assembly will debate and pass in due course. The PIB encompasses provisions dealing with the legal and regulatory framework for the oil and gas sector and establishes rules for the operation of MNCs in the industry. It seeks to develop a framework to create commercially oriented and profit-driven petroleum operations to ensure added value and internationalization of the petroleum industry by creating structured and effective governing institutions with well-defined and separate roles for the petroleum industry.[102] The PIB is expected to promote and increase transparency, accountability, and good corporate governance in Nigeria's oil and gas sector by letting go of confidentiality clauses through competitive bid processes for oil prospecting licences. [103]

[102] Gbenga Biobaku and Sandra Gini, 'A Review of the Proposed Petroleum Governance Bill 2016' (2018)< http://www.gbc-law.com/assets/publications/P-I-G-B-NEWSLETTER-2016.pdf >accessed 12 June 2020
[103] Ibid.

## 4.3 The Case of Gbemre

*Gbemre v. Shell Petroleum Development Company Nigeria Limited & Others*[104]

By order of a Nigerian federal high court on 14 November 2005, there was an important watershed in the struggle by local communities in the Niger Delta of Nigeria to protect their health, environment and farmlands, and to bring an end to gas flaring.[105] Mr Gbemre acted in a representative capacity for himself and for each and every member of the Iwehereken community in Delta State, Nigeria against Shell Nigeria, the Nigerian National Petroleum Corporation (NNPC) and the Attorney General of the Federation. Before the ruling in the suit brought by Gbemre in 2005, it had been the view of some industry observers and scholars that the only remedies open to individuals and communities who suffered damaging environmental effects as a result of the activities of oil companies was financial compensation and/or restoration.[106] The basis for this view was Section 36 of Schedule 1 to the Petroleum Act 1969 which provides for the payment of fair and adequate compensation.[107]

The applicants sought the following reliefs from the court:

*"a) A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Articles 4, 16 and 24 of the African Charter on Human and*

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[104] Gbemre v. Shell Petroleum Development Company and Others [2005]Suit No.FHC/B/CS/53/05; AHRLR 151 NgHC
[105] Ibid.
[106] Yinka Omorogbe, *Oil and Gas Law in Nigeria* (Lagos: Malthouse Press Limited, 2001) 151.
[107] Regulation 21 of the 1969 Petroleum Regulations uses the term 'fair compensation', while Regulation 23 uses the term 'adequate compensation'.

*Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean, poison-free, pollution-free and healthy environment."*

*"b) A declaration that the actions of the first and second defendants in continuing to flare gas in the course of their oil exploration and production activities in the plaintiff's community is a violation of the applicant's fundamental rights to life (including healthy environment) and dignity of human person, and therefore deprived them of enjoying the best attainable state of physical and mental health as well as right to a general satisfactory environment favourable to their development."*

*"c) A declaration that the failure of the first and second defendants to carry out an environmental impact assessment in the plaintiff's community concerning the effects of their gas flaring activities, is a violation of Section 2(2) Environmental Impact Assessment Act.".*[108]

The court affirmed that the actions of both respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community was a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter. The court further declared that both respondents, Shell Nigeria and the NNPC, were to be controlled from further flaring of gas in the applicant's community and were to take immediate steps to stop the further flaring of gas in the applicant's community.[109]

The court made the following declaratory order:

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[108] Chapter A9, Vol. I, Laws of the Federation of Nigeria 2004.
[109] Oluwatoyin Adejonwo-Osho, '*The Evolution of Human Rights Approaches to Environmental Protection in Nigeria*' (Dun Press 2008).

*"a) That the constitutionally guaranteed fundamental rights to life and dignity of human persons provided by Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Art. 4, 16 and 24 of the African Charter on Human Procedure Rules (Procedure and Enforcement) Act Cap A9 Vol.1 Laws of the Federation of Nigeria, 2004[110] inevitably includes the right to clean poison-free, pollution-free and healthy environment."*

*"b) That the actions of the 1st and 2nd Respondent in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter."*[111]

The provisions of Section 3(2)(a) and (b) of the Associated Gas Reinjection Act, Cap A25 Vol. 1, Laws of the Federation of Nigeria 2004 and Section 1 of the Associated Gas Reinjection (Continued Flaring of Gas) Regulations Section 1.43 of 1984 under which the continued flaring of gas in Nigeria may be permitted are unpredictable with the applicant's right to life and/or dignity of human person enshrined in the constitution and the African Charter and are therefore unconstitutional, null and void by virtue of Section 1(3) of the Nigerian Constitution.[112]

As no reliefs, as to damages or compensation were sought by the plaintiff, the court made no award of damages or any compensation, although it had the power to grant ancillary reliefs as it deemed fit.

The decision of the court was revolutionary on different levels. It was the first time that a Nigerian court had applied and extended the

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[110] Chapter A9 Vol. I, Laws of the Federation of Nigeria 2004.
[111] Ibid.
[112] Ibid.

guaranteed fundamental human rights enshrined in the Nigerian Constitution to an environmental case.[113] It was also the first time that a court had held and declared that the gas-flaring actions of oil companies amounted to a crime. In addition to the foregoing, no court had ever granted a restraining order on an oil company with regards to the continuation of exploration and production acts resulting in pollution, nor ordered that pollution or flaring by an oil company in any community must stop.

Gbemre v. Shell is a precedent case in Nigeria; it is the first judicial authority to declare that gas flaring is illegal, unconstitutional and a breach of the fundamental human right to life. Cases relating to environmental degradation in Nigeria are not new to the judiciary but what makes the Gbemre case special is the fact that the decision was the first of its kind, as it was the first case where the court took more consideration of the environment rather than potential loss of revenue and investment.

Despite Justice Nwokorie's laudable decision, Shell displayed a total disregard for the Nigerian justice system as it was discovered that no detailed phase-out had been submitted. On 30 April 2007, the legal representative of the plantiff discovered that Justice Nwokorie had been removed from the case by being transferred to another court district in the far northern state of Katsina, and also that the court file was not available, and that no representatives of Shell, the NNPC or the government had turned up.[114] The act of Shell and the NNPC was an

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[113] Olubayo Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Cambridge: Intersentia Publishing Ltd, 2014) 399.
[114] < https://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007 >accessed 17 June 2020.

obvious mockery of the Nigerian justice system as the once famous decision by Justice Nwokorie was rendered ineffective.

However, in Ikechukwu Opara & others v. Shell Petroleum Development Company Nig. Ltd. and 5 others,[115] where the facts were similar to Gbemre's case, the high court struck out the case due to procedural defects. It held that the rights created by the African Charter are beyond the definition ascribed to fundamental rights as contemplated by Section 46 of the Nigerian Constitution and so cannot be enforced by means of fundamental rights (enforcement procedure) rules.[116]

This case raises questions about the judicial attitude of Nigerian judges in matters relating to environmental hazards which affect human rights, which are created by multinational oil corporations which are of a disadvantage to their host communities.[117] With all due respect to the court, the applicants' claims were for the protection of their rights, which is the right to life and dignity, as expressly listed under Chapter IV of the Nigerian Constitution and therefore enforceable by means of fundamental rights (enforcement procedure) rules.[118] To strike out the case on the ground that the applicants reinforced their claims by citing articles 4, 16 and 24 of the African Charter suggests that the court's reasoning was faulty.[119] The court should have taken account of the fact that Nigeria has incorporated these rights into its domestic law by virtue of the ratification and subsequent domestication of the African Charter.[120] Although the learned trial judge conceded to the applicants' counsel's argument that issues bordering on whether there is a right to

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[115] *Gbemre v Shell* (n 104).
[116] Oluduro (n113) 402.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid.

pollute free air or whether the same is right to life requires interpretation of the constitutional provisions under Chapter IV of the Nigerian Constitution.[121] He struck out the case notwithstanding the continued negative impacts that the activities could have.[122] It is hoped that the appeal court will be bold and courageous in this case and uphold the existence of environmental rights in Nigeria, as done by trial courts in Gbemre's case.[123] This will enable victims of harm caused by oil exploration to ventilate their rights in court against the actors accountable. The explicit recognition of the duties of the multinational oil corporations towards protecting human rights in the Gbemre case shows that there is a prospect of the horizontal application of human rights provision to non-state actors in Nigeria.[124]

Section 6 of the Nigerian Constitution states that the judicial powers of the federation shall be vested in the courts.[125] Section 6(6)(b) of the constitution states that the judicial powers of the courts shall extend to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person. Thus, courts have exercised these powers in administering justice in cases brought before them.

The cases discussed above have shown the manner in which the courts have adjudicated over matters brought before them. However, it is a well-known fact that justice does not end or is not served at the point

[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Olufemi Amao, 'Human Rights, Ethics and International Business: The Case of Nigeria', in Aurora Voiculescu and Helen Yanacopulos (eds), *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility* (London: Zed Books Ltd, 2011), 204.
[125] See Section 6(1) of the Constitution of the Federal Republic of Nigeria 1999.

of the delivery of a judgement, but (save for declaratory judgements) when that judgement is actually enforced and its fruits recovered by the victorious litigant.[126] An unenforceable judgement is a bad judgement, and in Nigeria judgements and orders made by courts are often ignored, not because they are incapable of being enforced, but because the courts lack the clout to follow up such orders and judgements,[127]and also because there is no effective mechanism or follow-up process to ensure that court orders are obeyed.[128] The complexities of the Nigerian political environment have made it difficult to ensure the protection of rule of law.

## 4.4 Analysis of Codes of Conduct in the Oil and Gas Industry in Nigeria

A notable weakness of the codes of conduct in the oil and gas sector in Nigeria is mainly because their codes of conduct are written in unclear terms.[129] For example, Oshionebo states that ExxonMobil and Shell are two such companies with ambiguous terms in their codes of conduct.[130] ExxonMobil's Standards of Business Conduct state that: "it is dedicated to running safe and environmentally responsible operations". [131] Nonetheless, in ExxonMobil's code, there is no definition of the term

[126] Olufemi Amao (n124).
[127] See Human Rights Watch, *Everyone's In On the Game: Corruption and Human Rights Abuses by the Nigeria Police Force* (New York: Human Rights Watch, 2010), 2–3.
[128] Again, this is an issue that deals with the enforcement of judgements and court orders and thus has to do with the enforcement arm of governments, i.e., the police and bailiffs.
[129] Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press, 2009).
[130] Ibid.
[131] ExxonMobil, 'Standards of Business Conduct' (2011), available at https://www.exxonmobil.com/files/corporate/sbc.pdf, accessed 14 July 2020.

"safe and responsible operations".[132] Therefore, the clause could have a lot of interpretations by different shareholders. Shell's clauses are no different either, and it states that it will "support fundamental human rights".[133] Oshionebo is of the view that Shell was not right to make use of unclear expressions, and the proper terminology ought to be "respect or observe human rights".[134] The constitutional framework of Nigeria states that fundamental human rights are similar to civil and political rights which are justiciable and enforceable in Nigerian courts; however, socio-economic rights are not justiciable or enforceable in Nigeria.[135] The scope of economic, cultural and social (socio-economic) rights[136] is provided for in Chapter II of the Nigerian constitution, while civil and political rights are enforceable. Nonetheless, MNCs should clearly state socio-economic rights in the various codes of conduct.[137]

In respect of Addax Petroleum, it seems like an express mention of human rights protection in their code of conduct has been omitted.[138] Most times, corporations are affected by their ideological and cultural background in the construction of the civil regulatory standard in Nigeria.[139] Amaechi and Amao[140] examined the effect of the home countries of the oil industries in their localization of codes of conduct in

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[132] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1), 30–68. Also, Oshionebo (n129).
[133] Oshionebo (n128).
[134] Ibid.
[135] Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria'(n132).
[136] Ibid. See also Solomon Ebobrah, 'The Future of Economic, Social and Cultural Rights Litigation' (2007) 1(2) CALS Review of Nigerian Law and Practice 108–124 at 111.
[137] Ibid.
[138] Ibid.
[139] Ekhator (n132).
[140] K. Amaeshi and O.O. Amao, 'Corporate Social Responsibility in Transnational Spaces: Exploring Influences of Varieties of Capitalism on Expressions of Corporate Codes of Conduct in Nigeria' (2009), 86 Journal of Business Ethics, 225–239.

the oil and gas industry in Nigeria.[141] They stated that: "corporate codes of these MNCs operating in Nigeria, most likely reflects the features of their home countries' model of capitalism, respectively, notwithstanding with certain degree of modifications."[142]

However, Total believes that: "to ensure compliance with our code of conduct, we ask an independent third party, Good Corporation, to conduct ethical assessments of our operations every year."[143] The assessment tackles problems such as labour standards, business integrity, the environment and human rights.[144] Assessments were made in Angola, Uganda, Tunisia, South Africa and Algeria, amongst other countries.[145]

## 4.5 Transparency in the Oil and Gas Sector of Nigeria (Environmental Impact Assessment Act)

This law was enacted so that environmental degradation caused by exploration and the concerns of members of the oil extractive communities in Nigeria could be regulated.[146] The Act is directed specifically at the regulation of the industrialization process with regards to the environment.[147] The Act seeks to urge the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have

[141] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1), 30–68.
[142] Ibid.
[143] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1), 30–68. See also Total, *Security and Environment*, (Annual Report ,VPSHR, 2018) 30.
[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] EIA Act 2004, s1(a) Cap. E12, LFN.

a substantial influence on the boundary, on trans-state, or on the environment or bordering towns and villages.[148]

Apart from the Nigerian Constitution, there are certain other regulations in Nigeria that protect human rights in the corporate sector, particularly in areas where extraction is carried out in an environment.[149] Although, irrespective of several weaknesses in some of the regulations,[150] the ability of the federal executive to enforce the upright segments of the existing laws[151] has been questioned by scholars [152] and the judiciary.[153]

The EITI is a different international mechanism on MNCs' activities which has been localized in the oil and gas sector in Nigeria.[154] Many oil MNCs are signatories to EITI, they include; BG Group, Shell, Chevron Group, Statoil and Total.[155] The EITI Board nominated Nigeria as EITI compliant on 1 March 2011.[156] The NEITI has a secretariat controlled by an executive director and a governing board. The objectives of the NEITI Act 2007 were to ensure due process and transparency by extractive corporations and the federal government of Nigeria, monitoring and ensuring accountability in revenue receipts of the federal government,

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[148] Section 1(c) of the EIA Act, 2006.
[149] Ibid.
[150] Martin-Joe Ezeudu, 'Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Canvassing the Potential Role of the International Criminal Court' (2011) 11 AHRLJ 23, 36–39.
[151] Section 5 and Exclusive Legislative List, Part I of the Second Schedule to the 1999 Constitution; B.O. Nwabueze, *A Constitutional History of Nigeria* (London: C. Hurst, 1982), 142.
[152] Ezeudu (n149) 38; Ajuzie C. Osondu, *Our Common Environment: Understanding the Environment, Law and Policy* (Lagos: University of Lagos Press, 2012) 309; Adamu Kyuka Usman, *Environmental Protection Law and Practice* (Lagos: Malthouse Press, 2012) 170–172; Brown E. Umukoro, 'Gas Flaring, Environmental Corporate Responsibility and the Right to a Healthy Environment: The Case of the Niger Delta', in Festus Emiri and Gowon Deinduomo (eds), *Law and Petroleum Industry in Nigeria: Current Challenges* (Lagos: Malthouse Press, 2009) 62–63.
[153] *Gbemre and Others v Shell Petroleum Development Company Ltd and Others* at Federal High Court of Nigeria, Benin City, 14 November 2005, Suit No: FHC/B/CS//53/05. *SERAC v Nigeria* 2001 AHRLR 60 [ACHPR]. For discussion of this case, see Dejo Olowu, *An Integrative Rights-based Approach to Human Development in Africa* (Pretoria: Pretoria University Law Press, 2009), 152–156; *SERAP v Federal Republic of Nigeria*, Judgment N° ECW/CCJ/JUD/18/12.
[154] Nigerian Extractive Industries Transparency Initiative Act 2007.
[155] EITI Nigeria website, available at http://eiti.org/Nigeria, accessed 23 June 2020.
[156] Ibid.

and elimination of corrupt practices in the payment process in the extractive industry, amongst others.[157]

In March 2012, NEITI ordered the third audit to be conducted on the oil and gas industry in Nigeria.[158] The audit report was submitted on 18 December 2012. [159] This audit report was very scathing of the presentation of the Nigerian National Petroleum Corporation (NNPC) in the oil and gas industry in Nigeria. The report blamed the NNPC for failing to pay billions of dollars to the treasuries of the Nigerian government.[160] For instance, "a breakdown of the revenue lost to the activities of the NNPC as contained in the report showed that financial flows from the Nigeria Liquefied Natural Gas (NLNG), which incorporates dividends and loan repayment, with $4.84 billion was received by the NNPC, and was not reimbursed by the Corporation."[161] The revenue that went to the federal government in the period under review was a combination of earnings from the crude oil business, royalties, gas-flaring penalties and petroleum profit, amongst others.[162] The main corporations covered by the audit included the major multinational companies in the oil and gas industry in Nigeria such as, Agip, Chevron, Shell, and Total amongst others, and agencies of the federal government such as the NNPC, DPR, Central Bank of Nigeria and Federal Inland Revenue Services, among others.[163] According to the Chairman

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[157] Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria' (n140).
[158] Ibid.
[159] Nigeria Extractive Industries Transparency Initiative: Financial Flows Reconciliation Report: 2009–2011 Oil and Gas Audit', available at http://neiti.org.ng/sites/default/files/documents/uploads/neiti-eiti-core-audit-report-oil-gas-2009-2011-310113-new.pdf, accessed 20 July 2020.
[160] Ibid.
[161] Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria' (n118). See also, Juliet Alohan, 'Nigeria: NEITI Report – NNPC Cornered N2.1 Trillion Oil Proceeds in Two Years', *Leadership* Newspaper (Nigeria, 1 February 2013) < http://allafrica.com/stories/201302010164.html, >accessed 21 May 2020.
[162] Ibid.
[163] Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria'(n140).

of NEITI, Dr Ledum Mitee, some oil and gas companies, such as NECONDE Energy Ltd, SEPTA Energy Ltd, Emerald Energy Resources and Energia Ltd, declined to participate in the audit process.[164] Dr Mitee stated that a suitable sanction would be given to those corporations that refused to participate in the audit process.[165]

Before the establishment of NEITI, in the oil and gas sector of Nigeria, payment or oil revenues accruing to the federal government were hidden. NEITI reports have been the main spur in revealing the concealed aspect of Nigerian government activities in the oil and gas sector.[166] If no publication of the reports existed, Nigerians and other investors "would have slight information on the size of the sector or the extent and nature of the challenges in the management of revenue streams from it".[167] By publishing the various audit reports, NEITI has improved access to information that will, therefore, perpetually lead to enhanced transparency in monitoring oil revenues receipts by the federal government in Nigeria.[168]

Questionably, the influence of the audit reports on transparency in the oil sector has been low. For instance, in both the first and second audit reports, the NEITI is said to be "increasingly becoming toothless and institutionally moribund".[169] The third NEITI audit report was severely criticized by the NNPC. In a statement broadly spread by the NNPC in

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[164] Ledum Mitee, 'Speech Delivered on the Occasion of the NEITI Independent Oil and Gas Industry Audit Report Covering 2009–2011' (2013), at the Reiz Continental Hotel, Abuja, Nigeria, available at http://www.neiti.org.ng/sites/default/files/documents/uploads/speech-nswg-chair-press-briefing-2009-2011-audit-report-review-final-310113.pdf, accessed 30 July 2020
[165] Ibid.
[166] Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria (n140).
[167] Ibid.; see NEITI (n117).
[168] Ibid.
[169] George Anthony, 'The Petroleum Industry Bill (2009) and the Issue of Transparency and Accountability in the Extractive Industry', in G.U. Ojo (ed.), *Envisioning a Post Petroleum Nigeria* (Benin City: ERA Publishers, 2010) 146.

Nigerian newspapers and on the internet, the NNPC refuted the controversy of the third audit report on the discrepancy in the payment paid to the federal government.[170] The NNPC posited that: "NEITI without taking into account of the extant laws and regulations, rules and terms of applicable contracts in NNPC's activities, which repeatedly has shown the NNPC in a bad light to the public."[171]

It is argued that the main fault of the third audit report can be inferred from a letter written by the accountants to the Executive Secretary of the NEITI and attached to the audit report.[172] In the second paragraph of the letter, the accountants state that the audit report or 'engagement' was conducted in line with the International Standard on Related Services applicable to agreed-upon procedures engagements".[173] Therefore, the audit report was conducted in line with the best international audit and accounting standards.

NEITI is yet to attain much in the oil and gas industry. The corruption in the oil and gas industry and the lack of political motivation from the government to execute the NEITI, amongst other inherent difficulties, have accentuated the conundrum.[174]

## 4.6 Conclusion

Having gone through the laws and regulations governing the oil industry and the environment in Nigeria, it can be concluded that there are

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[170] Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria'(141).
[171] Ibid. see also Michael Eboh, 'N1.3 Trn Debt: NEITI Report's Inaccurate, Misleading – NNPC' *Vanguard Newspaper* ( Nigeria, 4 February 2013) < https://www.vanguardngr.com/2013/02/n1-3trn-debt-neiti-reports-inaccurate-misleading-nnpc/ > accessed 11 April 2021.
[172] Ibid.
[173] Ibid.
[174] Chilenye Nwapi, 'Enhancing the Effectiveness of Transparency in Extractive Resource Governance: A Nigerian Case Study' (2014) The Law and Development Review 7(1) 23–47.

lacunae, and they are inadequate to provide the level of protection required to ensure that there is accountability for human rights violations as a result of oil extraction. However, this chapter has also succeeded in showing that the inadequacy of the current legislation is not the biggest problem when it comes to the proper regulation of the Nigerian oil industry, as Nigeria has laws and regulations in place capable of regulating and holding MNCs accountable for their activities, but fails to ensure enforcement and compliance. The possession of well-developed and large environmental laws does not guarantee adequate remedies. There is a need for the Nigerian Government to address these inadequacies and ensure that the laws are effectively applied and enforced by all those charged with the responsibility of enforcing the laws.

In addition to these issues raised, other pertinent problems highlighted is that it weakens the litigants hope of getting justice, as seen in Gbemre's case above. The non-enforcement of the laws perpetuates the deprivation, alienation, exclusion and insecurity of the local inhabitants and breeds their contempt for the MNCs and government. The next chapter will examine the international mechanisms attempted to be used to hold MNCs accountable.

## Chapter Five

## International Mechanisms Aimed at Holding MNCs Accountable

### 5.1 Introduction

There are a number of international mechanisms that exist to attempt to hold MNCs to account. These include various voluntary codes and the US Aliens Tort Claims Act (ACTA). Voluntary codes of conduct can be adopted by companies in order to demonstrate their commitment to being accountable. Those codes can lay down standards that a company can agree to follow. In regard to MNCs, the codes can act to "promote socially responsible" conduct, while in developing countries, they are seen to help prevent abuse by MNCs.[1] As such it is important to describe the leading codes of conduct in order to demonstrate how they may, or may not, positively affect the behaviour of MNCs in Nigeria. A distinct mechanism that might act to hold MNCs accountable is under the US ACTA statute. It also merits discussion.

The state-centric view asserts that international human rights mechanisms levy only indirect accountability on MNCs.[2] Although some say that the mechanisms already impose direct accountability on corporations, they lack enforcement mechanisms, however.[3]

In its fourth session in 2007, the Human Rights Council stated that:

"... *corporations are under growing scrutiny by the international human rights mechanisms. And while states have been unwilling to adopt*

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[1] Sean D. Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 Colum.J. Transnational L 389–433,392–393.
[2] Nezir Akyesilmen, 'Responsibility of Transnational Corporations for Human Rights: The Case of Baku-Tbilisi-Ceyhan Oil Pipeline Project' (PhD Thesis, Middle East University 2008).
[3] Ibid.

*binding international human rights standards for corporations, together with business and civil society they have drawn on some of these instruments in establishing soft law standards and initiatives. It seems likely, therefore, that these instruments will play a key role in any future development of defining corporate responsibility for human rights."*[4]

As a result of struggles involved in holding MNCs directly accountable for human rights violations under international law, and the lack of appropriate mechanisms to be enforced in countries where oil exploration was carried out, multilateral organizations were guided to urge corporations to turn to voluntary codes. The UN Global Compact (2000), the OECD Guidelines on Multinational Enterprises (1976, revised in 2000) and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977) are some of the codes.[5]

These codes of conduct levy no legal, only moral, obligations on corporations, and they are not capable of being enforced by the application of outside sanctions. Commitment to the codes by corporations is voluntary, although as a condition for membership or licensing agreements, some corporations have accepted the codes.[6]

Currently, no framework regulating the activities of MNCs or binding treaty in international law exist. One main reason for this position is the fact that there is no legal status for MNCs in international law.[7] The attention of international instruments on the activities of MNCs is either

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[4] HRC, 2007a, 14.
[5] Freddy Mynongani, 'Accountability of Multinational Corporations for Human Rights Violations under International Law' (PhD Thesis, University of South Africa 2016).
[6] ILO, 'Codes of Conduct for Multinationals'< https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf >accessed 21 June 2020
[7] Edwin Mujih, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Farnham: Gower Publishing, 2013) 253.

through binding treaties which are directed to states – which can also be made applicable to MNCs (such as bilateral agreements and ILO conventions) – and mechanisms, or soft law concentrated on the activities of the MNCs. [8] Many literatures on private actors in international law and regulating MNCs, are available.[9]

## 5.2 International Labour Organizations Tripartite Declaration

The first mechanism to look at is the ILO's Tripartite Declaration of Principles Concerning Multinationals and Social Policy.[10] As a result of the activities of MNCs in the 1960s and 1970s there was a motivation to create international instruments for the control of MNCs, and also to outline their relations to host countries, most importantly in the developing countries.[11] In 1977, the Governing Body of the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, amended in 2000.[12] The aims of the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[13] are "to encourage the positive contributions of the MNEs to economic and social progress"[14] and "to minimize and resolve difficulties to which their operations may give rise".[15] The principles,

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[8] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1), 30–68.
[9] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).
[10] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (Geneva: ILO, 2001) < http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_101234.pdf >accessed 20 July 2020.
[11] ILO, 'Introduction', in *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (Geneva: ILO, 2001).
[12] Ibid.
[13] Hereinafter referred to as 'the Declaration'.
[14] Paragraph 2 of the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*.
[15] Ibid.

which were non-binding and established in the Declaration, have their origins in major ILO conventions and recommendations.[16] However, the success of the Declaration depends on the co-operation which exists between employers, employee groups and MNCs, as well as with MNCs' local associates or partners.[17] As a voluntary declaration, its purpose was to guide MNCs, governments and workers' organizations.[18]

The Declaration is commended as an instrument which plays an important role in securing the protection of basic labour standards in this globalization period.[19] The instrument encloses a wide range of rules that ought to be complied with by MNCs. The Declaration has some inherent strengths, as it generates good social policy advantage.[20] As provided by Paragraph 12:

*"governments of home nations should endeavour to promote good social practices in respect of the declaration, having regard to the social and labour law, regulations and practices in the host countries as well as to important international standards. This is to the benefit of the developing countries. It also has the advantage of a dispute procedure."*[21]

Regarding grievances, Paragraph 8 states that the right of workers to have their grievances addressed should be respected by both MNCs and national enterprises,[22] while Paragraph 59 posits that MNCs and national

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[16] ILO, *A Guide to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (Geneva: ILO, 2002) 4.
[17] Ibid.
[18] Paragraph 5 of the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*.
[19] Ibid
[20] Ibid.
[21] Paragraph 12 of the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.*
[22] Paragraph 8 of the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*.

enterprises working in union with workers' representatives, seek to create voluntary resolution machinery so as to settle disputes that arise in the industry.[23]

The Declaration is not devoid of several setbacks, one of which is its dependence in Paragraph 8 on "sovereign rights of states". It has been argued that reference to the importance of national law weakens the Declaration,[24] which may be as a consequence of states' insufficient development and effective legal systems to be able to impose effective sets of labour standards or law.[25] It sometimes makes MNCs relent in trying to improve labour standards above the fundamental standards in a country.[26] Such reliance on state sovereignty permits some amount of regulatory competition in the area of labour rights/standards; however, this might be an advantage to certain countries, and might convince some states to weaken labour standards in order to remain competitive.[27] The 'Good Social Policy' of the Declaration is weak because it does not "envisage the extraterritoriality application of superior home country standards to employees in host states".[28]

The Declaration is said to be encouraging,[29] non-binding and a set of voluntary rules agreed by governments, and employers' and workers' organizations.[30] As such MNCs can decline to accept it because sanctions are not forced on them. The dispute procedure has been said to be weak

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[23] Paragraph 59 of the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.*
[24] Peter Muchlinski, *Multinational Enterprises and the Law*, updated edition (Oxford: Blackwell, 1999), 460.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1) 30–68.
[29] Muchlinski (n24) 460.
[30] Ekhator (n28).

because it is "not judicial in nature".[31] It doesn't follow compliance and is hardly invoked.[32] It is restricted by the Annex to the Declaration – Paragraph 2 of the Annex provides that: "the procedure should not be in conflict with already existing national or ILO procedures."[33] Despite the weaknesses of the Declaration, it "still embodies the least international labour standards that states have agreed should apply to the operations of MNEs".[34] The Declaration was a good start at regulating labour standards.

### 5.3 Organisation For Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises

The second mechanism to look at regarding the international regulation of MNCs is the Organisation for Economic Co-operation and Development (OECD) Guidelines on MNCs. The OECD Guidelines on MNCs[35] were first adopted in 1976, and revised in 2000.[36] The Guidelines are "recommendations on responsible business conduct to MNCs operating in or from the adhering countries".[37] The Guidelines are known to be voluntary and non-binding.[38] Paragraph 7 of the Guidelines' General Principles do encourage self-regulation by MNCs, and the

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[31] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1) 30–68. See also, Muchlinski (n24) 459.
[32] Bob Hepple, 'Labour Regulation in International Markets', in S. Picciotto and R. Mayne, *Regulating International Business: Beyond Liberalization* (London: Macmillan, 1999), 193. See Ekhator (n28).
[33] Paragraph 2 of the Annex of the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*. See also, Ekhator (n28)
[34] Muchlinski (n24) 481.
[35] Ekhator (n28) see also OECD, *The OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2000) < http://www.oecd.org/dataoecd/56/36/1922428.pdf >accessed 20 July 2020.
[36] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1) 30–68.
[37] Ibid.
[38] Ibid.

Guidelines are very exhaustive.[39] They are proposed to be domesticated into national law or corporate governance by OECD members.[40] Part IV of the guidelines is about 'Employment and Industrial Relations'.[41] Paragraph 10 of its General Principles ensures that the guidelines are applicable to firms and subcontractors.[42]

The enforcement process of the guidelines is advantageous. Its National Contact Points (NCP) are created by states to "promote the guidelines, collect information, deals with requests and help in solving problems which may arise between business and labour in matters covered by the Guidelines".[43] Some weaknesses do exist though; for example, the Guidelines are weak in enforcement essentially because the NCP are almost non-existent in many countries,[44] and only reasonably small issues were covered in the Guidelines. The OECD is made up of financially buoyant nations, thus omitting a lot of countries, particularly developing countries. The Guidelines, nevertheless, are a "timely addition to the range of transnational regulatory instruments".[45] In 2007, the OECD, the European Commission, the European Parliament, NGOs and trade unions, to mention but a few, convened to adopt or develop the model NCP.[46] Hence:

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[39] Ibid.
[40] Ibid.
[41] Part 1V of The OECD Guidelines for Multinational Enterprises 2000.
[42] Paragraph 10 of The OECD Guidelines for Multinational Enterprises 2000.
[43] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1) 30–68.see Hepple (n32) 193.
[44] Ibid.
[45] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1) 30–68. See also, Jill Murray, 'A New Phase in the Regulation of Multinational Enterprises: The Role of the OECD' (2001) 30(3) Industrial Law Journal, 255–270 at 268.
[46] Friends of the Earth (England, Wales and Northern Ireland), 'A History of Attempts to Regulate the Activities of Transnational Corporations: What Lessons Can Be learned', cited in E. Emeseh 'Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?' (2010), 1(2) German Law Journa*l*, 234–252 at 240–241.

*"the aims of the Model NCP include making every effort to resolve questions of fact, equal treatment of all parties and the development of clear-cut procedures and timelines. Model NCPs expectedly will not assume that parallel legal proceedings take precedence and will not apply the lack of investment nexus as a pretext to exclude a specific instance."*[47]

The OECD Guidelines on MNCs were modified and adopted by states which adhered to it in 2011.[48] This was the fifth revision or update of the Guidelines and contained wide recommendations for accountable business conduct that states should reassure their corporations or enterprises to adhere to.[49] In May 2011, all the OECD states, Argentina, Brazil, Latvia, Lithuania, Egypt, Peru, Morocco and Romania, who were countries that kept to the OECD Guidelines, as well as the European Community, were directed to adhere to the part of the Guidelines (National Treatment) decreasing within its scope.[50] Like the 2000 edition, the 2011 version of the OECD Guidelines encompasses voluntary principles and standards for business conduct which are compatible with the extant laws and international measures.[51] Additionally, the basics of the Guidelines can be concluded from the following provision:

*"... countries adhering to the Guidelines make a binding commitment to implement them in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises. Furthermore,*

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[47] Emeseh (n46) 241.
[48] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) Intl. Comm. Law Review 20(1) 30–68. See also, OECD website, 'Guidelines for Multinational Enterprises: 2011 Update' < http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm > accessed 20 July 2020.
[49] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria (n 47).
[50] Ibid.
[51] Ibid.

*matters covered by the Guidelines may also be subject of national law and international commitments."*[52]

A major improvement in the revised OECD Guidelines is the addition of a new human rights chapter localized in Chapter IV of the Guidelines. Additionally, Chapter IV explains the human rights responsibilities or obligations of MNCs.[53] Some of the human rights obligations of MNCs rooted in the Guidelines include the requirement that they should respect human rights, try not to cause or aggravate human rights impacts while carrying out their activities, pursue means to reduce or prevent human rights impacts directly attributed to their business, have a policy commitment to promoting and respecting human rights, as well as carry out due human rights diligence as appropriate and expected to co-operate in the reversal or stopping of adverse human rights where negative impacts exist.[54] Therefore, the 2011 edition of the OECD Guidelines gives more acknowledgement to the importance of human rights dialogue in the international and national surface,[55] though it remains affected by the difficulties witnessed in earlier displays of the Guidelines, including the fact that it is soft law, voluntary and so not enforceable. However, some observers state that the Guidelines' non-binding nature is not an impediment. For example, the Guidelines are used to promote corporate accountability activities in different countries,[56] and they "represent an agreement on what makes up for

[52] The OECD Guidelines for Multinational Enterprises 2000
[53] Mujih Edwin, *Regulating Multinationals in Developing Countries: A Case-study of the Chad-Cameroon Oil and Pipeline Project* Farnham (Gower Publishing 2012) 165.
[54] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria (n 47).
[55] Ibid.
[56] OECD Annual Report (2006) < https://www.oecd-ilibrary.org/docserver/annrep-2006-en.pdf?expires=1592394878&id=id&accname=guest&checksum=A0A7D13FDFB140B6184121C9BAF676AB >accessed 20 June 2020.

good corporate behaviour in an increasing global economy".[57] Moreover, the Guidelines may grow into hard and binding international law if countries adhere to and seek to constantly apply them in their business relationships with MNCs.[58]

### 5.4 Other Attempts

Other attempts at the international regulation of MNCs include the draft Code of Conduct on Multinational Corporations by the United Nations Commission on Transnational Corporations (UNCTC), which was previously proposed as a set of binding legal rules (code of conduct) expected to regulate the conduct of MNCs in the international territory.[59] The code was designed towards the MNCs, even if it ought to have been adopted by all countries.[60] Therefore, the countries were anticipated to implement or enforce the codes.[61] It has been argued that the draft codes were very comprehensive and intended to be binding on the countries.[62] Notwithstanding the different consultations on this code of conduct, it was never formally adopted.[63] In accordance with this, the UNCTC was disbanded on the eve of the Rio Earth Summit and its activities taken over by the United Nations Commission on Trade and Development (UNCTAD) [64] which promoted voluntary initiatives

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[57] Peter Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case' (2001) 50(1) International and Comparative Law Quarterly 1–25, 24.
[58] Mujih (n53).
[59] Ekhator (n 47).
[60] Ibid.
[61] Ibid.
[62] Emily Carasco and Jang. Singh, 'Human Rights in Global Business Ethics Codes' (2008) 113(3) Business and Society Review, 347–374, 357, cited in Mujih (n53) 136.
[63] Jennifer Clapp, *Transnational Corporations and Global Environmental Governance* (Edward Elgar 2003).
[64] Ibid.

developed by the MNCs instead of developing a binding regulatory regime.[65]

Another effort at regulating MNCs in the international territory is the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with respect to Human Rights for Business.[66] It is stated that the Norms enjoy higher status in international law compared to voluntary codes because they "embody moral and political commitments of governments and corporations and represent standards of law in development (or soft law)".[67] The Norms also set out a list of human rights obligations anticipated by companies and also various modes of monitoring and enforcement.[68] Also, the UN Norms are practical measures to ensure states are meeting the agreed regulatory standards, and it is a significant reference and advocacy tool for NGOs.[69] Codes of conduct are less imposing than the Norms. However, MNCs have to be accustomed to it, due to its non-binding nature. NGOs and states have to monitor and implement standards under national laws. It is apparent from the above-mentioned analysis that international regulation or holding of MNCs is tilted towards the benefit of the companies.

Another attempt at regulating the activities of MNCs in the international plane was through the United Nations Global Compact. The Global

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[65] Ibid.
[66] Ekhator (n 47) see also http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En, accessed 20 July 2020.
[67] Emeseh (n46) 242.
[68] Amnesty International (2004), 'The UN Human Rights Norms for Business: Towards Legal Accountability'< http://www.amnesty.org/en/library/asset/IOR42/002/2004/en/c17311f2-d629-11dd-ab95-a13b602c0642/ior420022004en.pdf >accessed 20 June 2020.
[69]Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria (n 47).

Compact has been defined by the UN Secretary-General Ban Ki-moon thus:

*"the Global Compact asks companies to embrace universal principles and to partner with the United Nations. It has grown to become a critical platform for the UN to engage effectively with enlightened global business."*[70]

The UN Global Compact is a combined or strategic determination for businesses that are keen to commit their operations to conform to the 10 principles, particularly in the areas of labour, environment, human rights and anti-corruption. [71] The UN Global Compact cautions companies to observe and support a range of core values. Over 10,000 participating companies are currently under the Global Compact, from more than 130 countries and is the largest corporate responsibility measure or initiative in the world.[72] Some academics still maintain, notwithstanding the large number of corporate participants in the Global Compact initiative, many companies remain indifferent to it.[73]

Another soft law international mechanism that is said to 'regulate' MNCs in the international domain is the Voluntary Principles on Security and Human Rights (VPSHR). This was a US/UK-led initiative for business and civil society organizations.[74] The VPSHR was established in 2000 to help companies improve human rights protection while maintaining the security and safety of their operations or activities. [75] The VPSHR

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[70] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria (n 47) See also, UN Global Compact website < http://www.unglobalcompact.org/ >accessed 20 July 2020.
[71] Ibid.
[72] Ibid.
[73] Mujih (n53).
[74] Adefolake Adeyeye, 'Corporate Responsibility in International Law: Which Way to Go?' (2007) 11 SYBIL 141–161.
[75] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria (n 47) see also, T. Lambooji, 'Corporate Social Responsibility: Legal and Semi-legal Frameworks Supporting CSR: Developments 2000–2010 and Case Studies' (PhD Thesis, Leiden University 2010).

embodies three core parts: "risk assessment, interactions between companies and public security, interactions between companies and private security".[76] Under the VPSHR, MNCs are expected to evaluate the impact or risk when conveying equipment, including dangerous equipment, to private and public security firms in order to lessen or ease any accidental act, including human rights abuses.[77] In May 2012, seven countries, 11 NGOs and five organizations were observers and 20 companies participated in the VPSHR mechanism.[78] An outstanding strength of the VPSHR is that it is a "tripartite multi-stakeholder initiative".[79] Oshionebo asserts that regular application of the VPSHR in the extractive industries may improve the security situation and as a result, best security practices might surface.[80] However, an inherent limitation of the VPSHR is that it is voluntary and non-binding on the MNCs. Thus, MNCs might decide not to enforce or implement the VPSHR in their operations. There are no sanctions attached to the non-refusal of MNCs to localize the VPSHR in their operations.

The Extractive Industries Transparency Initiative (EITI) is another mechanism. The EITI is a voluntary initiative made up of stakeholders such as governments, NGOs, MNCs, international organizations and businesses.[81] One of the major objectives of the EITI is to ensure that the revenue realized from receipts from a country's natural endowments contributes to poverty alleviation and sustainable development, thereby acting as a barrier to the misappropriation of such revenues that can

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[76] Ibid.223.
[77] Ibid.
[78] Business and Human Rights Resource Centre, 'Voluntary Principles on Security and Human Rights'< http://business-humanrights.org/en/conflict-peace/special-initiatives/voluntary-principles-on-security-and-human-rights >accessed 20 July 2020.
[79] Ibid.
[80] Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press, 2009).
[81] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria (n 47).

lead to corruption, poverty and conflict in the extractive industries.[82] The EITI sets a global standard for transparency in oil, gas and mining.[83] It aims to promote transparency and accountability in payments made by extractive corporations to governments and government agents.[84] Nigeria is an active participant in the Extractive Industries Transparency Initiative (EITI). Currently, under the EITI, there are 31 compliant countries, 48 implementing countries and 38 countries which have produced EITI reports, including Nigeria.[85] In Nigeria, the initiative is called NEITI (Nigeria Extractive Industries Transparency Initiative). A number of oil MNCs that have signed up to this include Chevron Group, BG Group, Shell, Statoil, Total, CNOOC (China) and ONGC (India), amongst others.[86]

The voluntary nature of the international instruments regulating MNCs have been heavily criticized by academics.[87] In analyzing codes of conduct, Dieux and Vincke[88] contended that corporate accountability is merely a public relations tool and should be replaced with laws of a binding nature.[89] Likewise, other stakeholders apart from the states have an essential role. They further advocated that NGO's pressure on MNCs could be used to keep MNCs in check. However, Picciotto, in a discourse on voluntary codes, argued that codes are as effective as laws.[90] He was of the view that:

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[82] Ibid.
[83] EITI website< http://eiti.org/node/22 > accessed 20 July 2020.
[84] Ibid.
[85] EITI website < http://eiti.org/countries >accessed 20 July 2020.
[86] EITI Nigeria website < http://eiti.org/Nigeria >accessed 20 July 2020.
[87] Xavier Dieux and Franscios Vincke, 'Corporate Social Responsibility, Illusion or Promise?' (2005) Revue de droit des affaires internationales – International Business Law Journal 13– 34.
[88] Ibid.
[89] Ibid.
[90] S. Picciotto, 'Corporate Social Responsibility for International Business', in *The Development Dimension of RDI: Policy and Rule-Making Perspective* (2003), Proceedings of the Expert Meeting Held in Geneva,

"*codes entail a degree of formalization of normative expectations and practices and, even if they do not directly take the form of law, they may have indirect legal effects*."[91]

He further stated that voluntary codes can be enforced in various ways such as through private law (contractual agreements), via enforcement by private parties based on a state regulatory law, and in international law codes which can be of a legal and binding nature (for example, WTO agreements on Technical Barriers to Trade).[92]

To redress the irregularities in the international regulation of MNCs, various strategies have been suggested. They include the use of Ruggie principles (this will be examined extensively in the next chapter), CSR principles, self-regulation by MNCs, participation by communities, and civil regulation, amongst others. Amao contended that while CSR practices by MNCs are becoming well established, this development cannot replace the need for effective host state regulation.[93] Bradford[94] argued on the ineffectiveness of self-regulation in MNCs and advocated "the exploitation of legislative opportunities, domestic as well as international, to develop soft law into hard law and create a binding legal obligation that compels corporate legislative targets".[95]

The lack of consistency occurs in soft law regulation of MNCs when different standards are applied by MNCs in different countries. For instance, after the Deepwater Horizon spill of April 2010 (also known as

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6–8 November 2002, 151–172, United Nations Conference on Trade and Development < http://unctad.org/en/Docs/iteiia20034_en.pdf > accessed 20 July 2020.

[91] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria (n 47).

[92] Ibid.

[93] Olufemi Amao, 'Corporate Social Responsibility, Multinationals and the Law in Nigeria: Controlling Multinationals in Home State' (2008), 52(1) *Journal of African Law*, 89–113.

[94] W. Bradford (2007), *Beyond Good and Evil: Toward a Solution of the Conflict between Corporate Profit and Human Rights*, Working Paper Series < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=991241 >accessed 20 June 2020.

[95] Ibid.

the Gulf of Mexico oil spill), action was taken immediately by BP to provide compensation to the victims, and the company actually carried out a plan to ameliorate the damage. However, the opposite is the case in the Niger Delta where oil MNCs do not imitate such standards in oil spill management or control. For example, Shell is yet to clean up the damage done to Ogoniland.

### 5.5 Alien Tort Statute (ATS)

The Alien Tort Statute (ATS) is a United States law, enacted in 1789,[96] which provides that:

*"the court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or by a treaty of the United States."*[97]

For a long time, however, ATS was only implemented in matters concerning government officials who abused people with their powers, until the middle of the 1990s when human rights activists started using it to institute cases against companies accused of violating human rights outside the United States.[98] For more than three decades, the ATS has been an important tool in helping victims and survivors of some terrible abuses – including torture, crimes against humanity and genocide – to sue those liable in the United States.[99] However, in 2013, the Supreme Court placed limitations on ATS lawsuits, ruling that they must "touch and concern" the United States.[100] The extent of this limitation is not

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[96] The Judiciary Act of 1789, ch.20, S.9, 1 stat. 73, 77 (24 September1789).
[97] 28 U.S.C. S1350 (2000).
[98] Olubayo Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Cambridge: Intersentia, 2014), 312.
[99] See< https://earthrights.org/how-we-work/litigation-and-legal-advocacy/legal-strategies/alien-tort-statute/ >accessed 21 July 2020.
[100] Ibid.

clear, however, and the ATS remains an important legal tool to protect human rights.

The Act only applies to companies that have a connection to the US because they are registered in the US or listed on the US Stock Exchange.[101]

### 5.5.1 Corporate Accountability under the ATS

Early human rights ATS cases were mostly brought against individuals, but in the 1990s a number of cases were filed against MNCs for their complicity in human rights abuses.[102] Some corporations became used to getting away with crimes as long as those crimes were committed outside the US, in countries with weak legal systems, such as Nigeria, that were unable or unwilling to deliver justice to victims of abuse for crimes committed by MNCs, and where the government may have been complicit also.

Doe v. Unocal[103] was the first ATS case filed against a corporation, and established that corporations and their executives could be held legally responsible under the ATS for violations of international human rights law. Since the Unocal case, courts have continuously maintained that ATS cases can proceed against corporations if they commit the most serious abuses or if they "aid and abet" abuses by members of the government. The positive use of the ATS as a tool for corporate accountability also made the statute a target. The George W. Bush administration specifically challenged the use of the ATS by human rights lawyers and victims of abuse, contending that the statute could

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[101] Ibid.
[102] Ibid.
[103] *Doe v. Unocal Corp.* [1997] 963 F Supp.880.

not be used in human rights cases and could not be used to address abuses that occurred outside the United States.[104]

Natalie Bridgeman is of the opinion that plaintiffs are most possibly going to be able to get redress in US courts, as successful litigation on abuses is not common, even though corporate environmental abuse in foreign jurisdictions is.[105] Borchien Lai notes that out of all the numerous human rights and environmental violations cases, none has come to an end, neither has there been any successful judgement held against any corporate defendants.[106]

Using extra-territorial jurisdiction in the US to hold MNCs accountable is difficult for plaintiffs because they have to prove personal and subject-matter jurisdiction, *forum non conveniens* and a cause of action within the scope of the law of nations.[107]

In a judgment delivered by Chief Justice Roberts in Kiobel v. Royal Dutch Petroleum Co.,[108] the Supreme Court held that the presumption against extra-territoriality applies to the ATCA, wherein it was unanimously held that "federal courts do not have jurisdiction to hear lawsuits against foreign corporations accused of aiding in human rights abuses abroad" under the ATCA 1789.[109] It held that they must "touch and concern" US territory which was satisfactory. While affirming the judgement of the

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[104] See< https://earthrights.org/how-we-work/litigation-and-legal-advocacy/legal-strategies/alien-tort-statute/ >accessed 16 July 2020.
[105] Natalie L. Bridgeman, 'Human Rights Litigation under the ATCA as a Proxy for Environmental Claims' (2003) 6 Yale Hum.Rts. & Dev. L.J., 1–43.
[106] Borchien Lai, 'The Alien Tort Claims Act: Temporary Stopgap Measure or Permanent Remedy' (2005) 26 Northwestern JILB, 139–166, at 140.
[107] Olubayo (n97) 313.
[108] Suit No. 06-4800-CV, 06-4876-cv [2010 ]WL 3611392 2d Cir. Sept. 17 [2010]. The Supreme Court judgement was delivered on 17 April 2013.
[109] Thisday, 'US Supreme Court Backs Shell in Nigeria Human Rights Case'< http://www.thisdaylive.com/articles/us-supreme-court-backs-shell-in-nigeria-human-rights-case/145177/ >accessed 26 June 2020.

Court of Appeal, the court further held that corporations "are often present in many countries" and the fact that they are not present in the US alone is not enough to trigger cause of action in ATCA against their criminal complicity.

Although the Kiobel decision was unsatisfactory, it is uncertain today the impact it has made, however. Federal courts have given different meanings to the "touch and concern" requirement, and the Supreme Court has not given any further clarification.[110] Some courts have dismissed ATS cases under the Kiobel decision, even where they involve a US defendant, US conduct and significant US national security interests. Other courts have reached different conclusions in cases involving foreign conduct.[111]

Corporations have also set another attack on the ATS, arguing that only individuals, not corporations, can be sued for violating international law.

Following the above judgement, one could infer that corporate litigation has no future in respect to holding US corporations accountable for human rights violations abroad.

### 5.5.2 Zero Draft

The Zero Draft is a first official draft, published in 2018, which has a legal binding instrument in order to regulate in international law the activities of multinational corporations and other businesses.[112] The draft was published by the UN Human Rights Council's Open-ended

[110] < https://earthrights.org/how-we-work/litigation-and-legal-advocacy/legal-strategies/alien-tort-statute/ >accessed 20 June 2020.
[111] Ibid.
[112] < https://www.business-humanrights.org/en/zero-draft-summary > accessed 17 June 2020.

Intergovernmental Working Group on Multinational Corporations and Other Business Enterprises with respect to Human Rights (OEIWG).[113]

The purpose of the Treaty, as provided in Article 2, states that it is to:

*"Strengthen the respect, promotion, protection and fulfilment of human rights, to ensure effective access to justice and remedy to victims of human rights violations in the context of transnational business activities and to advance international cooperation in this regard."* [114]

Jurisdiction is vested in the court of the host state of the MNCs, where the violation occurred or where the offender is domiciled.[115] Article 8 affirms the right of victims to fair and effective access to justice.[116]

A new revised draft was released in July 2019, which made notable improvements to the previous one.[117] For instance, the revised draft aligns with the provisions of the UN Guiding Principles and proposes a comprehensive article on business enterprises that is more in tune with prevailing international law and national practices than the previous draft.[118]

## 5.6 Conclusion

As shown in this chapter that holding multinational corporations accountable for human rights violations is an underlying issue, it contends that although voluntary codes have an important role in

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[113] Ibid.
[114] Zero Draft 2018, Article 2.
[115] Ibid.
[116] Ibid.
[117] < http://opiniojuris.org/2019/08/15/the-revised-draft-of-a-treaty-on-business-and-human-rights-a-big-leap-forward/ > accessed 17 June 2020.
[118] Ibid.

ensuring that MNCs are accountable, they may not be sufficient to prevent environmental- related human rights violations by MNCs. Voluntary codes, while a welcome signal of corporate commitment, are nonetheless voluntary, and as such unenforceable, and so can easily be violated by unscrupulous MNCs.

Also, the ATCA has not been successful in holding MNCs accountable. While still hoping for an international legal binding instrument for holding MNCs accountable, the foreign victims of MNCs violation such as the Niger Delta people can continue to use ATCA to hold MNCs accountable for violations. In the long term, MNCs may be best served by finding ways to make voluntary codes more meaningful and effective. The next chapter will analyze the Ruggie Guiding Principles.

# Chapter Six

# The Ruggie Principle on Multinational Corporation Accountability for Human Rights Violations

## 6.1 Introduction

Internationally, adapting a human rights regime to provide a better effective protection against corporate violations of human rights is still novel.

As mentioned in Chapter 1, multinational oil corporations are dominant forces which have the ability to create economic growth, alleviate poverty and expand the rule of law, thereby making human rights protection attainable. However, if corporations are held accountable through rules and institutions, violations could be ameliorated or prevented.

The conflict that currently exists between business and human rights is as a result of the governance/accountability gap created by globalization, stemming from the power of state and non-state actors, and the inability of developing states to manage the corporations. This accountability gap creates an avenue in the environment for multinational oil corporations to commit harmful acts without adequate sanctioning or reparation for their actions. Attempting to narrow and eventually bridge the gaps between human rights and accountability is a fundamental challenge.

Although the issue of accountability for corporate human rights is still ongoing, there exist avenues where protection of human rights through corporate accountability can be enforced. Over the last decade significant development has occurred, and human rights being

respected by non-state actors has been a part of the UN document.[1] An example of the development is the UN Guiding Principles on business and human rights on the implementation of the "protect, respect, remedy framework", also known as the Ruggie Principle,[2] which was developed by John Ruggie, the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, and was endorsed by the human rights council.[3]

## 6.2 Introduction to the UN Guiding Principles

The Guiding Principles is a soft law, and therefore not binding on states. In its resolution, the UNHCR provides that the UN Guiding Principles can be further improved.[4] The status of the UN Guiding Principles in international law can therefore be seen as mere strong recommendations. It is a better and vivid expression of the human rights aspects of corporate accountability.

Many issues are still to be addressed and settled, considering the novel nature of the UN Guiding Principles. If the UN Guiding Principles turn out to be more explicit than any previous international guidelines on corporate accountability and human rights, the interpretations of the UN are immense; however, its interpretations and practices are still to be reconciled, and this process is to be led by a "working group on human rights and transnational corporations and other business enterprises" formed by the UNHCR. Academically, the continuous procedure of

[1] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 33–35.
[2] A/HRC/17/31.
[3] A/HRC/17/4.
[4] UNHCR A/63/286.

reconciling interpretations and practices is a possible vision for researchers within human rights, ethical philosophy, international law and organizational culture. Does the principle change the ethical, normative and legal expectations we have of corporations and states? To what extent will the principle actually change the behaviour of corporations and states in relation to human rights? What practical challenges does its implementation have currently and how are they to be solved? What effects will the framework have on various sizes of corporations? However, for individuals who suffered and continue to suffer the consequences of corporate violations with regards to human rights, a more pertinent question is: to what extent will the UN Guiding Principles lead to justice and improved human rights for those who experience human rights violations due to the conduct of corporations and states? For the UN Guiding Principles to have a significant effect on human rights as regards corporations, then aiming at attaining an increased level of justice and human rights implementation must be considered as the primary goal.[5] Similarly, any examination of the extent to which existing, or suggested, structures can help in the provision of justice and human rights implementation has to be of fundamental importance to all research related to this area, including the research presented in this thesis.

## 6.3 History of the UNGP

Many businesses were faced with a human rights abuses and business agenda for the first time after the endorsement of the UNGP. The UN's

[5] < http://www.diva-portal.org/smash/get/diva2:557656/fulltext01 >accessed 12 July 2020.

agenda for several decades attempted to define human rights duties for businesses, especially multinational corporations.

An attempt to convey the UN Draft Code of Conduct on Transnational Corporations[6] was abandoned in the late 1980s, and followed by opposing discussions over the Draft UN Norms on Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises (UN Economic and Social Council, 2003).[7] The Sub-Commission on the Promotion and Protection of Human Rights adopted these Rights in 2003, but they were subsequently rejected by the UN Commission on Human Rights in 2004. Hence, neither of those efforts have yielded success, although undoubtedly they have contributed to advancing discussion and identifying the most contentious issues.[8] International organizations such as the Organisation for Economic Co-operation and Development (OECD), in the 1976 OECD Guidelines for Multinational Corporations, proved to be more successful in addressing the challenges raised by companies' activities and defining their responsibilities,[9] which binds member states and are made up of propositions by governments to corporations on significant areas of business ethics, with ideas to carry out corporate lawful acts, conform with standards approved internationally and adhere to what is expected by society. Another example is the 1977 International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. Neither framework included

[6] The Draft Code of Conduct on Transnational Corporations (last version of the proposed draft code: UN Doc E/1990/94, 12 June 1990) required corporations to respect host countries' development goals, observe their domestic law, respect fundamental human rights and ensure consumer and environment protection.
[7] Ibid.
[8] Karin Buhmann, 'Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the "Protect, Respect, Remedy UN Framework" (2012) 1(1) ILR 88–101 at 97.
[9]<http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf >accessed 21 July 2020.

a better detailed reference to human rights in their text, until the paradigm shift 2000 revision.

To overcome the debate on rules for companies and create grounds for a more practical discourse than that of 2004 when the existing UN Commission on Human Rights rejected the Draft UN Norms, the mandate of the Special Representative of the Secretary General on Human Rights and Business (SRSG) was created in 2005. Unlike its predecessors, the SRSG decided against developing a new legal standard and focused on ways to improve respect for human rights in business. His approach was based on a mixture of brilliant models, which included existing, binding legal obligations for states, stemming from ratified international human rights treaties, which accepted the ethical/moral responsibility of business enterprises, coming up with what was soon to be described as principled pragmatism. This novel approach, which was controversial at the onset, proved successful. The Human Rights Council endorsed the UN Protect, Respect and Remedy Framework presented by the SRSG in 2008, and also extended his mandate so that he was tasked with its operationalization.[10] The UN Guiding Principles on Business and Human Rights developed subsequently by the SRSG were collectively endorsed by the HRC on 16 June 2011.

The UNGP explained the duties and responsibilities of both states and businesses on confronting human rights risks related to business activities, after years of research with several actors. Summarized into three principles, made up of 31 Foundational and Operational Principles, they affirmed:

[10] Ibid.

Principle I, State's Duty to Protect: "States have existing obligations to respect, protect and fulfil human rights against adverse impacts by non-state actors, including business."

Principle II, Business Responsibility to Respect: "The responsibility of business enterprises to respect human rights.''

Principle III, Access to Remedy: "The need for state and non-state based, judicial and non-judicial remedies to ensure that rights and obligations are matched to appropriate and effective remedies when breached."

## 6.4 The Special Representative of the Secretary General on Human Rights and Business (SRSG)

In 2008, the SRSG came forward with the framework known as the Protect, Respect and Remedy Framework[11] and in 2011 developed the framework into a single comprehensive combination known as the UNGP. [12] The Protect, Respect and Remedy Framework was conceptualized in 2008 and finally adopted in the UNGP, as the previous framework was geared towards a voluntary rather than regulatory framework for corporations.[13] The 2006 Interim Report was nothing other than a mere treatise assessing the motive behind the mandate and appointment of Ruggie as the SRSG.[14] Ruggie's mandate was significant, considering many factors such as the rising status of MNCs[15]

[11] Chapter 1 section 1.2.
[12] Ibid.
[13] Larry Catá Backer, Nabih Haddad, Tomonori Teraoka and Keren Wang, 'Democratizing International Business and Human Rights by Catalyzing Strategic Litigation: The Guidelines for Multinational Enterprises and the UN Guiding Principles of Business and Human Rights from the Bottom Up' (2014) Working Paper, 12(1) *Coalition for Peace and Ethics* 1–34 at 6–7.
[14] John Ruggie, 'Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2006), UN Doc. E/CN.4/2006/97< http://hrlibrary.umn.edu/business/RuggieReport2006.html >accessed 19 July 2020.
[15] Ibid.

and the inability of the government or international frameworks to hold MNCs accountable.[16] The role of globalization has also contributed to the fast growth of the status of MNCs[17] and its effects on the regulatory role of the states. This has contributed to unbalanced distribution of good and bad impacts of the globalized economy on both developed and developing countries.[18] According to the report, two instances where negative impacts can reflect are human rights violations by companies,[19] and the differences between the scope of the markets as against corporations and the inability of the community to maintain its standards.[20]

In a report, Ruggie examined the existing voluntary initiatives critically,[21] including the UN Norms,[22] and came to the conclusion that a state-based international order was outdated due to globalization, where factors which were novel are not within the scope of the territorial state; therefore, they only take up significant public roles.[23] While recognizing that the rule of law should be linked to economic development,[24] he expressed the hope that extra-territorial jurisdiction of MNCs by home states should be crucially taken into account in the new framework,[25] which was described as an ethical method of pragmatism so that the protection and promotion of human rights in the corporate sector could be achieved satisfactorily.[26] He was also of the

[16] Ibid. para. 16.
[17] Ibid. see paras 11 and 12.
[18] Ibid. para. 13.
[19] Ibid. para. 15.
[20] Ibid. para. 18.
[21] Ibid. paras 31–53, 73–75, 77 and 78.
[22] Ibid. paras 56–61 and 63–69.
[23] Ibid. paras 9 and10.
[24] Ibid. para 21.
[25] Ibid. para 71.
[26] Ibid. para 81.

view that respect for human rights should be the ultimate objective of any government, either at the state, regional or international level.[27]

The 2007 Report[28] looked at ways in which the state can effectively regulate corporations, the standards of assessing corporate human rights responsibility and accountability for corporations and of fishing out complicity in human rights violations.[29] It noted instances of best practice in human rights accountability by states and companies.[30] The report acknowledged five standards of corporate human rights and responsibility, which were developed and expanded to become the Protect, Respect and Remedy Framework of the UNGP.[31] Legal, social and moral standards were the forms of governance.[32] Obligated to protecting human rights in the business sector, the SRSG reasoned that governments and social actors had to compulsorily put together abilities in order to cover the present loophole, as corporate abuse was not redressed with adequate sanctioning or reparation as a result of society not being able to regulate the market, even if they could achieve it by using social and market institutional frameworks.[33]

The development of the tripartite Protect, Respect and Remedy Framework of the UNGP into a report was done in 2008.[34] Consideration and rejection by the SRSG, and some other approaches to CHRR and accountability, occurred before he eventually adopted and incorporated

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[27] Ibid. para 19.
[28] General Assembly of the UN, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', Report of the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', Human Rights Council, 9 February 2007.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', Report of the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Council (7 April 2008).

the tripartite framework.[35] Amongst some of the approaches he contemplated and then rejected were the rules-based approaches characteristic of American efforts, as well as mechanisms which were dependent on the production and enforcement of human rights affecting businesses.[36] The framework, especially the principle on state's duty to protect, follows the orthodox law, which depicts the states as duty bearers of human rights under international law.[37] However, the report is not successful for corporations and some governments who are critics of the UN Norms, as it adopts a horizontal corporate accountability policy to protect human rights globally.[38]

The 2009 Report[39] is similar to the 2008 Report as they addressed the legal fundamentals of the duties, policy justifications and scope of the framework.[40] The 2009 Report created the mechanisms and operational approaches developed in 2008 in protecting human rights duties, obligations and responsibilities of states and corporations.[41] Therefore, corporations are obligated to follow due-diligence mechanisms, while states are persuaded to use a regulatory and judicial framework in performing their responsibilities.[42] The scope of the 2009 Report went further than the 2008 Report and other previous ones on CHRR and

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[35] Larry Catá Backer, 'The Guiding Principles of Business and Human Rights at a Crossroads: The State, the Enterprise, and the Spectre of a Treaty to Bind Them All' (2014), *Coalition for Peace and Ethics Working Paper* 7(1).
[36] Ibid.
[37] Buhmann (n8) 97.
[38] Ibid. 97–98.
[39] John Ruggie, 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Council (22 April 2009) < http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf >accessed 16 July 2020.
[40] John Ruggie, 'Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework', Report of the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Council (9 April 2010) para. 16.
[41] Ibid.
[42] Ibid. para. 2.

accountability by creating opportunities for evolving norms for corporate human rights responsibilities.[43] The report is of the view that opportunities should be reachable as there may be some areas where corporations have to take up added responsibilities.[44] The report was of the view that thinking was a necessity and a factor for all corporations to respect and carry out their responsibilities.[45] It has been contended, however, that the report makes room for the option that corporations also have certain affirmative obligations to protect to attain human rights.[46]

In the 2010 report the SRSG asserted that the missing link in the governance gap in market regulation which encouraged corporate human rights violations without effective sanctioning was supposed to be covered by the framework.[47] The 2010 Report devised further means that can perform the primary duties and obligations of states to protect their citizens from corporate human rights violations,[48] as demanded by the Human Rights Council.[49] Substantial operational guidance on the responsibility of companies to respect human rights was provided and explained,[50] and several ways that victims of corporate human rights violations could have unimpeded access to effective remedies were suggested.[51] With regard to states, five important measures were identified:[52] they must not do anything that would crumble their capacity and ability to protect corporate human rights violations in their

[43] Ibid. para. 46.
[44] Ibid.
[45] Ibid.
[46] Ruggie Report (n40) paras 59, 61–65.
[47] Ibid. para. 2.
[48] Ibid. paras 20–53.
[49] Ibid. paras 88, 54 and 16.
[50] Ibid. paras 54–87.
[51] Ibid. paras 88–113.
[52] Ibid. para. 19.

jurisdiction;[53] they can promote human rights while doing business with corporations, as economic actors also;[54] they can create a culture of human rights responsibilities in their jurisdictions, as well as their roles as economic actors;[55] early conciliation with embassies of home states of companies can help the issue of corporate complicity in human rights violations, in states where conflict exists;[56] and states should provide means of redress and a policy for sanctioning, after caution has been taken to ensure that corporations do not partake in human rights violations overseas, but violations still occur.[57]

A given solution rests on several remedial judicial and non-judicial injustice mechanisms for corporate human rights violations by states and corporations.[58] To strengthen common standards for states and corporations within jurisdictions, commendatory regional and international mechanisms have to be put in place. [59]

Lastly, every state is obligated to embrace adjudicative extra-territorial jurisdiction and should likewise put into consideration the interest of the claimant, defendant and states in circumstances where the possibility of the host state not being able to provide redress to the victims is great.[60] The 2010 Report was criticized by some scholars who desired a binding international legal framework for corporate accountability. However, it was commended by some liberal scholars[61] who were of the opinion that,

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[53] Ibid. paras 20–25.
[54] Ibid. paras 26–32.
[55] Ibid. paras 33–43.
[56] Ibid. paras 44–45.
[57] Ibid. paras 47–49.
[58] Ibid. paras 114–116.
[59] Ibid. para. 115.
[60] Ibid. para. 107.
[61] Backer (n35) 68 and 80.

until the desired result is achieved, every little step towards that is welcomed.[62]

As noted earlier, it is imperative to remember that the 2010 Report is not final. However, as the forerunner to the final report, the SRSG reflected on what needed to be added to the report to make it complete. According to the SRSG, it was imperative that the 2011 Report initiate a set of Guiding Principles, co-operating elements and procedures for the operation of the framework.[63] In addition, in his view, the final report should suggest the establishment of a new body that will be in charge of advisory and competence-building tasks for the framework as the successor to the mandate of the SRSG, in order not to leave the mandate open without a monitoring establishment.[64] Following this forecast, the SRSG released his final report in March 2011.

### 6.5 Critical Analysis of the UNGP

As previously stated, it is the responsibility of states to protect against human rights violations by third parties, as provided for in Principle I of the tripartite framework of the UNGP. Adopting the UNGP was dependent on the existing responsibility of states to respect, protect and achieve human rights and fundamental self-determinations within their territorial jurisdictions.[65]

Therefore, as indicated in the UNGP, states' duties to be carried out should meet their responsibilities on corporate human rights

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[62] Ibid.
[63] Ruggie report (n8) para. 124.
[64] Ibid.paras 125–126.
[65] UNGP, paras 1a and 3(1)< https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf >accessed 17 June 2020.

violations.[66] The UNDP, though, warns that there should be a restraint on audacious interpretation of these duties. The record of states' duties by the UNGP should not be seen as creating new obligations for states, but just reiterating or clarifying the existing duties of states under the principles of international law.[67] The UNGP delimits the duty of states to protect into two major differences: that is, the ability to take efficient precautionary and corrective actions to deal with the problems associated with corporate human rights violations.[68] It states that states are obligated to prevent corporate human rights violations from repeating, and if violation reoccurs despite such preventive measures, justice must be given to the victims, and the offenders should be sanctioned.[69] It suggests that states can discharge these duties by making provision for an effective regulatory, judicial and thorough policy framework.[70] If these provisions are enforced, they must be subject to continuous review and reform so as to guarantee their viability, that they are adequate and strong enough to achieve their purpose,[71] which is to effectively combat corporate human rights violations when faced with them. As noted by the UNGP, it is a standard of conduct for the state to protect; they are not indirectly liable for corporate human rights violations.[72] Though most states have ratified international and regional treaties, the outcome of such ratification is that they would follow the international human rights obligations of the treaties.[73] Subsequently, if

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[66] Backer (n13) 108–123.See also, Osuntogun J, 'Global Commerce & Human Rights: Towards an African Legal Framework for Corporate Human Rights Responsibility and Accountability' (DPhil thesis, University of Witwatersrand 2015).
[67] UNGP (64) paras 2 and 3(1).
[68] Ibid. para. 3(1).
[69] Ibid.
[70] Ibid.
[71] Ibid; see Operational Principle, para. 4(3).
[72] Ibid. Commentary to Principle 1 of the Framework.
[73] < http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf >accessed 12 July 2020.

they do not adhere to adequate, protective or remedial measures in protecting their people from human rights violations by third parties, they may be held liable for committing a breach of such human rights obligations, or even be held liable for complicity in human rights violations committed by third parties.[74]

With regard to the home states of the MNCs, the commentary to Principle I briefly states the current position of international law on the issue, which is vague. It is of the view that states are not under pressure to regulate the conduct of their companies doing business abroad, and at the same time not prevented. However, it attempts to convince them to adopt a regulatory extra-territorial framework for corporate accountability[75] by stating that there are strong policy justifications,[76] probably because most treaties that they entered into provided that they regulate the activities of their corporations extra-territorially.[77]

However, unlike some scholars, it must be noted that the framework does not superimpose extra-territorial regulations for corporations.[78] It states that home states have a duty to make sure that from the inception of MNCs, they do not violate human rights obligations.[79] Likewise, adjoining states or multilateral or regional institutions have to co-operate, to play a crucial role in ensuring accountability by providing relevant important additional support to that effect.[80] This forms the basis for this research, and seeks to answer the question: What should be the role of the AU in ensuring accountability?

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[74] UNGP, Commentary to Pillar 1 of the Framework.
[75] Backer (n13) 92.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] UNGP, Commentary to para. 10.
[80] Ibid.para 12.

Principle II addresses the responsibility to respect. The main distinction between Principle I and Principle II is the fact that the state has a duty to protect but the corporation only has a responsibility to respect,[81] while both (protect and respect) are the same and equally exclusive as well. Therefore, the corporation should not neglect carrying out its responsibility to respect, just because the state failed to carry out its duty to protect.[82] The responsibility to respect human rights is much more than a state's territorial boundary; it is a worldwide standard which all corporations ought to comply with globally in the running of their businesses, and as such, why corporations should undertake their own responsibility independent of the state's approach towards it.[83] They may, however, have a negative effect on every part of the international dimension that acknowledges human rights[84] as they go about their business,[85] unless pre-emptive measures are taken by them to avoid the occurrence of unfavourable human rights impacts that could affect their business operations. [86] Apart from that, the UNGP also recommends a wide scope;[87] in as much as corporations alone are not the only perpetrators of such unfavourable impacts which occur, they are still obligated to guarantee that negligence on their part while carrying out their activities was not the cause of the violations. However,

[81] Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles', in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) 78–104, 93, noting that the UNGP deliberately used responsibility to respect 'to denote non-legal duties'.
[82] UNGP, para. 13(11).
[83] Ibid.
[84] Ibid.
[85] Ibid.Commentary to paras 13–14.
[86] Ibid.para 15
[87] Backer (n13) 126.

if for any reason they do encounter negative impacts, they should be responsible for tackling them instantly.[88]

So as to efficiently adhere to their responsibility to respect, three major fundamental principles affecting corporate operations are essential for performance by the corporations under the UNGP. The administrative policies of the UNGP consist of three principles and procedures regarding human rights agreements to be adopted by different corporations, depending on their classification.[89] Firstly, they must have a human rights mission statement, which must be provided for in their administrative concept and without compromising their administrative standard and supply-chain related decision-making processes.[90] The mission statement on its own cannot improve human rights in the corporate sector without an efficient regulatory regime in the state that sanctions corporate human rights violations. As Larry Backer argues, principles are not instructions in the proper way in which the crafting of policy commitments should be adopted.[91] Principles which require "interpretation of the UNGP and the existence of institutional structures" must be applied.[92] Likewise, Ruggie notes in his 2008 Report that companies need to adopt a human rights policy, but that largely looking at the way corporate responsibility to respect human rights is portrayed, it has not efficiently guaranteed human rights compliance in the corporate sector, which cannot be done without the adoption of a strong functional framework required to give those commitments meaning.[93]

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[88] UNGP. para. 15.
[89] Ibid. para. 15(15).
[90] Ibid. para. 16 (15a and 16).
[91] Backer (n13)494.
[92] Ibid.
[93] Ruggie Report (2008), para. 60.

Subsequently, the second principle is a due-diligence requirement which seeks to decrease the risk of corporations being involved in human rights violations. So corporations should assess and confront the actual and possible human rights impacts of their business by instilling human rights due diligence.[94] This can be done by providing remedy if risks of adverse impacts do exist and also by avoidance or reducing of possible risks.[95] However, according to scholars, the prerequisite is just a recommendation and not thorough enough to act as guidelines for corporations.[96] Due-diligence mechanisms as prescribed by the UNGP are able to assist companies in complying with their human rights responsibilities as well as in recognizing avenues through which tangible contributions to society beyond its basic economic impacts could be made, irrespective of its inadequacies.[97] However, since one focus of this study is to find out if implementing the UNGP through a regulatory framework is the solution, it would be imperative to determine if due diligence is not seen as a mere voluntary tool in the hands of corporations, but could be used as a regulatory framework for corporate accountability. According to scholars, the role of the state is to ensure that the existing regulatory tools acquire business due diligence for human rights in their territories, and to boost compliance by providing proper incentives.[98] According to the UNGP, states should also establish such responsibilities.[99] Thus, a due-diligence mechanism as seen by the UNGP is not just a voluntary tool but a regulatory framework for

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[94] Ibid.para. 18(17).
[95] Ibid.para. 18; see also Principles 18–22.
[96] Backer (n13) 495.
[97] Mark B. Taylor, Luc Zandvliet and Mitra Forouhar, 'Due Diligence for Human Rights: A Risk-Based Approach' (2009), Corporate Social Responsibility Initiative Working Paper No. 53, 1–23 at 18.
[98] Olivier De Schutter, Anita Ramasastry, Mark B. Taylor and Robert C. Thompson, 'Human Rights Due Diligence: The Role of States' (2012) < http://humanrightsinbusiness.eu/wp-content/uploads/2015/05/De-Schutter-et-al.-Human-Rights-Due-Diligence-The-Role-of-States.pdf >accessed 18 June 2020.
[99] UNGP, Pillar 1 of the Framework, Principles 2 and 3a.

corporate accountability. Failure to obey due-diligence mechanisms requires full sanction of the law.[100] This takes us to the third administrative principle which is entirely legal. It states that corporations are obligated to respect human rights which are recognized globally, obey laws in existence and handle either direct or indirect violations of human rights during company activities as a violation of legal fulfilment.[101] This principle is the foundation on which corporate responsibility to respect human rights rests. Compliance cannot be based on existing state domestic laws, as most state laws are inefficient. Focus needs to be extended to appropriate regional and international human rights treaties, as Backer argued that corporate responsibility to respect human rights should go beyond just a duty to conform with domestic law.[102] Corporations have a responsibility to respect certain multinational norms that are created through international law and norms, even though they are still obligated to conform with the domestic laws in jurisdictions where their exploration takes place.[103]

According to Ruggie, granting corporations the right or licence to carry out their business should be because these corporations are aware that the scope of their responsibility to respect human rights norms should exceed domestic laws.[104]

Principle III is access to remedy where, according to the UNGP, the state has the key responsibility of providing reparative acts within judicial and non-judicial redress mechanisms for complaints.[105] Principle 25 plainly

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[100] Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation' (2012), 22 *BEQ* 145– 177.
[101] Ibid.; see Principle 23 and its Commentary.
[102] Backer (n13)493.
[103] Ibid.
[104] John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) 3(2) MITI 189–212 at 199.
[105] Backer (n13) 140, noting that: 'The effect on the ability of corporations, along with other non-state

states that it is the sole responsibility of the state to see that victims of corporate human rights violations in their jurisdictions are not denied access to proper and efficient remedy through judicial, administrative, legislative or other ways applicable.[106]

At the beginning of a complaint brought between victims and a corporation, mechanisms which are non-judicial, such as arbitration and mediation, should be the first resort, which can be done through state parastatals or other business stakeholders; in the event that mediation and arbitration prove ineffective, they can resort to litigation.[107] At the beginning stage of a redress, a corporation can only complement the state and help in determining an effective functioning complaint mechanism for individuals and communities who may be negatively affected.[108]

Perhaps one of the main reasons for criticism of the UNDP is because it sees corporations as entities who should only share corresponding roles with states, rather than sharing responsibilities.

The major obstacle in providing a solution to the issue of an accountability framework is deciding what exact role corporations are expected to play, compared to that of the state, in protecting human rights.[109]

Since the Ruggie Principle emphasizes the fact that the state cannot assign or share liability for human rights violations because it maintains that the state has the primary responsibility, then the UNGP is not

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actors, to develop social norm-based remediation structures is thereby marginalized and diminished.'
[106] UNGP., para. 28 and Principles 26–31.
[107] Ibid., Principles 27 and 28.
[108] Ibid., Principles 29, 30 and 31.
[109] The UN norms created joint obligations for states and corporations to respect human rights and were rejected on that ground for creating a non-existing rule of international law.

sufficient to solve the challenges that exist.[110] Thus, Pillar 1,[111] Pillar 2[112] and Pillar 3[113] have been criticised for the same reason. Critics fear that if the role of the corporation to respect human rights is based solely on a voluntary background, corporations will go ahead violating human rights in states without strict regulatory frameworks to limit them.[114] Though the fears of NGOs and human rights activists are justified, there is a probability that legal obligations can surface from the state's duty to respect.[115] Also, if states do not carry out their obligation to protect, regional and international human rights bodies can provide reparative support so that victims of corporate human rights violations have access to justice, as directed by the UNGP.[116] The reparative support to be given to assist weaker states, and how this support should be given, as well as how it could address the issue of corporate human rights accountability, also drives this research.

## 6.6 Nigeria and the UNGP

The case of Nigeria exemplifies how the culture encourages states and MNCs in extractive resource control from being held accountable for

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[110] Pini Pavel Miretski and Sascha-Dominik Bachmann, 'The UN "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights": A Requiem' (2012) 17 *DLR* 1–41 at 37.
[111] Jonathan Bonnitcha, 'Is the Concept of "Due Diligence" in the Guiding Principles Coherent?', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208588, accessed 12 July 2020.
[112] Wesley Cragg, 'Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework' (2012) 22 *BEQ* 9–36 at 14.
[113] Jonathan Kaufman, 'Ruggie's Guiding Principles Fail to Address Major Questions of Obligations and Accountability', *Earth Rights International*, 5 April 2011, available at https://earthrights.org/blog/ruggies-guiding-principles-address-some-but-not-all-eri-concerns/, accessed 23 June 2020.
[114] Michael K. Addo, 'Human Rights and Transnational Corporations – An Introduction', in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer, 1999), 11.
[115] Astrid Sanders, 'The Impact of the "Ruggie Framework" and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation', London School of Economics Law, Society and Economy Working Papers, 18/2014, 9.
[116] UNGP., Principle 28.

their actions in sub-Saharan Africa, as most African states are coping with bad governance, unlike other developed states. The divided debate on whether a voluntary or legal framework is required shares the same motive, which is to strengthen accountability for corporate abuses,[117] and considerably different methods should be adopted in order to be successful.

The foregoing is based on two salient observations: firstly, African states are unwilling to enforce their domestic laws or court judgements when it comes to business and human rights disputes.[118] Instead of the African continent seeking responsibility internationally and continuing to accept being treated like helpless people seeking protection from across the ocean,[119]African leaders should focus attention on the domestic implementation of policies and the strengthening of regional institutions. Gas is still being flared haphazardly, despite rules and laws prohibiting it.[120] Pollution of the oceans and seas happens daily, and so much more. One would have thought that the Ogoni incidents and other degradations associated with multinational corporations would have been a history put behind us, but unfortunately violations are still recurring in modern times.

Secondly, even if MNCs, through their activities, partook in human rights violations, they were ignorant of the consequences of their actions and therefore not in a position to curb the potential risk involved.

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[117] Available at< https://www.ajol.info/index.php/jsdlp/article/view/140517/13025 >accessed 17 July 2020.
[118] *Jonah Gbemre v. SPDC and Others*, Unreported Suit No. FHC/B/CS/53/05, 14 November 2005. The court indeed noted that the Attorney-General of Nigeria regrettably did not put up any appearance, and/or defend the proceedings.
[119] *Doe v. Nestle USA Inc*. [2013] 738F.3d1048; *Akpan v. SPDC*, [2013] C/09/337050/HAZA 09-1580 delivered by the District Court of The Hague.
[120] Section 3 of the Associated Gas Reinjection Act, Cap A25, Laws of the Federation of Nigeria, 2004.

MNCs are unable to cope with the fast-growing business and human rights system, hence the many litigations brought against them.

Indigenous people claim that companies are not doing enough in terms of being socially responsible, like ensuring they provide clean water, clean up damaged lands after exploration, as well as provide adequate compensation when violations do occur, but rather corporations are in a hurry to claim that the local communities sabotage their efforts by protest or violence. If the companies respected the rights of the local communities and gave them what they deserved, communities would be willing to co-operate with the multinational corporations. So therefore, why do corporations choose to show little or no concern or respect for human rights? In instances where weak states are unable to carry out their duties by protecting human rights, should the corporations see it as an avenue to continue with their atrocities because they claim it is not their duty to protect human rights?

## 6.7 Can the Guiding Principles Be Implemented in Nigeria?

Corruption and lack of laws, which can hinder the development and dynamics of globalization, are present, so implementing the UNGP will be a difficult task.[121] Through the statutory body, Nigeria has a production sharing formula (PSF) between MNCs and the federal government.[122] The local people who directly benefit from the agreements are not consulted, because contracts are agreed and signed without the knowledge of members of the community, and also to

[121] Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell, 2006), 105; E.M. Macek, 'Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights' (2002) 11 MJG*T* 101, 104.
[122] The Nigerian National Petroleum Corporation is the statutory body of the state government that regulates activities in the oil and gas industry.

ensure that the corruption and bribery that ensued would not be known.[123] As it is, the solution to human rights issues in Nigeria would be a binding framework, as the principles of the UNGP could only be implemented if there was some transparency and accountability. Sadly, past experiences such as the Ogoni violation have not taught Nigerians to take environmental degradation seriously.

Extractive rights should be controlled by indigenous people, and MNCs who want to get a licence to carry out extractive activities should adhere to the existing terms set by the host state. The Guiding Principles do not provide new duties for states other than the ones currently in existence, which were established under international law. The UNGP, however, only creates an avenue for allowing corporations accountable for human rights violations to be tackled strongly.

### 6.7.1 State Duty to Protect Human Rights

UNGP I states that: states must protect against human rights abuse within their territory, including business enterprises, which requires making conscious efforts to prevent, investigate, punish and redress abuse through efficient policies, legislation, regulations and adjudication.[124] States are obligated to prevent the occurrence of corporate human rights violations and also provide access to remedies where such violation occurs.[125] This pillar also directs states to clearly set out ways to ensure that companies domiciled in their territory respect human rights.[126]

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[123] NNPC, 'Joint Venture Activities', available at < http://nnpcgroup.com/nnpcbusiness/upstreamventures/jointventureactivities.aspx >accessed 21 June 2020.
[124] Commentary to UNGP 1.
[125] Ibid.
[126] Commentary to UNGP 2.

In Nigeria, at the point of incorporation of a company, MNCs should be made aware of the UNGP by including them in each set of incorporation forms. Furthermore, the UNGP indicate that states are not as such responsible for human rights abuse by private actors.[127]

Indeed, states have various obligations with respect to human rights. Firstly, they must respect human rights;[128] secondly, they must protect human rights;[129] and thirdly, they must fulfil human rights.[130] Therefore, where states fail, as is mostly the case in weak states, to take practical and effective action towards fulfilling their human rights duties, or to prevent, investigate, punish or redress private actors' abuse,[131] they would be held accountable for breach of their human rights obligations under international law[132].

Morally states have the legal, ethical and moral right to control and regulate the extra-territorial activities of corporations domiciled in their jurisdiction or territory, irrespective of the reason.[133] The Alien Tort Statute in the United States was created for this purpose,[134] to check the activities of its corporations in diaspora.[135] The US Foreign Corrupt Practices Act instructs accounting transparency which is essential under the Securities and Exchange Act of 1934, as well as prosecutes the bribery and corruption of foreign officials.[136] Prohibiting US corporations

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[127] Commentary to UNGP 1.
[128] HR/PUB/12/02, 'The Corporate Responsibility to Respect Human Rights: An Interpretative Guide' (2012) para. 2 < http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf >accessed 23 July 2020.
[129] Ibid.
[130] Ibid.
[131] Commentary to UNGP 1.
[132] Ibid.
[133] Commentary to UNGP 2.
[134] *Kiobel v. Royal Dutch Petroleum Company* [2013] 133 S. Ct. 1659.
[135] The commentary advises states to regulate extra-territorial activities of its companies as this will ensure predictability for business enterprises by providing coherent and consistent messages, and preserving the state's own reputation.
[136] T. Markus Funk, 'Getting What They Pay For: The Far-reaching Impact of the Dodd-Frank Acts

and its officials, citizens and residents from manipulating anyone with personal payments or rewards was the purpose for which the Act was created.[137] The image of the state is what acts like this are there to protect.

There are several international human rights instruments that ought to be policy pointers for MNCs operating in a country to respect human rights and to protect their reputation, which Nigeria is signatory to, but unfortunately, because of weak governance, these instruments are not been enforced. Additionally, the importance of states imposing laws that have the effect of compelling corporations to respect human rights has been stressed in UNGP III, to ensure that laws and policies governing the operations of corporations, such as company law, foster respect for human rights.[138] Therefore, the enforcement of existing laws is key to closing the governance gap created by globalization.

### 6.7.2 The Corporate Responsibility to Respect Human Rights

By having a responsibility, it means that corporations are being demanded to ensure that they adhere to good moral manners while carrying out their activities. Corporations taking their responsibility to respect human rights seriously is a conduct that ought to be a global standard. [139] For corporations to carry out their obligations, it is necessary that they adhere to three fundamental principles.

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"Whistleblower Bounty" Incentives on FCPA Enforcement' (2010) 5(19) White Collar Crime Report 1–3.
[137] Fred Luthans and Jonathan Doh, *International Management: Culture, Strategy, and Behaviour* ( 9th edn (New York: McGraw-Hill, 2014).
[138] Commentary to UNGP 3.
[139] Commentary to UNGP 13.

Firstly, corporations should have and obey operation statements that seek to foster human rights compliance.[140] A lot of MNCs have statements regarding compliance with human rights standards.[141] There must be an operational regulatory rule that ensures that there are sanctions for violation of human rights standards. These statements are mere ambitions, so in order to bring them to reality, policies with institutional and functional structure must be put in place to reach human rights compliance.[142]

Secondly, corporations must be committed to due diligence so that the risk of compliance with human rights norms would be reduced.[143] Companies must weigh existing and potential human rights impacts during their activities.[144] In situations where violations of human rights occur, corporations should be quick to provide compensation for those damages.

Unfortunately, sometimes the government of a state is complicit in MNCs' violations, and because corruption has become a basic part of them, the motivation to enforce environmental laws against companies that err is absent.[145] Even with these shortcomings, due diligence and environmental impact assessments are key tools needed to conform with the UNGP. Nigeria should strengthen its environmental impact assessment regime to ensure that companies conduct due diligence intermittently so as to avoid potential violations. To additionally inspire corporations to adhere to due-diligence compliance, the Nigerian

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[140] Commentary to UNGP 16.
[141] Ibid.
[142] A/HRC/8/5, John Ruggie, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2008), para. 60.
[143] Commentary to UNGP 17.
[144] Ibid.
[145] The Ogoni case in the Niger Delta.

government can make incentives available to corporations that comply.[146]

Under the Environmental Impact Assessment Act,[147] Nigeria could seek to ban the activities of corporations who fail to adhere to due-diligence instructions. This will most likely create an avenue for the indirect application of human rights due diligence as contained in the UNGP, since corporations are subject to domestic laws.

Thirdly, multinational corporations ought to adhere to all laws and respect internationally recognized human rights within the scope of their activities. [148] MNCs should adhere to international human rights mechanisms, irrespective of whether the domestic laws of a state are inadequate to address corporate human rights challenges.

It is imperative to treat compliance with domestic and international human rights laws legally, because extractive activities are challenging and therefore attract a high level of risk for corporations to violate human rights, even with combined efforts from the state.

Corporations, therefore, have no excuse to avoid compliance with domestic and international human rights laws. Complying with the laws secures their social licence to operate, even though they may have been legally permitted to conduct business.

### 6.7.3 Access to Remedy

This pillar emphasizes states' duty to protect against corporate human rights abuse by guaranteeing that, through judicial, administrative,

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[146] Olivier De Schutter and Anita Rawasasty, Human Rights Due Diligence: The Role of States (December 2012) 59; < https://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf >accessed 11 April 2021.
[147] Cap E12 LFN, 2004, see Section 62.
[148] Commentary to UNGP 23.

legislative or other applicable avenues,[149] those impacted by abuse will be given access to effective remedy.[150] This duty and responsibility rests on the state. There are two main remedies pictured by this principle: procedural and substantive.[151] The substantive mechanism could be an apology, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions,[152] while the procedural approach could be extraordinary; and as corruption cuts through the Nigerian government, bureaucratic procedural formalities, burden of proof, legal fees, legal representations, corrupt judiciary and other extenuating factors, access to effective remedies through the Nigerian courts could be challenging.[153] Thus, states must ensure that an independent and transparent judiciary is in place to apply the UNGP.

Responsibility represents a moral act by corporations, while duty implies legal obligations that change to rights for the communities. Civil societies and critics of the UNGP are against their voluntary implementation.[154] They claim that MNCs choose to respect the laws that suit them, particularly when the laws become a financial liability for them.[155] It is relevant, however, to maintain that corporations only have a duty to adhere to the domestic laws of the host state, but it is not their responsibility to do so, although that is not to say that the concerns of the civil society are not significant. Sadly, there is no strong regulatory tool that guarantees that corporate human rights compliance does exist. Besides that, MNCs continue to take advantage of the

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[149] Commentary of UNGP 25.
[150] Ibid.
[151] Commentary to UNGP 25.
[152] Ibid.
[153] Ibid.
[154] Surya Deva, 'Multinationals, Human Rights and International Law: Time to Move beyond the "State-Centric" Conception?', in Jernej Letnar Èerniè and Tara Van Ho (eds), *Direct Human Rights Obligations of Corporations* (The Hague: Wolf Legal Publishers, 2015) 33.
[155] Ibid.

government's reluctance to see to the enforcement of stricter control of their activities. The next section attempts to look at methods that might help address the problem in Nigeria.

## 6.8 Regulatory Measures for Implementing the UNGP

### 6.8.1 The Nigerian Constitution

The Nigerian Constitution does not make provision for a Bill of Rights, as provided in other constitutions in Africa.[156] The socio-economic rights, which guarantee indirect implementation of the UNGP, are provided for in Chapter II of the constitution.[157] The constitution makes no mention of business and human rights, other than Chapter II. A solution would be to guarantee the International Bill of Rights in Nigeria's constitution. This Bill of Rights will be applicable to individuals and corporations as well. If this is done, MNCs will tighten their belt because they would not want to go against the provisions of the constitution of their host states.

### 6.8.2 The Companies and Allied Matters Act

The Companies and Allied Matters Act (CAMA) is the only legal document that regulates corporations in Nigeria. Unfortunately, there is no human rights provision contained in the 696 sections of the Act. According to Section 299, in situations where a loophole is identified during the operation of the company, to remedy the wrong and ratify the irregular conduct can only be done by a law suit and ratification made by the

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[156] Article 8(2) of the South African Constitution, 1996 provides that a Bill of Rights binds a natural or juristic person.

[157] 'Fundamental Objectives and Directive Principles of State Policies'. The justiceability of this section has been a subject of debate for decades. The section contains economic, social and cultural rights, such as the rights to environment and health.

company.[158] Looking at the provisions, it appears that when the company engages in a violation of human rights, it is only the company that can reprimand itself by suing, though the matters of the company are subject to several stages of interpretation. This provision protects minorities against illegal and unjust behaviour.[159] Trying to comprehend why a company who complies with the UNGP would violate human rights and yet still prosecute itself is difficult. It could be said to be an impossible thing to do. There is a need for CAMA to be amended and expanded so as to accommodate the interests of other stakeholders, including communities and extractive corporations.

The CAMA provides that directors should have a duty of care towards their shareholders.[160] It also states that directors shall carry out their duties in utmost good faith towards the company,[161] meaning that the company directors are to ensure that the human rights of the communities where oil exploration is done are not violated. Directors should consider human rights responsibilities as one of the best interests of the company.

For instance, the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of the people in South Africa, and affirms the values of human dignity, freedom and equality. Section 7(a) of South Africa's Companies Act states that the purpose of the Act is to ensure that the Bill of Rights provided in the constitution is complied with.[162] This therefore means that documents for incorporation of companies have to obey to human rights standards. South Africa's

[158] Section 299 of the Companies and Allied Matters Act, 1990 (hereinafter 'CAMA').
[159] Part X of CAMA.
[160] Section 279 of CAMA.
[161] Ibid.
[162] Section 7(a) of the Companies Act of South Africa, 2008.

Institute of Directors went a step further to promote transparency and accountability by commissioning the King Report on Corporate Governance in South Africa,[163] and by circulating periodic documents on their social responsibility tasks.[164]

The CAMA was enacted in Nigeria 26 years ago, but it is yet to go through a notable amendment process. States with weak governance are getting worse, while MNCs are becoming stronger and horrific, without any sign of potential improvement. Since Nigeria has had its fair share of corporate abuse, it is time for Nigeria to take the lead in taking action to tackle business and human rights issues in Africa. The CAMA should be amended to guarantee that on incorporation, all extractive corporations adhere to the UNGP. Corporations' incorporation forms should contain the Guiding Principles which companies must abide by.[165]

The case of West v. Jack & Ors[166] proves that the legal system is gradually tilting towards embracing liability for human rights violations. As was held by the Supreme Court, no person or body of persons, natural or legal, or institution is exempted from the above provision, irrespective of where a breach occurred or who committed the violation.[167] Therefore, natural and artificial persons are both bound to adhere to human rights provisions under applicable laws. The court overruled, in the case of Peterside v. IMB,[168] that corporations are

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[163] Kings Code for Governance Principles for South Africa, 2009. Available at< http://www.ngopulse.org/sites/default/files/king_code_of_governance_for_sa_2009_updated_june_2012.pdf >accessed 20 June 2020.
[164] Ibid.
[165] Nigeria's environmental laws create provisions for recognition of human rights; see Section 7 of the Harmful Waste (Special Criminal Provisions) Act, Cap H1 LFN, 2004; Section 6 of the Oil in Navigable Waters Act, Cap 06 LFN, 2004; Section 3(1) and 4 of the Associated Gas Re-Injection Act, Cap 08 LFN 2004; Section 62 of the Environmental Impact Assessment Act, Cap E12 LFN, 2004.
[166] *West v. Jack & Ors* [2009] SC.15/2009.
[167] Ibid., per Ngwuta, J.S.C.
[168] *Peterside v. IMB* [1993] 2 NWLR (Pt. 278) 377.

unable to be held accountable for human rights violations. To this end, it is suggested that Chapters II and IV of the constitution have a vertical application – meaning that duties are placed on the state not to violate human rights – and also a horizontal application which regulates private individuals;[169] thus those provisions bind the state, individuals and corporations.

The Nigerian Constitution has to make several changes, with express indication of the fact that all persons are bound by the provisions of the constitution. This should definitely imply that private bodies and individuals could no longer continue with the violation of fundamental rights of other citizens without been checked. They must not hide behind the veil of privacy or autonomy. The constitution should give the courts the power to find them liable for violations.

*Right to Property*

The right to own immoveable property anywhere an individual is legally allowed to reside is one of the alienable rights of every individual.[170] The activities of the extractive industries have the potential to take away those rights from individuals. In circumstances where they have to give up their houses because they have become uninhabitable, little or no adequate compensation is given to members of indigenous communities. The right of individuals to the exclusive possession and use of property is spelt out in Article 17 of the Universal Declaration of Human Rights.[171]

[169] ICT Access to Justice: Human Rights Abuses Involving Corporations – Federal Republic of Nigeria (2012) 5.
[170] Section 43 of the 1999 Constitution of Nigeria, 1999 (as amended).
[171] General Assembly Resolution 217 A, 10 December 1948.

Article 14 of the African Charter on Human and Peoples' Rights provides that the right to property shall be guaranteed.[172]

The fact that MNCs seek to cut down cost should not mean that innocent indigenes should be displaced from their homes, worse still be displaced without any form of reparation. Even though states have the discretion to use land owned by communities for a project beneficial to the public, exercising such a decision should be done mostly to benefit the indigenes who feel emotional about losing their lands, and as such should be compensated accordingly for it.

Most times these lands are sold to MNCs by them having to bribe the state and even the head of communities, who then fail to allot the money to displaced indigenes. These indigenes have a cultural and ancestral attachment to their lands – just like every other human being probably does – and for them to be ejected without reparation is an abuse which is horrific, inhumane, unjust and goes against any form of morality and ethics.

Besides, any form of agreement or contract made by MNCs and the state to acquire lands owned by a community should be done by consulting members of that community, and they should participate in the decision making of relinquishing their lands in the interests of the public – by so doing, due lawful process is being followed. Unlawful displacement from land which is not of public interest would basically not attract compensation. [173] In SERAC v. Nigeria, [174] the court held that procurement of the land belonging to the Ogoni people of Nigeria, using their powers, without reparation was a violation of Article 14 of the

[172] Adopted 27 June 1981.
[173] Section 28 of the Land Use Act, 1978.
[174] *SERAC v. Nigeria* [2001] AHRLR 60 ACHPR [2001]. Communication 155/96.

African Charter on Human and Peoples' Rights.[175] Indeed, whether right to property as enshrined in the Nigerian Constitution is respected in practice is not convincing. Ideally, projects carried out by MNCs ought to be beneficial to the public, as they generate revenue for the government, create employment for the community, even make the communities attract more investors. Currently there is no framework that guarantees community participation in decision making regarding acquisition of their ancestral habitat. Looking forward, in attempting to implement the UNGP, there should be an agreement that ensures the right procedure is carried out before acquiring lands for activities, and in cases where lands are acquired after consultation with communities, the right compensation should be allocated towards those lands.

Government must map out the specific duties of MNCs under the Nigerian Constitution and corporate laws, and as regards procedures for discretionary displacement of land, since technically the constitution provides for a right to property, there should be strict lawful procedures to go against that. By so doing, and putting other mechanisms in place, it will help determine the liability of MNCs under the law.

## 6.9 Conclusion

This chapter critically examined the UNGP. There is no doubt that a binding regulatory framework at international level would be an appropriate solution to the problem of corporate human rights violations in the world.

As mentioned previously, the UNGP adopted a polycentric process, which involved representatives from states, corporations and civil

[175] Ibid.

society holding MNCs accountable, instead of a treaty-based regulatory framework[176] that is contemplated by the outcome of the new process.

Thus, the endorsement[177] of the two resolutions[178] that initiated the process of a binding international legal instrument to control the activities of corporations' human rights is a significant development that was approved by the NGOs.[179]

A debate arose prior to endorsement,[180] as unfortunately, the EU, the US and Japan voted against the resolution, as well as deciding that indeed they did not want to get involved in any of the process.[181] According to the US representative, attempting to endorse another resolution was evading and dismissing the value of the UNGP, as the UNGP needed more time to be implemented. Subsequently, it is pertinent to ask whether endorsing another process which might create a binding legal regime to hold corporations accountable internationally might turn out to be a more suitable solution than implementing the UNGP? It is unpredictable. While rejection of the resolution by some states might be for ulterior motives,[182] they need to face reality and

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[176] Backer (n13) 3.
[177] UNHROHC, 'Human Rights Council Concludes Twenty-sixth Session after Adopting 34 Texts', 27 June 2014, Resolution A/HRC/26/L.22/Rev.1, available at< http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14798&LangID=E >accessed 21 July 2020.
[178] Ibid.
[179] Richard Girard, 'Social Movements Celebrate Historic UN Vote against Impunity', Transnational Institute (26 June 2014).
[180] Carey L. Biron, 'Contentious Start for UN Process toward Business and Human Rights Treaty' (Mint Press News, 10 July 2014); also available at< http://www.mintpressnews.com/contentious-start-u-n-process-toward-business-human-rights-treaty/193731/ >accessed 31 July 2020.
[181] Kinda Mohamadieh, 'Human Rights Council: Historic Resolution Adopted for a Legally Binding Instrument for TNCs', *TWN Third World Network*, 30 June 2014; also available at< http://www.twn.my/title2/climate/info.service/2014/cc140602.htm >accessed 21 July 2020.
[182] H.L.D. Mahindapala, 'US, EU Refuse to Cooperate with UNHRC on Human Rights' 3 July 2014 < https://www.sinhalanet.net/us-eu-refuse-to-cooperate-with-unhrc-on-human-rights > accessed 13 April 2021. Quoting one commentator as saying: 'the ganging up of leading market forces is clearly seen in the Western alliance of US, EU, Norway etc., rejecting the UNHRC resolution on TNCs', and another one saying: 'their decision to protect profits at the expense of human rights is unacceptable.'

realize that international law regarding corporate accountability can no longer be silent.

Both a new binding treaty process and implementation of the UNGP are geared towards one course, which is to hold corporations accountable. A regulatory approach is what is needed to implement the UNGP.

This thesis is of the view that the UNGP are still relevant and should not be put aside because of the initiation of a new process for a binding treaty, as they can both work hand in hand. As Backer argues, the process of creating a binding treaty must begin by reflecting on the UNGP.[183] The timeframe for the new treaty is unrestricted. A lot of obstacles have to be climbed before a new treaty can exist,[184] and it will certainly take a long time before it does.[185] In the interim, Ruggie argues that implementation of the UNGP should currently be more given attention. Justine Nolan argues that for corporate accountability and adherence to the principles in the UNGP, there was a need for a stricter mechanism, which is a legally binding law.[186] Which leads this study to seek an avenue regionally – which is the African Union – to improve accountability, which would be discussed in the next chapter.

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[183] Backer (n13), 542, noting that the construction of a new treaty for corporate accountability as an international rule of law must begin with determination of 'the extent of the current landscape of the state duty to protect ... and the operationalization' of the UNGP.

[184] Backer (n13), 196, discussing the challenges and bottlenecks that the new treaty will pass through to see the light of the day.

[185] During informal meetings before the vote, Ecuador revealed that the timeframe of the treaty process might take a decade; John Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors', Institute of Business and Human Rights, 9 September 2014, available at< https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors/ >accessed 11 June 2020.

[186] Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?', in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) 138–161,140.

## Chapter Seven

## African Commission, African Court and the Accountability of Multinational Corporations for human rights violations

### 7.1 Introduction

The previous chapters looked at the available framework with regards to oil exploration in Nigeria, and it was concluded that available frameworks are weak, and therefore there is no established rule of law holding multinational corporations accountable when they violate human rights. Also, previous chapters looked at the UNGP and concluded that on their own, they were not enough to hold MNCs accountable. So, this chapter will look at the role that the African Charter has played.

The African heads of state and government adopted the African Charter on Human and Peoples' Rights during the 18th ordinary assembly in Nairobi, Kenya in June 1981. The charter then became part of Nigerian law by virtue of the African Charter on Human and Peoples' Rights (Application and Enforcement) Act[1] of 1983. The African Charter has been acknowledged by the new African Union as the primary instrument for the protection and promotion of human rights in Africa,[2] though the Organisation of African Unity (OAU), within which the charter is designed to function, had been replaced by the African Union( AU).[3] The charter not only provides for traditional individual civil and political rights, but apparently also seeks to promote economic, social and cultural rights,

[1] Chapter A9, Laws of the Federation of Nigeria (LFN) 2004.
[2] John C. Mubangizi, 'Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and Gains' (2006), 6 African Human Rights Law Journal,146–165, 147. see Article 3(h) of the Constitutive Act of the African Union.
[3] Ibid.

including third generation rights, thus making it the first international human rights convention to guarantee all the categories of human rights in one document.[4] The detailed and protected socio-economic rights in the charter include equitable and satisfactory conditions of work,[5] right to health,[6] right to education,[7] protection of family,[8] right to self-determination,[9] right to dispose of wealth and natural resources,[10] right to economic, social and cultural development,[11] right to peace,[12] and right to a satisfactory and favourable environment.[13] The African Commission on Human and Peoples' Rights is a quasi-judicial body established within the African Union, by virtue of Article 30 of the African Charter, to promote human and peoples' rights and to ensure their protection.[14] Article 24 of the charter specifically provides that all peoples shall have the right to a general satisfactory environment favourable to their development.

The purpose of the commission is to promote as well as protect. It is the duty of the commission to exercise its protective mandate through its decisions or recommendations resulting from the reflection of complaints brought before it.[15] Human rights education, sensitization and raising awareness of the African Charter are the promotional mandates of the African Commission.[16] The commission has kept on

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[4] Ibid., 148.
[5] Article 15.
[6] Article 16.
[7] Article 17.
[8] Article 18.
[9] Article 20.
[10] Article 21.
[11] Article 22.
[12] Article 23.
[13] Article 24.
[14] African Charter, Article 30.
[15] Olubayo Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Cambridge: Intersentia Publishing Ltd, 2014).
[16] Ibid.

using communication or interactive procedures to constantly interpret the African Charter, which has led to its abundant jurisprudence.[17]

Since the charter was incorporated into Nigerian law, it has become part of Nigeria's legal system, with the full force of law and enforcement machinery.[18] Section 1 states that:

*"As from the commencement of this act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the schedule of the act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria."*[19]

The ratification of the charter is important, since it is currently possible to appeal suspected violations of the charter before Nigerian courts, including the right to a general satisfactory environment.[20]

### 7.2 The African Charter vis-à-vis the Nigerian Constitution

The extent to which domestic courts will apply international human rights treaties, if they are willing, depends on whether a monist approach is adopted by domestic law, meaning international law automatically forms part of the domestic law or has a dualist approach.[21] A dualist approach with regards to the domestic effect of international

[17] Japhet Biegon and Magnus Killander, 'Human Rights Developments in Africa Union during 2009' (2010) 10 African Human Rights Law Journal, 212–232, 224.
[18] Lawrence Atsegbua, 'A Critical Appraisal of Environmental Rights under the Nigerian Courts' (2004) 2(1) Benin Journal of Public Law, 55.
[19] African Charter, Section 1.
[20] Oluduro (n15) 449.
[21] Amos Enabulele, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?' (2009) 17 African Journal of International and Comparative Law 326–341.

treaties is what Nigeria adopts,[22] meaning international treaties in Nigeria do not operate automatically; however, they are to be incorporated into domestic legislation to be legally enforceable.[23] As a result of the non-justiciability of Chapter II of the Nigerian Constitution in Section 6(6)(c), Nigerian courts rejected adjudicating directly on any of its provisions, except when they are incorporated in a legislative or executive act.[24] The African Charter does not only include civil and political rights, but also socio-economic, cultural and social rights. Some rights exist under the African Charter which are enforceable; however, the constitution expressly identifies them as unenforceable,[25] though it can be argued that the African Charter generally complements the constitution and does not undermine it.[26] The African Charter contemplated its status in Abacha v. Fawehinmi.[27] The Supreme Court held that the charter is a part of Nigerian law, therefore it was stronger than any domestic statute. It was held, however, that the charter was not superior to the constitution, because the National Assembly or federal military government can repeal an international instrument.[28] Therefore, the constitution is superior to the African Charter, even though the latter is an international mechanism.

This means that if a conflict ensues between any sections of the 1999 Constitution of Nigeria and Article 24 of the African Charter, the constitution will take precedence. Thus, several scholars are not sure if the charter could be used to promote environmental rights,[29] meaning

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[22] Oluduro (n15).
[23] Section 12 of the Constitution of Nigeria, 1999.
[24] Ibid.
[25] Edwin Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria'(2007) 5(2) Journal of African Law 249–284, 255.
[26] Ibid.
[27] *Abacha v. Fawehinmi* [2000] S.C. 45 1997.
[28] Ibid.
[29] Atsegbua (n18).

doubting the effectiveness of the charter in holding multinational corporations accountable for human violations as a result of their extractive activities.

### 7.3 Jurisprudence of the African Commission

The case of Social and Economic Rights Action Center (SERAC) and Anor v. Nigeria,[30] which was a well-known case on the issue of environmental degradation and socio-economic rights brought before the commission, was filed by the socio-economic rights non-governmental organization (NGO) against the federal government of Nigeria. The state oil company, the Nigerian National Petroleum Corporation (NNPC), which is a major shareholder associated with Shell, was directly involved with the government in oil production. It was stated in the case that rights to health, a healthy environment, housing and food were violated due to the alleged prevalent contamination of soil, water and air and the destruction of homes in Ogoni communities. The plaintiffs went further, criticizing the Nigerian government for not addressing issues raised, but rather being an accomplice in violating international standards by making military powers available to the oil companies in order to threaten protesters with weapons, and as such denying communities access to information about the dangers of the oil activities, as well as ignoring the grievances brought by communities. The African Commission directed that the right to a satisfactory environment should be a right that entails the government taking reasonable measures to prevent pollution and ecological sustainable degradation,[31] control the

[30] Communication 155/96.
[31] Para. 52 of the Communication.

use of natural resources,[32] assume environmental and social impact assessment before commencing industrial development or extraction,[33] provide access to information to communities where oil exploration occurs,[34] and ensure that communities affected by the activities of MNCs be allowed to participate in decision making prior to oil exploration.[35]

Article 2 on non-discriminatory enjoyment of rights, Article 4 on the right to life, Article 14 on the right to property, Article 16 on the right to health, Article 18 on family right, Article 21 on the right of peoples to freely dispose of their wealth and natural resources and Article 24 on the right of peoples to a satisfactory environment were being violated by the Nigerian government. The commission further commented on the impact of globalization in developing countries, as it said:

*"the intervention of multinational corporations may be a potentially positive force for development if the state and the people concerned are ever mindful of the common good and sacred rights of individuals and communities."*[36]

The commission concluded that the right to housing and shelter could be found in the combined reading of Articles 14, 16 and 18 of the charter, irrespective of whether rights to housing were clearly expressed. The commission held that the right to shelter exemplifies the individual's right to live in peace, and the individual having the choice to live in a shelter or not,[37] as well as the right to housing extending to protecting the individual from forceful ejection.[38] The Nigerian government did not

[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Communication 155/96.
[37] Para. 61 of the Communication.
[38] Para. 62 of the Communication.

fulfil its obligations by failing to ensure that all human rights in the African Charter are assured. The commission made a formal request to the government to guarantee the protection of the environment, health and livelihood of the Ogoni people, as well as the whole Niger Delta, among other things, by:

*"Stopping all attacks on Ogoni, Niger Delta communities by the Rivers State internal securities task force, conducting an investigation into the said human rights violations and prosecuting officials of the security forces, NNPC and relevant agencies involved in the human rights violations, and undertaking a comprehensive clean-up of lands and rivers damaged by oil operations, ensuring appropriate environmental and social impact assessments for any future oil development, and the safe operation of any further oil development, and as well as providing information on health and environmental risks and meaningful access to regulatory and decision making bodies to communities likely to be affected by oil operations."*[39]

The African Commission explicitly states both procedural and substantive rights: procedural rights are rights to access environmental information and an avenue for fair hearing when environmental rights are being or are likely to be violated, while substantive rights are the obligation of the government to avert ecological degradation and pollution, in addition to promoting protection and sustainable development.[40] This resolution reflects the qualities mentioned in

[39] Para. 69 of the Communication.

[40] Morne van der Linde and Lirette 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) 1 AHRLJ 170.

international environmental principles, which include preventive principles and duty of care principles.[41]

The African Commission, in the SERAC case, held that responsibility for violations by the MNCs was to rest solely on the state, instead of acknowledging the presence of inequalities within power that exist between MNCs and developing countries such as Nigeria, and as such the decision was criticized. This is not surprising as it stems from there not being any regional human rights framework in Africa to hold corporations directly accountable for human rights violations. [42] Although, it is the primary responsibility of the state to protect human rights in international law, the commission ought to have looked at the circumstances of the case, however, and deliberated on the accountability of the MNC, especially in situations when the criminal law or the regulatory framework of the host state are considered too weak to have a positive impact.[43] Shell's business enterprises carried out violations which were supported by the state, and Shell was involved in some violations, as well as using military force to intervene during protests by members of the communities objecting to the activities of the MNCs, and as such there were reasons to hold Shell liable .[44]

Oloko-Onyango was of the opinion that the commission should be made to apply the provisions within the charter that articulate the issues of accountability and duty, and to seek an appropriate balance between state accountability and that of the non-state actors to tackle the abuses,

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[41] Michael Kidd, *Environmental Law: A South African Perspective* (Juta & Co. Ltd 1997) 8, quoted in van der Linde and Louw (n40) 178–179.
[42] Tineke Lambooy and Marie-Eve Rancourt, 'Shell in Nigeria: From Human Rights Abuse to Corporate Social Responsibility' (2008) 2(2) *Human Rights and International Legal Discourse*, 229–275.
[43] J. Oloka-Onyango, 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-state Actors, and the Struggle for Peoples' Rights in Africa' (2003) 18 Am. U. Intl L. Rev. 851–913, 903.
[44] Ibid. 904–905.

since they encounter stumbling blocks when attempting to use national institutions, as seen in the SERAC case.[45]

The commission should have been more practical in putting more effort into ensuring that liability was not just on the state – due to the negative effect that the activities of MNCs have on developing states such as Nigeria – but should have extended liability to Shell as well.[46] However, this approach would be contrary to the international law provision which is purely state-centric, which means that by international law, only the state bears responsibility. This approach could help reduce violations by MNCs, so as to protect the human rights of the communities that have grievances.

To protect and promote human rights against violations, the African Union should seek to revise or amend the charter, so that it could extend liability for human rights violations to private persons regionally.[47] This resolution has further identified the loopholes that need to be bridged in order for the charter to be an effective tool in promoting protection for weak states who suffer from the negative effects of MNCs. It will be a welcome development if the gap is bridged, since the commission expressly states that under the charter, all rights are applicable.[48]

If the above resolution is effective, it would mean that protection of social and economic rights is enforceable under the African Charter,[49] and Heysns describes it as an astonishing move towards making social

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[45] Ibid.
[46] Oluduro (n15).
[47] Evaristus Oshinebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (University of Toronto Press 2009).
[48] *SERAC & CESR v. Nigeria* [1996] 155/96.
[49] Ibid.

and economic rights justiciable[50] and represents a giant stride towards the realization of economic and social rights. This expansion strengthens the effectiveness of the charter in being able to guarantee the protection and enforcement of rights mentioned in it.[51] The SERAC case is also important because it further seeks to enhance the responsibilities of African governments in ensuring that the activities of MNCs operating in their countries are being monitored and controlled, in order to guarantee respect for social, economic and cultural rights.[52] Victims of human rights violations and civil society groups, through this decision, could act as a yardstick to exert force on the state to regulate the activities of MNCs by ensuring that corporations found violating the human rights specified under the charter are held accountable. The decision to enlarge the scope of liability for violation from a state-centric one to holding non-state actors liable under the charter can only be effective if the commission expressly acknowledges the fact that MNCs are indeed proficient in violating human rights.[53] Over the years the Niger Delta people could have their lands and claims to natural resources revoked by the government based on the theory of ownership, which confers all natural resources to the federal government, and as such the decision of the commission would have an effect on the Nigerian government,

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[50] Christof Heyns and Killander Magnus, 'The African Regional Human Rights System' in Felipe Gomez Isa & Koen de Feyer (eds), International Protection of Human Rights: Achievements and Challenges (University of Deusto 2006).

[51] Justice C. Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria' (2005) 1 Afr J. Legal Stud. 2, 129–146.< http://booksandjournals.brillonline.com/docserver/17087384/1/2/22109730_v1n2_s5.pdf?expires=1504105864&id=id&accname=guest&checksum=7AF714C3CA7DE95111453F0A5F55A4E9 >accessed 21 September 2020.

[52] Dinah Shelton, 'Decision Regarding Communication 155/96 (Social and Economic Action Center/Center for Economic and Social Rights v. Nigeria), case No. ACHPR/COMM/A044/1' (2002) 96 Am.J.Int'l L. 937–942, 941.

[53] Oshionebo (n48) 112.

which has used revocation of rights as a justification.[54] Enforcement of the recommendations made by the commission would ensure that victims whose rights have been violated by the activities of MNCs could participate with the Nigerian government and MNCs in order to work out a solution, and in turn this would help foster confidence among the Niger Delta communities towards the Nigerian government and the MNCs.[55]

In the case of the Centre for Minority Rights Development (Kenya) and Anor v. Kenya,[56] a complaint was filed on behalf of the Endorois community against the state by the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG). A complaint was brought against the government of Kenya alleging that the community had been displaced from its ancestral lands without adequate compensation for the destruction of its properties and the interruption of its pastoral business, and as such this violated the African Charter, which includes the right to practise one's own religion and culture, as well as the entire stages of developing a community.[57] As alleged by the complainants, the Endorois Welfare Committee, which represented the Endorois community, carried out fake and made-up consultations, as well as obtaining make-believe consents on behalf of the community.[58] It was held by the commission, therefore, that the charter's rights to freedom of religion, property, cultural life, free removal of natural resources and development were violated, because the aggrieved victims were forcefully removed from their ancestral land

[54] Nsogurua J. Udombana, 'Between Promise and Performance: Revising States' Obligations under the African Human Rights Charter' (2004) 40 Stan. J. Int'l L., 105–142.
[55] Christopher Mbazira, 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6 African Human Rights Law Journal, 333–357.
[56] Afr. Comm'n HPR, CASE 276/2003, 4 February 2010.
[57] Oluduro (n15).
[58] Ibid.

with little compensation.[59] It was the recommendation of the commission that Kenya reinstate the Endorois community to its ancestral land, compensate the community sufficiently with damage payments, as well as pay royalties to the Endorois community for activities embarked upon on their property.[60] It was held that with regard to participation, the community had no sufficient participation as they did not have the opportunity to agree to terms before projects were carried out by the state. As no environmental impact assessment was undertaken, communities had no realistic advantage to gain from the projects; likewise, they did not benefit from reparations either.[61]

Article 14 of the charter, the right to property, is violated when the above characteristics are not present. The fact that effective participation and an equitable share in the profits of the land were not guaranteed violated the right to development.[62] This case – being the first decision to establish who indigenous peoples are in Africa, and what rights they have – had a tremendous input on the jurisprudence of the rights of indigenous peoples, as it was a key precedent for possibly similar groups of people and indigenous communities in Africa, including the Niger Delta communities in Nigeria.[63] Apart from the charter being the first international convention establishing the right to development, it was the first time that the commission decided that a violation of the right to development in Article 22 of the African Charter had occurred.[64]

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[59] Ibid.
[60] Ibid.
[61] Report of the African Commission's Working Group of Experts on Indigenous Population 2005. Available at< https://www.iwgia.org/images/publications/African_Commission_book.pdf >accessed 17 June 2020.
[62] *Centre for Minority Rights Development (Kenya) and Anor v. Kenya* (2003) 279
[63] Victor Mosoti, 'Endorois Welfare Council v. Kenya, the World Bank (Law and Development)' (December 2010), available at< http://wmi.uonbi.ac.ke/sites/default/files/cavs/wmi/Tove%20Thesis%20pdf_0.pdf >accessed 11 July 2020.
[64] Biegon and Killander (n17).

A lot of positive improvement has been made by the commission, contrary to past opinions by scholars about the inefficiency of the commission, which they described as a pain for African governments.[65] Meanwhile, from 1996, complaints filed before the commission have been brilliantly looked at and involved on the issues of law and facts – and as such adequate judgement has been given[66] – and this has fostered meaningful development of international human rights law which mirrors African practice.

## 7.4 State Accountability for Human Rights Violations of Non-State Actors, Including MNCs

The state is not the only one to bear all the responsibilities under the African Charter, as it does not state that the charter cannot hold persons who fail to carry out their roles under the charter. Thus, the charter can inquire about the role played by both state and non-state actors, especially MNCs, in violating rights protected by the charter.[67] In spite of that, it is imperative to be aware of the fact that interpreting the charter can be extremely complex, as even some scholars and the African Commission has attested to interpreting it,[68] and as such anyone can wrongfully interpret it.

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[65] Makau wa Mutua, 'The African Human Rights System in a Comparative Perspective' (1993) 3 ACHPR 5.

[66] Chidi Anslem Odinakalu and Camila Christensen, 'The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures' (1998) 20 Human Rights Quarterly 235–280,278.

[67] Oluduro (n15).

[68] Rachel Murray observes that the difficulty lies in 'the use of differing words interchangeably with no clear statement as to whether they are synonymous', while Odinkalu affirms that 'foremost among the problems that the Commission has encountered is the very text of the African Charter itself, which like the Rules of Procedure, is opaque and difficult to interpret'. See Rachel Murray, 'Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter American and European Mechanisms' (1999) 17 NQHR 109,133. Chidi Odinkalu, 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary

In interpreting the charter, the African Commission follows a state-centric approach to accountability, as proved by international law, which is possibly why interpreting the responsibilities of duty holders proves difficult. The African Commission might not have much influence in changing the state-centric approach to accountability, as it is the standard established by all regional and international organizations, as Rachel Murray stated: "It would be illegitimate for the African system to jettison the 'underlying concepts of international law'."[69]

Having a state-centric approach has both favourable and unfavourable consequences, leaving the burden of protecting human rights on the state and also ensuring that the state is held liable for violations of human rights done by non-state actors within the state.

A second reading of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts was adopted in 2001 by the International Law Commission (ILC), which is the body responsible for its making, as it seeks to devise, by a method of codification and ongoing development, the basic rules of international law which relate to the responsibility of states for internationally wrongful acts.[70] The draft articles are not directly binding, because of the non-existence of a treaty;[71] however, indirectly it may be binding as customary international law.[72] Emphasis is placed on the secondary rules of international law, which concern state responsibility, and they help make available the mechanism which controls the duty of state when it has been violated, and what would be

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Assessment' (1998) 8 *TLCP* 359, 406.
[69] Murray (n68).
[70] ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts', adopted by the Commission at its Fifty-third Session (2001) available at< http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf >accessed 20 July 2020.
[71] Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 MJIL 1–36, 5.
[72] Ibid.

the legal consequences of such violation.[73] There is said to be an internationally wrongful act of state when any conduct consists of an act or omission of two elements:

(a) It is attributable to the state under international law.

(b) It contributes to a breach of its obligation under the same law.[74]

Admittedly, as the conduct of any state organ shall be related to an act of the state,[75] it should be determined when the conduct of collective or individual entities can be relatable to states. Article 4, however, covers legislative, executive, judiciary and other functions.[76] So, Article 5 provides that the conduct of a private entity shall be regarded as resulting from the state if the private entity is empowered by the law of that state to exercise elements of governmental authority under international law, as long as during the specific time that they were acting, the private entity was authorized to exercise in that capacity.[77] The definition of entity in this regard has been interpreted widely and liberally to include:

*"All human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation, whether or not they have any connection to the government."*[78]

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[73] ILC, 'Commentaries to the Draft Articles, Extract from the Report of the International Law Commission on the Work of its Fifty-third Session', Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), chp.IV.E.2, available at< http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf >accessed 21 June 2020.
[74] Article 2 of Draft Articles. *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran*) (judgment) [1980] ICJ Rep 3, 30 (*Diplomatic and Consular Staff* case).
[75] Ibid
[76] Ibid.
[77] Ibid.
[78] Ibid.

Following from the above, it is implied, therefore, that any act of MNCs would be the conduct of the state if they were empowered by the state to exercise any form of governmental authority.

Article 8 also states another instance that relates to conduct by private persons. It states that the conduct of a private person or group of people shall be said to be an act of a state under international law, if that private person or group of people were given the go-ahead to act or were under the influence or control of the state.[79]

The basic principle, however, is that one cannot attribute the conduct of a private person/group of people/MNCs to the state under international law, but in situations where there is a particular actual relationship between the MNC and the state, then as such the MNC acts on behalf of the state.[80]

There exist two instances where the conduct of MNCs would be attributed to the state: firstly, when a private person or MNC carries out a wrongful act on instruction from the state; secondly, when private persons or MNCs are directed or controlled by the state to carry out an act.[81]

Attributing the conduct of MNCs to the state is largely seen as acceptable under international jurisprudence.[82] In such situations, it would not matter if the person involved was a private person or if they were carrying out government activity.[83]

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[79] Ibid., Article 8.
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Ibid.

Generally, circumstances like this occur when the state recruits another subsidiary or initiates a private person to play a supplementary role, while they stay out of the official structure of the state.[84]

Although corporations' actions may be attributed to the state, it is imperative that these corporations' actions are consistent with the international obligations of the state to act.[85] As known, international law acknowledges the doctrine of separateness of corporate entities at domestic level, except in circumstances where a corporate veil is used as an avenue to commit fraud or evade action.[86]

It is noted that the state may exercise control or give certain directions to a private person or a group of people, and so has to be accountable for their actions.[87] The facts of the case would determine whether the state has a responsibility or not. According to Article 8, three elements have to be present for it to be said to be attributable to the state, and it is adequate to establish any one of the three.[88] These elements are control, direction and instruction, and they must have resulted in an action which led to an internationally wrongful act.[89]

Additionally, it should be noted that there are two elements attributed to state responsibility under international law: firstly, private persons being attributed to the state to act; secondly, private persons or corporations breaching their obligations. However, a state may be held responsible for the consequences of conduct carried out by corporations,

[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.

if the state did not provide adequate measures to prevent a negative outcome.

## 7.5 African Commission on Human Rights

Some academics are of the opinion that the African Commission has failed to ensure that the charter acts as a regulator for human rights in Africa. In the opinion of Mohammed Radwan, in promoting, protecting and implementing the provisions of the charter, the African Commission has not been strong.[90] Likewise, Oloka-Onyango supports the opinion that the current situation of human rights violations in Africa has not changed, even with the presence of the African Commission, and there continues to be disappointment in the way the state runs.[91] Nsongurua Udombana criticized the African Commission by stating that it has made it clear time without number that it is not fit to protect and ensure that Africans have standard human rights.[92] Following from this, there has not been any clear instance when the commission has interpreted the charter to see human rights accountability as not just state-centric.

However, the commission has showed its ability to protect in a small way the provisions in the charter that seek to minimize or limit some of the rights guaranteed under the charter; so in order to see that those rights are protected, the African Commission has made it difficult to bridge by ensuring that when the charter is interpreted, it guarantees

[90] Mohammed Abdelsalam A. Radwan, 'Article 58 of the African Charter on Human and Peoples' Rights: A Legal Analysis and How It Can Be Put into More Practical Use', a paper delivered at the 1996 Annual Conference of the African Society of International and Comparative Law, 290–309.
[91] Joseph Oloka-Onyango, 'Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?' (2000) 6 BHRLR 39, 71.
[92] Nsongurua J. Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Late Than Never' (2000) 3 YHRDLJ 45–111,73.

human rights obligations under the charter and domestic laws are not used by the state to limit rights.[93]

The African Commission also interpreted the charter so as to reflect or contain the rights to food, shelter and housing, although not expressly available in the charter in the SERAC case. According to Dejo Olowu, when the African Commission will apply the decision in SERAC case to African countries who are not parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) cannot be determined now; although it cannot be determined, Olowu is hopeful that the decision will possibly be developed into a standard for the implementation of economic, social and cultural rights in the African regional system.[94] Some liberal scholars are of the opinion that, despite the limitations of the charter, it has proven to be a fast-growing regulatory institution in Africa.[95] Although at its inception the African Commission was faced with issues, as of now it has established itself as a regional institution that seeks to protect human rights in its region.

### 7.5.1 Application of the Jurisprudence of the African Commission on Social-Economic Rights and the Environment by the Nigerian Courts

The SERAC case decision has become ground-breaking, and in some African courts – including those in Nigeria and wherever human rights

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[93] *Media Rights Agenda and Others v Nigeria* [2000] AHRLR 200 ACHPR [1998].

[94] As a result of uncertainty, he advocates a new approach that can be used to enforce the new rights. See Dejo Olowu, *An Integrative Rights-Based Approach to Human Development in Africa* (Pretoria: Pretoria University Law Press, 2009) 154.

[95] Odinkalu (n68) He notes: 'The Commission has tried, with substantial success, to address these shortcomings through its practice, evolving procedures, and jurisprudence'; Vincent Nmehielle, 'Development of the African Human Rights System in the Last Decade' (2004), 11(3) *HRB*, 1 at 6–11. He notes: 'The protective mandate of the Commission has progressively developed to some degree, to the point where it has arguably entrenched itself as an institutional supervisory mechanism.'

guaranteed by the charter are violated – the jurisprudence of the commission is used in judgements. Some have commended the court's decision in Gbemre's case [96] on international law principles. The complaint of the applicant was on the basis of Articles 4, 16 and 24 of the charter, and the failure to make reference to domestic African jurisprudence – most importantly the SERAC case which addressed ESC rights – was viewed to be inadequate.[97] The court, by virtue of the constitutional provisions, did not encourage legislative measures to implement the principles in the charter by failing to apply the rights.[98]

In the case of Ikechukwu Opara v. Shell,[99] the judge failed to mention the importance of upholding socio-economic rights, as he did not cite any instrument dealing with socio-economic rights. At this point, it is pertinent for the Nigerian government to examine Chapter II of the constitution with deals with socio-economic rights, so as to make these rights justiciable. The people of the Niger Delta have continued to suffer as a result of the non-justiciability of socio-economic rights. The Gbemre case was not brought to the Appeal Court or the Supreme Court of Nigeria, and now we are left to wonder if these courts would have upheld the decision of the Federal Court.

Nigerian judges should avail themselves of the decision in the Gbemre case, in order to protect human rights. The constitution of Nigeria, as well as the African Charter, imposed the duty of protecting and

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[96] *Gbemre v. Shell Petroleum Development Company and Others* [2005] Suit No.FHC/B/CS/53/05; AHRLR 151 NgHC
[97] Oluduro (n15).
[98] Deji Adekunle, 'Domestic Protection of Socio-economic Rights: Case Studies on the Implementation of Socio-economic Rights in the Domestic Systems of Three West African Countries' (2010), 11(3) *ESR Review*, 15–16 at 16; < https://journals.co.za/content/esrrev/11/3/EJC33362 >accessed 11 July 2020.
[99] *Ikechukwu Opara & ors. v. Shell Petroleum Development Company Nigeria Ltd & 5 ors.* [2005] FHC/PH/CS/518 [2005].

promoting the environment in Nigeria on the Nigerian government,[100] but sadly this has not been the case because socio-economic rights are non-justiciable under the Nigerian Constitution. [101] International tribunals are not as good as national courts when it comes to ensuring binding and enforceable relief, either through remuneration or injunctive, as well as enforcing international law, for they have authority over the assets of the most common polluters, corporations and individuals.[102] Also, states are more willing to uphold the judgements and decisions of their own local courts rather than international institutions because they are not confident of international judgements.[103] Although victims were aware of the provision of socio-economic rights in the charter and the decision of the commission, the fact that the judicial system in Nigeria is not liberal means that Niger Delta indigenes who are victims of degradation are sceptical of instigating litigation based on violation of their socio-economic rights.[104] Courts in Nigeria will be fulfilling the purpose of the charter by depending on the jurisprudence of the commission, and also ensuring that victims of human rights in Nigeria get adequate remedy; however, these victims are prevented from getting redress because the Nigerian courts are holding on to the fact that the constitution makes no provision for holding multinational corporations accountable.

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[100] Section 20 of the 1999 Constitution of Nigeria; see also Article 21 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter A9, Vol 1, Laws of the Federation of Nigeria 2004.
[101] Section 6(6)(b) of the 1999 Constitution.
[102] Linda A. Malone, 'Enforcing International Environmental Law through Domestic Law Mechanisms in the United States: Civil Society Initiatives against Global Warming', in LeRoy Paddock et al. (eds), *Compliance and Enforcement in Environmental Law: Toward More Effective Implementation* (Cheltenham: Edward Elgar, 2012) 118.
[103] Udombana (n92).
[104] Rhuks T. Ako, 'The Judicial Recognition and Enforcement of Rights to Environment: Differing Perspectives from Nigeria and India' (2010) 3 NUJS Law Review 423–445.

### 7.5.2 Benefits of the Application of African Commission Jurisprudence by Nigerian Courts

The government of Nigeria can promote human rights by ensuring that the charter is interpreted widely to make provisions for socio-economic rights, as well as giving the courts in Nigeria a legal system that can apply socio-economic rights, [105] therefore improving further the provisions of the charter, as indigenes, including non-state actors, would be more abreast with reporting issues to the commission. [106] At an ordinary session of the African Commission on Human and Peoples' Rights (ACHPRs), held in 1999, lawyers were encouraged to see the importance of the charter as a regional and international human rights instrument during their advocacy.[107] Judges were also admonished to participate hugely by integrating the charter and the potential jurisprudence of the commission while giving judgements, which would help promote and protect the rights and freedoms guaranteed by the charter. [108] It admonished judges to ensure that their thinking and judgements rely on all relevant human rights instruments, either as applicable authoritative laws or as influential aids to interpretation of constitutional and legislative provisions on fundamental rights, freedoms and obligations. [109] Hence, in situations where legal practitioners avoid making reference to the charter and fail to refer to the commission's decisions while their case is being held, judges in Nigeria should emulate Ngcobo J. of the Constitutional Court of South

[105] Udombana (n68)..
[106] Ibid.
[107] Oluduro (n15).
[108] Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995-1996.
[109] Ibid.

Africa, who was an outstanding judge for making reference to the charter to strengthen his resolutions.[110]

National mechanisms for the enforcement of the people's decisions is quite easy, as domestic courts are much nearer to the people; therefore, applying decisions of the commission by national courts in Nigeria will help to overcome the problem of enforcement of the commission's decision.[111]

### 7.5.3 The African Court on Human and Peoples' Rights

A proposal to produce an African court was made at a 1961 African conference centred on the rule of law.[112] The African Court on Human and Peoples' Rights (the African Court) was founded by a protocol and implemented on 10 June 1998, and was eventually ratified by the stipulated 15 states in January 2004, after which 11 judges took their oath on 2 July 2006.[113] It is hoped that the charter will take a lead from Europe and America on how to respect the right to a healthy environment. Scholars are hopeful of an African Court that could curb the shortcomings of the commission, so as to carry out their duties efficiently.

It seems like the African Court is bidding to rescue the African Commission from its shortcomings. Definite decisions would be carried out by the African Court, and according to the protocol it is established that there is a time frame in which parties ought to comply with the

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[110] *Richard Gordon Volks No v. Ethel Robinson & Ors*. [2005] CCT 12/04
[111] Mbazira,
[112] Protocol to the African Charter on Human and Peoples' Rights on the Establishment. < https://www.achpr.org/public/Document/file/English/achpr_instr_proto_court_eng.pdf >accessed 20 June 2020.
[113] Oluduro (n15).

judgement of the court and ensure execution.[114] Following the inter-American and European courts of human rights experiences, according to Article 27 of the protocol, should it be discovered by the court that the human rights of the people have been breached, a necessary directive to provide remedy as well as financial compensation should be made. In situations where cases are of severe importance and urgency, and when necessary to avoid irreparable harm to persons, the court would use its discretion to embrace procedures that are provisional. Article 29(2) provides that the AU council of ministers shall be notified of the judgement and shall monitor its execution on behalf of the AU assembly, and Article 30 provides that states are expected to execute the decisions. Article 31 enjoins the court to have a report – which includes instances where states have not conformed with the decisions of the court – be submitted at AU assembly meetings.

The Niger Delta people, as well as those affected by degradation, should have access to the court, as well as be sufficiently compensated when a violation occurs, with compliance and lawful organization being two completely different things. If Nigeria, as well as other African states who experience violations, decide to embrace and follow the decisions of the court, it would be a positive step.[115] The inter-American Court on Human Rights provides, in Article 68(2), that before judgement can be enforced, the court's judgement may be executed in the affected state, following the domestic process governing the implementation of judgements against the state. This method has been adopted by the

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[114] Protocol to the African Charter on Human and Peoples' Rights on the Establishment. Available at< https://www.achpr.org/public/Document/file/English/achpr_instr_proto_court_eng.pdf >accessed 20 June 2020.

[115] Muna Ndulo , 'The African Commission and Court under the African human rights system', in Akokpari J & D Shea Zimbler (eds), *Africa's Human Rights Architecture* (Johannesburg: Jacana,2008)

Economic Community of West African States (ECOWAS) Court of Justice, and the decisions of the ECOWAS Court can be enforced in the highest national court of states that are members[116] – in Nigeria, that would be the Supreme Court. If this above method was followed, then the rights of victims of human rights degradation in Nigeria would be sufficiently safeguarded. The states should decide to accept, respect and comply with protocol provisions, by discarding provisions that do not adhere to human rights violation compliance, and they should enforce the decisions of the court since they have guaranteed to be obligated by them, as agreed in the principle that agreement must be kept, by virtue of the provisions of Article 1 of the African Charter.[117] According to the commission:

*"The Nigerian government itself recognises that human rights are no longer solely a matter of domestic concern. The African charter was drafted and acceded to voluntarily by African states wishing to ensure the respect of human rights on this continent. Once ratified, states parties to the charter are legally bound to its provisions. A state not wishing to abide by the African charter might have refrained from ratification. Once legally bound, however, a state must abide by the law in the same way an individual must."*[118]

Discoveries made by the African Commission have been said to be aloof and strange to victims and as such they meet a brick wall while trying

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[116] George Mukundi Wachira, 'African court on human and peoples' rights : ten years on and still no justice' (London : Minority Rights Group International, 2008). < https://minorityrights.org/wp-content/uploads/old-site-downloads/download-540-African-Court-on-Human-and-Peoples-Rights-Ten-years-on-and-still-no-justice.pdf > accessed 11 April 2021.

[117] Article 1 of the African Charter provides that member states shall recognize the rights, duties and freedoms enshrined in the charter and shall undertake to adopt legislative or other measures to give effect to them.

[118] *International Pen, Constitutional Rights Project, interights on Behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v. Nigeria* [1998] ACHPR 137

to enforce approvals.[119] While still deciding a case on behalf of the late leader of MOSOP, Ken Saro-Wiwa, the tyranny government, under the late General Sani Abacha's military government, debated against the commission's right to deliberate on cases, or even make recommendations,[120] as the government of Nigeria went further to state that the commission was judicially not equipped, after the commission accused the government of Nigeria of not fulfilling its human rights duties.[121] Based on the above, General Sani Abacha's government went ahead in executing Ken Saro-Wiwa, irrespective of the fact that the commission had asked the Nigerian government to adjourn the case until the commission had concluded its dialogue. Additionally, the Nigerian government has not attempted to implement the decision in the SERAC case given by the commission.[122] To date, the Nigerian government has not carried out the recommendations made by the commission, and the violation of people's human rights in oil exploration areas in Nigeria by multinational oil corporations is ongoing. Justice C. Nwobike stated that[123] the decision taken by the Nigerian government in the case of the Ogoni people was against the principles of international human rights law.

Decisions to abide by recommendations or advices given by the commission cannot be imposed on states, as a state has the discretion

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**[119]** Makau Mutua, **'**The Construction of The African Human Rights System: Prospects And Pitfalls' in Samantha Power and Graham Allison (eds), *Realizing Human Rights: Moving From Inspiration To Impact* (St. Martin's Press, 2000)

[120] Ibid.

[121] Mukundi Wachira (n116).

[122] The setting up of agencies such as the NDDC and the creation of the Niger Delta Ministry subsequent to the decision of the African Commission can be partly attributed to the decision, as well as the agitation in various quarters in the country to address the economic and social deprivations in the Niger Delta.

[123] Nwobike (n53).

to adhere or not.[124] This behaviour gives liberty for degradations to continue to be done in weak regions, and victims see no need to take their cases up with the African Commission.

Notably, if the state does not comply with the recommendations provided in Rule 112(2) within 180 days after any decision is made, or have failed to make contact, then a case of non-compliance can be filed against the state in the African Court, according to Rule 18 of the latest rules of procedure of the commission, pursuant to Article 5(1)(a) of the protocol. [125] It therefore implies that if member states who are signatories to the African Court protocol fail to adhere to recommendations made, there would be a legal enforcement towards them coming from the African Court. If the African Court is going to be efficient at ensuring that recommendations are enforced on time and effectively, then the above provisions would be commendable. The commission should be encouraged to have its own mechanism for enforcement, in case circumstances arise where there is a delay in enforcing the decisions of the African Court.[126] By so doing, it would improve the effectiveness of the commission, so that they can in turn

[124] The African Commission on Human and Peoples' Rights, Information Sheet No. 3, Communication Procedure, Organization of African Union.
[125] The Rules of Procedure of the African Commission on Human and Peoples' Rights was approved by the African Commission on Human and Peoples' Rights during its 47th ordinary session held in Banjul, The Gambia, 12–26 May 2010.
[126] George Mukundi Wachira (n116).

improve on providing compensation for people of the Niger Delta region who have been victims of human rights violations.

One of the major problems facing the African Court today is its accessibility by the people. Currently there are only two instances by which cases could be taken to the African Court. Cases can be brought before the court by two different groups. Firstly, we have the organs of the AU, the African Commission and inter-governmental organizations; these groups have direct and unrestricted contact with the court. Secondly, we have individuals and NGOs who have spectator status at the commission, and can only bring cases before the court where a state has made a declaration under Article 34(6) allowing such uninterrupted access; and, in any event, the court has the discretionary power to grant or decline access.[127] If individuals and NGOs could have access to the African Court, and resolve issues that have made the African Commission unsuccessful, then the African Court would be said to be effective. Currently, there is still a lack of knowledge and understanding about the African Court by individuals in member states. As such, more information on how the court can enhance human rights protection should be given to the people.

### 7.5.4 The African Court of Justice and Human Rights

Blending the African Court on Human and Peoples' rights and the African Court of Justice (ACJ)[128] brought about a development that was novel

[127] Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

[128] The African Court of Justice (ACJ) was established by the Constitutive Act of the African Union, 2002, and is designed to operate as a separate court different from the African Court on Human and Peoples' Rights. A protocol to set up the Court of Justice of the African Union was adopted on 11 July 2003, and entered into force on 11 February 2009; AU Doc. Assembly/AU/Dec.25(ii). Article 2 of the Protocol

to the African regional judiciary, by adopting an mechanism that merged the courts.[129] The courts were merged into one court and then established as the African Court of Justice and Human Rights.[130] Three states, namely Libya, Mali and Burkina Faso, had ratified the protocol as of August 2010.[131] The African Court of Justice and Human Rights, which is the new court, has two sections: the human rights section and a general affairs section.[132] It has a period of transition which ought not to be more than one year or any time resolved by the Assembly, after entry into force of the protocol, to facilitate the African Court on Human and Peoples' Rights' obligations to the new African Court of Justice and Human Rights.[133]

The court can include individuals and relevant non-governmental organizations accredited to the African Union or its organs, as a result of the expansion of the categories that can have access to the Africa Court of Justice and Human Rights.[134] Individuals and NGOs will be able to bring forward petitions without being given a difficult time by the state, by doing away with the old requirement of making a further declaration before giving individuals and NGOs access to bring petitions before the court.[135] This will help the victims of human rights abuse, such as the Niger Delta people, to approach the court directly without

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establishes the ACJ. Although the protocol has been ratified by the required 15 AU state parties, the court was never operationalized by the AU.

[129] Protocol on Statute of the African Court of Justice and Human Rights, EX CL/253 (IX), Annex ii Rev, Article 1.

[130] Ibid., Article 2.

[131] Coalition for an Effective African Court on Human and Peoples' Rights, Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights.

[132] Draft Protocol on the Statute of the African Court of Justice and Human Rights, EX CL/253 (IX), Annex ii Rev, Articles 5, 16 and 19.

[133] Ibid., Article 7.

[134] Ibid., Article 30.

[135] Abdelsalam A. Mohamed, 'Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights' (1999) 43 Journal of African Law 201–203,204.

any hindrance.[136] This can be found in the European Court of Human Rights as well, as Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms imposes an obligation on the state not to obstruct the exercise of a guaranteed right.[137]

The executive council is given the authority to observe the execution of court judgements on behalf of the assembly, under Article 43(6). This will help in reducing potential obstacles faced by victims of human rights violations regarding the decisions of the African Commission not being implemented. This provision is similar to what exists under the European Convention on Human Rights.[138]

The decisions of the African Court of Justice and Human Rights are definite and binding on all parties. If a party does not conform with the judgement of the court, the court shall then transfer the matter to the AU assembly, which then takes into account procedures to make the judgement become effective.[139] By so doing, the AU assembly may have to levy sanctions, pursuant to Paragraph 2 of Article 23 of the constitutive act.[140] This further emphasizes the relevance of the AU assembly in helping to enforce decisions of human rights bodies, such as the African Court on Human and Peoples' Rights or the African Court of Justice and Human Rights, as well as helping to enforce the recommendations of the African Commission. Irrespective of the fact that the decisions of the African Court of Justice and Human Rights are binding, if the mandatory will on the part of member states to enforce the decisions of the court is not present, there would be no purpose to

[136] Mukundi Wachira (n116).
[137] Article 34, Convention for the Protection of Human Rights and Fundamental.
[138] Article 54 of the European Convention on Human Rights, Rome, 4 November 1950 and its Five Protocols.
[139] Draft Protocol on the Statute of the African Court of Justice and Human Rights, Article,46.
[140] Ibid., Article 46(5).

making those decisions and the whole African regional structure would be a misconception. Therefore, irrespective of the fact that to comply with courts' decisions, sanctions are used, member states are advised to willingly respect their human rights obligations, and the decisions of the commission and court;[141] therefore, the majority of victims of human rights violations, especially the Niger Delta people, would be able to utilize the court and the commission for better protection from the Nigerian government and the oil MNCs. The African regional judicial system can hold MNCs accountable for their human rights violations if it is adequately reformed and checked, so as to complement the ability of the host state and efforts made at the international level.

The Court of Justice of the Economic Community of West African States (ECOWAS) has handled cases relating to the significance and enforcement of the provisions of the African Charter in Nigeria. In the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. President of the Federal Republic of Nigeria & 8 Ors,[142] the plaintiff – a human rights non-governmental organization (NGO) – alleged that the activities of the oil industry in the Niger Delta constitutes a violation of the right to an adequate standard of living, and of other fundamental human rights such as the right to a clean and healthy environment, as well as depriving the people of the region of economic and social development. It further alleged that the SPDC, Elf, Agip, Chevron, Total and ExxonMobil, who were all defendants, were actively involved in human rights violations of the Niger Delta people. The fact that the plaintiff did not have *locus standi* to establish an action for and on behalf of the people of the Niger Delta was also one of the

[141] Mukundi Wachira (n116).
[142] Suit No. ECW/CCJ/APP/08/09; Rul. No. ECW/CCJ/APP/07/10.

aims of the defendants. They stated that the plaintiff was not a legal person under Nigerian law and as such was incapable of instituting an action before the court. They went ahead in alleging that the court did not have the jurisdiction to adjudicate on the dispute brought to it because it was neither a member of ECOWAS nor a community institution. The court held, in a judgement given on 10 December 2010, that the plaintiff, having been registered under Nigerian laws as a human rights non-governmental organization, was a legal entity duly founded. Regarding *locus standi*, the court – referring to several international human rights law treaties, such as the Aarhus Convention, the American Convention on Human Rights, the Rules of Procedure of the African Court of Justice and Human Rights and the doctrine of *actio popularis* – held that the plaintiff, having been adequately founded and enjoying the status of an observer before ECOWAS institutions, did not require any particular mandate from the people of the Niger Delta to bring the action for the alleged violation of human rights that affected the people of the area.[143] On the issue of the capability of the court, it held that the additional procedure, which modified the ECOWAS treaty, bestowed on it capability to resolve cases of human rights violations which took place in any member state of the community.[144] However, the contention of the defendants, ranging from the SPDC to ExxonMobil, was that as they were not parties to the treaty or other ECOWAS legal instruments, they were not eligible to be sued before the Ecowas Community Court of Justice (ECCJ). One of the preliminary objections of the oil companies was not having the jurisdiction of the ECCJ extended to disputes between individuals. Using the current position in international law, the court ruled emphatically that only states and

[143] Oluduro (n15).
[144] Ibid.

community institutions have the mandate to be defendants before the ECCJ involving claims of human rights violation against multinational corporations. This was still the ruling in the SERAP case as well. Depending on its previous decision in the case of Peter David v. Ambassador Ralph Uwechue,[145] the court held that:

"*As an international court with jurisdiction over human rights violations, the court cannot disregard the basic principles and the practice that guided the adjudication of the disputes on human rights at international level. Viewed from the angle, the courts recalls that international regime of human rights protection before international bodies relies essentially on treaties to which states are parties as the principal subjects of international law. As a matter of fact, the international regime of human rights imposes obligations on states. All mechanisms established thereof are directed to the engagement of state responsibility for its commitment or failure towards those international instruments. From what has been said, the conclusion to be drawn is that for the dispute between individuals on alleged violation of human rights as enshrined in the African charters on human and peoples' rights, the natural and proper venue before which the case may be pleaded is the domestic court of the state party where the violation occurred. It is only when at the national level, there is no appropriate and effective forum for seeking redress against individuals, that the victim of such offences may bring an action before an international court, not against the individuals, rather against the signatory state for failure to ensure the protection and respect for human rights allegedly violated. Within the ECOWAS community, apart from member states, other entities that can be brought to this court for alleged violation of human rights are the*

[145] *Peter David v. Ambassador Ralph Uwechue* [2010] ECW/CCJLR /RUL/03/10.

*institutions of the community because, since they cannot, as a rule, be sued before domestic jurisdiction, the only avenue left to the victims for seeking redress for grievance against those institutions is the community court of justice."*[146]

Although the ECCJ acknowledges the right of Nigerians to enjoy a healthy environment, through active interpretation of significant treaties, however, it was unsuccessful in asserting jurisdiction or accountability over multinational corporations for human rights violations supposedly committed by them.

## 7.6 Conclusion

This chapter has argued that, since the regulation of MNCs under international law and under voluntary initiatives has not been successful, the strengthening of regional institutions should support those efforts. Although this chapter has contended that weak institutions largely contribute to the problems of human rights abuses by MNCs in Nigeria, it has suggested that institutions, if effectively strengthened, have the potential to be part of the way out of the present situation. Strengthening the institutions that ensure rights protection, the rule of law, recognition, participation procedures, transparency and accountability will no doubt empower the Niger Delta people to resort to law to protect their rights. Identifying ways in which the domestic courts and local institutions can be strengthened and reformed will enhance the protection of the rights of citizens against human rights abuse at the hands of the government and MNCs, and help to enhance the capabilities of the domestic courts and local institutions/agencies. Given the quality

[146] Ibid.

of Nigerian crude, the profitability of the region's oil and the fact that it is not possible for the multinationals engaged in resource extraction to move their capital to wherever labour is more accommodating, since the resources are immovable,[147] states like Nigeria should take advantage of these factors to negotiate better and more sustainable exploratory practices with the MNCs.

The African Commission should be empowered to have its own enforcement or implementation mechanism, as Article 1 of the African Charter provides that member states shall recognize the rights, duties and freedoms enshrined in the charter and shall undertake to adopt legislative or other measures to give effect to them.

Strengthening regional institutions will result in more efficient law enforcement, not only through improvement of the regional capacity to implement laws and environmental standards, but also through enhancement of its image. A restored public image will enable that Africa and its state gain the citizens' trust, and their participation in the decision-making process. This will finally ensure that, in addition to being fair, just and equitable, environmental legislation and policies are implemented more efficiently.[148]

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[147] Max Stephenson Jr. and Lisa A. Schweitzer,'Rights Answers, Wrong Questions: Environmental Justice as Urban Research' (2007) JSTOR 44, 319-339.

[148] Alberto Costi, 'Environmental Protection, Economic Growth and Environmental Justice: Are They Compatible in Central and Eastern Europe?', in Julian Agyeman, Robert D. Bullard and Bob Evans (eds), *Just Sustainabilities: Development in an Unequal World* (Hoboken, NJ: Earthscan, 2012) 303.

# Chapter Eight

# Improving Human Rights Accountability through the African Union

## 8.1 Introduction

We are encouraged to bridge the gap which exists between corporate accountability and multinational corporations by discovering novel mechanisms that would be capable of ensuring that human rights violations as a result of exploration activities by multinational corporations do not occur. The enforcement framework of international human rights has various loopholes.[1] Trying to enhance enforcement of corporate human rights can be likened to a puzzle through which one has to find a way – a puzzle which constantly evolves through the passage of time, trials and persistent change.[2]

Institutional and normative mechanisms which are lacking in the African Union (AU) are not available to apply to the activities of MNCs in the region.[3] There are, however, avenues set in place to reduce the difficulties faced. This chapter will pay attention to the recent development, which is the approaches made by the AU to enhance its institutions so as to hold corporations accountable for their activities in Africa, as well as the effects in Nigeria.

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[1] Hannah Moscrop, 'Enforcing International Human Rights Law: Problems and Prospects' (2014), *E-International Relations Students*, also available at< http://www.e-ir.info/2014/04/29/enforcing-international-human-rights-law-problems-and-prospects/ >accessed 23 June 2020.

[2] Ashley Grimes, 'Enforcement of International Human Rights Law: Barriers to Implementation', available at< http://www.grimeslawaz.com/enforcement-of-international-human-rights-laws-barriers-to-implementation/ >accessed 21 June 2020.

[3] Eghosa O. Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) International Community Law Review 20, 30–68, 32.

## 8.2 African Union Anti-Corruption Convention and the Extractive Industries

Corruption is one of the major problems affecting most African states, and the corporations carrying out activities in Africa have been actively involved in the corruption outrage; its impact is clearly visible and cannot be underestimated. Many MNCs partake in bribing governments so that they can acquire natural resources contract agreements, and also bribe the military to rough-handle any members of the community who interfere during their operations in the community.[4] Improving human rights in Africa has been unsuccessful because of the wide spread of corruption around the region.[5] Corruption is never a victimless crime, and most times affects the vulnerable, poor and sidelined people. As such, to curb corruption and the effect of corruption in Africa, the AU adopted the Convention on Preventing and Combating Corruption (AU Anti-Corruption Convention) on 1 July 2003. The AU Anti-Corruption Convention, which is mandatory and binding,[6] was enacted in August 2006.

The Convention can be used as an approach to foster accountability of MNCs in Africa. By charging governments to take up a wide range of methods, both administrative and statutory, in order that afflictions of corruption can be resolved in Africa, the Convention does not entertain

[4] Olatunde Otusanya, Sarah Lauwo and Gbadegesin Adeyeye, 'A Critical Examination of the Multinational Companies Anti-Corruption Policy in Nigeria' (2012) 1 Accountancy Business and the Public Interest 1–52.
[5] Kolawole Olaniyan, 'The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal' (2004) 4(1) African Human Rights Law Journal 74–92.
[6] Ekhator (n3).; see also Olufemi Amao, 'The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of Multinational Corporations' (2008) International Journal of Human Rights 12,5.

corruption in either the private or public sector.[7] Article 1 of the Convention defines private sector as:

*"the sector of a national economy under private ownership in which the allocation of the productive resources is controlled by market forces, rather public authorities and other sectors of the economy not under the public sector or Government."*[8]

The definition involves every kind of private body, which includes both small and medium initiatives, partnerships and extractive industries.[9] Also, according to Article 4(1)(e) and (f), this Convention would apply to the below listed acts which lead to corruption and associated offences:

*"(e) the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;"*[10]

*"(f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result."*[11]

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[7] Ekhator (n3); see also African Union Convention on Preventing and Combating Corruption.
[8] Article 1 of the African Union Convention on Preventing and Combating Corruption.
[9] Ekhator (n3).
[10] Article 4(1)(e) of the African Union Convention on Preventing and Combating Corruption.
[11] Ibid., Article 4(1)(f).

The above provisions of the Convention can assist in curbing the effect of corruption in Africa by building partnerships that exist amongst governments and the sectors of civil society and private sectors. Therefore, the provisions in Articles 1 and 4 impose the responsibility on African states to ensure MNCs' activities in regions highlighted by the Convention.[12] Additionally, Article 5(2) admonishes African states to:

*"Strengthen national control measures to endeavour that the organisation and operations of foreign companies in the territory of a State Party shall be subject to the respect of the national legislation in force."*[13]

Article 11 of the AU Anti-Corruption Convention also admonishes governments to seek to:

- Implement and strengthen legislative and different methods so as to avoid as well as fight corruption and associated offences done by authorities in the private sector.
- Battle alongside unfair competition, admiration for tender procedures and property rights, by establishing frameworks so there can be enhanced participation by the private sector.
- Adopt such other ways that encourage members of state to report cases of corruption, like instances of paying bribes to win offers, without fear.

According to Article 9 of the AU Anti-Corruption Convention, it admonishes states to take up legislative and extra instruments to enhance their access to the important information needed to fight the

[12] Nsongurua Udombana, 'Fighting Corruption Seriously – Africa's Anti-Corruption Convention' (2003) 7 Singapore Journal of International and Comparative Law 447–488, 464–465; see also Ekhator (n3).
[13] Article (5)(2) of the AU Anti-Corruption Convention.

hazard of corruption and additional related offences.[14] Possibly, the enacting of the Freedom of Information Act in Nigeria was the fulfillment of this provision.[15]Also, Article 19 of the Convention encourages state parties to participate in fostering regional and international co-operation regarding the prevention of corruption in the home countries of MNCs. Also, Article 22 of the Convention is of the view that an advisory board be created within the AU comprising 11 members elected by the executive council, who will help fight and stop corruption and other associated offences.[16] Article 16 enjoins the authorities to seize the proceeds of corruption pending the outcome of judgements delivered. The AU Anti-Corruption Convention's notable strength is contained in Article 12 in which it admonishes state parties to engage in promoting the Convention and participate in its monitoring and implementation, by working with civil society.[17]

The AU Anti-Corruption Convention has a rights-based approach which can be seen in its objectives.[18] One of the objectives that stands out is that it seeks to "promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights."[19] The AU Anti-Corruption Convention looks at corruption as an occurrence that hinders individuals from enjoying human rights in general.[20]

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[14] Ekhator (n3).
[15] Ibid.
[16] Olufemi Amao, 'The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of Multinational Corporations' (2008) International Journal of Human Rights 12,5.
[17] Ekhator (n3).
[18] Article 2 of the AU Anti-Corruption Convention.
[19] Article 2(4) of the AU Anti-Corruption Convention.
[20] Thomas Snider and Won Kidane, 'Combating Corruption through International Law in Africa: A Comparative Analysis' (2007) Cornell International Law Journal 40, 3.

Yet another part of the AU Anti-Corruption Convention that makes it stand out is its emphasis on behaviour towards the accused. Article 14, under the "minimum guarantees of a fair trial",[21] guarantees that:

*"subject to domestic law, any person alleged to have committed acts of corruption and related offences shall receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter on Human and Peoples' Rights and any other relevant international human rights instrument recognized by the concerned state parties."*[22]

Therefore, the AU Anti-Corruption Convention is unique in the way that it pays importance to the rights of the accused and the reference it makes to human rights instruments.[23] If a law that is to be enforced does not take into account the fundamental rights of those accused, more harm can be caused in society.[24] Most especially in the African region, we see accused people being treated poorly by law enforcement agents.

The down side of the Convention is how it pays attention to state responsibility and lives out any provision holding MNCs directly liable for corruption[25] – therefore MNCs not being directly accountable when involved in corruption is a major criticism of the Convention.[26] Although

[21] Mauritius and Seychelles, 'Compendium of Regional and International Agreements on Extraction and Mutual Legal Assistance in Criminal Matters' (2009) Vienna, available at< http://www.unodc.org/documents/terrorism/Publications/Compendium_Mauritius_Seychelles/Compendium_Mauritius_Seychelles.pdf >accessed 16 June 2020.
[22] Article 14 of the AU Anti-Corruption Convention.
[23] Snider and Kidane (n20).
[24] Ibid., 718.
[25] Amao (n16).
[26] Ekhator (n3).

states are to regulate the activities of MNCs, many African countries do not have the means of controlling the activities of MNCs efficiently.[27]

Another criticism of the Convention is the fact that it does not have a penal and preventive system.[28]

Irrespective of these criticisms of the AU Anti-Corruption Convention, to confront the issue of corruption, Nigeria has enacted domestic legislation to curb it.[29] Yet still, with the presence of national laws and bodies on corruption[30] – such as the Economic and Financial Crimes Commission (Establishment) Act 2004[31] and the Corrupt Practices and Related Offences Act 2000[32] – as regards corruption in Nigeria, no MNCs have been held liable.[33] There have been no cases with successful legal action established against MNCs by the government in Nigeria.[34] During the outrage that broke out against Halliburton, the company was accused of bribing the Nigerian authorities to sway the award of a contract for a liquefied natural gas plant in Nigeria. The company was penalized a huge sum by some countries,[35] as well as some of its officials being jailed.[36] Richard Cheney, who was a previous United States Vice President from 2001 to 2009, and also the Chairman of Halliburton from 1995 to 2000, had a case of criminal conspiracy

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[27] Ibid.
[28] Snider and Kidane (n20).
[29] Ibid.
[30] Ekhator (n3).
[31] Ibid.; Cap E1 LFN 2004.
[32] Ekhator (n3); Cap 359, LFN 2004.
[33] Ekhator (n3).; see also Gbemi Odusote, 'The Judiciary as a Critical Linchpin in Nigeria's Anti-Corruption Crusade' (2012), 34(2) Liverpool Law Review 123–143, which highlighted corruption cases in Nigeria involving local politicians.
[34] Otusanya (n4).
[35] Ekhator (n3); see also Obiora Okafor and Benson Olugbuo, 'The Economic and Financial Crimes Commission and the Accountability of Corrupt Foreign Actors' (2011), 4(3) *Law and Development Review*, 2–29.
[36] Ekhator (n3); see also John Rudolf, 'Albert Stanley, Former Halliburton Exec, Sentenced in Bribery Scheme', *Huffington Post*, 2 December 2012.

brought against him by the Nigerian government for allegedly paying 180 million dollars in bribes to the Nigerian government.[37] However, a plea bargain was reached by Halliburton and they agreed to pay the Nigerian government a fine of around 250 million dollars.[38] Okafor and Olugbuo have argued:

*"Yet the fact that the Halliburton trials, which were launched by the Attorney-General of the Federation of Nigeria in early September 2010, are among the first significant instances of the EFCC actually filing criminal charges in court against noncitizen individuals and corporations for their perpetration of acts of grand corruption in Nigeria is indicative of the fact that it is difficult to conclude that the EFCC has optimized its potential in the specific area of the prosecution of grand corruption perpetrated by foreign actors in Nigeria."*[39]

The AU Anti-Corruption Convention takes into account the unique predicament that African states experience, of which Nigeria is no exception. The Convention recognizes the existing realities faced by Africa, and it does not just act as a crime control mechanism, but also balances the battles that Africa faces in order to realize accountability, good governance, rule of law and development.[40] However, the benefits of the Convention cannot be entirely reached if there is no corresponding obligation on the part of the home country.[41] For example, it seems as though the Nigerian government does not have the will to hold MNCs

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[37] See< https://www.theguardian.com/world/2010/dec/02/dick-cheney-halliburton-nigeria-corruption-charges >accessed 21 July 2020.
[38] Eghosa O. Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?' (2018) International Community Law Review 20, 30–68, 32. See also < https://www.theguardian.com/world/2010/dec/15/nigeria-dick-cheney-plea-halliburton >accessed 22 June 2020.
[39] Ekhator (n38).
[40] Snider and Kidane (n20).
[41] Ibid.

accountable yet, and as such may persist until the government sits up and holds corporations accountable for corruption.

Currently, the only way to legally fight corruption would be for states that are party to the AU Anti-Corruption Convention to comply with the United Nations Convention Against Corruption (UNCAC), so as to resolve issues of corruption between international regions, because unlike the AU Anti-Corruption Convention, which only has preventive measures, the UNCAC has penal and deterrence measures.[42]

### 8.3 Roles of NEPAD in the Holding of MNCs Accountable

A developmental initiative with the support of the AU is the New Partnership for Africa's Development (NEPAD), which promotes collective action in Africa, by helping African states overcome their developmental challenges.[43] Stephen Gelb describes the concept of NEPAD as:

*"an attempt by African leaders to promote collective action by African states within a coherent framework to address the continent's lack of development. It is intended both to respond to global systemic risks originating from Africa, and to establish conditions for the continent's increased integration with global markets … its essential focus is to overcome the problems of weak and incapable states."*[44]

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[42] Ibid.
[43] Ekhator (n38).
[44] Stephen Gelb, 'The New Partnership for Africa's Development (NEPAD)' (2002) ; see also Sanusha Naidu, 'The New Partnership for Africa's Development (NEPAD) in the Context of Responsiveness and Accountability', < https://pdfs.semanticscholar.org/527d/ed2f6d7ac3812ba3f32fab771f94e8960ab9.pdf >accessed 20 July 2020.

The history of NEPAD can be discovered from three parallel initiatives.[45] Three African leaders at the time, Presidents Obasanjo of Nigeria, Mbeki of South Africa and Bouteflika of Algeria, formed the initiative at the request of the Organisation of African Unity (OAU) in order that a developmental plan be drafted for Africa.[46] These three leaders were at that time representatives of three large intergovernmental groups that represented Africa. They were the Non-Aligment Movement (NAM), the G77 and the OAU respectively.[47] NEPAD was born out of the New African Initiative (NAI) in October 2001, and this initiative seeks to foster the economic growth and development of Africa through improved governance.[48] The major objective of NEPAD is basically to pull Africa out of underdevelopment, so as to make Africa stronger in the eyes of the global market;[49] simply put, it aims to develop Africa by increasing its foreign investment.[50]

In Africa, as regards the extractive industries, the objective of NEPAD is to improve the value of natural reserves information, ensuring that there is an accountability mechanism which is appropriate for development in the oil sector, that best practice guarantees that the production and extraction of high-standard natural resources are established, as well as that policies that regulate compliance with operational costs and promote diversification of production and exports are put in place.[51] Oshionebo is of the view that NEPAD's focus is on foreign investment, rather than sustainable development.[52]

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[45] Naidu (n44).
[46] Ibid.
[47] Ibid.
[48] Ekhator (n3).
[49] Ibid.; Paragraph 1 of the NEPAD Document.
[50] Ekhator (n3).
[51] Paragraphs 156 and 157 of the NEPAD Document.
[52] Oshionebo (n48).

Although NEPAD has been criticized for being too ambitious, for having an unidealistic assessment of power within the global economy, it is not in the best interests of Africa, however, if it should deny that NEPAD is a potential instrument which could promote good governance, human rights and economic development in Africa.[53] However, for the initiative to achieve its purpose, it will require a responsive government ready to embrace a global standard of good governance and strengthen the relationship between its state and others.

As noted in the G8/Africa Kanansakis Summit G8 Africa Action Plan,[54] NEPAD supports self-regulation in the extractive industries in Africa,[55] as it is mentioned that the G8 works with African governments as well as civil society to discourse the connection which exists between armed conflict and oil exploitation in Africa, and achieves it through encouraging voluntary regulators and adapting voluntary principles of corporate social responsibility by those involved in the development of Africa's natural resources.[56] In Nigeria, NEPAD is below the presidency, with a Chief Executive Officer who runs the office and acts as a special adviser to the president on NEPAD.[57] The closeness that exists between the federal government of Nigeria and NEPAD may lead to abuses of power and undue interference, which may hinder transparency and accountability.[58]

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[53] Naidu (n44).
[54] Ekhator (n3). also < http://www.mofa.go.jp/policy/economy/summit/2002/africa.html >accessed 24 June 2020.
[55] Ibid.
[56] Ibid.
[57] Ibid.; see also NEPAD Nigeria, < http://nepad.gov.ng >accessed 21 July 2020.
[58] Ibid.; see also Chris Landsberg, 'The African Peer Review Mechanism: A Political Retort on the AU's Most Innovative Governance Instrument' (2012) 42(3) African Insight, 104–118, 110–113, on how the NEPAD and APRM process was hijacked by South African government officials to the detriment of the participation of CSOs.

## 8.4 The African Peer Review Mechanism (APRM) and the Role in Regulating MNCs in Nigeria

The APRM is a mutually agreed self-monitoring framework which is voluntary and has been recognized by African Union member states. The APRM was first introduced in 2002 and then established in 2003 under the execution framework of NEPAD development.[59] AU member states can be parties to the APRM.[60]

Attention is given to the procedure which APRM plays in facilitating the delivery of accountability, good governance, peace, as well as security, during the operation of MNCs in Nigeria. The APRM review process has been done twice by Nigeria. There are four review processes which ought to be made by APRM:[61] the first review, known as a base review, is conducted by a country within the first 18 months after joining the APRM initiative;[62] then every two to four years a periodical review is done, and the member state is obliged to make a request to be reviewed outside the periodic review of the initiative; lastly, if it is brought to the APRM's knowledge that a member state's actions could threaten a political and economic crisis, then a conduct review may be done on impulse.[63]

Although the APRM does not have sanctions, it has been an exceptional achievement of NEPAD's development in Africa. The agendas lined up by NEPAD run into ten areas: climate change, natural resource management, agriculture and food security, integration of regions, as

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[59] Mouzayinn Khalil-Babatunde, 'Lessons from Implementing the APRM National Programme of Action in Nigeria, Governance and APRM Programme', December 2014, < https://www.saiia.org.za/policy-briefings/658-lessons-from-implementing-the-aprm-national-programme-of-action-in-nigeria/file >accessed 22 July 2020.
[60] Ibid.
[61] Ibid.
[62] NEPAD Nigeria (n57).
[63] Ekhator (n3).

well as infrastructure, human development, economic and corporate governance, and other areas such as gender, capacity development and ICT.[64] A peer review mechanism, the APRM, was invented in order to help hasten the realization of the projects which were under NEPAD.[65] Countries who are parties to APRM devote themselves to adopting appropriate laws, policies and standards, as well as building relevant human and institutional capacity to ensure that the primary purpose is realized,[66] even if it is a voluntary initiative.[67] APRM comes with a broad public participation process which is initiated by member states, revised and collected in the National Programme of Action's (NPOA) publication, which is made up of objectives and recommendations which stakeholders are guided by, so that the government, private sector and civil society can achieve the idea of the member state.[68] APRM development can be achieved when a self-assessment process is undertaken and dialogues that are beneficial to all stakeholders have been made.[69] To help member states develop their action in the preliminary programme, APRM depends on a self-assessment questionnaire (SAQ).[70] The APRM process, while considering states' submissions with different types of African and international human rights conventions and standards, places emphasis on four premises.[71] Corporate governance and socio-economic development, economic governance and management, democracy and political governance are

[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Olivier De Schutter and Anita Rawasasty, Human Rights Due Diligence: The Role of States (December 2012) 59; < https://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf >accessed 11 April 2021.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] APRM < https://www.aprm-au.org > accessed 09 April 2021.

the confined parts expressed in the APRM process. The Memorandum of Understanding was signed by 33 countries, consenting to the APRM, including Nigeria, Algeria, Burkina Faso and Ghana.[72] The AU recently adopted the APRM as the mechanism for monitoring the sector in Africa that pertains to natural resources;[73] this was done to restructure the APRM country self-assessment questionnaire and included a section that involved the governance of extractive industries, as it was seen as a positive way of developing an Africa-centred scheme.[74] The APRM Country Review Report of Nigeria is where the process of how to monitor the oil and gas sector is situated.[75] The report states that as a result of the consistent push from indigenes on MNCs, it has improved on its current widespread participation in corporate accountability activities.[76]Previously, the extractive industries were of the view that they had neither a moral nor a legal obligation to the communities where extraction was being carried out, other than to pay taxes and royalties to the government.[77] MNCs in the Niger Delta currently map out new policies and approaches to get the indigenes involved in community development projects, and are joining hands with NGOs to ensure that community development initiatives are funded; all these were advised because of the constant pressure being mounted on MNCs in the Niger Delta to stop the use of militants to subdue the indigenes, as well as to stop the abuse of human rights in the communities as a result of their

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[72] Ibid.; see also Ekhator (n3).
[73] Ekhator (n3).; see also Kofi Annan, 'Foreword' in African Progress Panel Report (2013), *Equity in Extractives: Stewarding Africa's Natural Resources for All*, < http://www.africaprogresspanel.org/event-perspectives-on-progress-an-agenda-for-action/ >accessed 12 July 2020.
[74] Ekhator (n3).; see also UNECA, *Harnessing the African Peer Review Mechanism (APRM) Potential to Advance Mineral Resources Governance in Africa: Issues Paper* (2013), 4.
[75] Ekhator (n3).; see also APRM, *APRM Country Review Report No. 8: Federal Republic of Nigeria* (June 2008), < http://www1.uneca.org/Portals/aprm/Documents/CountryReports/Nigeria.pdf >accessed 12 July 2020.
[76] Ibid, Ekhator(n3)
[77] Ibid.230.

exploration.[78] There is a notion that shareholders are beginning to see that multinational corporations are not proactive in investing in communities where they operate.[79] In Nigeria, reviews always boil down to the fact that all sizes of business should be accountable for their activities.[80]

The findings from the review state that, although an environmental regulatory mechanism exists in Nigeria, it is not sufficient to ensure that environmental laws are respected by the extractive industries in Nigeria, however.[81] Consequently, NGOs and the media should continue to urge MNCs to respect environmental laws in Nigeria and expose those who violate human rights by their activities.[82] Also, the report of the review highlights recommendations which Nigeria is being encouraged to initiate. As part of the recommendations made, it was stated that the Nigerian government should consider implementing labour laws in the private sector, as well as trade unions, and as mentioned earlier, help to spread the negative effect of environmental degradation by using the media or social media. Finally, it should have an accountability commission with the purpose of creating an understanding about corporate accountability in Nigeria.[83]

Nigeria made two progress reports, in wish they expressed their desire to implement the APRM report, responding to the APRM report. From the initial progress report created,[84] members of the community were urged to have a discussion with multinational corporations and the

[78] APRM, *APRM Country Review Report No. 8*
[79] Ibid., 233.
[80] Ibid
[81] Ibid.
[82] Ibid., 231.
[83] Ibid., 237–238.
[84] Ekhator (n3).

Nigerian government on how good practices could be promoted.[85] The government also stated that a decline in violent crimes in the Niger Delta has been recorded because the government declared an amnesty for armed militants in the Niger Delta.[86] Furthermore, Chevron is working hand-in-hand with other corporations to create new ways to find a solution to the issues in the Niger Delta.[87]

In its second progress report,[88] the Nigerian government was able to point out plans to help out those in society that were unable to afford legal aid assistance.[89] The Nigerian government also affirmed that there had been progress in access to justice for victims in human rights enforcement in Nigeria, as a result of the development of the Fundamental Human Rights (Enforcement Procedure) Rules of 2009.[90] According to the Nigerian government, the current developed corporate governance code has led to a realization of the significance of fostering accountability in Nigeria.[91] To improve the need for corporations to take part in corporate accountability, a new national tax policy has been introduced by the government to encourage a fair system for donations to be deducted under tax laws.[92] In other words, the extent to which responsibility in areas such as skills procurement initiatives, grants and providing for important services, as well as various others, can be achieved is due to the expansion by MNCs in Nigeria.[93]

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[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Nigeria Country Report Part 1: Executive Summary 2013.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.

In the report, which was centred on the impact of the APRM on mineral resources governance in Africa, the United Nations Economic Commission for Africa (UNECA) particularly looked at the significance of reliable public participation in the administration of natural resources in Nigeria.[94] Also, findings showed that indigenes of the Niger Delta seem not to participate in the management of their own natural resources.[95] With regards to corporate accountability practices of MNCs in the Niger Delta, UNECA states:

*"Ensuring access to state power by the local communities, including minority representation; and utilizing public-private partnerships and dialogue between communities and oil companies to support the implementation of a corporate accountability platform which is important towards development approaches and eventually increase growth."*[96]

It could mean, therefore, that MNCs try to ameliorate clashes and promote transparency in the administration of mineral or natural resources by getting a social license to operate.[97]

The fact that the APRM is voluntary, without any sanctions or obvious penalties, makes it weak and not dependable. However, from above, it can be seen that the APRM and NEPAD processes promote accountable MNCs, and have had a positive impact on MNCs. The two institutions, although not directly making provisions on how to hold MNCs accountable for their violations, rather indirectly stress the notion that AU mechanisms can help hold MNCs accountable. In different country

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[94] UNECA, *Harnessing the African Peer Review Mechanism (APRM) Potential to Advance Mineral Resources Governance in Africa: Issues Paper* (2013), 4.
[95] Ibid.
[96] Ibid.
[97] Ibid.

reports on the APRM, the Nigerian government stated that they have accepted APRM report recommendations, as well as concentrated on reforms in the extractive industries in Nigeria.

### 8.5 African Mining Vision

The African Mining Vision is a declaration that was adopted by African heads of state at the February 2009 AU summit as a result of the meeting held in October 2008 by African ministers in charge of mineral resource development.[98] The African Mining Vision is a complete effort put in place by African leaders incorporating mining policies at the national and regional levels.[99] The African Mining Vision is an effort by Africa to solve the threat of having a wealthy amount of natural resources but yet continuous poverty and hardship in African states[100] such as Nigeria. Weak states in Africa continue to undergo hardship as a result of a lack of strong governance mechanisms, as well as corruption. Irrespective of the profits that African countries with natural resources make, it does not in any way infer that the presence of MNCs will bring development to indigenous communities,[101] even if the government does create good policies.

At the indigenous level, the objectives of the African Mining Vision are to ensure that it provides development by enabling staff and communities to benefit from large-scale mining activities and ensuring that the environment is protected.[102] In addition, the objective of the African Mining Vision is to try to guarantee African states a chance to

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[98] African Mining Vision, February 2009, < http://www.africaminingvision.org >accessed 14 June 2020.
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Ibid.

negotiate contracts with mining MNCs, in order to make significant revenues and localize participation in their activities.[103]

At the regional level also, the African Mining Vision wants to promote the incorporation of mining into industrial and trade policy, in reducing transaction costs and so much more.[104] Therefore, the aim of the African Mining Vision is to foster development that enhances growth by building economic and social connections that are beneficial to Africa,[105] as well as encouraging public participation and fostering transparency in the mining industry in Africa.[106] Additionally, corporate accountability practices are encouraged to be incorporated by mining companies, to further improve development in Africa.[107] The African Mining Vision encourages African states to move from narrow to broader development needs that will incorporate development and natural resource policies.[108]

However, one of the criticisms of the African Mining Vision is that it has excluded other forms of extractive corporations, and rather refers only to mining. No African state has adopted or implemented the African Mining Vision.

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[103] Ibid.; see also Ekhator (n38)..
[104] Ibid.; African Mining Vision.
[105] Ibid.
[106] UNECA, *Minerals and Africa's Development: The International Study Group on Africa's Mineral Regimes* (2011) < https://www.uneca.org/publications/minerals-and-africas-development >accessed 21 June 2020.
[107] Ekhator (n38); see also Chilenye Nwapi, 'Realising the Africa Mining Vision: The Role of Government-initiated International De-velopment Think-tanks' (2016), 7(1) Journal of Sustainable Development Law and Policy, 158–182, 162.
[108] Kofi Annan, 'Foreword' in African Progress Panel Report (2013), *Equity in Extractives: Stewarding Africa's Natural Resources for All*, < http://www.africaprogresspanel.org/event-perspectives-on-progress-an-agenda-for-action/ >accessed 12 July 2020.

## 8.6 Working Group on Extractive Industries, Environment and Human Rights Violations

The working group is a supplementary mechanism formed under the African Commission.[109] Examples of supplementary instruments made by the African Commission include special rapporteurs, committees and working groups.[110] The African Commission controls the obligation and responsibility of the subordinate instruments and all in charge of a subordinate instrument have to make known its dealings with the African Commission at each ordinary session of the commission.[111]

The working group's development can be linked to the resolution of the African Commission at its 39th Ordinary Session which was held in Banjul, The Gambia, in May 2006, to conduct a study on human rights damages by MNCs in Africa.[112] The main purpose of the study was to identify problems that needed to be subsequently researched, in order to be part of the development of a jurisprudence by the African Commission to hold MNCs accountable for human rights violations, as provided in the African Charter.[113]

The African Commission received reports in abundance from investors and NGOs; one consequence of the study was the creation of a Working Group on the Extractive Industries, Environment and Human Rights Violations by the African Commission at the 46th Ordinary Session – held at Banjul, The Gambia, in November 2009 – by virtue of Resolution

[109] African Commission on Human and Peoples' Rights, < http://www.achpr.org/mechanisms/ >accessed 23 June 2020.
[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Ibid.

ACHPR/Res. [114] (XLVI) 09 (Resolution on the Working Group on Extractive Industries, Environment and Human Rights Violations).[115]

The Resolution states:

*"Examine the impact of extractive industries in Africa within the context of the African Charter on Human and Peoples' Rights; research the specific issues pertaining to the right of all peoples to freely dispose of their wealth and natural resources and to a general satisfactory environment favourable to their development; undertake research on the violations of human and people's rights by non-state actors in Africa; request, gather, receive and exchange information and materials from relevant sources, including Governments, communities and organizations, on violations of human and people's rights by non-state actors in Africa; to inform the African Commission on the possible liability of non-state actors for human and people's rights violations under its protective mandate; formulate recommendations and proposals on appropriate measures and activities for the prevention and reparation of violations of human and people's rights by extractive industries in Africa; collaborate with interested donor institutions and NGOs, to raise funds for the Working Group activities; prepare a comprehensive report to be presented to the African Commission by November 2011."*[116]

The report shields activities of the working group in the inter-session period within May and October 2013.[117] The Legal Resources Centre

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[114] Ibid.; see also Ekhator (n38).
[115] Ibid.
[116] Ekhator (n38); African Commission website, '46th Ordinary Session: Resolution on Working Group on Extractive Industries' (2006) ACHPR Res.364
[117] Ekhator (n38); see also Pacifique Manirakiza, *'Inter-Session Report' Presented at the 54th Ordinary Session of the African Commission on Human and Peoples' Rights* (2013), < http://www.achpr.org >accessed 14 June 2020.

worked hand-in-hand with the working group[118] to set up a workshop involving various civil societies operating in South Africa, Zambia, Mozambique, and Zimbabwe.[119] The meeting was an opportunity for working group members to discuss with significant investors regarding best practices which would assist the working group's obligation to survey the activities of the extractive industries in Africa and their effect.[120]

The person in charge of the working group report gave quite a number of recommendations. It was recommended that every investor, including oil extractive corporations, should co-operate specifically with regards to the mapping of the extractive industries in Africa, which the working group is now involved in.[121] The report also recommended that African states which were not signatories to the Extractive Industry Transparency Initiative (EITI) should adopt it, so as to improve transparency throughout the exploitation of natural resources.[122] African states are encouraged by the report to execute decisions of the African Commission and to comply with the periodic reports of the commission.[123] Lastly, the report directs African states to co-operate with the working group, particularly involving discussions about getting permission to work on research and data operations.[124]

In 2016 the African Commission authorized the working group to discuss further regarding reporting guidelines that the state sees as a sufficient guide, and on the information which should be incorporated in their

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[118] The Legal Resources Centre is South Africa's largest public and human rights law clinic which was established in 1979; < http://lrc.org.za/lrcarchive/ >accessed 24 May 2020.
[119] Manirakiza (n117).
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid.

periodic report, due to lack of extractive industries reporting guidelines.[125] Currently, though, the guidelines have still not been totally developed by the working group.

Consequently, from above, the working group is most likely to experience a direct impact of MNCs being held accountable for their activities in Africa imminently.

## 8.7 Role of the NGO in Holding Multinational Corporations Accountable

In Nigeria, non-governmental organizations (NGOs) perform accountability functions via their activities in the oil and gas sector, particularly pertaining to MNCs. For example, NGOs can challenge MNCs through boycott, public campaigns and other forms of pressure. According to Oshionebo,[126] This is related to the impact of state regulation, and misdemeanours of such MNCs can lead to social sanctions. Secondly, NGOs are independent of MNCs and the Nigerian state. Thus, they are in a position to advise and influence both the MNCs and the state without bias. Furthermore, NGOs can also influence accountability through litigation, publications, lobbying of MNCs and the state, and public awareness campaigns, amongst other strategies.[127] NGOs have been very proactive in litigation, especially in the areas of oil pollution, environmental degradation and human rights. Such

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[125] African Commission on Human and Peoples' Rights 364: Resolution on Developing Reporting Guidelines with Respect to the Extractive Industry – ACHPR/Res. 364 (LIX) 2016, < http://www.achpr.org/sessions/59th/resolutions/364/ >accessed 21 July 2020.
[126] Evaristus Oshionebo, 'Transnational Corporations, Civil Society and Social Responsibility in Nigeria's Oil and Gas Industry' (2007) 15 African Journal of International and Comparative Law 107–129.
[127] Ibid.

litigation has added to a growing jurisprudence on the regulation of MNCs by NSAs in Nigeria.[128] This is evident in human rights protection in Nigeria, where the courts have produced "pro-human rights alterations and reformations".[129] Thus, the Nigerian government is more sensitive to the environmental and social responsibilities of oil companies,[130] and MNCs are expected to negotiate and agree on a memorandum of understanding with the host the communities, honour agreements, and endeavour to be more responsive to their problems.[131]

NGOs have played a major role in elevating the plight of victims of environmental degradation in the Niger Delta from local to international recognition and awakening the international community.[132] This was especially evidenced by the Ogoni crisis, where an NGO (MOSOP, in coalition with both local and international NGOs) brought to the attention of the world the human rights violations and environmental degradation in that part of Nigeria. This action by MOSOP also had an effect on the major MNC (Shell) operating in Ogoni. Shell revised its code of conduct to include human rights, and it now also (along with other MNCs) regularly organizes training and consultation with stakeholders in the Nigerian oil sector.[133]

From the foregoing, it is obvious that the activities of NGOs in the oil and gas industry are akin to accountability. Hood et al. stated that any

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[128] Ekhator, 'Improving Access to Environmental Justice under the African Charter'(n121)..
[129] Obinna Okafor, 'Modest Harvests: On the Significant (but Limited) Impact of Human Rights NGOs on Legislative and Executive Behaviour in Nigeria' (2004) Journal of African Law 48(1) 23–49, 24.
[130] Ibid.
[131] Augustine Ikelegbe, 'Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle' (2001) 39(3) Journal of Modern African Studies, 437–469, 460.
[132] Rhuks T. Ako, 'Enforcing Environmental Rights under Nigeria's 1999 Constitution: The Localisation of Human Rights in the Niger Delta Region, in Koen de Feyter et al. (eds), *The Local Relevance of Human Rights* (New York: Cambridge University Press, 2011).
[133] Evaristus Oshionebo, Regulating Transnational Corporations in Domestic and International Regimes (n126).

analysis of a regulatory regime strengthens two distinct connotations or dimensions.[134] They posited that one dimension of any risk in a regulatory regime entails: three components upon which the basis of any control system is formed, which are, ways of setting standards, ways of gathering or targets, and ways of changing behaviour to meet the standards or targets.[135] Information gathering, standard-setting and behaviour modification are *sine qua non* of a regulatory regime.[136] The second feature of a risk regulatory regime is the distinction or difference between regulatory regime 'context' and regime 'content'.[137] The regime context is the background wherein the regulatory regime is localized, recognising the level of risk, several indications and how such risks can be reduced, the level of public reaction towards risk and also how the different actors are affected by the hazard as a result of such risk regimes.[138] However, the regime content is said to be the interplay of policy setting of the state and other organizations or institutions involved in holding accountable or addressing the risks and attitudes or bias of the regulators.[139]

The first feature of the risk regulatory regime stated above is similar to the regulatory process. For example, in command and control-based regulatory framework, the state or regulatory agencies partake in the

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[134] Christopher Hood et al., *The Government of Risk* (Oxford: Oxford University Press, 2001). A similar model was also proposed by T. Beer et al., 'NGOs: Between Advocacy, Service Provision, and Regulation', in D. Levi-Faur (ed.), *The Oxford Handbook of Governance* (Oxford: Oxford University Press, 2012), it was argued that NGOs play three major roles in international governance: advocacy, service provision and regulation via the instrumentality of their activities.
[135] Ibid.
[136] Tetty Havinga, 'Conceptualizing Regulatory Arrangements: Complex Networks of Actors and Regulatory Roles' (2012) Nijmegen Sociology of Law Working Paper Series, 13: ".. a regulatory regime comprises not only legislation and other rules"; also Sol Picciotto, 'Introduction: Reconceptualising Regulation in the Era of Globalization' (2002) 29(1) Journal of Law and Society 1–11, said, regulation consists of four components: rule-making, monitoring, compliance and enforcement.
[137] Hood et al (n134).
[138] Ibid.
[139] Ibid.

regulatory process by engaging in information gathering, standard-setting and behaviour modification. However, it has been argued that CSOs can also partake or contribute to the aforementioned three control components of the risk regime, as enunciated by Hood et al.[140] The contention of this thesis is that civil society groups have engaged in holding MNCs accountable in Nigeria via the three control components of the risk regulatory regime, as enunciated by Hood et al.

Still, irrespective of the significant efforts made by the NGOs in promoting the cause of the Niger Delta people, particularly those on human rights, they have not been able to participate essentially in the promotion of MNCs accountability and regulatory effectiveness in Nigeria. The reasons for this include lack of expertise, lack of funds, lack of cooperation among the grassroots NGOs and ethnic community relationship, the rise of NGOs, especially in the Niger Delta oil-rich region, with no good intention to pursue social goals but operating for personal enrichment exist. Hence access to regional bodies like the AU should not be fettered.

### 8.7.1 Human Rights Under the AU and the Role of the NGOs

The AU Act enhances the promotion of peace, security and stability in Africa, promoting institutions, principle, popular participation and good governance, the promotion and protection of human rights and peoples' rights by the African Charter and other relevant instruments.[141] The AU principles, with its human rights element, related to the participation of the African peoples in the activities of the Union; the right of the Union to intervene in a member state according to a decision of the Assembly

[140] Ibid.
[141] Article 3 of the AU act.

in respect of grave circumstances, namely war crimes, genocide and crimes against humanity; promotion of gender equality; respect for human principles, the rule of law, human rights, promotion of social justice to ensure balanced economic development, promotion of good governance, respect for human life, condemnation and rejection of unconstitutional changes of governments. [142] There is a strong development towards making a new organisation more people-centred. The AU has the objective of promoting common participation and operates based on the principle of the involvement of the African peoples in the activities of the Union.[143] In connection with this objective, the AU planned its first ministerial conference on human rights, which adopted the Kigali Declaration.[144] The meeting not only recognised the importance of NGOs, but it also called for their protection in the following statement:

*"The Assembly recognises the critical role of civil society organisations (CSOs) in general and particularly, human rights defenders, in the protection and promotion of human rights in Africa, calls upon the Member States and regional institutions to protect them and encourage the participation of CSOs in decision-making processes to consolidate participatory democracy and sustainable development, and underscores the need for CSOs to be independent and transparent".[145]*

It is thus apparent that the objectives of the AU embrace the protection and promotion of human rights. These objectives cannot be realised effectively and come into life fully without the involvement of NGOs and

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[142] Article 4 of the AU act.
[143] Baimu, E 'From the OAU to the AU: Taking Stock of 40 Years of Human Rights Protection in a Regional Institutional Framework and Charting the Future' (2003) an unpublished paper 6.
[144] The 1st AU Ministerial Conference on Human Rights in Africa Meeting on 8 May 2003 in Kigali, Rwanda, adopted the Kigali Declaration.
[145] Para 28 of Kigali Declaration.

civil society in the activities of the AU.[146] In this regard, implementing a treaty or a convention aimed at protecting and promoting human rights has always been difficult. The international experience shows that the UN would not have monitored the implementation of the various human rights treaties by member States without the participation and expertise of NGOs.

### 8.7.2 Roles of Civil Society Organizations (CSO) in AU Mechanisms

Civil society organizations have a great part to perform in trying to foster many AU mechanisms and conventions. The presence of participation by civil society in government or NGO initiatives over the years has led to positive impacts. With the non-involvement of civil society, the degree to which states adhere to the African Charter on Human and Peoples' Rights[147] has been largely insignificant.[148] Under the African Court of Human and Peoples' Rights process, there is not direct access to the court by members of state.[149]

In 2012, the African Charter on Democracy, Elections and Governance (ADC), which fosters the principles of human rights, democracy and governance,[150] was endorsed.[151] The ADC is said to be "the first binding

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[146] The Declaration adopted by the meeting of the African Parliaments on the Pan African Parliament, 30 June -01 July 2003, Cape Town, South Africa, reaffirmed the same principle.
[147] African Charter of Human and Peoples' Rights OAU CAB/LEG/67/3 rev. 5, 21 ILM. 58, entered into force on 21 October 1986.
[148] Stacy-Ann Elvy, 'Theories of State Compliance with International Law: Assessing the African Union's Ability to Ensure Compliance with the African Charter and the Constitutive Act' (2012) 41(1) Georgia Journal of International and Comparative Law 75–155.
[149] Ekhator (n3).
[150] Andre Mangu, 'African Civil Society and the Promotion of the African Charter on Democracy, Elections and Governance' (2012) 12(2) African Human Rights Law Journal 348–372.
[151] African Charter on Democracy, Elections and Governance Ratification Table, <

regional instrument adopted by member states of the African Union that attempts to comprehensively address all of the elements necessary for the establishment of liberal democracies."[152] Article 27(2) of the ADC avers that states are charged to take up the responsibility of "fostering popular participation and partnership with civil society".[153] However, no CSOs are involved in the ADC process, and CSOs could play a monitoring role through the ADC process.[154] CSOs can help bring about knowledge of ADC to African states, and get involved in its execution in African states.[155] An issue which got the attention of the AU is the fact that CSOs have not been given an avenue to participate.[156]

Initiatives like NEPAD have been criticized for not having the participation of CSOs; thus, it was stated that African CSOs have not been properly put in place to face the existing problems.[157]

Distinct from NEPAD, corporate participation in the APRM process by CSOs was operational.[158] Good governance practice was restored, irrespective of the many problems encountered by CSOs involved in the APRM process.[159] Nonetheless, the APRM process is a voluntary one and some African countries are signatories,[160] including Nigeria.

CSOs have been active at using the African Commission to hold African governments accountable for human rights violations,[161] as well as

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http://www.achpr.org/instruments/charter-democracy/ratification/ >accessed 30 July 2020.
[152] Stacy-Ann Elvy, 'Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance' (2013) 27(1) Emory International Law Review 41–116.
[153] Ekhator (n38).
[154] Mangu (n150), 369–370.
[155] Ibid., 367–368.
[156] Ekhator (n38).
[157] Chris Landsberg, 'Reflections on the African Union after Decade One' (2012), 42(3) Africa Insight 1–12.
[158] Olivier (n67).
[159] Ibid.
[160] Ekhator (n38).
[161] Ibid.

socio-economic rights.[162] With regards to management and control of natural resources, CSOs in Africa have been instrumental in holding governments responsible for environmental degradation in Africa.[163]

The AU has adopted various initiatives and frameworks; however, execution has been the main issue: the vigorous participation of civil society, as well as individuals in a state, is significantly needed for the successful execution of AU initiatives. Professor Landsberg stated that:

*"... the real strength and success of the AU, NEPAD and other continental initiatives will be determined by the extent to which they empower people and create opportunities for them to improve their lives. In the future, the AU, NEPAD, APRM, PAP and other structures, institutions and programmes will continue to be tested on the basis of the impact they have on the lives of ordinary African citizens. Indeed, if they wish to build their credibility in the eyes of the African populace at large, they will have to begin to show that they can be sources for the betterment of their lives, not just economically, although this is very important, but also in the human rights, peace-making, peace-keeping and democratic governance realms."*[164]

## 8.8 African Justice and the Malabo Protocol

The African Union (AU) adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) in May 2014, which, if ratified, will create the first-ever regional criminal court (RCC).[165] It is an important instrument

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[162] Ibid.
[163] Ibid.; see also the SERAC case, which was filed by civil society.
[164] Chris Landsberg (n 157).
[165] 'Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,' AU Doc. STC/Legal/Min. 7(1) Rev.1, 14 May 2014 [hereinafter 'Malabo Protocol']. The

which extends the jurisdiction of the yet to be established African Court of Justice and Human Rights (ACJHR) to crimes under international law and transnational crimes.[166]

The set-out plan for the ACJHR was a court with two sections: that is, a general affairs section and a human rights section.[167] The international criminal law section is the third section which is being introduced by the Malabo Protocol.[168] Therefore, if the Malabo Protocol is passed, the ACJHR will then have jurisdiction to try 14 crimes, including trafficking in hazardous wastes, illicit exploitation of natural resources, genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenaries, corruption, money laundering, trafficking in persons, trafficking in drugs, and the crime of aggression.[169] This means that the international criminal law section of the ACJHR will serve as an African regional criminal court, hence similar to the function of the International Criminal Court (ICC), although in a smaller terrain or landscape, but with a large extension of crime list.[170] The African Union (AU) sees a potential alternative to the International Criminal Court (ICC) which could extend and strengthen the jurisdiction of the African Court on Human and Peoples' Rights (ACHPR). The presence of the protocol will at least give victims recourse to a regional instrument first, before proceeding to international law.

Matiangai Sirleaf is of the opinion that there are various methods by

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AU Assembly adopted the Malabo Protocol on 30 June 2014 at its 23rd Ordinary Session; see also Matiangai Sileaf, 'The African Justice Cascade and Malabo Protocol' (2017) International Journal of Transitional Justice 11, 71–91.

[166] Amnesty International, 'Malabo Protocol: Legal and Institutional Implications of Merged and Expanded African Court' (2016) ARF 01/3063

[167] Ekhator (n38) Ibid.

[168] Ibid.

[169] Ibid.

[170] Ibid.

which African courts could attempt to close the justice gap, as states would be met with less resistance than those of international instruments, since states share a similar history, culture and geographical location.[171] Sirleaf also argues that the African Court would not replace the ICC, but rather, it would be a place of first instance if national courts fail. Therefore, if the ACJHR is unable to provide justice for the victims, they can proceed to the ICC.[172]

Embracing the Malabo Protocol obviously leaves room for great improvement, as the particular principles and values which form the basis of the protocol are commendable.[173] These values include respect for human rights and sanctity of life; condemnation, rejection and fighting of impunity; strengthening of AU's commitment to promote sustained peace, security and stability; and prevention of serious and massive violations of human rights.[174]

The presence of a regional criminal court can have a good effect on the African continent, subsequently ameliorating the suffering and hurt borne by the complicities, and helping to free the region from crimes under international law and other serious violations and abuses of human rights.[175] Thousands of civilians, mostly indigenes, have lost their lives as a result of degradation and conflict in the region, with thousands being displaced from their homes forcefully or because it was unhealthy to live there as a result of gross pollution.[176] These conflicts are not devoid of terrible accounts of killings, torture, rape of women,

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[171] Sileaf (n165).
[172] See< https://www.justiceinfo.net/en/other/37633-what-prospects-for-an-african-court-under-the-malabo-protocol.html >accessed 20 July 2020.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid.

child labour, as well as malicious destruction of property.

## 8.9 Conclusion

This chapter examined the potential of putting more focus on regional institutions in holding MNCs in Africa accountable for their activities. This has not been entirely successful, notwithstanding the deficiency of the accountability framework found in the AU mechanisms. This chapter has contended that the accountability of MNCs can be extended or inferred in Africa from numerous AU mechanisms, which include the African Commission on Human and Peoples' Rights, NEPAD, APRM and the Working Group on Extractive Industries, Environment and Human Rights Violations. The chapter also looked at the role which the NGOs and civil society has played in bringing AU initiatives into the limelight, and is of the view that with the participation of civil society in Africa and Nigeria in particular, MNCs will gradually be held accountable.

This chapter is also of the opinion that the presence of a regional criminal court through the Malabo Protocol can have a good effect on the African continent and subsequently ameliorate suffering.

There are still substantial gaps needed to be filled. Potentially, having a binding treaty would help hold MNCs accountable for their activities, meaning the AU having a binding regional treaty to hold MNCs directly accountable for their activities in member states.[177]

[177] See< http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)608636 >accessed 21 July 2020.

# Chapter Nine

# Conclusion

It has been the aim of this thesis, first of all, to undertake a study on how to improve the issue of human rights accountability of corporations in Nigeria through a regional approach, thereby strengthening states' human rights duties to hold multinational corporations accountable for the operations of the oil and gas industry, especially relating to exploration and production in a developing country, Nigeria. Thereafter, it has been the aim to consider what lessons may be drawn for legal, regulatory and judicial reform in Nigeria, as well as regional institutions in Africa. Bearing in mind that the sorts of improvement needed would involve long-term solutions at best, given the challenges facing Nigeria, the soft laws were analyzed; the conclusion reached was that they haven't been successful. Also, the United Nations Guiding Principles (UNGP) in particular were examined and it was found that the UNGP are still relevant and should not be ignored due to the commencement of the new process for a binding treaty. One is not an impediment to the other, and processes to attain the objectives of the two can work concurrently; however, more emphasis should be put on holding MNCs accountable for their activities in Africa, and Nigeria in particular, through the AU having a binding regional treaty.

In the preceding chapters, the *modus operandi* of oil companies in their different host countries formed the bedrock of this work. The differing standards employed by these companies in developed countries, when viewed in juxtaposition with developing countries, is such that it has left many dissatisfied and even outraged.

This thesis opened with an overview of the Nigerian oil industry in Chapter Two, through its history and development. Chapter Four set out to do an extensive review of the legal regime adopted in Nigeria, with specific reference to the extractive industries. Issues dealing with the inadequacy of legislation were addressed, as well as the complex problem of proper enforcement and also compliance by the industry. The adequacy of penalties imposed for breaches was another pertinent issue which it was agreed had played a huge factor in the decision of many oil companies operating in Nigeria to choose not to be accountable for human rights violations in weak states where they carry out their operations. Chapter Three looked at the relevant concepts with regards to the research. Chapter Four also revealed the extent to which environmental degradation by MNCs is a significant problem in Nigeria, which is not only responsible for a large amount of environmental pollution, but has also led to the forfeiture of a significant amount of revenue for the Nigerian government and the public. The shortcomings of the judiciary in preserving its fairness and the problems of corruption and judicial approaches to powerful economic actors were other issues covered by this chapter. Chapter Five examined international frameworks that are available, and why they are not sufficient.

Furthermore, Chapter Six examined the UN Guiding Principles and their importance, but concluded, however, that Africa did not only need a voluntary instrument. Chapter Seven analyzed the African Charter and its importance to the thesis.

The question of how to achieve the goal of making MNCs accountable became a pressing issue, so we looked into the UNGP for answers. With this in mind, Chapter Six dealt with UNGP and whether they could proffer a solution that could be applied in Nigeria. It was concluded that since there is an urgent need for transparency and accountability, then UNGP

would indeed be implemented; however, what Nigeria would need is a binding law. Soft laws express moral and political obligations of governments and corporations and signify standards of law in development. They also list the human rights obligations expected of corporations, and also the several means of their monitoring and enforcement.[1] Although the norms were non-binding, they were framed to look like a treaty.

Bearing in mind, however, the fact that the majority of the solutions proffered in Chapter Six could only be effected in the medium term as it is a soft law, Chapter Eight went further to look at the potential of putting the focus on regional institutions in holding MNCs in Africa accountable for their activities. This has not been entirely successful, notwithstanding the absence of a clear accountability framework in the AU mechanisms. Chapter Eight also contended that holding MNCs in Africa accountable can be extended or inferred from many AU mechanisms, such as the African Commission on Human and Peoples' Rights, NEPAD, APRM and AU conventions. Also, holding them accountable in Africa means there is binding regional treaty that will directly hold MNCs accountable for their activities in member states.[2]

The connection between the African Commission and NGOs has enhanced the work and jurisprudence of the African Commission in particular and to the improvement of the promotion and protection of human rights in Africa in general. Therefore, it is clear from the above that the importance of NGOs in monitoring the implementation of human

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[1] Amnesty International, *The UN Human Rights Norms for Business:* Towards Legal Accountability (2004) IOR 42/0002.

[2] See< http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)608636 >accessed 23 June 2020.

rights objectives and policies of the AU and NEPAD cannot be over emphasised.

At the outset of this thesis it was stated that the goal of this work was to address the issue of violations by MNCs and how to hold them accountable, as well as highlighting, in the process, the pertinent problem of proper implementation of African regional mechanisms and examining their role in ensuring compliance. The main research question to be answered was:

i. How to improve human rights accountability by multinational corporations in the oil and gas industry in Nigeria?

Subsidiary questions that were to be answered are:

ii. What is the reason in favour of human rights accountability by multinational corporations in Nigeria?
iii. What is the nature, extent and history of human rights violations by corporations in Nigeria?
iv. What is the current level of regulatory, normative and corporate accountability frameworks for corporations doing business in Nigeria?
v. Is the current level satisfactory?
vi. Are soft laws enough to hold MNCs accountable?
vii. How do and can AU mechanisms hold corporations accountable?

This research has shown that:

1. We need to learn from our negligent past and seek to redress damaging behavior in developing countries. An industry that is accountable will interest more investors than a poorly regulated sector.
2. The multinational corporations in the oil industry in Nigeria provide a strong and well-documented example of severe environmental

destruction by oil multinationals and the effects of that environmental destruction on the local population.[3]

3. The current laws in place in Nigeria are inadequate in ensuring that the environment is sufficiently protected, as many of the laws are out-dated and most of them were not enacted to cope with the level of degradation that the oil industry has exposed the country to; attempts to enact more stringent laws have been blocked by oil companies who threaten to take their business elsewhere.
4. It has been shown that Nigeria is presently incapable of effectively regulating its oil industry and ensuring compliance with the law by the powerful economic actors, and indeed the Nigerian government and its agencies.
5. As a result of the incompetence of the existing regulatory mechanism overriding the activities of multinational corporations, there are new regulatory and accountability paradigms advocated by scholars; perhaps the African Union and its mechanisms can be the basis of MNC accountability in Africa. This has been highlighted in Chapter Eight.

In order for Nigeria to ensure that the environment is adequately protected to a standard commensurate with that applicable in developed countries, it is imperative that solutions which deal with the twin issues of enforcement and accountability are found. Some of the solutions proffered are enclosed in Chapter Eight of this thesis and will involve a long-term overhaul and restructuring of both the laws and the attitudes of government, companies and individuals to the way business and operations are conducted in the country.

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[3] *Wiwa v. Royal Dutch Petroleum Co* [2000] 226 F.3d 88 2d Cir. [2000].

Bearing in mind that it could take several years for the solutions proffered in Chapter Four to become fully effective, and in light of the fact that oil spills and gas flaring continue to occur in the country, it is necessary to find an avenue in which people or institutions who are affected by the operations of the oil and gas industry can have recourse to justice, especially when one considers the failings of the Nigerian judiciary.

It is as a result of the failings highlighted in Chapter Two and the acknowledgement that it will take a long time for the solutions put forward in Chapter Four of this work to become effective that Chapters Six and Seven dealt with the possible short-term solution of aggrieved parties having recourse to justice in the courts; this is a possible means of securing reparation, as is evident from the plethora of cases that are beginning to be filed in foreign jurisdictions.

The drive of the whole of this work has been geared towards highlighting the degradation crisis, with a view to improving human rights protection in developing countries by holding multinational corporations accountable for human rights violations during the course of oil exploration, with the emphasis on Nigeria, and achieving a standard similar to the developed countries, which in turn has the effect of securing a sustainable future for everyone, including generations unborn, and reducing the impact of the actions of this present generation by dealing with our use of resources and by minimizing adverse environmental impacts. Ensuring that we develop in a sustainable manner means living within the capacity of the planet to sustain our activities and, where possible, replenishing the natural resources we have at our disposal. It also means ensuring that the actions we take today do not hinder our quality of life in the future, bearing in mind

those who do not have access to the same level of resources, and the wealth generated by those resources.

*Recommendations*

In a bid to ensure that the aforementioned goal is met, set out below are the recommendations that this thesis has to offer regarding improving protection within the oil and gas industry, with regards to Nigeria in particular and other developing countries in general. The subsequent recommendations are made from a legal point of view.

Therefore, the solutions identified and advocated by this work – which will have the effect of advancing the practices adopted by oil companies operating in Africa and Nigeria, holding multinational corporations accountable for human rights violations, improving the accountability and enforcement regimes currently applicable, changing the attitudes of the Nigerian government as well as its agencies, increasing the confidence of those violated as well as concerned industry watchers in the Nigerian judicial process, and indeed securing the growth of sustainable environmental development on a long-term basis within Nigeria – will necessarily involve the following recommendations:

A) Soft law in Africa or Nigeria should be developed. There is so much reference to the Western display of soft law, therefore neglecting core African or Nigerian values in the codes of conduct in operation in the oil and gas sector. In this regard, it is asserted that African mechanisms should be used as a guide by the oil MNCs in their development of codes of conduct in Nigeria.

B) Grant an international court power to try multinational corporations; establish a human rights world court; a proposed binding international treaty is needed potentially; and adoption of the Malabo

Protocol in June 2014 in Africa extended the jurisdiction of the future African Court of Justice and Human Rights (African Criminal Court) to include corporate criminal responsibility. Although the protocol is yet to be ratified, there is urgent need for a regional criminal court in Africa. African states should attempt to ratify the protocol, so as to strongly enhance the corporate criminal liability paradigm in Africa. African solutions to African issues would be a welcome development, and that is what having direct jurisdiction by the courts would enhance.

The African Commission Working Group on Extractive Industries, Environment and Human Rights Violations can be mandated by the AU to develop such a treaty, alongside its work on reporting guidelines for MNCs. African states are eager to have a binding international treaty regulating the activities of MNCs. For example, African states voted for the recent resolution that the UN Human Rights Council should establish a working group to negotiate the feasibility of a binding international treaty regulating the activities of MNCS.[4] The Malabo Protocol is additional proof that African states are willing to develop a binding treaty.

Also, the treaty should focus on issues such as remedies, access to justice, expected due diligence by companies and remedial mechanisms. Some of these concepts can be localized in existing AU mechanisms such as the African Charter on Human and Peoples' Rights – particularly Article 21, which focuses on the right to free disposal of wealth and natural resources, and Article 24, on the right to a general satisfactory environment in Africa – the African Commission and the Malabo Protocol. The AU should also provide civil society with the power to monitor and enforce the treaty.

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[4] John Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (2014) 8 IHBR Commentary, 1–8.

C) Improve upon the current system of environmental impact assessments obtainable in Nigeria and ensure strict observance of laws and regulations involving environmental impact assessments. Currently in Nigeria, the public and private sectors of the Nigerian economy sometimes carry out unauthorized projects or activities without taking into account the potential effects that such projects or activities may have on the environment, and when it is clear that a project might affect the environment greatly, an environmental impact assessment should be done.

Environmental impact assessments should be carried out before extraction, although the reality is that in Nigeria the situation is different, and the provisions of Sections 7 and 9 are not firm.

D) The creation of a stronger African Union along the lines of the European Union, in which each member state relinquishes some of its sovereignty to the super-national body or authority, as applies in the European Union, which has overarching powers and control over member states and in which such countries are thus bound by the laws handed down by such authority. This is increasingly seen as desirable, especially when one views the flagrant disregard of many Nigerian national laws. This would have the effect of compelling the Nigerian government to comply with laws and directives, or else be sanctioned or penalized. It is usually much better to comply with directives than be sanctioned. The conduct of member states should be regulated by applying appropriate sanctions:

(i) These would reduce bribery and corruption as a result of the law or appropriate regulations not being followed.

(ii) Since member states would be required to set rules, it would lead to massive transparency, because each member state would be required

to follow set rules and where applicable publish the appropriate data or reports.

(iii) Periodic environmental audits should be carried out regularly in Nigeria. With such a system, oil companies which continue not to be accountable or to follow environmental standards would face serious sanction and/or ultimately risk losing their operating licenses in Nigeria.

E) The Petroleum Industry Bill (PIGB) should reflect the interests of various stakeholders, including civil society organizations and oil-producing communities in Nigeria, before it is passed into law.

In conclusion, any potential binding AU treaty on the regulation of MNCs should operate within the existing international regulatory framework consisting of the African Charter on Human and Peoples' Rights, the African Commission, NEPAD, APRM, the Working Group on Extractive Industries, Environment and Human Rights Violations, soft law and national laws, amongst others. In essence, if the institutions of the AU actively promote good governance, the incidence of corporate irresponsibility might be reduced on the continent.

The AU should support the indigenous and Nigeria human rights NGOs and should work closely with them. These NGOs are sometimes threatened by their governments concerning their activities in monitoring human rights. The international and regional experiences show that these organisations offer great help in providing information regarding the specific situation of human rights at the grassroots level.

The AU should increase the participation of African human rights NGOs and take into account the constraints posed by limited resources in their participation and involvement in the activities of the AU. It is recommended that the AU should assist NGOs in allocating specific resources and facilitating their fundraising from international sources,

like the European Union, to enhance their capacities and ability in promoting and protecting human rights in Africa and Nigeria in particular.

The revised Zero Draft should be embraced. The AU should incorporate the provisions into the African Charter, as the proposed Zero Draft is a legally binding mechanism which seeks to promote and protect human rights and ensure that victims of environmental degradation are granted effective access to justice.

A regional action plan (RAP) should be put in place. This plan would have to determine how the accountability gap in the existing human rights protection mechanism can be filled in order to effectively protect the vulnerable people of the region – such as women, children and indigenous people – and weak states that are exposed to corporate human rights violations. If a member state fails to comply, the regional protection mechanism will come to the rescue of the victims. Africa should not follow the voluntary approach.

It is concluded that if the recommendations made in this thesis were adopted and applied in Nigeria and other developing countries, it would close the gap; it would be an improvement in the way that the extractive industries operating in developing countries choose to carry out their operations; and it would invariably lead to growing general standards within the oil industry, which will lead to consistency of operations internationally and the achievement of sustainable environmental protection on a global scale.

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