CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

Corporate Social Responsibility can be described as those activities undertaken by a business Organisation as obligations owed to the society which includes the immediate host community, the customers, contractors and employees of the business enterprise, the government as well as the environment, to minimize the impacts of the operations on the stakeholders. It connote the obligation to act right by using the natural resources of the society in such a manner that shows concern for the right of future generations and to employ international standards and recognize industrial best practices in carrying out its operations so that harm is avoided to the health, livelihood and life of the indigenous people in the host community where such extractive operations are been carried out.

In Nigeria, indigenous peoples are found within the Niger Delta region where oil and gas – the mainstays of the Nigerian economy, are extracted.[1] There are indigenous peoples in other parts of the country but majority of these are not affected by the activities of oil and gas multinational corporations (MNOCs), hence, the emphasis on the indigenous peoples of the Niger Delta region.[2]

The Niger Delta region of Nigeria comprises six core Niger Delta States[3]and three non-core Niger Delta States.[4] Situated in the southern part of Nigeria, the Niger Delta ranks among the most densely populated regions in Africa.[5] The region is considered among the ten most important wetlands and marine ecosystems in the world, and plays host to many rare species,

[1]United States Energy Information Administration, Country Analysis Brief: Nigeria (2016) <https://www.marcon.com/librarycountry-briefsNigeria/nigeria.pdf> accessed 15 September 2017.
[2] For example, Hausa, Yoruba, Fulani, Tiv, Jukun, Idoma, Igala, Nupe
[3]The core States are Rivers, Bayelsa, Delta, Edo,AkwaIbom and Cross River.
[4]The non-core Niger Delta States are Abia, Imo and Ondo.
[5]B R Konne (n 1) 181.

including several primates, ungulates and birds.[6] The region is also a harbinger of vast mangrove ecosystem which serves as a habitat of great importance for the vast fish population found along the West African coastline.[7] Majority of Nigeria's oil production occurs in the Niger Delta region.[8] Nigeria began commercial production of crude petroleum in 1958 after oil was first discovered in 1956 in Oloibiri (present-day Bayelsa State).[9] Since then, Nigeria has gone on to become the largest producer of crude oil in Africa, with an estimated 37.2 billion barrels of oil reserves as of January 2013.[10] Besides, Nigeria holds the largest natural gas reserves on the African continent and became the world's fourth largest exporter of Liquefied Natural gas (NLNG) in 2015.[11]

Crude oil and national gas are the mainstays of the Nigerian economy.[12] The International Monetary Fund (IMF) estimates show that in 2014 alone, oil and natural gas export revenue clocked $87 billion and accounted for 58% of the total government revenue for that year.[13] In terms of foreign exchange, oil and gas raked in revenue constituting more than 95% of the country's total exports to the world in 2014.[14]

Apart from the Shell Petroleum Development Company of Nigeria Limited (SPDC), there are other MNOCs which operate in Nigeria's oil and gas industry which are hosted by communities in the Niger Delta region.[15] The oil industry in Nigeria is highly visible in the

[6] *Ibid,* 182.
[7] B R Konne, '*Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland*' [2014](47) Cornell International Law Journal 181, 182.
[8] Amnesty International, '*Nigeria: Petroleum, Pollution and Poverty in the Niger Delta'*<https://www.es.amnesty.org/uploads/media/REPORT_Petroleum_Pollution_and_Poverty_in_the_Niger_Delta.pdf> accessed 27 November 2017.
[9] B R Konne (n 1) 182.
[10] *Ibid.*
[11] US Energy Information Administration (n 2) 2.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] These include Eni, Total, Statoil, Mobil Producing Nigeria Unlimited (MPNU), Nigerian Agip Oil Company (NAOC), Chevron, Nigeria Liquefied Natural Gas (NLNG). Of these Companies, SPDC has the most dominant presence and influence throughout the Niger Delta region, justifying why the major confrontations in the region are always against SPDC.

Niger Delta because the region has control over a large amount of land. SPDC alone operates over 31,000 square kilometres of land, crisscrossed by thousands of kilometres of pipelines, which are punctuated by wells and flow stations. Majority of the oil installations are close to the homes, farms and water sources of the host communities.[16]

More than 60% of the people living in the Niger Delta derive their livelihood from their natural environment.[17] They hold their lands sacred. For many, their principal source of food is the land which they use for crop cultivation, fishing and gathering of forest products, including hunting.[18] Vegetation and forests serve as the main source of energy for the people.As source of medical treatment, herbs and roots are known cures of various diseases among the locals.Land provides ceremonial and spiritual affinity between the people and their deities. Thus, to this indigenous people, their land means everything to them. Land is life as their economic, social, cultural, health and religious needs can only be met through the use of their land.[19] The rivers and creeks are widely used for bathing and other domestic applications, and are their main source of drinking water.[20]

However, the activities of MNOCs operating in the oil and gas industry in Nigeria portend grave pollution and environmental risks to human life, health and rights within the region and this has been the case for the over fifty years SPDC and other MNOCs have been operating in the Niger Delta host communities.[21] Oil spills, waste dumping and gas flaring are endemic in the Niger Delta. Amnesty International reports that every year, hundreds of oil spills occur.

16 Amnesty International Summary (n 9) 1.
17 *Ibid.*
18 *Ibid.*
19 A Whitmore, *Pitfalls and Pipelines: indigenous Peoples and Extractive Industries (Bagiuo City, Philippines:*Tebtebba Foundation and IWGIA 2012) 4.
20 Amnesty International Summary (n 9) 2.
21 *Ibid.*

The National Oil Spill Detection and Response Agency (NOSDRA),hasregistered 2,000 spill sites and it has been claimed that the figure may be far higher.[22]

Niger Delta communities have to drink, cook with and wash in polluted water. They eat fish contaminated with oil and other toxins, if they are lucky enough to find fishes which have all gone extinct due to accumulated and unabated years of large scale pollution of the rivers and seas of the region.[23] Their lands have been destroyed and no longer suitable for agriculture – the major occupation of the host communities.[24] Persistent gas flares and oil spills ensure that the air the people breathe reeks of oil, gas and other pollutants, resulting in breathing problems, skin lesions and other health problems such as asthma, lung disease, heart attack, miscarriage and skin disease.[25] Flaring of gas in the Niger Delta has been a normal occurrence since oil production began in the region.[26] A study has shown that more gas is flared in the Niger Delta than anywhere else in the world.[27] In fact, data from two flow stations – Kolo Creek and Obanna, show that on the average, approximately 800,000m^3/day of gas is flared.[28] Emissions from combustion of associated gas have been held to contain toxins such as benzene, nitrogen oxide, dioxins, hydrogen sulphide, xylene and toluene.[29] In an environmental assessment carried out in Ogoniland, the United Nations Environment Programme (UNEP)[30] showed extensive pollution from petroleum hydrocarbons in

[22]Amnesty International, 'Nigeria: *Petroleum, Pollution and Poverty in the Niger Delta'*<https://www.es.amnesty.org/uploads/media/REPORT_Petroleum_Pollution_and_Poverty_in_the_Niger_Delta.pdf> accessed 27 November 2017.
[23]*Ibid.*
[24]B R Konne (n 1) 184.
[25]Amnesty international Summary (n 9) 2. See also J Adekola and others, '*Health Risks from Environmental Degradation in the Niger Delta, Nigeria'* [2017](35)(2) Environment and Planning C: Politics and Space 334, 340.
[26]*Ibid*, 339.
[27]Friends of the Earth International, Clashes with Corporate Giants: 22 Campaigns for Biodiversity and Community (Friends of the Earth International, Amsterdam 2004).
[28]M Ishisone, *'Gas Flaring in the Niger Delta: The Potential Benefits of its Reduction on the Local Economy and Environment'*<https://www.nature.berkeley.edu/classes/esM6/projects/2004final/Ishisone.pdf> Accessed 15 September 2017.
[29]A K Edafienene, *'Media Exposure, Policy Agenda Setting and Risk Communication in Sub-saharan Africa: A Case Study of Nigeria's Niger Delta Region'* (Ph.DDessertation, University of Glamorgan 2012).
[30]UNEP, Environmental Assessment of Ogoniland [UNEP Report] <https://www.postconflict.unep.ch/publications/OEA/UNEP_CEApdf> Accessed 15 September 2017.

Ogoniland in many land areas, sediments, and swamps – translating to the reality that both surface and groundwater had been severely contaminated. The report found that the groundwater in Ogoniland is exposed to hydrocarbons spilled on the surface, observing that,"[i]n 49 areas, UNEP observed hydrocarbons in soil at depths of at least 5m".[31] UNEP observed that the hydrocarbon pollution in the groundwater in many areas was in excess of the national standards established by the Environmental Guidelines and Standards for the Petroleum Industries in Nigeria (EGASPIN).[32] In the area of public health, the UNEP Report found that oil spills have exposed the Ogoni people to high concentrations of hydrocarbons in the area and drinking water.[33] UNEP further stated in the report that a particular community has been drinking water from well contaminated with benzene – a known carcinogen, "at levels over 900 times above the World Health Organization (WHO) benchmark. [34] Hydrocarbon contamination was found in 28 other wells across ten different communities.[35] In several samples studied, it was found that the hydrocarbon levels were "at level 1,000 times higher than the Nigerian drinking water standard of 3mg/l.[36] As regard the air samples analyzed, UNEP study team found benzene in concentrations 900 times higher than recommended levels.[37] The Report concluded that in view of the over 50 years of unabated gas flaring and pollution to which the people of Ogoni have been exposed and Nigeria's average life expectancy, "it is a fair assumption that most members of the current Ogoni community have lived with chronic oil pollution throughout their lives.[38]

The scenario in Ogoniland is the same in other indigenous communities playing host to MNOCs in the Niger Delta region. Before 2011, there was no published study on the extent

[31]UNEP Report, 9.
[32]*Ibid*, 10.
[33]*Ibid*.
[34]*Ibid*, 11.
[35]*Ibid.*
[36]*Ibid*.
[37]*Ibid*, 13.
[38]UNEP, Environmental Assessment of Ogoniland [UNEP Report], 10 <https://www.postconflict.unep.ch/publications/OEA/UNEP_CEApdf> Accessed 15 September 2017.

of environmental degradation and its associated health hazards in any host community in the Niger Delta.[39] Till date, the Ogoni study is the only environmental assessment conducted by the Federal Government of Nigeria in collaboration with SPDC, by an independent and specialist body. This explains the absence of data on the exact state of the environment and health of indigenous peoples of the Niger Delta after over 50 years of persistent gas flaring, oil spillage and environmental recklessness on the part of the MNOCs.

In the exploration and exploitation of oil and gas resources in the Niger Delta region of Nigeria, indigenous peoples are exposed to two sets of hazards. The first is the forcible expropriation of their land and associated resources by the Federal Government and the MNOCs through anti-people legislations.[40] The second is the taking away of the environment, health and means of livelihood of the local people.[41] Under Nigerian law, "… 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 Exclusive Economic Zone of Nigeria shall vest in the government of the federation and shall be managed in such manner as may be prescribed by the National Assembly".[42] Other Acts of the National Assembly have since re-enacted verbatim the above provision.[43] The Land Use Act also vests the title in all lands comprised in the territory of a State in the Governor of the State to hold in trust and administer for the benefit of Nigerians in such State.[44] The combined effect of the regulatory framework in Nigeria is that apart from the bare usufructuary rights possessed

[39]B R Konne (n 1) 183.
[40]Constitution of the Federal Republic of Nigeria 1999 (as amended) [1999 Constitution] s 43(4); Land Use Act, Cap L5 Laws of the Federation of Nigeria [LFN] 2004; Petroleum Act, Cap P8, LFN 2004; Exclusive Economic Zone Act, Cap E17 ,LFN 2004.
[41]A R Temitope and A AAdedeji, *'Public Participation: An Imperative to the Sustainable Development of the Nigerian Oil*
Industry'<https://www.bhu.ac.in/lawfaculty/blj/2006.../5_RT%20AKO_Public_Participation_1_[1].doc accessed 30 September 2017.[arguing that oil and gas exploration and exploitation at all the stages interfere with farming and fishing - two major occupations of the indigenous peoples].
[42] 1999 Constitution, s 44(3).
[43] Petroleum Act 1969, s 1; EEZ Act 2004, s 1.
[44] [LUA] 1978 (now 2004), s 1(1).

over the land surface, the right of indigenous peoples – the owners of the lands housing natural resources in Nigeria, including oil and gas, to the resources in, on or under their ancestral land is not recognized.[45] Irrespective of where the resources occur, they are deemed to be the property of the Federal Government of Nigeria, which alone has the locus to determine the use to which they will be put.

However, under international law, the right of indigenous peoples to own and control their resources,[46] and where they are not given control, the right to their free, prior and informed consent (FPIC) before the exploitation of their resources by national governments[47] has been given recognition. Most importantly and relevant to this study is their right to a clean, safe and healthy environment[48] - a third generation right which has assumed greater importance as a condition precedent to a full and meaningful enjoyment of the right to life and dignity of human person.[49] Thus, international law recognizes the right of every person to a generally satisfactory environment favourable to his/her development, and this includes indigenous peoples, particularly those who are hosts to MNOCs – whose operations constitute the mainstay of the country's economy.[50]

Consistent with international standards and environmental regulations, most countries have recognized the right of their nationals to a clean, safe and healthy environment satisfactory and favourable to their development through direct constitutional provision,[51] although there

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[45] A R Temitope and A AAdedeji (n 42) 7-8.

[46] Convention Concerning Indigenous and Tribal Peoples in Independent Countries 1989 [ILO Convention 169], arts 4.1, 7.4, 13 and 14; African Charter on Human and Peoples' Rights [ACHPR] 1981, art 21.

[47] ILO Convention 169, art 15.

[48] ACHPR 1981, art 24;United Nations Declaration on the Rights of Indigenous Peoples 2007 [UNDRIP], art 25, General Assembly [GA] Resolution [Res] 61/295/UNGAOR 61st Sess, Doc. A/RES/61/295 adopted on 13 September 2007 <https://www.un.org/esa/solder/unpfii/documents/DRIPS.en.pdf> accessed 16 September 2017.

[49] B A Oloworaran, *'The Right to a Clean and Healthy Environment, and the Fundamental Human Rights Provisions of the Constitution of the Federal Republic of Nigeria, 1999'* [2009](1)(2) Petroleum, Natural Resources and Environment Law Journal 53, 58-59.

[50] US Energy Information Administration (n 2) 2.

[51] For example, Canada, South Africa, India.

are variations among practitioners as to the relative weights attached to the right.[52] In a number of jurisdictions, environmental rights are fundamental rights;[53] while in others, the right is banished to a part of the constitution christened "Fundamental Objectives and Directive Principles of State Policy", and in most cases designed to be unenforceable.[54] Even at that, courts in such jurisdictions, including their apex courts, have given the right to a clean, safe and healthy environment an imprimatur of approval which equates it with right to life through an expansive and progressive interpretation of the right to life.[55] In other countries, environmental rights are recognized under ordinary statutes lower in status to the constitution.[56] Whatever means adopted, the jurisprudence that has emerged is that the right of every individual to the enjoyment of a satisfactory environment conducive to their development is recognized, guaranteed and enforced across jurisdictions the world over.[57]

While in Nigeria the Federal Government regulates the exploration and exploitation of the oil and gas resources of the indigenous peoples through the Nigerian National Petroleum Corporation (NNPC) – which is effected by means of Joint Ventures (JVs) or Production Sharing Contracts (PSCs) with MNOCs[58], little or no considerations are given to the impact such exploration and exploitation activities will have on the indigenous peoples' health, economy, ecology and ecosystem.[59] For instance, the Department of Petroleum Resources (DPR) – an agency under the Federal Ministry of Petroleum Resources, is responsible for the

[52]For the purpose of enforceability and standing accorded environmental rights, they are included in national constitutions as positive or negative. See B AOloworaran (n 52) 62-63.
[53]About 60 countries have so far enacted environmental rights as fundamental rights. This includes South Africa. See J R May, *'Constituting Fundamental Environmental Rights Worldwide'* [2006-2007](23) Pace Environmental Law Review 113, 114-115, for a comprehensive catalogue of the countries.
[54]For instance, Nigeria, India.
[55]Countries in this category are South Asian Countries of India, Pakistan, Philippines, Nepal, etc. For instance, the Indian Supreme Court held in Virendra Gaur v State of Haryana India (1995) 2 AIR 577 SC that the enjoyment of the right to life is dependent on the existence of a clean and healthy environment.
[56] Countries in this category include Mexico, Tanzania and Indonesia.
[57]AOmaka, Municipal and International Environmental Law (Lions Unique Concepts 2012) 40.
[58]US Enemy Information Administration (n 2) 3.
[59]N Stewart, *'Transiting from Sanction to 'Punitive Damages": An Imperative for Curbing environmental Harmful Activities of Multinational companies in Nigeria's Niger Delta Region* [2012](4) Natural Resources and Environmental Law Journal 47, 55.

enforcement of environmental standards in the oil and gas sector.[60] Despite the enactment of a number of oil and gas-focused legislations and regulations,[61] environmental protection is still a far cry from internationally acceptable standards. It is interesting and heart-rending to observe the presence of gas-flaring permission clauses in Nigeria's oil and gas statutes in this twenty-first century when global efforts are currently being galvanized towards the total eradication of flares.[62]

The Constitution of the Federal Republic of Nigeria 1999 specifies the environmental objectives of the Nigerian State.[63] However, the same Constitution declares the right non-justiciable by ousting the jurisdiction of courts of law on any question touching on whether that provision has been breached by anybody.[64] Scholars have reasoned that the non-justiciability declaration in Section 6(6)(c) is countered by Section 13 of the Constitution.[65] Others hold the view that environmental rights are enforceable in Nigeria in view of the country's domestication of the African Charter on Human and Peoples' Rights,[66] which expressly recognize the right of all people to a generally satisfactory environment favourable to their development.[67] The Supreme Court of Nigeria appears to have laid down that whereas, the provisions of chapter two of the 1999 Constitution are not justiciable, they will nevertheless be justiciable where the appropriate legislative authority takes steps to enact

[60]B R Konne (n 2) 195.
[61]These include the Petroleum Act, Cap P10, LFN 2004; Petroleum (Drilling and Production) Regulations 1969; Environmental Impact Assessment Act, Cap E12, LFN 2004; Oil in Navigable Waters Act, Cap O6, LFN 2004; Associated Gas Re-injection Act, Cap A10, LFN 2004; Associated Gas Re-injection (Continued Flaring of Gas) Regulations No. 43 of 1984; Environmental Guidelines and Standards for the Petroleum Industry in Nigeria [EGASPIN] 1992 (as revised in 2002); National Oil Spill Detection and Response Agency Act No. 15 of 2006.
[62]For instance, Associated Gas Re-injection Act, s 3; Associated Gas Re-injection (Continued Flaring of Gas) Regulations, s 1(a)-(e). See generally, U E Nwanji, '*Gas Flaring: Legal and Environmental Perspectives'* [2009](1) (1) Natural Resources and Environmental Law Journal.
[63]1999 Constitution, s 20.
[64]*Ibid*, s 6(6)(c).
[65]B A Oloworaran (n 50) 72-73 [arguing that courts in Nigeria can hide under the inherent powers and sanctions of a court of law under Section 6 of the Constitution to enforce Section 20 through an expansive and progressive interpretation of Sections 33 and 34 of the 1999 Constitution as has been done in other jurisdictions].
[66]*Ibid.*
[67]ACHPR 1981, art 24.

specific legislations on any of the broad objectives.[68] It is submitted that neither Section 13 nor Article 24 of the ACHPR can ground the enforcement of environmental rights in Nigeria as a constitutional or fundamental right. As the Supreme Court of Nigeria held in *AbachavFawehinmi*,[69] the ACHPR is inferior to the 1999 Constitution, even though being a document encapsulating Nigeria's international obligations; it is in a special class above the ordinary laws of Nigeria. Therefore, Article 24 of the ACHPR must of necessity kowtow to Section 6(6)(c) of the 1999 Constitution. This is anchored on the unassailable fact that the 1999 Constitution is the supreme law of Nigeria.[70]

From the foregoing, it is clear that indigenous peoples' resources are taken away without their free, prior and informed consent. Also, their right to complain and seek justices also taken away going by S.6(6) c of the 1999 constitution of the Federal Republic of Nigeria. Presently, claims against MNOCs operating in the Niger Delta region on grounds of environmental recklessness, degradation and damage to the environmentsuch as those caused by blow-outs, oil spills, gas explosion, and the like, are maintained under the common law actions in negligence,[71] nuisance[72] and the rule in *Rylandsv Fletcher*.[73] These channels of claims for environmental damage are unsatisfactory for several reasons. First is the issue of locus standi– the legal right to sue and proof of interest. In public nuisance, for instance, it is a requirement that for a claimant to succeed, he must prove that he suffered damage/injury which is higher and above those suffered by the community. Legitimate claims have been thrown out as a result of failure to discharge this onus of proof.[74] Second, the reliefs grantable

[68]*Attorney-General of Ondo State v Attorney-General of the Federation* [2002] 9 NWLR (pt 772)1.
[69](2000) FWLR (Pt 4) 557.
[70]1999 Constitution, ss 1(1)-(3), 12(1) and (3).
[71]*SPDC v Otoko* (1990) 6 NWLR (pt 159) 693.
[72]*Amos v SPDC* (1977) 6 SC. 109 [Plaintiff's claim against the defendant company for blockingthe plaintiff's community's creek/waterway was dismissed on the ground that the plaintiff failed to prove damage suffered over and above that suffered by the public].
[73](1866) L R 1 Exch 256; (1866) L R 3 H L 330 [affirmed by the House of Lords]; *UmudjevSPDC*(1975) 9-11 SC 155.
[74]*Amos v SPDC*, supra;

in such claims are usually monetary compensation in nature. In other words, the oil spill, blow-out or other environmental catastrophes must occur first before the claimant can approach the court. By this time, the damage to the environment has been done and the damages awarded cannot adequately remediate the environment to its pre-pollution state. As it is said that half bread is better than no bread, claims in tort appear at the present, to be the only avenue open to indigenous peoples in the Niger delta region to seek environmental justice.

With the performance of the DPR, thereappears to be no reason for optimism as it may seem incongruent with the modus operandi of Nigeria's enforcement agencies to expect a departure from statusquo.[75]

By and large, the conclusion to be drawn from the discussion so far is that the Federal Government of Nigeria on which is the international obligation to respect and protect the Human rights of indigenous people of the Niger Delta, has abdicated its responsibility. It is therefore inevitable that we turn our attention to the MNOCs for the protection of the rights of indigenous people's right to a clean, safe and healthy environment. It has been pointed out elsewhere that the indigenous peoples of the Niger Delta region are host communities to a number of MNOCs. Apart from the local oil and gas companies which operate primarily onshore and in limited capacity, the MNOCs are all foreign-based and operate in Nigeria through their subsidiaries.[76] It is a fair assumption that the international standards governing extractive industries and MNOCs operating in developing countries are entrenched in their national laws.[77] Besides, there are a host of international codes of conduct and best practices for MNOCs, all of which hold MNOCs to a high standard of environmental consciousness

[75]B R Konne (n 2) 195.
[76]Amnesty International Summary (n 9) 1.
[77]Such international standards include: American Petroleum Institute [API]; American Society of Mechanical Engineers [ASME]; US Integrity Management [IM] for High Consequence Areas [HCA]; the Alaskia Best Available Technology [BAT].

and protection.[78] Protection of environmental rights and upholding of environmental standards have emerged as aspects of corporate social responsibility (CSR) all over the world.[79]

In Nigeria, MNOCs engage in CSR in the restricted sense of economic empowerment and other social engagements,[80] even though host communities have expressed discontent with the minimal impact of such CSR given the enormous profits MNOCs derive from their land[81] and also in view of the ecological and environmental devastations the activities of MNOCs have inflicted upon them.[82] The propriety or otherwise of this argument is not within the purview of this work. But suffice to point out that the CSR of MNOCs operating in Nigeria's Niger Delta focuses extensively on economic and social aspects to the detriments of the environmental aspect of CSR.[83] Studies conducted in host communities regarding the CSR of MNOCs in the Niger Delta region have documented a common trend, such as: building of schools, construction of markets and roads, construction of water projects , provision of electricity; provision of skills acquisition empowerment/capacity building, including scholarships, employment opportunities; social engagements like sports promotion/development, sponsorship of festivals/cultural ceremonies as well as talent hunt;

[78]Ibid.
[79]C U Mmuozoba, '*Oil Economy, Corporate Social Responsibility and the Politics of Pipelines Explosions: Are there Socio-legal Paradigms for Pipeline Integrity in Nigeria*?' [2009](1)(1) Natural Resources and Environmental Law Journal 46, 56; A O Adeyeye, Corporate Social Responsibility of Multinational Corporations in Developing Countries: *Perspectives on Anti-corruption* (Cambridge: Cambridge University Press 2012) 7.
[80]A C School, *'CSR and Oil Companies: A Comparative and Contextual Analysis of Stakeholder and Institutional Influence on Companies' Corporate Social Responsibility'* (MSc Dissertation, Copenhagen Business School 2012) 4-5; S Lebura, *'Stakeholder Relationships in the Nigerian Oil Industry'* (Ph.D Dissertation, De Montfort University 2013) 42-44; B I Isife, C O Albert and I N Odua, *'Performance Analysis of Community Development Activities of Two Multi-National Oil Companies in Rivers State, Southern Nigeria'* [2012](2)(9) Developing Country Studies 57, 59-61.
[81]B R Konne (n 2) 182 [stating that within 1958 when SPDC started production in Ogoniland and 1993 when its operations ceased, SPDC generated an estimated $30 billion but relatively little has trickled down to the indigenous communities].
[82]Ibid.
[83]B I Isife, C O Albert and I N Odua (n 34) 59-61.

and payment of compensation to families for the loss of usufructuary rights over lands bearing oil and gas installations and facilities.[84]

Thus, contrary to the global trend and international best practices which give primacy to the protection of the environment in which extractive industries operate, protection of the health of the host communities, preservation of their ecology, flora and fauna, and the land upon which the lives of indigenous peoples depend, MNOCs operating in the oil and gas industry in the Niger Delta region of Nigeria restrict their CSR in host communities to the social and economic spheres.[85] The MNOCs, as part of their CSR, build health Centre's for some host communities.[86] Studies have shown that these healthCentre's do not work or have the intended impact on the people because they are either not equipped with the necessary facilities or qualified doctors/manpower are not employed to man them. MNOCs usually donate empty health Centre'sto their host communities in the expectation that the State government will shoulder the responsibility of maintenance and deployment of medical professionals, which in the majority of the cases, does not happen. The MNCOs do this to avoid or to pass on the obligation to pay the medical professionals to the government.

According to a statement obtained from SPDC's website, SPDC as part of its CSR to host communities in the Niger Delta region currently supports 27 health facilities in the Niger Delta.[87] It also indicates that more than 880 government employed community health staff work at these facilities.[88] Among the health services rendered at the 27 health facilities are ante-natal, natal and post-natal services, immunization, HIV/Aids support, malaria

[84]S Lebura (n 84) 41-44.
[85]B I Isife, C O Albert and I N Odua (n 84) 59-61.
[86]S Lebura (n 84) 44; Shell Nigeria, '*Health Care Programs'*<https://www.shell.com.ng/sustainability/communities/health-in-nigeria.html> accessed 16 September 2017, Chevron Nigeria, Chevron's Health Care Programmes'<https://www.chevron.com/worldwide/nigeria> accessed 18 September 2017.
[87]Shell Nigeria, *'Shell's Health Programs'* (n 91).
[88]*Ibid*.

sensitization and eradication, as well as tackling emergencies like ebola.[89] To say the least, these health services are clearly and grossly adequate to deal with the severe life-threatening ailments caused to the health of indigenous peoples through environmentally reckless and irresponsible behaviours like gas flaring, oil pollution, gas explosion and oil waste dumping.[90] Rather than establish facilities for the treatment of cancer, asthma, lung diseases and other ailments associated with exposure to oil pollution and gas flaring, SPDC's intervention in the health sector of the people is to provide treatment for malaria, to look after pregnant women and to assist them in delivery, to immunize children against polio and to provide counseling and discounted treatment for HIV/Aids – sicknesses that have no bearing on the environmentally irresponsible operations of MNOCs.[91] It needs to be said that other oil and gas companies operating in the region also render similar health services to their host communities.[92]

MNCs build state-of-the-art medical facilities for their workers but exclude members of their host communities from accessing them. In some cases, members of the host communities are made to pay for treatments received in such hospitals. This is tantamount to requiring the host communities to pay for the environmental damage and deteriorating health condition inflicted on them by the activities of MNOCs. Thus, indigenous peoples' right to a clean, safe and healthy environment favourable to their development is not recognized under Nigerian law, despite its international recognition under various United Nations [UN] declarations[93] and Conventions'[94] as well as human right instruments.

[89] *Ibid.*
[90] The New Republic (2005) cited in OD J Egbe and F A E Paki (n 1) 128.
[91] Shell Nigeria *'Shell's Health Programs' (*n 91).
[92] Chevron Nigeria, *'Chevron Health Programs'* (n 91).
[93] Universal Declaration of Human Rights 1948 [UDHR], art 25(1); UNDRIP 2007, art 25.
[94] International Covenant on Economic, Social and Cultural Rights 1966, arts 11 and 12; ILO Convention 169, art 4.

Nigeria is not a party to all the Declarations and Conventions on the right of indigenous peoples within the UN system. Nigeria has signed and ratified most international human rights treaties but has not domesticated them.[95] The 1999 Constitution requires all treaties entered into between Nigeria and any other country to be first enacted into law before they will have effect in Nigeria.[96] Till date, no such law has been passed by the National Assembly, except the ACHPR.[97] In the hierarchy of norms in Nigeria, the Supreme Court has reiterated that the 1999 Constitution is supreme over all other laws including international treaties domesticated in Nigeria in line with Section 12(1)(3).[98] Thus, Article 24 of the ACHPR which grants to all people the right to a generally satisfactory environment favourable to their development, is not applicable in Nigeria since section 6(6)(c) of the 1999 Constitution declares environmental rights non-justiciable in the country. The conclusion is that indigenous peoples have no right to a clean, safe and healthy environment in Nigeria, like their counterparts in other parts of the world. The CSR of MNOCs in Nigeria is restricted in scope and generally does not protect the environment and health of the indigenous peoples.

1.2 Statement of the Problem

Various UN and regional Declarations and human rights instruments grant to indigenous peoples the right to a generally and satisfactory environment favourable to their development, and this includes the right to life and healthy living.[99]The activities of MNOCs in the Niger

[95]Nigeria has ratified the International Covenant on Civil and Political Rights (ICCPR) 1966. Nigeria has domesticated the ACHPR 1981 via the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A10, LFN 2004. However, Nigeria is neither a signatory nor a party to the ILO Convention 169.

[96]1999 Constitution; s 12(1)-(3). See also African Reinsurance Corp v Fantaye (1986) NWLR (pt32) 811; *Ogugu v State*(1994) 9 NWLR (pt 366) 1;SERAC v Nigeria, Comm. No. ACHPR/COMM/A044/1, Afri Commission on Human and Peoples' Rights of 53 (27 May 2002).

[97]African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A10, LFN 2004.

[98]*Abacha v Fawehinmi*(n 69); Lakanmi v Attorney-General*(West)* (1970) 6 NSCC 143; LabiyiAnretiola (1992) 10 SCNJ 1; (1992) NWLR (pt 258) 139.

[99]United Nations Declaration on the Human Environment 1972 [Stockholm Declaration], princ 1 <https://www.unep.org/Documents. Multilingual/Default.asp?documentid=97&articleid=1503> accessed 19 September 2017 [stating that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn

Delta region of Nigeria pose grave threat to the health, lives and environment of the people. In most countries of the world, the right to a clean, safe and healthy environment, particularly of indigenous peoples, is recognized, guaranteed and protected as a fundamental right. Despite the fact that S.20 of the 1999 Constitution stipulate the state protection of the environment but the provision remain non justiciable by virtue of S.6(6)(C) of same constitution .

MNOCs operating in the Niger Delta limit their CSR to economic and social packages and do not address the environmental risks which their operations inflict on the indigenous peoples. This contravenes international law and best practices to which the parent companies of MNOCs abroad subscribe.

There seems to be a yawning gap in knowledge in the area of the relationship between CSR of oil and gas companies and the right of indigenous peoples to a healthy environment in Nigeria. So much literature has been generated in the area of CSR of multinational oil companies operating in the Niger Delta region of Nigeria as well as the environmental impacts of their operations. Literatures on the CSR of MNOCs in the Niger Delta focus exclusively on the economic and social aspects of CSR but ignore the environmental aspect.[100]Equally, studies on the environmental impacts of oil and gas exploration in Nigeria focus exclusively on Nigeria's poor regulatory mechanism and lack of political will to

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responsibility to protect and improve the environment for present and future generations"]; United Nations Declaration on Environment and Development 1992 [Rio Declaration], princ 23, UN Doc. A/CONF/151/5 [stating that "the environment and natural resources of people under oppression, domination and occupation shall be protected."]; ILO Convention 169, 1989 arts 4.1, 7.4, 13, 14, 15, UNDRIP 2007, ICESCR 1966, arts 11 and 12; ACHPR 1981, art 24.

[100]C U Mmuozoba, *'Oil Economy, Corporate Social Responsibility and the Politics of Pipelines Explosions*: *Are there Socio-legal Paradigms for Pipeline Integrity in Nigeria?*' [2009](1)(1) Natural Resources and Environmental Law Journal 46, 56; A O Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-corruption* (Cambridge University Press, Cambridge 2012) 7; A C School, *'CSR and Oil Companies: A Comparative and Contextual Analysis of Stakeholder and Institutional Influence on Companies' Corporate Social Responsibility'* (MSc Dessertation, Copenhagen Business School 2012) 4-5; S Lebura, *'Stakeholder Relationships in the Nigerian Oil Industry'* (Ph.DDessertation, De Montfort University 2013) 42-44; B I Isife, C O Albert and I N Odua, *'Performance Analysis of Community Development Activities of Two Multi-National Oil Companies in Rivers State, Southern Nigeria'* [2012](2)(9) Developing Country Studies 57, 59-61.

enforce environmental standards but do not investigate the correlation between CSR of oil and gas companies and the indigenous peoples' right to a healthy environment in the country.[101] Against this background, this study seeks to fill in the gaps in knowledge by investigating how the CSR of oil and gas companies operating in Nigeria could be directed towards addressing the environmental health of the indigenous peoples.

1.3 Aim and Objectives of the Study

The aim of this study is to examine the CSR of oil and gas companies and the right of indigenous peoples to a healthy environment in Nigeria. The specific objectives are:

1. To examine the environmental and health impacts of the operations of oil and gas companies in Nigeria.
2. To ascertain whether the CSR of oil and gas companies in Nigeria extends to the protection of the lives, health and environment of indigenous peoples in Nigeria.
3. To ascertain whether indigenous people have right to a healthy environment under international law.
4. To ascertain if the right to a clean, safe and healthy environment is recognized and protected in Nigeria?
5. To examine what the focus of the CSR of oil and gas companies in Nigeria should be.

1.4 Research Methodology

Various methods were used to conduct the study and these were: personal observations and library-based or doctrinal methods.This study isessentially a legal research, and as such primarily adopted the doctrinal and analytical approach. These methods were chosen because

[101] B R Konne, *'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland'* [2014](47) Cornell International Law Journal 181, 182-185.

the research turns exclusively on the interpretation and analysis of legal texts and cases.The research assembled materials for interpretation and analysis from a wide pool of primary and secondary sources. Primary sources utilized in the course of the study include international human rights instruments, international environmental protection instruments with emphasis on those applicable to the oil and gas industry, international declarations of principles, codes of conduct and best practices on CSR and the rights of indigenous peoples, Nigerian statutes and case law. Secondary materials were authoritative scholarly opinions gleaned from textbooks, journal articles, commentaries, handbooks, specialist/technical reports, statistical bulletins, periodicals and newspapers as well as internet materials. These offered invaluable assistance in the task of interpreting the primary source materials. The study adopted the comparative approach to understand the practices in other jurisdictions, particularly the United States [US] and India, with a view to seeing what leaves MNOCs and the Nigerian government can borrow from them.

This researcher also adopted personal observation as one of the major methods used in the study. This involved visiting the sites of oil spillages and gas flares in selected indigenous communities to view first-hand the condition of the environment – farmlands, rivers, drinking water sources and the various health challenges faced by locals as a result of environmental pollution caused by oil and gas operations in the host communities. This method enabled the researcher to verify the stories of environmental degradation that have dominated the literature as being the resultant effect of oil and gas production in the Niger Delta region of Nigeria.

1.5 Significance of the Study

Previous studies have indicated that the CSR of MNOCs have minimal impact in the host communities as what the MNOCs give in return to the development of their host communities

does not equate with what is generated from their operations by way of profit. Studies have also established that oil and gas exploration and exploitation have deleterious effect on the health and environment of indigenous peoples, and detailed the tensions that have been generated in the search for environmental justice.

This study is significant because it will help in a better understanding of the constituent ingredients of a company's CSR, particularly in relation to oil and gas companies, through a demonstration of the need to extend CSR to environmental protection in Nigeria. MNOCs will benefit from this study as they will better appreciate the health and environmental risks their operations pose to their host communities and arm them with information required to take steps to incorporate environmental consciousness, responsibility and sustainable development as core components of their CSR. It is hoped that this study will illuminate the understanding of MNOCs that CSR is not all about the development of economic and social infrastructure but extends to the preservation of the lives of indigenous peoples, their health, environment and the resources upon which they depend for survival. Such approach will enhance robust stakeholders' relationship thereby de-escalating tensions in the search for environmental justice.

Indigenous peoples will benefit from this study as it will enable them to know and assert their rights under international law in Nigeria. This knowledge will change the context and complexion of their relationships with MNOCs as well as the content of the obligations of MNOCs articulated in their Global Memorandum of Understanding (GMOUs) which govern stakeholders' relationships in the Niger Delta region. Thus, apart from the usual discussions and agreements on capital projects/infrastructure and human capacity building, host communities can now negotiate terms relating to the inculcation of environmental best practices in oil and gas operations into the GMOUs.

Knowledge from the key findings of this study will assist the Federal Government of Nigeria (FG) to address the regulatory loopholes in the oil and gas legislations in Nigeria which continue to open up avenues for the flouting of Nigeria's international human rights and environmental protection obligations, through repeal or amendment of environmentally non-complaint laws. Recognition and protection of the environmental rights of indigenous peoples will help in laundering Nigeria's image in the comity of nations as a responsible country.

A key contribution of this study is the proposal of double standard approach to human and environmental rights enforcement by MNOCs and the voluntarism approach, both formulated to explain the differences in MNOCs' operations and standards observed in developed countries and those observed in the developing countries like Nigeria, and to urge for the voluntary assumption of responsibility for environmental protection by MNOCs in developing countries, on the basis of the protection of the human species, given the developing countries' government's dependence on natural resources exploitation and their willingness to lower environmental standards for MNOCs.

1.6 Scope and Limitations of the Study

While the findings of this study could have diffused application, particularly to industries and countries possessing similar characteristics with Nigeria's Niger Delta region, it is however instructive to delineate the context in which this study was carried out. The research was meant to cover the entire Niger Delta region where oil and gas companies in Nigeria operate but the sheer large size of the region, coupled with its complex topography and rugged terrain, made covering the field impossible. Therefore, some indigenous peoples and MNOCs were chosen. The indigenous peoples chosen are host communities (Ogoni, Ijaw and Egi and Ibani) all in Rivers State, while the MNOCs chosen are oil and gas operators in the Niger Delta region (SPDC, MPNU, Chevron and NLNG). The indigenous peoples were chosen due

to their agitations for environmental rights in Nigeria and their activities on the global scene as members of the Unrepresented Peoples Organization (UNPO). The oil and gas companies were selected by virtue of their position as key players in the oil and gas industry in Nigeria, in addition to being the operators of the Joint Ventures (JVs) with the Government of Nigeria.

Therefore, this study is limited to the CSR of MNOCs, particularly in respect of their CSR obligations to the protection of the health and safe environment of the indigenous people in Nigeria. It did not investigate the economic, social and cultural aspects of MNOCs' CSR. Similarly, the study did not investigate the CSR of other MNOCs operating in sectors of the Nigerian economy other than oil and gas.

In the course of this study, a number of difficulties were encountered. Non-availability of current and relevant materials on the subject posed serious challenge. Practically all the textbooks and journal articles consulted did not offer much help on the linkage between CSR of oil and gas companies and the indigenous peoples' right to a healthy environment. Foreign materials which treat the subject were unhelpful generally in application to Nigeria due largely in part to the differences in state of development between the countries and Nigeria. Furthermore, the complex terrain of the Niger Delta region marked by communities/settlements cut off by oceans, mangrove forests and its associated transportation problems, made it difficult for the researcher to visit most of the communities comprised in the chosen indigenous groups to view first-hand the state of environmental degradation as well as the MNOCs facilities, particularly their offshore operations to assess their general level of consciousness. These would have enriched the quality of the work if they were available.

1.7 Research Questions

To achieve the overall aim and objectives of this study, some research questions have been formulated to serve as guide. There is an overarching question that is meant to be answered at the end of the study, along with other sub-questions which would elicit answers that will assist in answering the over-arching question. The over-arching question is: What is the relationship between the CSR of oil and gas companies and the indigenous peoples' right to a healthy environment in Nigeria?

To further illuminate the answers to the above question, other sub-questions to which answers are sought in the course of this study are:

(1) What are the environmental and health impacts of the operations of oil and gas companies in Nigeria?

(2) Does the CSR of oil and gas companies in Nigeria address the protection of the health and environment of indigenous peoples?

(3) Do indigenous peoples have right to a generally satisfactory environment conducive to their development?

(4) Are these environmental rights recognized, guaranteed or protected in Nigeria?

(5) What should be the proper focus of the CSR of oil and gas companies in Nigeria?

1.8 Organizational Layout

This dissertation is structured into seven chapters with each treating a separate but interconnected segment of the entire study. Chapter one is the introductory chapter and as usual traced the background of the study, generated the statement of the problem, presented

the aim and objectives of the study,research methodology, stated the significance of the study and its contribution to knowledge, its limitations, formulated the research questions, generated the organizational layout of the study and reviewed literature on the CSR of MNOCs and indigenous peoples' right to healthy environment with a view to discovering gap in knowledge and further clarify key terms and concepts used in the study.

Chapter two presents an overview of the Nigerian oil and gas industry, discusses some initial oil and gas companies in Nigeria as well as the current ones operating in the Niger Delta area of Nigeria. It also emphasis the CSR models of these companies.

Chapter three discusses the quantum of environmental pollution by the oil and gas industry in Nigeria. It examine the concept of pollution, traces its origin, examines the types of pollution, the causes of pollution, stages of pollution and the impacts of pollution on the environment and public health.

Chapter four focuses on the examination of indigenous peoples in relation to the oil and gas industry in Nigeria. The chapter discusses the Ogoni, the Ogba nation, the Ijaw (Izon) and the Ibani as representing the indigenous peoples in the Niger Delta. The chapter also examined the indigenous people's agitations for environmental protection in Nigeria, and the expected norms on the responsibility of multinational company with regards to human rights of the people.

Chapter five examines the Legal And Conventional Frameworkfor Healthy Environment in Exploration and Exploitation Of Oil and Gas and some Jurisdiction notably the US and India,anddiscuss the gaps in Nigeria environmental standards and the judicial system regarding environmental issues.

Chapter sixexamines the attitude of the courts to CSR issues. The chapter analyzed the various environmental enforcement options open to indigenous peoples in pollution cases. Furthermore, the chapter examined the rule in *Ryland v Fletcher*and negligence as causes of action, the results of suing MNOCs in Nigerian courts and the effects of judgments of foreign courts on MNOCs. Chapter seven rounds off the study with the conclusion and recommendations that will be useful for the government, the multinational companies and the indigenous people.

1.9 Literature Review

A lot of work has been done by scholars and researchers on the CSR of oil and gas companies in Nigeria. Similarly, the environmental and health impact of the operations of oil and gas companies *vis-à-vis* the right to a healthy environment has been well documented in literature.

Ogula posits that CSR initiatives in the Niger Delta began in the 1960s and 1970s when the first wave of MNOCs commenced oil exploration and production in the region. Ogula argues that since the last half of the century MNOCs have adopted diverse CSR strategies ranging from philanthropic projects and scholarship awards, cash payments, agricultural projects, schools, healthcare centres to the construction of roads.[102] He, however, argued that these social interventions did not seem to achieve the intended impacts over the long term, due to certain problems associated with them. He identified at least four problems that bedeviled the early attempts by MNOCs to give back to the society, particularly their host communities.

First, is the perceived focus of MNOCs on the primacy of their own business objectives of maximizing profit rather than to impact positively on the living conditions and welfare of the

[102]D Ogula, *'Corporate Social Responsibility: Case Study of Community Expectations and the Administrative Systems, Niger Delta'* [2012] (17) (37) *eQualitative Report* 1, 4.

communities in which they operate. In other words, the MNOCs maintained a conservative and half-hearted approach to CSR by accepting very minimal ethical obligations because they considered CSR as incompatible with the objective of business. Communities responded by perceiving MNOCs' CSR efforts as cosmetic attempts to act in a socially responsible manner – regarded as image boosting missions.

The second problem was the failure to design CSR projects towards addressing critical economic, environmental and social problems. For example, the donations of schools and health facilities to host communities were carried out as one-off interventions as against their sustainable nature. Thus, once schools or health centres have been constructed, how and whether they work or satisfy the yearnings of the locals was no longer the MNOCs' business. Despite calls for the cessation of gas flaring, MNOCs continue to flare gases, showing a blatant disregard for environmental health.

The third problem is that the integration of community development and self-help projects in the CSR of MNOCs arrived rather belatedly in the mid-1990, emphasizing that the adoption of CSR was a reaction to the host communities' hostilities towards them. The fourth problem is the lack of co-ordinated strategic approach to the implementation of CSR efforts of MNOCs which ensured that the efforts had little impact on the host communities. In support of this assertion, Ogula posits that the huge sums of money injected into scholarships, schools and agricultural extension projects neither alleviated poverty nor engendered the socio-economic development of the Niger Delta region. He similarly asserts that MNOCs' response to oil spillages and other forms of environmental pollution have been half-hearted and covered mostly the immediate impacted sites while areas outside are excluded.[103] The conclusion from this study is that CSR as presently formulated and implemented by MNOCs is dysfunctional and lopsided and cannot guarantee the health of the members of their host

[103]D Ogula (n 108) 5.

communities as well as protect their environment. The gap in this study is that it focused on the general notion of CSR as the concept is understood in Nigeria, *vis-a-vis* the relationship among stakeholders in the oil and gas sector. The study did not investigate whether indigenous peoples (host communities) have a right to a healthy and clean environment conducive to their well-being and development, and if they do, what can be done to integrate environmental consciousness, responsibility and accountability into the CSR initiatives of MNOCs in the Niger Delta.

Oloworaran, does not believe that the failure of CSR of MNOCs is due to its design and implementation as contended by Ogula. Oloworaran did not lay the difficulty in implementing the right to healthy environment of indigenous peoples at the doorstep of MNOCs. He believes MNOCs would be more environmentally accountable if the Nigerian laws expressly take the lives, livelihoods and health of their people seriously by recognizing the right to a safe and livable environment as a fundamental right in the law. In his study of the right to a clean and healthy environment and the fundamental rights provisions of the Constitution of the Federal Republic of Nigeria, the author examined the concept of environmental right generally.[104]He argued that such rights are guaranteed under international law but do not exist on their own under the 1999 Constitution because Section 20 of the 1999 Constitution which recognizes the obligations of the Nigerian State towards the protection of the environment is neutralized by Section 6(6)(c) of the same Constitution which takes away the right of citizens to take actions against unwholesome environmental practices. This study further established that all over the world, there is a growing jurisprudence towards environmental protection and the recognition of the right of individuals and groups to a clean, safe and healthy environment, such that even in jurisdictions where such right has not been accorded constitutional flavour, the courts have championed the recognition of the right

[104]B AOloworaran (n 56).

through its inextricable merger with the right to life. The study, therefore, concluded that there is a right to environment in Nigeria since the right to life expressly guaranteed and enforced will acquire no worth where persons are subjected to primitive and unabated environmental degradation. It is submitted that beyond the examination of the right to environment from an individual right's perspective, Oloworaran did not focus his research on indigenous peoples' right to a clean and healthy environment under Nigerian law. The issue of how far MNOCs' CSRs can be used to police environmental recklessness in Nigeria was not investigated by the researcher, thus opening the gap for this study.

Contributing to the debate on what should be the proper scope of the CSR of MNOCs particularly in the area of environmental health of indigenous peoples, Ameshi and others studied the conceptualization of CSR among indigenous firms in Nigeria.[105] The scholars appear to blame the poorly developed structure and content of CSR of MNOCs in Nigeria on the failure of government to provide basic amenities for its citizens. The authors argue that there is a shift in focus in terms of what CSR should encapsulate in Nigeria. In other words, they hold the view that presently indigenous peoples believe that CSR should be about the MNOCs providing electricity, schools, health centres and other basic infrastructures for them. They reject the view that the provision of these amenities is the responsibility of MNOCs. In their view, it is the primary responsibility of government to provide these basic needs for its people and not for MNOCs whose primary responsibility is to make profits for their shareholders. This study sought to find out whether the notion of CSR as conceived by indigenous peoples in Nigeria is the same with the conception of the term in Europe or in western countries. After establishing the differences between the corporate governance structures of Nigerian companies and their western counterparts, as well as the socio-cultural contexts in which they operate, the researchers found overwhelming evidence that the waves

[105]K M Ameshi and Others, '*Corporate Social Responsibility (CSR) in Nigeria: Western Mimicry or Indigenous Practices*?' [2006] International Centre for Corporate Social Responsibility, Research Paper Series 1.

and the methods of the concept are viewed by both cultures differently.[106] Due to the governance failure in Nigeria, where basic needs and infrastructure like food, clothing, shelter, schools, roads, pipe borne water, electricity and health facilities are luxuries for most communities, even in the 21st century, the study revealed that indigenous people perceive CSR from the prism of philanthropy – for instance, a way of giving back to the society.[107]

The study also showed that the indigenous peoples arrange their priority areas where they want CSR to address in the following order of descending importance: Education (including training and skills development), provision of healthcare, infrastructural development (including roads, water, electricity, town hall, etc), poverty alleviation (including soft loans, employment) and security.[108] It concluded that Nigeria's perception did not mirror or reflect the popular western standard or expectations of CSR and its focus areas, such as consumer protection, fair trade, green marketing, environmental concerns, socially responsible investments, and the like.[109] The major gaps in this study is that it failed to address the nagging issue of right of indigenous peoples to healthy environment as well as the integration of environmental concerns into the CSR of MNOCs in a weak economy like Nigeria where environmental standards, monitoring and enforcement are deliberately lowered for economic expediencies.

Halboom rejected the view that CSR cannot be enforced on MNOCs in developing countries in the absence of statutory backing. He argued that even in the absence of express recognition of the right to environmental health of indigenous peoples, MNOCs could still be held accountable to high environmental standards using the internationally formulated industry best practices guidelines to which MNOCs have subscribed in their home countries. The

[106](n 111) 19.
[107]*Ibid*, 22.
[108]*Ibid*, 27.
[109]*Ibid,19*

author used the developing country of Suriname as a case study. Halboom maintained that the right of indigenous peoples to their lands is not recognized under the law of Suriname. All lands in Suriname belong to the State and the highest interest any Suriname can have in his/her ancestral land is a lease, which can be revoked on ground of overriding public interest to use the land for developmental or economic projects, such as mining.[110]

Apart from that, there are little environmental rights appertaining to indigenous people under Surinamese law.[111] For instance, there is no requirement that Environmental Impact Assessment (EIAs) should be conducted before the commencement of a major mining project.[112]Haalboom asserts that the MNOCs operating in Suriname are members of the International Council on Metals and Mining (ICMM), an international organization made up of companies interested in social responsibility. However, the ICMM makes no reference to human rights, and more recently indigenous rights, as part of its guidelines,[113] but holds its members to a high standard of environmental consciousness in the conduct of operations. As the author observes, the Surinamese government has signed the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP] and has also adopted ILO Convention 169 of 1989, but has not gone the extra mile to ratify them.[114] Thus, the research studied the extent to which indigenous peoples' rights to their land and resources as well as their environmental health can be fashioned into the CSR of the MNOCs operating in Suriname. This work also examined how NGOs representing indigenous populations and community leaders sought to hold two MNOCs which are key operators in the mining industry responsible for over 80 percent of the country's foreign earning as well as over 25% of total government revenue

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110 (n 111) 972-4.

111 B Haalboom, '*The Intersection of Corporate Social Responsibility Guidelines and Indigenous Rights: Examining Neoliberal Governance of a Proposed Mining Project in Suriname'* [2012] (43) *Geoforum*969-979, 972.

112 *Ibid*, 972-3.

113 *Ibid*, 971.

114 (n 117) 973.

accountable for the environmental recklessness exhibited by the MNOCs in the course of their operations.[115]

However, this research found that despite this porous and weak governance and regulatory structure in Suriname NGOs and the local communities still used CSR to hold the MNOCs to a high standard of accountability in environmental and land rights matters based on the ICMM standards, even though the MNOCs rejected a number of rights claimed by the indigenous peoples. It is worthy of note that the environment of Haalboom's research is similar to the Niger Delta scenario and the Nigerian government as well as the MNOCs operating in the Niger Delta, and can provide a good reference point in the present study. What can be concluded from this research is that in the absence of strong laws in the host country providing for environmental probity and responsibility, indigenous peoples can enforce their rights to healthy environment through voluntary binding operational guidelines of MNOCs applicable to their home countries. The major gap in this study is that it did not explore the rights of indigenous peoples to a healthy environment under international law and in view of growing national jurisprudence, recognizing the linkage between right to healthy environment and right to life. Secondly, since the study did not examine the situation of indigenous peoples in the Niger Delta Region of Southern Nigeria within the context of oil and gas production, a gap is opened within which the present research can be situated.

Rwabizambuga rejects the view that MNOCs should be held environmentally accountable under voluntarily subscribed operational principles and guidelines in their host countries instead of through laws made by the host countries. The author asserts that unless the government of developing countries put up deliberate legislative and policy measures targeted at curtailing the environmental recklessness of MNOCs, not much can be achieved by way of voluntary self-regulation. He argues further that stakeholder engagement is crucial

[115] *Ibid*, 972.

to the negotiation of CSR policies and practices in developing countries and to the role of societal pressures as drivers of SPDC's CSR agenda in the Niger Delta region of Nigeria.[116] Findings from this study show that SPDC's CSR is still driven by the neo-liberal inclination because governments in the countries where SPDC operates have not taken the initiative to regulate the company's CSR.

The study buttresses that failure of government in providing infrastructural foundations for SPDC's CSR is responsible for the limited impact the MNOC's CSR initiatives have recorded in the Niger Delta region. According to this study, it is this government's failure and neglect of its primary obligations as well as the limited impact of MNOCs' CSR on the Niger Delta communities that has led to a strained stakeholders' relationship in the oil and gas industry in the country. This study concentrated on the management of stakeholders' relationships and engagement of stakeholders in the formulation and negotiation of CSR initiatives of SPDC. No attention was given to the fundamental question of rights to healthy environment. The limited focus on SPDC alone also provides impetus for the present research.

Supporting Rwabizambuga, Amao contends that a well-developed legal framework plays a major role in the capacity of a State to regulate the CSR of MNOCs, and in particular, their ability to integrate environmental consciousness into their operations. The converse of this view is that in the absence of a strong regulatory regime, not much can be achieved in terms of protecting indigenous peoples' right to healthy environment. In the case of Nigeria, Amao found several areas of weaknesses in the legal framework which make it difficult for Nigerians, particularly indigenous populations within their operational areas to hold MNOCs accountable for environmental pollution and degradation. The study also explored the

[116] A Rwabizambuga, '*Corporate Social Responsibility Practice in the Nigerian Oil Sector: The Case of Royal Dutch Shell'* (Ph.D Thesis, London School of Economics and Political Science, London 2008) 12.

prospects for enhancing the capacity of Nigeria's legal and institutional frameworks for effective control of MNOCs.[117] He argued for the use of CSR by MNOCs to complement the gaps in Nigeria's oil and gas governance and regulatory frameworks.

Thus, in his view, where the Nigerian law is not strong enough to hold MNOCs environmentally accountable as it is at present, MNOCs should re-channel the focus of their CSR from the provision of basic infrastructure to implementing sound and robust environmental protection mechanisms for the sake of the lives and health of their host communities. Though this study examined the rights of Nigerians within the municipal and international contexts, it did not examine the rights of indigenous peoples as species of minority and disadvantaged groups protected under international law. Similarly, it did not study the rights to healthy environment of the indigenous peoples of the Niger Delta region of Nigeria as hosts to MNOCs.

Alabi and Ntukekpo, on their part, do not believe that the provision of basic amenities to host communities by MNOCs has any significant impact on the people since these do not address the grave environmental concerns of the indigenous peoples. In their study of the community development projects of chevron in three Niger Delta communities – Elekahia (Rivers State), Aniakpo (Delta State) and Igbokoda (Ondo State),[118] it was found that the projects that constitute the CSR of Chevron Nigeria Limited [CNL] are schools and hospitals, jetties and foot-bridges, scholarship and bursary awards, portable water, drug donation to hospitals and health centres, electricity and financial donations with varying levels of attention. It also revealed that most of the projects executed by CNL had no significant bearing on the communities. Though this study is limited to only one MNOC and three communities in the

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117 O OAmao, '*Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States'* [2008] (52) (1) *Journal of African Law* 89-113.

118 O F Alabi and S SNtukekpo, '*Oil Companies and Corporate Social Responsibility in Nigeria: An Empirical Assessment of Chevron's Community Development Projects in the Niger Delta'* [2012] (4) (2) British Journal of Arts and Social Sciences 361-374.

Niger Delta, the findings could be extrapolated to other communities and MNOCs operating in the Niger Delta. The study did not find evidence of environmental protection practices that demonstrated CNL's concern for the ecosystem, source of livelihood and health of the indigenous peoples in the area of study. The gap in the study is that it did not adopt a rights-based approach and did not investigate whether or not in view of Nigeria's non-recognition of the right of indigenous peoples to a healthy environment, host communities can hold MNOCs to a higher standard of environmental accountability.

Konne highlighted the imperative of integrating the right of indigenous peoples to a healthy environment into the CSR of MNOCs operating in the Niger Delta region of Nigeria. The work investigated Nigeria's attitude towards the protection of the environment and health of the Ogoni people, in view of SPDC's environmental recklessness in Ogoniland. Basing its data on the report of the United Nations Environment Programme [UNEP's] study on Ogoniland, the researcher concluded that the Federal Government of Nigeria has not shown any commitment to protect the environment and health of the people. Konne seems to agree with other scholars that a progressive and robust legal framework for the regulation of the CSR activities of MNOCs in Nigeria, especially the protection of the right of indigenous peoples to healthy environment, as well as its effective monitoring and enforcement is the panacea to the protection of the environment and health of indigenous peoples in Nigeria. He argued that the rights of indigenous peoples enshrined under international law are not recognized in Nigeria. The study found that Nigeria lowered its environmental standards unduly for MNOCs operating in the country and that the absence of effective monitoring and enforcement of standards was responsible for the MNOCs adopting procedures that violate international standards and global best practices in the oil and gas industry. However, the

study did not examine whether CSR of MNOCs can be utilized as a tool for enhancing environmental right in Nigeria.[119]

What can be deduced from the previous studies reviewed in this segment is that all the studies agree that to offer effective protection to indigenous people in terms of their health and environment, adequate and robust laws are needed. At present, there are no such adequate laws. Even the skeletal laws in existence are not being effectively monitored and implemented. There appears also to be some views that in the absence of sound and robust legislative framework, MNOCs should be held environmentally accountable through voluntary self-regulation standards. Most of the studies focused on the social impacts of the CSR of MNOCs on the indigenous people. Do indigenous peoples in Nigeria have rights to a healthy environment free from all pollutions and environmental degradation? Are these rights enforced? Are the CSRs of MNOCs as presently practiced adequate in content and coverage to deal with the issues of environmental pollution and damage to health that daily torment the Niger Delta people? Should the MNOCs go beyond their present CSR focus on education, social and economic empowerment to demonstrate environmental probity, responsibility and accountability in their CSR approaches? These issues are not comprehensively addressed in the studies examined. Studies that address CSR of MNOCs do not integrate the right of indigenous peoples to healthy environment into it; while studies that examine the imperative of the right of indigenous peoples to healthy environment do not link it up with CSR. This creates a yawning gap in knowledge because there is need to ascertain the relationship between the CSR of MNOCs and indigenous peoples' right to healthy environment. The gap in these studies as revealed by the review is that none has attempted to define the proper

[119] B R Konne, '*Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland'* [2014] (47) *Cornell International Law Journal* 181, 182-185.

focus of the CSR of MNOCs within the context of right of indigenous peoples to healthy environment. The present study fills this gap in knowledge.

1.10 Definition of Terms

In the course of this study a number of key terms will be employed. These include: corporate social responsibility [CSR], company, oil and gas companies, indigenous peoples, rights and environment. It is important these concepts are explained from the outset to provide a clearer understanding of the discussions that will follow in subsequent chapters. This segment, therefore, attempts a clarification of such terms.

1.10.1 What is Corporate Social Responsibility?

Scholars have sweated over the exact meaning of CSR but with no signs of success.[120]There are scholars, writers or jurists who have bothered to explain the concept. This has prompted Pedersen to assert that CSR is "one of the buzzwords of the millennium" due to its growing popularity in awareness and usage among corporations and individuals.[121]CSR has been identified as whatever corporations do to enhance economic development in any country.[122] CSR has also been described as an all-embracing term which covers various aspects of the activities of corporations or businesses such as corporate citizenship, corporate

[120]S Lebura, '*Stakeholder Relationships in the Nigerian Oil Industry'* (Unpublished Ph.D Dissertation, De Montfort
University 2013) 47.
[121]E R Pedersen, *'Making Corporate Social Responsibility (CSR) Operable: How Companies Translate Stakeholder Dialogues into Practice'* [2006](111)(2) Business and Society Review 137.
[122]C L Anderson and R L Bieniaszewska, *'The Role of Corporate Social Responsibility in an Old Company's into New Territories* [2005](12) (1) Corporate Social Responsibility and Environmental Management 1-9.

accountability, philanthropy, enhancing stakeholder value, or participation in sustainable development.[123]

According to Blowfield and Frynas, CSR is an umbrella word which encapsulates a variety of theories and practices that postulate the following:

(a) That firms have a responsibility for the impact of their activities/operations on the host communities and the natural environment; which are in most cases beyond the reach of legal compliance and liability of individuals;
(b) That firms bear a responsibility towards the actions or activities of other corporate bodies with which they transact business;
(c) That businesses need to manage their relationship with the wider society in which they operate in order to maximize their profitability, give back to the society and reduce tension among the various stakeholders.[124]

According to the World Business Council for Sustainable Development [WBCSD], CSR is "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large."[125] This definition portrays CSR as the activities that companies or business entities undertake in order to contribute to the development of the economy, improve the quality of life, not only of the workforce and their families, but also the indigenous communities in which they operate as well as the society at large. In Nigeria, MNOCs carry out CSR in areas such as environmental matters, human rights, transparency,

[123]S C Amba-Rao*, 'Multinational Corporate Social Responsibility, Ethics, Interactions and Third World Governments: An Agenda for the 1990s'* [1973] 12 Journal of Business Ethics 553, 554.
[124]M Blowfield, '*Corporate Social Responsibility: Reinventing the Meaning of Development*? [2015](81)(3) International Affairs 515, 522; J G Frynas, *'The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies* [2005](81)(3) International Affairs 381.
[125]Cited in M M Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Springer-Verlag Berlin Heidelberg 2013) 16.

local content utilization, bribery and corruption, labour and workers' welfare issues as well as disclosure of information and consumer protection.[126]

Scholars and stakeholders have come up with different perspectives on what corporate social responsibility [CSR] is. Apart from its meaning, the scope of CSR has been greatly debated over the years and till date, there appears to be no general consensus about its content. Scholars have asserted that the content and scope of CSR is determined by a number of factors, including ideological leaning and national differences.[127] CSR goes beyond the rendering of philanthropic or charitable acts. This is particularly so in developed countries where the government provides the basic and infrastructural needs of the people.[128] It has been contended that not only is the meaning of CSR affected by variations among countries, but also differ among stakeholders or industry players within the same country.[129]

Mmuozoba contends that the first sense in which CSR is to be understood is that it seeks to impose a kind of social obligation on multinational corporations (MNCs), namely, "the obligation to adopt socially responsible, ethical and best practices in their commercial pursuit irrespective of the sectors in which they operate.[130] Thus, in this sense, CSR requires organizations to integrate socially responsible and ethical practices as part of business strategies with emphasis on labour practices, human rights and environmental standards.

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[126]Shell Nigeria: Annual Report 2006, "People and Environment' <https://www.shell.com/home/content/nigeria/news_and_library/contd/publications/annual_reports_archive.html> accessed 20 September 2017.

[127] T Brejning, *Corporate Social Responsibility and the Welfare State: The Historical and Contemporary Role of CSR in the Mixed Economy of Welfare* (Farnham: Ashgate Publishing Limited 2012) 29; M M Rahim, *Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy* (Berlin Heidelberg:Springer-Verlag2013) 14.

[128]J G Frynas (n 59) 180.

[129]Ibid.

[130] C U Mmuozoba, *'Oil Economy, Corporate Social Responsibility and the Politics of Oil Pipeline Explosions: Are there Socio-Legal Paradigms for Pipeline Integrity in Nigeria* [2009](1)(1) Natural Resources and Environmental Law Journal 46, 56; O Arowolo, '*Social Responsibility of Multinational Oil Companies and the Challenge of Local Communities – Any prospects for Reconciliation?* [2004](2)(4) Oil, Gas and Energy Law Intelligence 2.

The World Economic Forum [WEF] uses the term "corporate citizenship" to represent or denote the concept "corporate social responsibility'. It thus, defines corporate citizenship as:

> The contribution that a company makes in society through its core business activities, the social investment and philanthropy programmes, and its engagement in public policy. That contribution is determined by the manner in which a company manages its economic, social and environmental impacts and manages its relationships with different stakeholders, in particular, shareholders, employees, customers, business partners, governments, communities and future generations.[131]

This view sees CSR as responsibility owed to all facets of the society, including its shareholders, employees, customers, business partners, governments, communities where its operations are carried out, and future generations which have stakes in the use of nature's endowments.

Zerk criticizes the distinction often drawn between law and CSR, and dismisses the distinction as not only confusing but unhelpful. According to the author, legal rules are never absolute and where absolute do not always secure absolute compliance. His contention is that compliance with legal rules is a component of CSR.[132]

CSR has been described as the notion that every business entity as a component part of society has a responsibility to operate ethically and in compliance with its legal obligations and to strive to minimize any adverse effects of its operations and activities on the environment, society and human health.[133]

Banerjee has suggested the following as the rationale and assumptions behind the CSR discourse:

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[131]WEF, *'Following Questionnaire on the World Economic Forum Statement: Global Corporate Citizenship: The Leadership Challenge for CEOs and Boards'* [2002] <https://www.weforum.org/pdf/GCCI/GCCI_CEO_Questionnaire.pdf> accessed 26 September 2017.
[132]J A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press 2007) 31.
[133]Ibid, 32.

(i) Corporations should think beyond making money and pay attention to social and environmental issues;

(ii) Corporations should behave in an ethical manner and demonstrate the highest level of integrity and transparency in all their operations;

(iii) Corporations should be involved with the community in which they operate in terms of enhancing social welfare and providing community support through philanthropy or other means.[134]

Spence posits that CSR is the various things companies do in order to navigate the 'swirling currents' of changing expectations.[135] Modern CSR programmes are reflections of the realization that businesses do not take place in a vacuum.[136] CSR is linked to the notion that companies owe duties to their external stakeholders far and above legal stipulations. Thus, Spence argues that the word 'responsibility' connotes a duty owed to someone or something; while the modifier 'social' signifies that the duties owed by corporations are to the society at large. Proponents of the stakeholder theory believe that business managers owe stakeholders a variety of legal and ethical duties. These stakeholders include employees, suppliers, neighbours (host communities), customers, governments and NGOs, as each of these stakeholders is affected in one way or the other by the activities of every business organization.[137]

[134]S B Banerjee, '*Corporate Social responsibility: The Good, the Bad and the Ugly'* [2008](34)(1) Critical Sociology 51, 62.
[135]D Spence, *'Corporate Social responsibility in the Oil and Gas Industry: The Importance of Reputational Risk'*
[2011] (86) Chi-Kent L Rev. 59.
[136]D Spence, *'Corporate Social responsibility in the Oil and Gas Industry: The Importance of Reputational Risk'*
[2011] (86) Chi-Kent L Rev. 59.
[137]*Ibid.*

Blowfield and Frynas argue that governments, civil society groups and businesses have come to accept CSR as a bridge linking the arena of business and development.[138] They contend that CSR is a catch-all term for 'a variety of theories and practices all of which emphasize that corporate entities have responsibility for the impact of their operations on both the society and the natural environment. According to them, these obligations transcend merely complying with legal stipulations to establishing good relationship with recognized stakeholders in order to add value to the business or for the purpose of economic viability.[139]

Idemudia has also posited that CSR should progress from the domain of responsibility to the domain of accountability through the enactment of binding codes or legal regulations that will hold corporate bodies accountable for their activities.[140]

1.10.2 The Meaning of Company in Nigeria

Section 567(1) of the Companies and Allied Matters Act[141] defines a company as "a company formed and registered under this Act or an existing company" However, this definition does not reveal the distinctive characteristics of a company. According to Chief Justice Marshall of the USA, "A company is a person, artificial, invisible, intangible, and existing only in the contemplation of the law being a mere creature of law, it possesses only those properties which the character of its creation confers upon it either expressly or as incidental to its very existence".[142]

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[138]M Blowfield and J G Frynas, *'Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World'* [2005](81) (3)International Affairs 499.
[139]*Ibid.*
[140]U Idemudia, 'Conceptualising the CSR Development Debate: Bridging Existing Analytical Gaps' [2008](28) Journal of Corporate Citizenship 91, 93, G U Ojo, *'Community Perception and Oil Companies Corporate Social Responsibility Initiative in the Niger Delta* [2012](3)(4) Studies in Sociology of Science 11, 12-13.
[141] Cap C20, Laws of the Federation of Nigeria 2004.
[142]'Meaning, Characteristics and Types of a Company' <https://www.ddegjust.ac.in/studymaterial/bba-201.pdf> accessed 31 May 2018.

However, whether a company operates for profit or for charitable purpose, the common denominator is that the members share in the loss of the company.

1.10.3 Understanding Oil and Gas

Oil and gas together make petroleum. Petroleum, which is latin for rock oil, is a fossil fuel, meaning it was made naturally from decaying prehistoric plant and animal remains. It is a mixture of different hydrocarbons molecules containing hydrogen and carbon that exist sometimes as a liquid (crude oil) and sometimes as a vapor (natural gas). Petroleum (or crude oil) is a complex, naturally occurring liquid mixture containing mostly hydrocarbons, but containing also some compounds of oxygen, nitrogen and sulfur. It is often referred to as the "black gold." Petroleum forms by the breaking down of large molecules of fats, oils and waxes that contributed to the formation of kerogen. This process began millions of years ago, when small marine organisms abounded in the seas. As marine life died, it settled at the sea bottom and became buried in layers of clay, silt and sand. The gradual decay by the effect of heat and pressure resulted in the formation of hundreds of compounds.[143]

Because petroleum is a fluid, it is able to migrate through the earth as it forms. To form large, economically recoverable amounts of oil underground, two things are needed: an oil pool and an oil trap. An oil pool, which is the underground reservoir of oil, may literally be a pool or it could be droplets of oil collected in a highly porous rock such as sandstone. An oil trap is a non-porous rock formation that holds the oil pool in place. Obviously, in order to stay in the ground, the fluids oil and associated gas – must be trapped, so that they cannot flow to the surface of the earth. The hydrocarbons accumulate in reservoir rock, the porous sandstone or limestone. The reservoir rock must have a covering of an impervious rock that will not allow

[143] Essential Energy Education : Petroleum –Oil and Gas ….energy4me.org >energy-source accessed 31 May 2018.

the passage of the hydrocarbon fluids to the surface. The impervious rock covering the reservoir rocks is called a cap rock. Oil traps consist of hydrocarbon fluids held in porous rock covered bya cap rock.

On its own part, the term, 'natural gas' refers to hydrocarbon-rich gas. It is a gaseous fossil fuel that is found in oil fields, natural gas fields, and coal beds.

In its pure state, natural gas is colorless, shapeless, and odorless. It is a combustible gas, and it gives off a significant amount of energy when burned. It is considered to be an environmentally friendly lean fuel when compared with other fossil fuels (coal and crude oil). The combustion of fossil fuels other than natural gas results in the emission of enormous amounts of compounds and particulates that have negative impacts in human health.

1.10.4 Who are the Indigenous Peoples?

The Indigenous and Tribal Peoples Convention[144] did not define the term 'indigenous peoples' but states that the Convention applies to:

> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the population which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institution."[145]

Indigenous peoples are peoples recognized under international law as possessing a set of specific rights based on their historical links to a particular territory as well as their cultural or

[144]International Labour Organization [ILO] Convention 169. It was adopted in 1989 [ILO Convention 169 of 1989].
[145]ILO Convention 169 of 1989, art 2.

historical distinctiveness from other populations that are often politically dominant.[146] The concept has beenused to define these groups as especially vulnerable to exploitation, marginalization and oppression by nation-states which may still have been formed from the colonized populations or by politically dominant ethnic groups.[147]

Thus, indigenity is reflected by a sense of collectivity or a shared sense of identity under international law.[148]

We can conclude from the foregoing that indigenous peoples are peoples in any country who have a distinctive cultural way of life, inhabit a particular geographical territory and share a common identity. The United Nations Unrepresented Peoples Organization [UNPO] has recognized a number of tribal peoples in independent countries across the world as indigenous peoples. There are criteria that assist in the definition of indigenous peoples. One of such is the self-identification criterion. [149] Similarly, the UN Permanent Forum on Indigenous Peoples has stressed that in addition to the above requirements, the distinctive badge of indigenous peoples' are:

(i) A strong link to territories and surrounding natural resources.
(ii) Distinct social, economic or political systems; and
(iii) Distinct language, culture and beliefs.[150]

Within the context of this study, the Indigenous People referred to are those who are the ones in the host communities that are directly and closely affected presently by the activities of the MNOC .The Ogoni, Ijaw (Izon), the Egiand the Ibani (Bonny) people of Rivers State are the indigenous peoples being referred to in this study.

[146]"Indigenous Peoples Literature' <https://ww.indigenouspeople.net> accessed 20 September 2017.
[147]*Ibid.*
[148]"Indigenous Peoples Literature' <https://ww.indigenouspeople.net> accessed 20 September 2017.
[149]UN Human Rights Office of the High Commissioner, *Indigenous Peoples and the United Nations Human Rights System* (UN Human Rights Office of the High Commissioner, New York 2013) 2.
[150]*Ibid*, 3.

1.10.5 The Import of Rights

A right has been defined as a just and proper claim or title to anything, or that which may be claimed on just, moral, legal or customary grounds.[151] The Black's Law Dictionary renders the word 'right' as follows: "that which is proper under law, morality, or ethics; something that is due to a person by just claim, legal guarantee, or moral principle; a power, privilege or immunity secured to a person by law, a legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong".[152]According to Ladan, whenever it is said that a person has a legal right, it means that some other person owes him or her a duty.[153] Thus, the right-owner is entitled to some benefit, advantage requiring the doing of a thing in which the right-owner has an interest from a person under a duty to perform.[154] The learned scholar further asserts that every right is concerned with an interest and therefore a legal right is protected by law.[155]It, however, should be noted that there is difference between 'interest' and 'right'. This is because not all interests are protected by law. Thus, in according protection, the law chooses only those interests that are regarded to be worthy of protection. This means that it is only where an interest is protected by law that it becomes a legal right.[156] It can be concluded that right is any claim or interest possessed by a person which is protected by law, the breach of which entitles the right-holder to seek legal redress and its enforcement.

[151]The New International Webster's Comprehensive Dictionary of the English Language (Encyclopedic edn, New York: Typhoon International 2004) 1084.
[152]B A Gardner (ed),Black's Law Dictionary (8th edn, Thomson West 2004) 1347.
[153]M T Ladan, *Introduction to Jurisprudence: Classical and Islamic* (Lagos: Malthouse Press Limited 2010) 149.
[154]*Ibid.*
[155]M T Ladan, *Introduction to Jurisprudence: Classical and Islamic* (Lagos: Malthouse Press Limited 2010) 149.
[156]*Ibid*

Human rights arerights that human beings possess by the mere fact of being human. These rights are neither created nor can they be suspended or abrogated bythe State.[157] In the most basic sense of the expression, the idea of human rights revolves around the notion that humans, as distinct from other species of animals, are imbued or endowed with certain sets of rights that are fundamentally inalienable, simply by virtue of their being members of the human species.[158]Human rights are the rights which appertain to an individual solely on the basis that he or she is a member of the human race.[159]These rights are universal and apply to every human, irrespective of race, colour, gender, class, nationality, religion, age, employment status, political orientation, sexual orientation, disability status and so forth.[160]They are rights which are so fundamental to the existence of life that their deprivation or violation makes life illusory or non-existent.[161]

The UN defines human rights as those rights that are inherent in our state of nature and the absence or deprivation of which human beings will live as sub-humans.[162]These natural rights are called fundamental rights in the various international human rights instruments as well as national constitutions. In *Ransome kutu v Attorney General of the Federation*,[163] the Nigerian Supreme Court stated that, "A fundamental right is a right which stands above the ordinary laws of the land and which is antecedent to the political society. It is a precondition to a civilized existence."[164] They are rights which every human being must assert, exercise, enjoy and obtain remedy for their violation through appropriate legal mechanisms, where breached.

[157]Business Dictionary <https://www.businessdictionary.com/definition/human-rights.html> accessed 21 September 2017.
[158]'Lesson I: *Introduction to the Concept of Human Rights'* <https://www.online.missouri.edu/exec/data/causes/2497/public/lesson01/.aspx> accessed 21 September 2017.
[159]Ikpeze '*The Environment, Oil and Human Right in Nigeria*; http//www.ajol.info/index/acticle/viewfile/82388/72543 accessed 13 october 2017
[160]'*Introduction: Concept of Human Rights'* <https://www.shodhganga.inflibnet.ac.in/bitstream/10603/61833/8/08_chapter%20pdf> accessed 21 September 2017.
[161]*Ibid*.
[162]D J O'Byme, *Human Rights: An Introduction* (Singapore: Pearson Education 2005)

[163](1985) 2 NWLR (Pt 6) 211.
[164]*Ransome-Kutiv Attorney General of the Federation(*n 214) 229.

Several rights have been so far recognized under international law, including right to life; dignity of human person; personal liberty and freedom from slavery, torture, inhuman, cruel and degrading treatment, fair hearing and a fair trial; family and private life; thought, conscience and religion; association and assembly; freedom of speech and the press; freedom of movement, freedom from discrimination, right to equal treatment

before the law; right to participate in political and public life of a country; to reproductive health; right to medical health; food, clothing and housing; education; and right to a clean, safe and healthy environment which is favourable to man's development, and so forth. These rights are articulated under various international human rights instruments.[165]

1.10.6 Concept ofEnvironment

To understand the term 'healthy environment, it is important to understand what 'environment' means. The World health Organization [WHO] defines environment, particularly in relation to health, as "all the physical, chemical, and biological factors external to a person, and all the related behaviours".[166]It has also been defined as "the physical and cultural spaces in which the human species live, reproduce and die. It consists of the water, the atmosphere, land and all living and non-living things that inhabit these spaces".[167]

It is the complex of physical, chemical, and biotic factors (such as climate, soil and living things) which act upon an organism or an ecological community and ultimately determine its form and survival.[168] Environment is also the sum total of all surroundings of a living

[165]UDHR 1948; ICCPR 1966; ICESCR 1966; Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW] 1979; Convention on the Rights of Persons with Disabilities 2006; Convention on the Rights of the Child [CRC]1989; ACHPR 1981; African Charter on the Rights and Welfare of the Child[ACRWC] 1990.
[166]World Health Organization, Preventing Disease through Healthy Environments (WHO, Geneva 2006).
[167]M Ajiya and Y B Habibu, '*Issues and Challenges on Environmental Rights: The Nigerian Experience'* [2014] (3)(5) American International Journal of Social Science 143.
[168]Merriam-Webster Dictionary of the English Language <https://www.merriamwebster.com/dictionary/environment> accessed 4 October 2017.

organism, including natural forces and other living things, which provide conditions for development and growth as well as of danger and damage.[169]Omaka defines environment to mean the abode of human, plant and animal existence.[170] It can be concluded from the foregoing that the term 'environment is a very wide concept. It is not restricted to physical conditions but also extend to the abiotic components. In other words, environment is the sum total of the surroundings – both biotic and the abiotic factors that influence how man, animals and plants live and interact among ourselves as well as the non-living variables of the environment. The environment comprises the atmosphere (air), the biosphere (land) and the hydrosphere (water).

A healthy environment is an environment that promotes positive health and well-being. Environmental health, according to the WHO comprises those aspects of human health, including quality of life, that are determined by physical, biological, social and psychosocial factors in the environment.[171] A healthy environment refers to an environment that is free from pollution, gas flaring, destruction of the flora and fauna, contamination of the drinking water, toxification of the water bodies/seas and the destruction of aquatic living resources.

It encompasses environmental practices that reduce to the barest minimum the spillage or flaring of contaminants and other toxins into the environment. It includes the sustainable use of natural resources in such a way that the ability of the future generation to use the same resources is not compromised. The ACHPR defines it as an environment favourable to man's development.

[169]Business Dictionary <https://www.businessdictionary.com/definition/environment/html> accessed 4 October 2017.
[170]AOmaka, *Municipal and International Environmental Law* (Lagos: Lions Unique Concepts 2012) 1.

[171]J M Links, *'Introduction to Environmental Health'*<https://www.ocw.jhsph.edu/courses/environmentalHealth/PDFs/Lecture1.pdf> accessed 21 September, 2017.

CHAPTER TWO: THE HISTORY OF OIL AND GAS INDUSTRY IN NIGERIA

2.1 Overview of the Nigerian Oil and Gas Industry

The first oil discovery in commercial quantities in the Niger Delta region took place at Oloibiri field in January 1956 by Shell D'Arcy and a second oil field was discovered later at Afam in present-day Rivers State.[172] Actual crude oil exploration from the Oloibiri and Afam fields occurred in 1958. Discovery and production of oil and gas from the giant Bomu oil field which has an Estimated Ultimate Recovery [EUR] of 0.311 billion barrels of crude oil and a total of 0.608 billion barrels of oil equivalent occurred in 1958.[173]

The oil and gas industry, thus, began to play a vital role in shaping both the economy and the political destiny of the Nigeria the in early 1960s. The attainment of independence by Nigeria from Britain in 1960 led to Shell-BP relinquishing its acreage and its exploration licences were converted into prospecting licenses that encouraged oil development and production.[174] As a result of the increased dominance of the oil and gas industry on the Nigerian economy, the sole concessionary policy was abandoned and exclusive exploration right was introduced to attract other MNOCs in order to speed up oil and gas exploration and production.[175] By 1961, the country's oil and gas sector had been liberalized and new MNOCs admitted. The new entrants include: Texaco Overseas Nigeria Petroleum Company Unlimited, Amoseas, Gulf Oil Company (now Chevron *SocieteAfricaine das Petroles* [SAFRAP] (which later became Elf Nigeria Limited in 1974]. Tennessee Nigeria Limited [Tenneco] and *AziendaGeneraleItalianaPetroli* [AGIP] (now Nigerian Agip Oil Company [NAOC]) joined in 1962; while ENI and Philips Oil Company joined in 1964; and Pan Ocean Oil Company joined in 1992. Most of these MNOCs have achieved huge success in oil and gas production

[172] *Ibid*.
[173] *Ibid.*
[174] *Ibid.*
[175] *Ibid*, 17.

in the Niger Delta region of Nigeria, and have engaged in both onshore and offshore oil and gas exploration and production.[176]

Following the huge income generated by the oil and gas industry and its contribution to the revenue of the Federal Government of Nigeria, the Federal Government swiftly moved to divest ownership of the oil and gas deposits underneath the land of the indigenous peoples of the Niger Delta region and placed it in the Federal Government Section 44 (3) of the Constitution of the Federal Republic of Nigeria 1979[177] declared that "… 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 Exclusive Economic Zone of Nigeria shall vest in the government of the federation and shall be managed in such manner as may be prescribed by the National Assembly"

This position was re-enacted in the Constitution of the Federal Republic of Nigeria 1999.[178] Apart from the constitutional provisions, other statutes such as the Land Use Act,[179] the Petroleum Act[180] and the Exclusive Economic Zone Act,[181] have been enacted to effectively expropriate the interests of indigenous peoples of the minority Niger Delta region and place such right in the majority tribes dominated-Federal Government where the indigenous peoples have no say in the exploration and exploitation of the resources found in their lands. Thus, in effect, ownership of oil and gas in Nigeria is vested in the Federal Government of

[176]U C Anochie and O M Onyinye, '*Evaluation of Some Oil Companies in the Niger Delta Region of Nigeria: An Environmental Impact Approach'* [2016] (3) (2) International Journal of Environment and Pollution Research, 1-15, 16.

[177][1979 Constitution].

[178] (As Amended) [1999 Constitution] s 43(4)..

[179]Land Use Act, Cap L5, Laws of the Federation of Nigeria [LFN] 2004 [*Section 1 vests the ownership of all lands comprised in the territory of a state in Nigeria in the Governor of such State to hold in trust for the use and benefit of all Nigerians in the State. Section 5 converts all previous interests exercised by indigenous peoples over their lands to a leasehold to be granted by the Governor or Local Government Chairman, as the case may be upon due application. Section 28 gives the Governor the Power to revoke the right of occupancy granted to a holder on ground of overriding public interest, which is defined in Section 51 of the Act to include oil and gas development.*

[180] Cap P8, LFN 2004, s 1 [re-enacting Section 43(4) of the 1999 Constitution (as amended) to the effect that all property shall vest in the government of the Federal Republic of Nigeria],

[181]Cap E 17, LFN 2004; s 1.

Nigeria. The Nigerian State participates in oil and gas exploration and production through the NNPC. The NNPC was established in 1977 to oversee the regulation of the country's oil and gas industry, with the secondary obligation of developing the upstream and downstream oil and gas sectors. The Department of Petroleum Resources [DPR], a department within the Ministry of Petroleum Resources, is responsible for general compliance, leases and permits, as well as environmental standards.[182]

At present, Nigeria's major oil and natural gas projects are funded through Joint Ventures [JV] between the MNOCs and the NNPC, under which the NNPC is usually the majority shareholder, holding up to 55 percent equity in each project. The rest of the projects are operated through Production Sharing Contracts [PSCs] with MNOC. Currently, NNPC has JV arrangements and/or PSCs with SPDC, MPNU, Chevron Nigeria Limited [CNL], Total and ENI. Other MNOCs active in the Nigeria's oil and gas industry include: Addax Petroleum, Statoil and Sasol.[183] There are also a handful of Nigerian companies which are also involved in oil and gas production but their operations are generally limited to onshore/shallow water projects due to financial and technical constraints.[184] Because onshore and shallow water projects in the Niger Delta region has been affected by insecurity, there is now a growing trend whereby MNOCs, particularly SPDC, CNL, Total, ENI, and ConocoPhilips, sell their interests in marginal onshore and shallow water fields, mostly to Nigerian companies and smaller MNOCs, in order to focus their investments on deep water projects and onshore natural gas projects.[185]

[182]US Energy Information Administration U S Energy Information Administration, Country Analysis Brief: Nigeria (2016) 3 <https://www.marcon.com/librarycountry-briefsNigeria/nigeria.pdf> accessed 15 September 2017; O A E Ndu and B A Agbonifoh, '*Corporate Social Responsibility in Nigeria: A Study of the Petroleum Industry and the Niger Delta Area'* [2014](6)(2)
International Review of Social sciences and Humanities 214, 221.
[183]US Energy Information Administration (n 13) 3.
[184]Ibid.
[185]US Energy Information Administration U S Energy Information Administration, Country Analysis Brief: Nigeria (2016) 3 <https://www.marcon.com/librarycountry-briefsNigeria/nigeria.pdf> accessed 15 September

Currently, there are over 18 MNOCs involved in oil and gas exploration and production in the Niger Delta, but the major players are SPDC, MPNU, CNL, Eni, Total, NAOC and NLNG though, SPDC is the largest player in the country.[186] Its operations span over an estimated 31,000 square kilometers and include thousands of kilometres of pipelines traversing mangrove swamp forests, majority of which are close to homes, farms and water resources.[187]

2.2 Some Initial Oil and Gas Companies Operating in the Niger Delta Region

The German firm, Nigerian Bitumen Corporation was the first company that prospected for petroleum in Nigeria in 1908. Shell D'Arcy (a consortium of Iranian Oil Oompany), first renamed British Petroleum (and further renamed Royal Dutch Shell), was the next multinational company to be granted a sole concessionary right over the whole of Nigeria. In 1955, Mobil Producing Nigeria Unlimited [MPNU], a subsidiary of American Socony-Mobile Oil Company, was granted oil exploration licence and began oil explorations in the country in 1955 under the name, Mobil Exploration Nigeria Incorporated (later registered as Mobil Producing Nigeria Unlimited in 1969).[188] The first oil discovery in commercial quantities in the Niger Delta region took place at Oloibiri field in January 1956 by Shell D'Arcy was the first company to discover oil in commercial quantities in Nigeria. By 1961, the country's oil and gas sector had been liberalized and new MNOCs admitted. The new entrants include: Texaco Overseas Nigeria Petroleum Company Unlimited, Amoseas, Gulf Oil Company (now Chevron *SocieteAfricaine das Petroles* [SAFRAP] (which later became Elf Nigeria Limited in 1974]. Tennessee Nigeria Limited [Tenneco] and

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[186]U C Anochie and O M Onyinye (n 1) 17.

[187]B R Konne, '*Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland* [2014](47) Cornell International Law Journal 181, 182.

[188] U C Anochie and O M Onyinye, '*Evaluation of Some Oil Companies in the Niger Delta Region of Nigeria: An Environmental Impact Approach'* [2016] (3) (2) International Journal of Environment and Pollution Research, 1-15, 16.

AziendaGeneraleItalianaPetroli {AGIP] (now Nigerian Agip Oil Company [NAOC]) joined in 1962; while ENI and Philips Oil Company joined in 1964; and Pan Ocean Oil Company joined in 1992

2.3 Current Oil and Gas Companies in Nigeria

There are several oil and gas companies currently operating in Nigeria's oil and gas industry and which are being hosted by indigenous peoples. Though there are a few Nigerian companies in the sector, all of the major operators are foreign based. It is the activities of these MNOCs that have sparked off protests and various agitations in the Niger Delta region bordering on environmental pollution, marginalization, absence of development, among others. This segment examines the profiles of MNOCs such as SPDC, CNL, MPNU, Total and NLNG.

2.3.1 Shell Petroleum Development Company of Nigeria Limited [SPDC]

SPDC is the pioneer oil and gas company in the Nigeria's petroleum industry. It is the leading MNOC and oil and gas company operating in the country. SPDC has the largest acreage of land (concessionary area) in Nigeria from which it produces some 39 percent of the nation's total oil production. The company's operations are concentrated in the Niger Delta region and adjoining shallow offshore areas where it operates in an Oil Mining Lease [OML] area of around 31,000 square kilometres. SPDC has over 6,000 kilometres of pipelines and flow lines, 87 flow-stations, 8 gas plants and more than 1,000 producing wells. The company employs more than 4,500 people directly of whom 95 percent are Nigerians. SPDC is the operator of the JV Agreement [JVA] involving the NNPC (which holds 55 percent), SPDC (30 percent), Total Exploration and Production Nigeria Limited [TEPNG]

(10 percent) and NAOC (5 percent).[189] SPDC is owned by the Dutch and the United Kingdom governments.

2.3.2 Mobil Producing Nigeria Unlimited [MPNU]

MPNU is an American company. It is one of the largest oil producers in Nigeria and commenced operations in the country in 1955 under the name Mobil Exploration Nigeria Incorporated [MENI]. MPNU operates a JVA with the NNPC (which holds a 60 percent share) with the remaining 40 percent going to MPNU. Since 1961 when the company was granted Oil Prospecting Licence [OPL] offshore in present day AkwaIbom State, MPNU has made visible contributions to the development of Nigeria's oil and gas industry. For example, MPNU and its JV partner, NNPC, operate over 90 offshore platforms comprising about 300 producing wells at a capacity of over 550,000 barrels per day of crude, condensate and natural gas liquids [NGLs].[190]

2.3.3 Chevron Nigeria Limited [CNL]

CNL is a US-based company and is one of the largest operators in Nigeria's oil and gas industry. Chevron operates in Nigeria through its subsidiary, CNL. The company holds a 40 percent interest in 8 concessions in the onshore and near-onshore regions of the Niger Delta under a JVA with the NNPC which holds the remaining 60 percent share. Chevron also operates in Nigeria through other subsidiaries. In 2016, CNL's net daily production in Nigeria averaged 204,000 barrels of crude oil, 159 million standard cubic feet of natural gas

[189]'SPDC – Shell Petroleum Development Company of Nigeria <https://www.shell.com.ng/about-us/what-we-do/spdc.html> accessed 4, October 2017.
[190]ExxonMobil, 'Mobil Producing Nigeria Unlimited'<https://www.corproate.exxonmobil-com/en/company/worldwide-operations/locations/nigeria/about/mpn-overview> accessed 4, October 2017.

as well as 4,000 barrels of liquefied petroleum gas [LPG]. CNL has interests, ranging from 20 percent to 100 percent in 3 operated and 6 non-operated deep water blocs in Nigeria. CNL operates the Agbami Field which lies 70 miles (113 kilometres) off the coast of the central Niger Delta region and spans 45,000 acres (182 square kilometres. In addition, the company operates and has a 55 percent interest in OML 140. The bloc lies in roughly 8,000 feet (2,438 metres) of water, 90 miles (145 square kilometres) off the coast of the western Niger Delta region, which includes the Nsiko discoveries. The company is also involved in natural gas projects in the western Niger Delta and Escravos areas, including the optimization of the Escravos Gas Plant [EGP], the Escravos Gas-to-Liquids [EGTL] facility and the Sonam Field Development Project.[191]

2.3.4 Total Exploration and Production Nigeria Limited [TEPNG]

TEPNG is Italian-based oil and gas Company and a subsidiary of the Total Group which operates in about 130 countries of the world. TEPNG is the fourth largest oil and gas company in Nigeria. It has operated in the upstream sector of the Nigerian oil and gas industry for over 50 years and has contributed about 3 billion barrels of oil to Nigeria's production from 1960 to 2016. The company operates and holds a 40 percent interest in the NNPC/TEPNG JV, producing oil and natural gas from several onshore and shallow water concessions. Another Total subsidiary, Total Upstream Nigeria Limited [TUPNI], operates the Akpo Field in OML 130 deep water lease and is presently developing the Egina Field, expected to come on stream in 2018 with a capacity of 200,000 barrels per day. In addition, TEPNG has non-operated interests in the SPDC-operated JV (10 percent), the Bonga Field

[191] 'Chevron-Nigeria' <https://www.chevron.com/worldwide/nigeria> accessed 4, October 2017.

(12.5 percent), and the Usan Field (20 percent). TEPNG also has a 15 percent interest in NLNG which operates 6 liquefaction trains on Bonny Island.[192]

2.3.5 Nigeria Liquefied Natural Gas Limited [NLNG]

The NLNG was incorporated as a Limited Liability Company on 17 May 1989, to harness Nigeria's vast natural gas resources and produce liquefied natural gas and natural gas liquids for export. NLNG is owned by four shareholders, namely: the Federal Government of Nigeria represented by the NNPC (49 percent shares), SPDC (25.6 percent), TEPNG (15 percent) and Eni (10.4 percent). The company has two wholly-owned subsidiaries, namely: Bonny Gas Transport [BGT] Limited and NLNG Ship Management Limited [NSML].[193] The NLNG is located on Bonny Island in Rivers State. The company has 6 trains currently operational. The NLNG plant is capable of producing 22 Million Tonnes Per Annum [MTPA] of NLG, and 5 MTPA of NGLs (LPG and condensate) from 3.5 billion standard cubic feet per day of natural gas intake. NLNG has championed Nigeria's efforts to eliminate gas flaring as the company's operations have helped reduced Nigeria's flaring profile from 65 percent to below 25 percent. The company also supplies about 40 percent of the annual domestic LPG (cooking gas) consumption.[194]

2.4 The MNOCs and Execution of Corporate Social Responsibility

The MNOCs operating in Nigeria, especially in indigenous communities scattered throughout the Niger Delta region, have adopted various CSR models. Majority of the projects that

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i[192] Total, '*Upstream and Downstream Activities of Total in Nigeria'*<https://www.nigeria.total.com/en/total-nigeria/total-nigeria> accessed 4, October 2017.

[193]Nigeria LNG Limited, '*Facts and Figures on NLNG 2016'* <*https://www.nlng.com/Media-Centter/Publications/2016%20Facts%20and%20Figure%20on%20NLNG.pdf*> accessed 22 September 2017.

[194]NLNG, '*Our Company Profile'* <https://www.nlng.com/ourcompany/pages/profile.aspx> accessed 4, October 2017.

constitute their CSR are provision of social and basic infrastructures like roads, bridges, markets, boreholes, town halls, electricity, etc; education projects such as building/renovation of schools, equipment of libraries, donation of computers and laboratory equipment, award of scholarships, among others; economic empowerment packages like the provision of soft loans to women and youths to boost the economy of their host communities; capacity building and manpower development, for example, in the area of provision of skills acquisition in different vocations as well as the employment and training of indigenes of host communities; and health care delivery such as the building/renovation/refurbishment of primary health centres, donation of beds and other medical facilities, including drugs.[195]

These represent the major areas of CSR of MNOCs in Nigeria. However, MNOCs operating in the Niger Delta region of Nigeria have recently incorporated environmental and health protection and conservation aspects of CSR into their operations and corporate policies, albeit at minimal levels. This segment examines the environmental and health protection CSR models of Shell Petroleum Development Company of Nigeria Limited [SPDC], Chevron Nigeria Limited [CNL], Mobil Producing Nigeria Unlimited [MPNU], Total Exploration and Production Nigeria Limited [TEPNG] and the Nigeria Liquefied and Natural Gas Company Limited [NLNG], respectively. In doing this, attention will be focused on their respective approaches towards environmental pollution prevention, remediation and resources conservation, as well as the health of the indigenous peoples. This is been done with a view to determining whether their CSRs as presently constituted can contribute to a healthy environment for the indigenous peoples (the self-regulation model) or to make a case for the

[195] O F Alabi and S SNtukekpo, '*Oil Companies and Corporate Social Responsibility in Nigeria: An Empirical Assessment of Chevron's Community Development Projects in the Niger Delta'* [2012](4)(2) British Journal of Arts and Social Sciences 361, 367; B I Isife, C O Albert and I N Odua, *'Performance Analysis of Community Development Activities of Two Multi-National Oil Companies in Rivers State, Southern Nigeria'* [2012](2)(9) Developing Country Studies 57, 59-61; F N Igbara and Others, '*Corporate Social Responsibility and the Role of Oil Companies in Community Development Projects in Rivers State Nigeria: An Evaluation'* [2014](19)(3) IOSR Journal of Humanities and Social Science 92, 94-95.

mandatory inclusion of environmental protection and health of the indigenous peoples in the CSR of MNOCs (the State intervention model).

2.4.1 The Environmental Care

The CSR of MNOCs has been bereft of any environmental consciousness in the Niger Delta region of Nigeria. All the MNOCs operating in the Niger Delta region claim to have done well in the area of incorporating environmental friendliness into their operations. For example, Shell Nigeria[196] claimed in respect of its operations in Nigeria thus:

> SPDC continues to make progress in close collaboration …towards the objective of ending the continuous flaring of associated gas. Since 2000, all new SPDC JV facilities have been designed to eliminate continuous flaring of associated gas. In parallel, a multi-year programme has been successfully implemented to install equipment for capturing associated gas from older facilities. As a result, flaring volume from SPDC JV facilities was reduced by 93% between 2012 and 2016 and flaring intensity… by around 81% over the same period.[197]

Similarly, in respect of oil spills, Shell Nigeria claims that:

> A key priority for Shell is to achieve the goal of no spills from its operations. No spill is acceptable and we work had to prevent them. Shell Companies in Nigeria operate under the same standards as all other Shell operated ventures globally. Regrettably, in addition to spills caused by criminal activity there were seven operational spills of more than 100 kilograms in volume from Shell Companies in Nigeria facilities during 2016. This number is less than the 16 spills in 2015, due to continued progress on preventing operational spills, such as regular inspections and maintenance of pipelines. In 2016, the trial volume of oil spilled from operational incidents remained at 0.2 thousand tonnes, the same as 2015.[198]

[196]Shell Nigeria is a subsidiary of Royal Dutch Shell Plcand is used to mean the various Shell companies in Nigeria. These include Shell Petroleum Development Company of Nigeria Limited (SPDC), Shell Nigeria Exploration andProduction Company Limited (SNEPCO), Nigeria Liquefied Natural Gas Company Limited (NLNG) and Shell Nigeria Gas Limited (SNG).
[197]Shell in Nigeria: Briefing Notes April 2017 (Shell International BV 2017) 18.
[198]Shell in Nigeria: Briefing Notes April 2017 (Shell International BV 2017) 21.

Shell Nigeria also reports that third party interference on pipelines and other infrastructure was responsible for 90 percent of oil spill incidents of more than 100 kilograms from SPDC JV facilities in 2016.[199] In addition, it is claimed that crude oil theft on SPDC JV's pipeline network resulted in a loss of about 5,660 barrels of oil a day in 2016, which is less than the 25,000 bbl/d in 2015.[200] Shell Nigeria also claims that the number of sabotage related spills declined to 45[201] compared with 93 in 2013. Shell Nigeria claims this reduction in oil theft and sabotage related oil spills is attributed to continued improvements in air and ground surveillance and response by government security forces, among others.[202]

In the aspect of prevention of oil spills, Shell Nigeria claims that the SPDC JV is focused on implementing its ongoing work programme to appraise, maintain and replace key sections of pipeline and flowlines. Specifically, Shell Nigeria claims that:

> SPDC continues to undertake initiatives to prevent and minimize spills caused by theft and sabotage of its facilities in the Niger Delta. In 2016, we sustained on-ground surveillance efforts on SPDC JV's areas of operations, including its pipeline network, to mitigate incidences of third party interference and ensure that spills are detected and responded to as quickly as possible. There are also daily overflights of the pipeline network areas to identity any new spill incidents or activities. We have also installed state-of-the-art high definition camera to a specialized helicopter that greatly improves the surveillance of our assets and have implemented anti-theft protection mechanisms on key infrastructure.[203]

As regards spill response and clean up, Shell Nigeria claims to have performed optimally as well as boast of compliance with Nigerian oil industry regulatory requirements and

[199] *Ibid*.
[200] *Ibid*.
[201] This does not include figures from the Forcados incidents of 2016.
[202] Shell in Nigeria Briefing Notes 2017 (n 2) 21.
[203] Shell in Nigeria Briefing Notes 2017 (n 2) 21.

international standards.[204] For instance, it is claimed that SPDC JV cleans and remediates the area impacted by spills from its facilities, irrespective of cause. It claims that:

> SPDCs remediation practices are compliant with the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria [EGASPIN], Revised Edition 2002 as well as relevant international standards.[205]

This claim is also made by other MNOCs operating in the Niger Delta region. However, evidence suggests they have not done enough as their operations still do not reflect respect for the health and environment of the host communities. This segment examines the CSR models of some MNOCs in their host communities.

2.4.2 Chevron Nigeria Limited [CNL] Model

In the environmental stewardship section of Chevron 2016 Corporate Responsibility Report Highlights, the company states that, "we conduct our business in a socially and environmentally responsible manner, respecting the law and universal human rights to benefit the communities where we work."[206] Similarly, CNL claims that:

> Chevron places the highest priority on the health and safety of our workforce and protection of our assets, communities and the environment. We are committed to continually improving our environmental performance and reducing the potential impacts of our operations through the implementation of our operational excellence management system.[207]

CNL also claims that it has four environmental principles which define how the company develops energy in an environmentally responsible manner across the life of its assets. These principles are: include the environment in decision-making, reduce your environmental

[204] Shell in Nigeria: Briefing Notes April 2017 (Shell International BV 2017) 22.
[205] *Ibid.*
[206] Chevron, 2016 Corporate Responsibility Report Highlights (Chevron 2016) <https//www.chevron.com/-/media/shared-media/documents/2016-corporate-responsibility-report.pdf> accessed 23 September 2017.
[207] Chevron, 'Environment Initiatives' <https://www.chevron.com/corporate-responsibility/environment> accessed 17 October 2017.

footprint, operate responsibly and steward your sites. The company has in accordance with ISO 14001 defined seven types of environmental activities in the following areas: site residual impacts (which involves decommissioning, remediation, reclamation; management of all types of solid waste regardless of hazardous classification; preparing for potential emergencies (such as prevention, preparedness, response and recovery of accidental releases; protection and conservation of biodiversity as well as management of air emissions.

2.4.4 Mobil Producing Nigeria Unlimited Model [MPNU] Model

MPNU claims that it has an unwavering commitment to operations integrity, safety and flawless execution of project activities and that operating ethically and responsibly is ingrained in its business culture which is monitored, enforced and improved upon through the globally deployed Standards of Business Conduct and Operations Integrity Management Systems [OIMS]. OIMS fully meets the requirements of the International Organization for Standardization [ISO] 14001 Environmental Management Systems[208].

2.4.5 Total Exploration and Production Nigeria Limited [TEPNG] Model

TEPNG claims that its CSR policy is to:

(a) Respect local, national and international laws, cultural norms, rules and regulations bordering on societal matters including applicable industry standards, corporate group directives on CSR.

[208] *https//corporate.exxonmobil.com* accessed 17 October 2017.

(b) control and reduce the impact of the company's activities on people and environment through the implementation of various procedures, risk assessments and management systems in all the company's operations and projects life cycles.[209]

2.4.6 Nigeria Liquefied Natural Gas [NLNG] Model

The NLNG claims that it has a sound health, safe and environment [HSE] policy anchored on the need to take proper care of its assets, the health and safety of its assets, the health and safety of its employees and stakeholders, and to give proper regard to the sustainable management of its environment. NLNG works to prevent damage to assets and minimize any negative impact on the environment. This is achieved in the following areas:

(a) Discharges to Water

To comply with regulatory requirements and its HSE policy, NLNG claims to have adopted the principle of minimization through abatement at source for aqueous effluents which have the potential of causing negative impact on the receiving environment; where this is not feasible, end-of-pipe technology is utilized. Periodically, a Post Impact Assessment [PIA] of the recipient water body is carried out to assess the cumulative impact of NLNG's treated effluents and to confirm that NLNG's activities are not interacting adversely with the environment.

[209] Total E & P Nigeria Limited, TEPNG/ASKS Agreement Performance Report 2010-2012 (Total E & P Nigeria Limited 2013) 14.

(b) Sewage Treatment and Disposal

NLNG has dentrification/nitrification biotreater for waste water sewage from the plant. All domestic sewage from the Residential Area is treated in this facility so that only treated clean water flows into the river.

(c) Solid Waste Management

NLNG claims that its waste management strategy complies with the concepts of 'wastes management hierarchy' and 'duty of care' for both on-site and off-site treatment and disposal activities.

(d) Non-Hazardous Waste

NLNG claims it carries out the incineration of combustible within its facility as the fragile nature of Bonny Island does not allow for the creation of a landfill site.

(e) Hazardous Waste

NLNG clams it is committed to the policy of prevention of harm to people and the environment as well as the promotion of sustainable development. The company therefore ensures the proper management of its hazardous waste using the best practical environmental options after approvals from the Federal and Rivers State Ministries of environment.

(f) Emission to Air

NLNG claims that it adopts minimization through abatement at source. It carries out stack emissions and routine ambient air quality monitoring at identified areas within the plant fence and surrounding communities to ensure that ground level concentrations at the work place and in the nearby settlements do not exceed regulatory tolerance limits for ambient air pollutants.

(g) Biodiversity and Nature Conservation

NLNG has established a native park on Bonny Island to preserve the natural environment of its host communities. The site of the park is the natural habitat of salt water Hippopotamus – a rare species in Nigeria, as well as other interesting flora and fauna prevalent in Bonny Island.[210]

2.5 Corporate Social Responsibility And Human Rights of the People

The adoption of treaty framework on the CSR of MNOCs has proved difficult at the international level because of the lack of global consensus on what should be the CSR of business enterprises as well as the extent to which States/governments should go in regulating businesses' obligations to their stakeholders. However, despite this challenge of finding a common ground for holding business enterprises accountable to certain internationally recognized standards of conduct through the binding force of treaties, the growing influence of businesses, particularly MNOCs in the economies of States as well as the impacts of their operations on a multi-stakeholder composition in their host countries have continued to attract concern from diverse backgrounds. Against this background, governments of States, business organizations and other industry-specific professional bodies have at one time or the other come together to agree on certain core principles or standards which business enterprises, particularly MNOCs ought to observe in the conduct of their business activities, whether in their home States or host States. This segment discusses some of such codes of conduct which serve as guidelines on what should be the proper conduct of business activities in a civilized society, bearing in mind the need to be environmentally, economically and socially responsible, accountable and transparent

[210] Nigeria LNG Limited, Facts and Figures on NLNG 2005 (NLNG 2015) 68-74.

- The OECD Guidelines for Multinational Enterprises[211]

The Organization for Economic Co-operation and Development [OECD] Guidelines for Multinational Enterprises [MNEs] are recommendations addressed by governments of adhering States to MNEs operating in or from adhering countries. The MNE Guidelines serve as voluntary principles and standards for responsible business conduct, in a variety of areas, including employment and industrial relations, human rights, environment, information disclosure, competition, taxation and science and technology.

In the area of human rights, the MNE Guidelines impose upon States the duty to protect human rights. It declares that enterprises should operate within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they carry out their business activities, in addition to relevant domestic laws and regulations.[212] MNEs are required to respect human rights, which entails that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Within the context of their own operations, it requires that MNEs avoid causing or contributing to adverse human rights impacts and address such impacts when they occur, seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts; have a policy commitment to respect human rights; carry out human rights due diligence as appropriate to the size, nature and context of operations and the severity of the risks of adverse human rights impacts; and provide for or co-operate through legitimate processes in the remediation of

[211][MNE Guidelines] 2011.
[212]MNE Guidelines 2011, Chapter IV.

adverse human rights impacts where they identify that they have caused or contributed to these impacts.[213]

Apart from obligations of MNEs to respect the human rights of the people, the MNE Guidelines also impose obligations on MNEs to protect and conserve the environment. The environmental obligations of MNEs are contained in chapter 6. MNEs are required to, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives and standards, take due account of the need to protect the environment, public health and safety and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.[214]

The provisions of the MNE Guidelines are similar to the UN Guiding Principles on Business and Human Rights in that both documents emphasize respect for human rights and environmental rights as well as access to justice and public participation in environmental processes. Being a voluntary code of conduct, the National Contact Point [NCP] and the Investment Committee established as the implementation mechanisms are not strong enough as their duties revolve around promotional activities, information gathering and sharing as well as voluntary co-operation.

- UN-Backed Corporate Social Responsibility Initiatives

While it has been difficult to adopt a binding CSR instrument for MNOCs at the international level due to disagreements over the extent of business responsibilities towards the promotion, protection and respect for human rights, the UN has been able to galvanize support for the adoption of a set of non-binding codes of conduct. This segment examines such UN-backed CSR initiatives.

[213] *Ibid.*
[214] *Ibid*, chapter VI.

- UN Guiding Principles on Business and Human Rights[215]

The Guiding Principles on Business and Human Rights was unanimously adopted by the United Nations Human Rights Council [UNHRC] in 2011. The Guidelines operationalize the UN framework and further define the main duties and responsibilities of States and business enterprises with respect to business-related human rights abuses. The Guiding Principles is divided into three parts or pillars, which are: Protect, Respect and Remedy [PPR].[216] Each of these pillars defines concrete and actionable steps which governments and companies are required to take in order to meet their respective duties and responsibilities of preventing human rights abuses in business operations and also provides remedies where abuse occurs. The Guiding Principles are anchored on the recognition of:

> (a) States existing obligations to respect, protect and fulfill human rights and fundamental freedoms;
> (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
> (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.[217]

A. State Duty to Protect Human Rights

The Guiding Principles provide that:

> States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislations, regulations and adjudication.[218]

Under international law, States are required to respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction. This duty extends to protection against

[215]United Nations Human Rights, Guiding Principles on Business and Human Rights (United Nations, New York and Geneva 2011) Adopted by the Human Rights Council Resolution 17/4 of 16 June 2011 [UN Guiding Principles].
[216]United Nations Human Rights, Guiding Principles on Business and Human Rights (United Nations, New York and Geneva 2011).
[217]*Ibid*.
[218]UN Guiding Principle 2011, *Princ 1*.

human rights abuse perpetrated by third parties, including business enterprises. The duty of the States to protect the human rights of persons within their territory is a standard code of conduct. States may breach their international human rights obligations where an abuse is attributed to them, or where they fail to take appropriate measures to prevent, investigate, punish or redress private actors' abuse. In furtherance of States' duty to protect human rights, Principle 2 declares that, "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operation."[219]This implies the responsibility of parent or home States to regulate the extra-territorial operations of businesses domiciled in their territories.

Generally, under international law, States are not obliged to regulate the extra-territorial activities of businesses domiciled in their territories. However, they are not prohibited generally from doing so. In meeting the requirement of Principle 2, States have adopted a range of measures some of which have extra-territorial implications.[220] Examples include the requirements by States that "parent" companies report on the global operations of the entire enterprise; multilateral soft law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments, such as the International Monetary Fund [IMF] and the World Bank.

Other States have also adopted measures that amount to direct extra-territorial legislation and enforcement, and this includes utilizing the criminal regime to allow for prosecutions based on the nationality of the perpetrator irrespective of where the offence is committed.[221] Whatever approach adopted, the bottom-line remains that States have a duty to ensure that the expectation that businesses domiciled in their territories must respect human rights

[219]Guiding Principles, *Princ 2*
[220]United Nations Human Rights (n 5) 4.
[221]*Ibid.*

throughout their operations and regardless of where their business activities are carried out, must be impressed on them in a clear manner. This is to prevent such Multinational Enterprises [MNES] from exploiting loopholes in the human rights and regulatory framework in developing countries to perpetrate human rights abuses.[222]

Furthermore, in order to discharge effectively their duty to protect human rights, the Guiding Principles impose on States certain general regulatory and policy functions. Principle 3 requires States to take the following specific actions:

(a) To enforce laws that aim at or have the effect of requiring business enterprises to respect human rights, and periodically to access the adequacy of such laws and address any gaps found in such laws;

(b) To ensure that other laws and policies governing the establishment and the day to day operation of business enterprises, such as corporate law do not constrain but enhance business respect for human rights;

(c) To provide effective guidance to business enterprises on how to respect human rights throughout their operation; and

(d) To encourage, and where appropriate require business enterprises to communicate how they address human rights impacts.[223]

States should not assume that businesses invariably prefer, or benefit from State inaction.[224] Therefore, the above functions impose on States the duty to consider a smart mix of measures, including national or international, voluntary or mandatory, to foster business respect for human rights. This makes it obligatory for States not to abdicate their

[222]United Nations Human Rights, Guiding Principles on Business and Human Rights (United Nations, New York and Geneva 2011).
[223]Guiding Principles, *Princ 3.*
[224]United Nations Human Rights (n 5) 5.

responsibility. Thus, States are to plug in gaps by enforcing existing laws that directly or indirectly regulate business respect for human rights. Principle 4 requires States to take additional steps to protect against human rights abuses by business corporations that are owned or controlled by the State, or that receive substantial support and services from State agencies, by requiring the observance of human rights due diligence.[225] This is true of MNOCs in Nigeria who receive substantial support from the Federal Government of Nigeria in their operations. For instance, Shell Petroleum Development Company of Nigeria Limited [SPDC][226] was indicted in the Federal Government crack-down on the Ogoni people in the 1990s during their agitation for resource control, political autonomy and environmental justice, because the Federal Government had substantial stake in the Joint Venture [JV] operations of SPDC and was willing to go to any length to crush every opposition to SPDC's operations even if it translates to gross human rights violations.[227]

In addition, the Guiding principles impose upon States the duty to exercise adequate oversight for the purpose of effectively discharging their international human rights obligations when they contract with, or legislate for business enterprises to render services which have the potential to impact on the enjoyment of human rights.[228] This obligation requires States to be in the saddle with respect to fulfilling their duty to protect human rights in their territories.[229] In other words, States should not hide behind the privatization of the delivery of services which have serious impacts on the human rights for persons in their territories to abdicate their responsibilities under international human rights law.[230] Thus, where States cede to private business enterprises the duty to provide services that may have

[225]United Nations Human Rights, Guiding Principles on Business and Human Rights (United Nations, New York and Geneva 2011).
[226]B Manby, *Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis* (Carnegie Council on Ethics and International Affairs) 6.
[227]*Ibid.*
[228]Guiding Principles 2011, *Princ 5*.
[229]United Nations Human Rights (n 5) 8.
[230]Ibid.

direct impact on human rights, States are under obligation to ensure that the business enterprises render such services or operate in accordance with the States' human rights obligations. Doing otherwise could result in reputational and legal consequences for the State concerned.[231] It is, therefore, important that the relevant service contracts or enabling laws lay down or clarify the State's expectations that these business enterprises observe human rights. In relinquishing control over certain businesses or services to private corporations, States are required under this principle to adopt appropriate measures towards the effective oversight of the corporations' activities, including through the provision of adequate independent monitoring and accountability mechanisms.[232]

The first pillar or arm of the UN Framework – duty of States to protect human rights, mandate States to take adequate and appropriate measures towards the protection of the human rights of the people within their territories by business enterprises, whether local or foreign, regardless of size of business and regardless of the sector in which businesses operate. It requires States to enact laws appropriate to plug holes in the legal regime governing specific industries and design effective monitoring and standards enforcement mechanisms to ensure that business enterprises respect human rights.[233] Where the activities of business enterprises will have negative impact on human rights, as in the case of MNOCs operating in the Niger Delta region of Nigeria, and in particular environmental pollution, States are obligated to lay down basic human rights obligations which such business entities must comply with in order to do business in their territories. States are required to police the business entities through a variety of means – voluntary or mandatory – legislative or by

[231]United Nations Human Rights, Guiding Principles on Business and Human Rights (United Nations, New York and Geneva 2011).
[232]*Ibid.*
[233]*Ibid*.

inserting human rights observance requirements in the service contracts, reporting and human rights due diligence requirements, among others.[234]

These provisions are commendable and appear to be in stark contrast to the situation in Nigeria where the country has abdicated her human rights obligations under international human rights law. In Nigeria, for example, there are no adequate laws to hold MNOCs to a high level of human rights accountability.[235] In the oil and gas industry, most of the laws governing industry operations were enacted over 40 years ago.[236] They have not been revised ever since despite their obvious deficiencies. The regulatory standards are poor. There is no express recognition of the right of indigenous peoples – host communities to MNOCs, to a clean, safe and healthy environment.[237] In fact, the Associated Gas Re-Injection Act[238] and the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations[239] expressly permit MNOCs to continue to flare associated gas in host communities in total disregard to the impact of such practice on the environment and health of the people, and in violation of their right to a generally satisfactory environment favourable to their development.[240]

In addition, the penalties prescribed in the laws are ridiculous in nature and lack the potency to deter environmentally irresponsible behaviour on the part of the MNOCs. Indigenous peoples have been living with unabated gas flaring since Nigeria began commercial oil and

[234]United Nations Human Rights, Guiding Principles on Business and Human Rights (United Nations, New York and Geneva 2011).
[235] U Uduok, and E B Akpan, *Gas Flaring in Nigeria: Problems and Prospects'* [2017](5)(1) Global Journal of Politics and Law Research 16-28.
[236]For instance, the Petroleum Act was enacted in 1969; the Petroleum (Drilling and Production) Regulations was
enacted in 1972; Associated Gas Re-Injection Act was enacted in 1979.
[237] B AOloworaran, '*The Right to a Clean and Healthy Environment and the Fundamental Human Rights Provisions of the Constitution of the Federal Republic of Nigeria*, 1999 [2009](1)(2) Petroleum, Natural Resources and Environmental Law Journal 53, 60.
[238] Cap A10, Laws of the Federation of Nigeria [LFN] 2004 s 3(2).
[239]Regulation 2.
[240]African Charter on Human and Peoples' Rights 1981, art 24.

gas production over 50 years ago.[241] There are no penalties for oil spillages and the preventative measures required to be taken by MNOCs in their operations are not complied with. The Department of Petroleum Resources [DPR] charged with the responsibility of enforcing international best practices and environmental standards in the industry, has no capacity and resources to carry out its duties. The disconnect between standards formulation and their implementation in Nigeria's oil and gas industry was noticed by the United Nations Environment Programme [UNEP] study group during the environmental assessment of Ogoniland.[242]

The DPR has no standard reporting mechanism; neither does the National Oil Spill Detection and Response Agency [NOSDRA] have the necessary capacity to respond to oil spills or to conduct Joint Inspection Visits [JIVs].[243] It has been claimed that most oil spill cases are voluntarily reported by the MNOCs involved.[244] In other words, the MNOCs are the perpetrators and at the same time the agency that determines the volume and cause of spill – whether sabotage or equipment failure/negligence.[245] This has led to a situation where MNOCs claim that 70 percent of oil spill incidents in the Niger Delta are caused by sabotage.[246] They usually come to this conclusion through their own private assessment since

[241]O F Oluduro and O Oluduro, '*Oil Exploitation and Compliance with International Environmental Standards: The Case of Double Standards in the Niger Delta of Nigeria'* [2016](37) Journal of Law, Policy and Globalization66.
[242]B R Konne, '*Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland*' [2014](47) Cornell International L aw Journal 181, 195.
[243]United Nations Environment Programme, Environmental Assessment of Ogoniland (UNEP, Kenya 2011) 12.
[244]A R Temitope and A AAdedeji, *'Public Participation: An Imperative to the Sustainable Development of the Nigerian Oil Industry'*<https://www.bhu.ac.in/lawfaculty/blj2006.../5_RT%20AKO_Public_Participation_1_[1].doc > accessed 17 October 2017.
[245]M Ajiya and Y B Habibu, *'Issues and Challenges on Environmental Rights: The Nigerian Experience'* [2014](3)(5) American International Journal of Social Science 143, 147.
[246] Amnesty International, Nigeria: Petroleum, Pollution and Poverty in the Niger Delta (Amnesty International Publications 2009) 15.

in the majority of cases NOSDRA and DPR appear clearly to have abdicated their responsibilities.[247]

B. Business Enterprises' Corporate Social Responsibility to Respect Human Rights

The second pillar or arm of the tripod – 'Protect, Respect and Remedy' on which the Guiding Principles stand, is the duty imposed on business corporations to respect human rights. While it is the duty of the States to protect human rights by providing a framework – regulatory, monitoring and enforcement, within which businesses will operate, this second pillar imposes a duty on business concerns to respect human rights. Specifically, Principle 11 declares that, "[b]business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved".[248] The obligations enunciated in the foregoing Principle clearly demonstrate that the duty to respect human rights is a global standard of expected conduct for all business concerns, irrespective of the geographical space where they operate. The duty exists independently of States' duty or ability and desire to fulfill their own human rights obligations, and does not in any way diminish those obligations.[249] In other words, whether a particular State has discharged effectively her obligation to protect human rights through the provision of adequate mechanisms expected of it under international human rights law or not, this duty on business entities operating in States continues to exist.[250]

Thus, business enterprises are not permitted to avoid their own responsibility by pleading that a particular State in which they operate has failed in her human rights obligations to her citizens or those domiciled within her territory, by not enacting appropriate laws to promote

[247]B R Konne (n 46) 195.
[248]Guiding Principles 2011, *Princ. 11.*
[249]United Nations Human Rights (n 5) 13.
[250]*Ibid.*

human rights observance, or that the State's enforcement mechanism is weak.[251] Even in developing economies where governments are known to depend on the activities of business organizations for their survival, and where economic considerations result in the lowering of human rights and operational standards to attract foreign investments irrespective of its impacts on the human rights of individuals in their jurisdictions, this principle still holds businesses to the same standards required of them in developed societies where stringent operational measures are imposed on businesses.[252]

The responsibility on businesses to avoid violating human rights of others and to address adverse human rights impacts associated with the activities with which they are involved transcends compliance with national laws and regulations which protect human rights.[253] Addressing negative human rights impacts requires businesses to adopt adequate and appropriate measures for their prevention, mitigation and, where appropriate, remediation. It requires business corporations to undertake other commitments or activities which support and promote human rights, and which may contribute to the enjoyment of human rights.[254] This, however, does not compensate for their failure to respect human rights throughout the duration and in all phases of their operations. In carrying out this duty, businesses are under an obligation to refrain from undermining States' abilities to meet their own human rights obligations, including through actions that might weaken the integrity of judicial processes.[255]

To buttress the scope of the duty imposed on businesses to respect human rights, the Guiding Principles state thus:

> The responsibility of business enterprises to respect human rights refers to internationally recognized human rights –

[251] *Ibid.*
[252] United Nations Human Rights, Guiding Principles on Business and Human Rights (United Nations, New York and Geneva 2011) 13.
[253] *Ibid*.
[254] *Ibid.*
[255] *Ibid.*

> understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[256]

The purpose of Principle 12 appears to be to clear any doubt as to what standards of human rights business organizations are required to comply with in the course of their operations.[257] Thus, since the activities of business enterprises can have profound impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such aspects of human rights, be it labour, environmental production, health, anti-corruption, due process, consumers, and communities, and such like.[258] These impacts may be positive, such as increase in employment opportunities or the improvement in public services. At other times, the impact of business operations could be deleterious, such as environmental pollution, workers' under-payment or the forceful eviction or relocation of communities from their ancestral locations, health hazards associated with industry activities, dislocation of communities' source of livelihood as well as social life, to mention just a few. Thus, the principle imposes on businesses the obligation to respect human rights covering all aspects of their operations.[259]

The human rights to be respected are those articulated in an authoritative list of core internationally recognized human rights as embodied in the International Bill of Rights.[260] The International Bill of Rights comprise the Universal Declaration of Human Rights [UDHR] as well as the major instruments by which it has been codified and given expression – such as the International Covenant on Civil and Political Right [ICCPR] and the International Covenant on Economic, Social and Cultural Rights [ICESCR], and of course,

[256]Guiding Principles 2011, *Princ 12.*
[257]United Nations Human Rights (n 5) 14.
[258]*Ibid.*
[259]*Ibid.*
[260]*Ibid.*

the principles concerning fundamental rights set out in the eight ILO core conventions as encapsulated in the Declaration on the Fundamental Principles and Rights at Work.[261] These instruments constitute the benchmark against which other social actors are to assess the human rights impacts of business enterprises. It needs to be pointed out that the responsibility of corporations to respect human rights is distinct from issues relating to legal liability and enforcement, since these are issues defined to a large extent by national laws.[262]

The responsibility of businesses to respect human rights involves two major actions. The first requires that business enterprises avoid causing or contributing to adverse human rights impacts through their own activities and that they should address such impacts when they occur. The second action requires that business enterprises seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. This Principle holds business enterprises to a high standard[263] of respect for human rights, not only with respect to the negative human rights impacts that flow directly from their own operations but also those attributable to third parties with which business enterprises may establish business relationships.[264]

Principle 19 defines business enterprises 'activities' to include both actions and omissions; while its business relationships are defined to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services. Thus, the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.

[261]United Nations Human Rights, Guiding Principles on Business and Human Rights (United Nations, New York and Geneva 2011) 14.
[262]*Ibid.*
[263]*Ibid.*
[264]*Ibid.*

Principle 15 requires business enterprises to put in place policies and processes appropriate to their size and circumstances, including a policy commitment to meet their responsibility to respect human rights;[265] a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;[266] as well as processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.[267] These require actions and steps ranging from communication of business enterprises policy commitment;[268] to assessing actual and potential human rights impacts of business enterprises' activities, integrating and acting upon the findings; and to tracking responses and communicating how impacts are addressed.[269] In order to account for how they address their human rights impacts, business enterprises are required to communicate this externally, especially when concerns are raised by or on behalf of affected stakeholders.

Principle 21 requires business enterprises whose operations or operating contexts pose risks of severe human rights impacts to report formally on how they tackle them.[270] Another aspect of the businesses' obligation to respect human rights is to carry out remediation of the impacts of their operations.[271] In all operational contexts, businesses are required to comply with all applicable laws and respect internationally recognized human rights, irrespective of where they operate, developing countries inclusive;[272] business enterprises are also required to seek ways of honouring the principles of internationally recognized human rights when faced with conflicting requirements.[273] Businesses are further required to treat the risk of

[265]Guiding Principles 2011, *Princ 15(a).*
[266]*Ibid,Princ 15(b).*
[267]*Ibid,Princ 15(c).*
[268]*Ibid, Princ 16.*
[269]*Ibid, Princ 17.*
[270]*Ibid, Princ 21.*
[271]*Ibid, Princ 22*
[272]*Ibid, Princ 23(a).*
[273] Guiding Principles *2011Princ 23(b).*

causing or contributing to gross human rights violations as a legal compliance issue, regardless of the setting in which they operate.[274]

The requirement that business enterprises owe obligations towards the respect of human rights in their areas of operation is commendable and stands in contrast with what obtains in Nigeria, particularly in the Niger Delta where MNOCs operate in the oil and gas industry. Commercial production of oil and gas began in Nigeria in 1958 with SPDC as the first MNOC. From 1958 till the 1990s, there was no form of respect for the human rights of the members of the indigenous communities. It has been contended that even the skeletal CSR undertaken by SPDC and other MNOCs in the Niger Delta region today owe its origin to the Ogoni agitation against ecological genocide in the 1990s.[275] The manner in which MNOCs carry out their operations in the Niger Delta with the active backing of the Federal Government of Nigeria does not show any regard for human life, health and environment which are human rights protected under the International Bill of Rights.

For instance, the UNEP team that conducted environmental assessment of Ogoniland – aftermath of SPDC's over 30 years operations in the area, found that oil fields are interwoven with Ogoni communities; pipelines are exposed to the surface across community centres and homes; hydrocarbon pollution are visible in surface and underground waters; the ecosystem, including vast expanse of mangrove forests are destroyed; there are pollutants in the air.[276] It was further found that clean up and remediation efforts carried out by SPDC did not meet international best practices and standards.[277] The local communities were drinking water from wells and river sources contaminated with benzene, a known carcinogen, in concentrations over 900 times the World Health Organization (WHO) standard. In some communities, the

[274]*Ibid, Princ 23(c).*
[275] O Shoaga (n 2).
[276]United Nations Environment Programme (n 31) 12.
[277]United Nations Environment Programme (n 31) 12.

experts found hydrocarbon contamination levels at least 1000 times higher than the Nigerian drinking water standard of 3µg/l.[278] The frequency of oil spills reported annually by MNOCs and DPR suggests that preventative measures are discarded in Nigeria contrary to international standards and best practices.[279] There is hardly environmental impact and risk assessment carried out by MNOCs before, during and after their operations. Even when carried out, local communities to be affected by their operations are not given the opportunity to make informed inputs and to challenge the credibility of the process.[280]

Gas flaring occurs on a daily basis and has formed part and parcel of oil production process in Nigeria, irrespective of its health implications on the indigenous communities.[281] Nigerian laws regulating the oil and gas industry permit the continuous flaring of gases provided the flaring MNOC is ready to pay certain fines to the government.[282] Thus, the Federal Government of Nigeria trades the health and lives of its people for royalties and flaring penalties to be paid by MNOCs. Under the Guiding Principles, MNOCs are under obligation to go beyond the lower standards set by national laws to respect human rights of others as articulated in the International Bill of Rights: This includes the obligation to refrain from causing or contributing to adverse human rights impacts, including the adoption of measures to identify, prevent, mitigate and account for methods of addressing the human rights impacts of their activities and to remediate such adverse impacts. MNOCs in Nigeria by their actions and omissions are clearly in breach of all known civilized conducts and expectations of the Guiding Principles in showing gross violations of human rights in the Niger Delta region of Nigeria, particularly the environmental right of indigenous peoples.

C. Access to Remedy

[278] *Ibid, 11.*
[279] *Ibid, 12.*
[280] *Douglas v SPDC,* Suit No. FHC/2CS/573 [Unreported].
[281] U Udok and E B Akpan (n 23) 17-18.
[282] For instance, the Associated Gas Re-Injection (Continuous Flaring of Gas) Regulations 1984.

The third pillar or arm in the UN Framework tripod is the obligation of States and business enterprises to provide access to remedy for persons who complain or allege the infraction of any of the human rights enshrined in the International Bill of Rights. Principle 25 of the Guiding Principles declares as follows:

> As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

The import of this provision is that without an effective mechanism for the ventilation of grievances associated with business-related human rights abuses, and access to an effective remedy against abuse, the States' duty to protect will be rendered meaningless. Access to remedy has both procedural and substantive aspects.[283] Remedies provided by the grievance redressing mechanisms contemplated by Principle 25 may take a range of substantive forms aimed at counteracting or making good any human rights damage that may have occurred. Such remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or undertaking for non-repetition of action that caused damage. Also the procedures that will protect effective remedy is required to be impartial, and insulated from corruption as well as being independent.[284]

Under this Principle, State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial. Some mechanisms may require affected persons to be

[283]United Nations Human Rights (n 5) 27.
[284]United Nations Human Rights, Guiding Principles on Business and Human Rights (United Nations, New York and Geneva 2011) 27.

directly involved in seeking remedy, while on other occasions an intermediary seeks remedy on their behalf. Examples of State-based grievance mechanisms adopted by States include: the courts (for both civil and criminal actions), labour tribunals, national human rights commissions, National Contact Points [NCP] established under the Guidelines for Multinational Enterprises of the Organization for Economic Co-operation and Development, Ombudsman offices and other Government-run complaints offices (for example, Public Complaints Commissions).[285]

Effective judicial mechanisms are at the heart of ensuring access to remedy and their ability to dispense justice and address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process. To this end, Principle 26 of the Guiding Principles provides that:

> States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

This Principle imposes an obligation on States to ensure that they do not erect barriers to prevent legitimate cases from being presented before the courts or other alternative sources of effective remedy. States are similarly under obligation to ensure that the dispensation of justice is not obstructed by corruption of the judicial process; that courts are independent of economic or political pressures from other State agents and from business enterprises; and that the legitimate and peaceful activities of human rights defenders are enhanced.[286] Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed could include the attribution of legal responsibility among members of a corporate group under domestic criminal and civil laws in such a way that it facilitates the

[285] *Ibid, 28.*
[286] United Nations Human Rights, Guiding Principles on Business and Human Rights (United Nations, New York and Geneva 2011) 29.

avoidance of appropriate responsibility; where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of their claim; and where vulnerable groups, for example, indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights which applies to the wider population.[287]

This is another area where the Nigerian State has violated its obligations to protect and respect the human rights of its people. In the aspect of environmental rights as human rights, the Nigerian State does not recognize the right of persons within its jurisdiction to a clean, safe and healthy environment, in contravention of its obligations under international human rights law to protect the environment and health of the people.[288] For example, the South African State recognizes the right of its peoples to a clean environment. According to Article 24 of the Constitution of the Republic of South Africa:

Everyone has the right-

(a) to an environment that is not harmful to their health or wellbeing; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[287] *Ibid.*
[288] AOmaka, *Municipal and International Environmental Law* (Lions Unique Concepts, Lagos 2012) 146.

This provision is in the Bill of Rights and enforceable as fundamental rights under the Constitution.[289] The South African position is accords with global trends where the right to a healthy environment has been entrenched into the constitutions of countries.[290] Countries that are yet to enforce environmental rights as fundamental rights have nevertheless adopted and enforced the right to a healthy environment as part of the right to life.[291] For instance, in India, the right to a healthy environment is recognized by the Constitution as a fundamental objective and directive principle of State policy but not as a fundamental right that can be enforced on its own.[292] However, Indian courts have consistently held that a hygienic environment is an integral and inextricable facet of the right to a healthy life as it would be impossible to live with human dignity without a humane and healthy environment.[293] Furthermore, in the Bangladeshi case of Farooquev Bangladesh,[294]the Supreme Court made a very useful statement of the law regarding the inextricable linkage between right to life and a healthy environment when it held that:

> Articles 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.

Despite this sweeping global jurisprudence towards the recognition and enforcement of environmental rights, the trend in Nigeria moves in an anti-clockwise direction. The Constitution of the Federal Republic of Nigeria 1999 merely mentions 'environment' as a Directive Principle of State policy and not as an enforceable right.[295] Section 20 of the 1999

[289]C M Van der Bank and M Van der Bank, '*Environmental Protection in South Africa: Human Rights Approach'* [2014](5)(23) Mediterranean Journal of Social Sciences 2059.
[290]AOmaka (n 92) 140.
[291]B AOloworaran (n 12) 62-3.
[292]Indian Constitution 1948, art 48 A.
[293]*Tellis v Bombay Municipal Council* (1987) LRC (Const 351 Ind. *SC) AIR SC 226; Gaur v State of Haryana*(1995) 2 AIR 577 SC.
[294](1997) 49 Dhaka law Reports (AD) 1.
[295]AOmaka, *Municipal and International Environmental Law* (Lions Unique Concepts, Lagos 2012) 148.

Constitution states that [T]he state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria. Notwithstanding this bogus claim, the same Constitution declares that whatever has been stated as the fundamental objectives and directive principles of State policy remains bare wishes and aspirations which the Nigerian State seeks to achieve but does not confer any right on any person or group to enforce them.[296] The provision therefore ousts the jurisdiction of all courts in Nigeria with respect to the enforcement of environmental rights.[297] Attempts have so far been made to enforce the right to a clean, safe and healthy environment in Nigeria through appeal to international human rights law, namely, the African Charter on Human and Peoples' Rights which Nigeria has domesticated as part of her municipal law, and through its merger with the right to life guaranteed and enforced as a fundamental right under section 33 of the 1999 Constitution.[298]

In *Gbemrev SPDC*[299]and *Okparav SPDC*,[300] the applicants in the respective cases alleged that the gas flaring activities of the respondent company caused risks such as premature death, respiratory illnesses, asthma and cancer to inhabitants of their communities. Specifically, the applicants who represented their respective communities in the Niger Delta region, alleged that gas flaring contributes to adverse climate change in the affected communities as the emitted carbon dioxide and methane caused warming of the environment, contaminates food and water, caused painful breathing, chronic bronchitis, decreased lung function, affected the food security of the affected communities and also caused acid rain which corrodes corrugated iron sheets and other metals, amongst sundry claims. No form of Environmental Impact Assessment (EIA) whatsoever was undertaken by any of the respondents to ascertain the harmful consequences of their gas flaring activities in the area to the life, environment,

[296] 1999 Constitution, s 6(6)(6)(c): *Attorney-General of Ondo State v Attorney-General of the Federation* (2002) 9 NWLR (pt 772) 2..
[297]1999 Constitution, s 6(6)(c).
[298]*Gbemre v SPDC*, Suit No./CS/B/153/2005 [Unreported*]; Okpara v SPDC*, Suit No. FHC/PH/CS/518/2005 [Unreported].
[299]*Ibid.*
[300]*Ibid.*

health, food, water, development, infrastructure etc. Flowing from the above claims, the applicants who instituted separate actions before different divisions of the Federal High Court, sought declarations, to wit:

(1) That the constitutionally guaranteed fundamental rights to life and dignity of the human person provided for in Sections 33(1) and 34(1) of the 1999 Constitution, and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,[301] inevitably includes the right to a clean, poison-free, pollution-free and healthy environment;

(2) A declaration that gas flaring constitutes a breach of the right to clean, poison-free, pollution-free and healthy environment;

(3) A declaration that the provisions of Section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and Section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations which encourage continued gas flaring in Nigeria are inconsistent with the applicants' rights to life and dignity of the human person pursuant to Sections 33(1) and 34(1) of the 1999 Constitution as well as Articles 4, 16 and 24 of the ACHPR Act;

(4) Perpetual injunction restraining the respondents by themselves or their agents, servants, contractors, workers or otherwise howsoever described from further flaring of gas in the applicants' communities.

The Federal High Court sitting in Benin held that the constitutionally guaranteed rights to life and dignity of the applicants inevitably includes the rights to a clean, poison-free, pollution-free and healthy environment and accordingly held that the gas flaring activities of the respondent constitute a gross violation for the applicants' rights as enshrined in the 1999 Constitution. The court proceeded to grant all the reliefs sought by the applicants. The

[301] [ACHPR] Act, Cap A9, LFN 2004.

Judgment of the court in *Gbemre cases* was more in the nature of specific declarations. There was no award of damages, costs or compensations. An important features of the judgement in this case is that it links the right to life, popularly conceived of as a civil right with the right to a healthy environment a social right. The court lend itself to the progressive conception of the indivisibility of all human right.[302] In December 2005, Mr. Gbemre filed a suit against Shell on the grounds that Shell failed to comply with the court's previous order.[303]However, Gbemre's lawsuit was unsuccessful in effecting positive changes because the court was not able to administer the constitutional principle guiding the case after November 2005, the date the court issued an injunction to Shell. The court failed to implement the principle behind its decision "the right to clean poison free, pollution free healthy environment". The court's inability to implement its decision is evidenced by the fact that in April 2006, the court release Shell of its obligation to stop flaring gas on the condition that Shell met the quarterly step-by-step reduction in gas flaring.[304]By adopting a step by step approach, the goal was to end gas flaring by April 30 2007.[305]However, the Nigeria court of Appeal restrained the Gbemre court from sitting on May 31, 2006, the date set for personal appearances regarding Shell's step by step proposal to halt gas flaing.[306] Sadly, by April 30, 2007, Shell failed to present the quarterly step by step gas flaring reduction proposal and was still flaring gas. Between April 2006 and April 2007 Shell did not reduce the amount of gas flared. After Shell

[302] Hakeem O. Yusuf, *Oil on Trouble Waters : Multinational Corporations and Realising Human Rights in the Developing World with specific reference to Nigeria, 8 African Human Rights Law Journal* (2008) p.79at 95

[303] See press release, Climate Justice, Shell fails to obey court order to stop Nigeria flaring,again May 2, 2007 http://www.climatelaw.orgshell-fails-obey-court-order-stop-nigeria-flaring visited feb 14th 2018

[304] See Climate Justice press release 11 supra note 48('in April 2006 …Shell was granted a conditional stay of execution, releasing it from the duty to comply with a court order in November 2005 to stop flaring on three conditions. One year on, two of these conditions have not been met') The first condition was that Shell was allowed a period of one year …to achieve a quarterly phase-by-phase stoppage of its gas flaring activities in Nigeria under the supervision of the trial court. ' The second condition was that ' a detailed phase by phase technical scheme of arrangement, scheduled in such a way as to achieve a total non flaring scenario in all their on shore flow stations by 30th April 2007' must be submitted to the court personally by managing Director of Shell Nigeria and Group managing Director of NNPC . The scheme was never implemented nor submitted to the court by the defendants and they fail to attend court sitting on 30th April 2007

[305]EferiekoseUkala ; *Gas flaring in Nigeria's Niger Delta; Failed promise and reviving community voice 2* wash & lee Journal of Energy , Climate & Environment 97 (2011)

[306]*ibid*

violated the orders and a contempt case was filed, the trial judge who originally heard the case was transferred to a different division and the case file was reported lost. Since then no actions have been taken against Shell. The Gbemre case events illustrate that the Gbemre case did not lead to any immediate social change, because after the trial judge ruled in favour of Gbemre, the court failed to implement the constitutional principle on which the case was grounded: the right to a pollution free and healthy environment. This shows that the judiciary is not free from manipulation by the executive arm of Government which should not be the case. Each arm of Government is to work harmoniously with other arms and not oppressively.

However, in Okpara'scase,[307] the applicants' suit was struck out on technical grounds of wrong procedure and wrong joinder of cause of action. While the decision in Gbemre's case[308] has been hailed as a victory for environmental rights, there appears to have been no definite pronouncements on environmental rights of Nigerians by the Court of Appeal or Supreme Court – two courts whose pronouncements could be taken as the position of the law on any given subject. In any case, SPDC appealed against the decision and the last appears not to have been heard on it. Suffice to say that Nigeria has no effective mechanism for the judicial determination of grievances and claims arising out of the activities of MNOCs operating in the country's oil and gas industries in the face of the unabated flaring of gases and oil spillages emanating from the operations, in breach of principles 25 and 26 of the Guiding Principles.

At the moment, all actions founded on pollution or environmental degradation can only be maintained under tort either as nuisance,[309] negligence[310] or strict liability, particularly under

[307]*Okpara v SPDC*, Suit No. FHC/PH/CS/518/2005 (Unreported).
[308]*Ibid.*
[309]*SPDC v Farah* (1995) 3 NWLR (pt.382) 148; *SPDC v Tiebo VII (*1996) 4 NWLR (pt 445) 657.
[310]*US Seismograph Services v Onokposa*(1972) 1 All NLR (pt 1) 347; *Shell-BP v Usuro* (1960) SCNLR 121.

the rule in Rylandsv Fletcher[311]. This judicial approach to providing remedy against MNOCs for environmental damage related to their operations under Nigerian law is limited in scope and functionality. At best, injuries complained of are compensable only in monetary terms.[312] Economic considerations rarely allow injunctive remedies to apply. It is submitted that Nigeria should make express provision for environmental rights and remove every bottlenecks on access to the courts in search of environmental justice against the recklessness and environmentally reprehensible activities of MNOCs in the Niger Delta region of Nigeria.

- United Nations Global Compact[313]

The United Nations Global Compact [UNGC] is an open and voluntary corporate citizenship initiative by companies all over the world to engages a wide spectrum of multi-stakeholder participants across the world. It was first proposed by the UN Secretary-General in an address to the World Economic Forum in 1999 and was subsequently launched at the UN Headquarters in 2000. It is made up of more than 2000 companies and other societal actors drawn from more than 80 countries and has thus been hailed as the world's largest corporate citizenship initiative.[314]

The UNGC calls on companies and businesses to embrace, support and enact, within their spheres of operations and influence, a set of core principles which will regulate their operations in the areas of human rights, labour standards, environmental protection and anti-corruption.[315] With respect to environmental protection, the UNGC requires businesses to

[311] [1868] LR 3 HL 330; Ogiale v Shell (1997) 1 NWLR (pt 480) 148;
[312] A Omaka (n 76) 147
[313][UNGC] 2000.
[314]UN Global Compact Office, The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions (UN Global Compact Office and the OECD Secretariat,
Paris 2005) 2.
[315]*Ibid*.

support a precautionary approach to environmental challenges;[316] undertake initiatives aimed at promoting greater environmental responsibility;[317] and encourage the development and diffusion of environmentally-friendly technologies.[318] In the area of human rights, the UNGC requires business enterprises to support and respect the protection of internationally proclaimed human rights;[319] and ensure that they are not complicit in human rights violations.[320]

MNOCs operating in the Niger Delta region of Nigeria are required to adhere to these principles in furtherance of their aspirations to become good corporate citizens. Observance of the principles contained in the UNGC entail developing corporate policies to observe good oilfield and oil industry practices, and in particular, the abolition of all forms of environmental pollution such as gas flaring and oil spillages; the adoption of the precautionary principles and the sustainable development of Nigeria's oil and gas resources.

This chapter carried out an assessment of the extent to which MNOCs operating in the Niger Delta region of Nigeria have been able to integrate environmental responsibility into their operations. This was done by examining the claims of some of the MNOCs regarding what they have achieved in that regard, particularly SPDC. These claims were balanced against authoritative expert reports of studies conducted on the environmental situation in certain indigenous communities, such as the UNEP Report on Ogoniland. These showed that SPDC's and other MNOCs' claims that they adopt standards compatible with international best practices in environmental protection are patently incorrect, translating to the reality that MNOCs are driven by profit motive and may be reluctant to shoulder the huge environmental control costs required to protect the environment.

[316]UNGC 2000, *princ 7.*
[317]*Ibid, princ 8*
[318]*Ibid, princ 9.*
[319]*Ibid, princ 1.*
[320]*Ibid, princ 2.*

CHAPTER THREE: THE QUANTUM OF ENVIRONMENTAL POLLUTION IN THE OIL AND GAS INDUSTRY IN NIGERIA

3.1 Origin of Pollution in Context of Nigerian Oil and Gas Industry

Pollution has been defined as any discharge of material or energy into water, land, or air that causes or may cause acute (short-term) or chronic (long-term) detriment to the earth's ecological balance or that lowers the quality of life.[1] It is the introduction of contaminants into a natural environment that causes instability, disorder, harm or discomfort to the ecosystem, such as physical systems or living organisms.[2] Pollution can take the form of chemical substances or energy, such as noise, heat, or light.[3] Pollution may also be defined as addition of undesirable material into the environment as a result of human activities.[4]

The agents responsible for environmental pollution are called pollutants. A pollutant may be defined as a physical, chemical or biological substance unintentionally released into the environment which is directly or indirectly harmful to humans and other living organisms. Pollutants may cause primary damage, with direct identifiable impact on the environment, or secondary damage in the form of minor perturbations in the delicate balance of the biological food web that are detectable only over long time periods. Pollutants, the elements of pollution, can be foreign substances or energies, or naturally occurring; when naturally occurring, they are considered contaminants when they exceed natural levels. Pollution is often classed as point source or nonpoint source pollution.

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[1] A O Coker, '*Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria'*<https://www.tandicebsolutions.com/rokdownloads/National_Conference_on_the_Environment/ProfAkinwaleCoker1.pdf> accessed on 31 May 2018.

[2] Pollution: Overview' https://www.seinemaritime.net/suports/uploads/files/pollution%20E-bookPart%201%20overview.pdf accessed 31 May 2018.

[3] *Ibid.*

[4] 'Environmental Pollution' <ttps://www.download.nos.org/333courseE/10.pdf> accessed 30 May 2018.

The first oilpollution was the oil spill that occurred atAraromi in the present Ondo state in 1908. In July 1979 the Forcados tank 6 Terminal in Delta state incidence spilled 570,000 barrels of oil into the Forcados estuary polluting the aquatic environment and surrounding swamp forest.[5] The *Funiwa* No.5 Well in Funiwa Field blew out an estimate 421,000 barrels of oil into the ocean from January 17th to January 30th 1980 when the oil flow ceased, 836 acres of mangrove forest within six miles off the shore was destroyed. The *Oyakama* oil spillage of 10th May, 1980 resulted in a spill of approximately 30,000bbl.[6] In August 1983,Oshika village in Rivers state witnessed a spill of 5,000 barrels of oil from Ebocha-Brass pipeline which flooded the lake and swamp forest, the area had previously experienced an oil spill of smaller quantity; 500 barrels in September 1979 with mortality in crabs, fish and shrimp. Eight months after the occurrence of the spill there was high mortality in embryonic shrimp and reduced reproduction due to oil in the lake sediments. The Ogada-Brass pipeline oil spillage near EtiarnaNembc in February 1995 spilled approximately 24,000 barrels of oil which spread over freshwater swamp forest and into the brackish water mangrove swamp.[7]

It is estimated that 9-13 million (1.5 million tonnes) of crude petroleum has been spilled into the Niger Delta ecosystem over the past 50 years, and this quantity is 50 times the estimated volume spilled in Exxon Valdez oil spill in Alaska 1989. The Shell Petroleum Development Company (SPDC) since 1989 recorded an average of 221 spills per year in its operational area involving 7,350 barrels annually. From 1976-1996 a total of4647 oil spill incidences spilling approximately 2,369,470 barrels of oil into the environment of which 1,820,410.5(77%) were not recovered. Most of these oil spill incidences in the Niger Delta

[5]A AKadafa, '*Oil Exploration and Spillage in the Niger Delta of Nigeria'* [2012] (2) (3) *Civil and Environmental Research* 38
[6]*Ibid,* 41.
[7] *Ibid*.

occur on land, swamp and the offshore environment.NNPC estimates 2,300 cubic meters of oil has spilled in 300 separate incidences annually between 1976 and 1996.[8]

The Punch Newspaper of February 20, 1991 reported a total of 2,796 oil spill incidences recorded between the periods of 1976-1990 leading to 2,105,393 barrels of oil spilled. The United Nations Development Programme [UNDP] 2006 also reported that between the periods of 1976-2001, 3 million barrels of oil were lost in 6, 817 oil spill incidences in the Niger Delta region of Nigeria of which over 70% of the spilt oil was not recovered.[9] In 2001, the Western operations of the Shell Petroleum Development Company [SPDC] recorded a total of 115 incidences of oil spills in which 5,187.14 barrels of oil were spilled and 734,053 barrels of the spilled oil representing 14.2% were recovered. In January 1998, 40,000 barrels of crude oil was spilled by Mobil in Eket but the largest spill in Nigeria was the offshore well blow-out in January 1980 with a spill of approximately 200,000 barrels of oil into the Atlantic Ocean from an oil facility which damaged 340 hectares of mangrove forest.[10]

3.2 Causes of Pollution

Oil spills are a common event in Nigeria and occur due to a number of causes, including: corrosion of pipelines and tankers (accounting for 50 percent of all spills), sabotage (36 percent), and oil production operations (6.5 percent), with 1 percent of the spills being accounted for by inadequate or non-functional production equipment.[11] The largest contributor to the oil spill total, corrosion of pipes and tanks, is the rupturing or leaking of production infrastructures that are described as, "very old and lack regular inspection and

[8]A AKadafa, '*Oil Exploration and Spillage in the Niger Delta of Nigeria'* [2012] (2) (3) *Civil and Environmental Research* 38
[9]*Ibid,* 42.
[10]*Ibid.*
[11]S O Adelana and Others, '*Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas'* [2011] (2) (6) American Journal of Scientific and Industrial Research834-839, 834.

maintenance".[12] A reason that corrosion accounts for such a high percentage of all spills is that as a result of the small size of the oilfields in the Niger Delta, there is an extensive network of pipelines between the fields, as well as numerous small networks of flowlines - the narrowdiameter pipes that carry oil from wellheads to flowstations - allowing many opportunities for leaks.[13]

In onshore areas most pipelines and flowlines are laid above ground. Pipelines, which have an estimate life span of about fifteen years, are old and susceptible to corrosion.[14] Many of the pipelines are as old as twenty to twenty-five years. Even Shell admits that 'most of the facilities were constructed between the 1960s and early 1980s to the then prevailing standards.[15] SPDC [Shell Petroleum and Development Company] would not build them that way today." Sabotage is performed primarily through what is known as 'bunkering", whereby the saboteur attempts to tap the pipeline. In the process of extraction sometimes the pipeline is damaged or destroyed. Oil extracted in this manner can often be sold.[16]

Sabotage and theft through oil siphoning has become a major issue in the Niger River Delta states as well, contributing to further environmental degradation.[17] Damaged lines may go unnoticed for days, and repair of the damaged pipes takes even longer. Oil siphoning has become a big business, with the stolen oil quickly making its way onto the black market.[18] With the popularity of selling stolen oil increases, the number of deaths associated with oil siphoning is increasing. In late December 2006, more than 200 people were killed in the Lagos region of Nigeria in an oil line explosion. Nigerian regulations of the oil industry are

[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] S O Adelana and Others, *'Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas'* [2011] (2) (6) American Journal of Scientific and Industrial Research834-839, 834.
[16] *Ibid.*
[17] *Ibid*, 835.
[18] *Ibid*, 836.

weak and rarely enforce regulations. In essence, this allows the industry to indulge in self-regulation.[19]

3.3 Types of Pollution

Oil and gas production carries with it extensive pollution which affects the health, livelihoods and environment of indigenous people. The major pollutions are oil spillage and gas flaring. This segment examines oil spillage and gas flaring and their impact on health, farming and fishing of host communities.

3.3.1 Oil Spillage

Oil spillage is the spilling of crude petroleum from an oil facility into the environment. Oil spillage is a release of a liquid petroleum hydrocarbon into the environment due to human activity, and is a form of pollution.[20] The term often refers to marine oil spills, where oil is released into the ocean or coastal waters. Oil spills include releases of crude oil from tankers, offshore platforms, drilling rigs and wells, as well as spills of refined petroleum products (such as gasoline, diesel) and their by-products, and heavier fuels used by large ships such as bunker fuel, or the spill of any oily white substance refuse or waste oil.[21] Spills may take months or even years to clean up. Oil also enters the marine environment from natural oil seeps. Public attention and regulation has tended to focus most sharply on seagoing oil tankers.[22]

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[19] *Ibid.*

[20] S O Adelana and Others, '*Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas'* [2011] (2) (6) American Journal of Scientific and Industrial *Research* 834-839, 834.

[21] *Ibid.*

[22] *Ibid.*

Oil spillage is one of the greatest environmental problems confronting Nigeria especially in the Niger Delta zone. Oil communities have been at the receiving end of this environmental problem. The problems have generated a lot of concerns within ofthe three tiers of government especially in producing States.

An estimated 9 million-13 million (1.5 million tons) of oil has been spilled into the Niger Delta ecosystem over the past 50 years and this is 50 times the estimated volume spilled in Exxon Valdez oil spill in Alaska in 1989. For instance, in January 1998, 40,000 barrels of crude oil was spilled by Mobil in Eket but the largest spill in Nigeria was the offshore well blowout in January 1998, 40,000 barrels of crude oil was spilled by Mobil in Eket but the largest spill in Nigeria was the offshore well blowout in January 1980 with a spill of approximately 200,000 barrels of oil into the Atlantic Ocean from an oil facility which damaged 340 hectares of mangrove forest.

The Niger Delta has a complex and extensive system of pipelines running across the region and large amounts of oil spill incidences have occurred through the pipelines and storage facility failures, these failures could be caused by material defect, pipeline corrosion, ground erosion but the oil companies blame most of the spills on sabotage. The Department of Petroleum Resources contends that 88 per cent of the oil spill incidences are traceable to equipment failure. The main causes of oil spills in the Niger Delta are vandalism, oil blowouts from the flow stations, accidental and deliberate releases and oil tankers at sea. Figures 1 shows extensive oil spillage in a river in the Niger Delta.

Figure 1:A River in a Niger Delta community showing extensive oil spillage

3.3.2 Gas Flaring

One of the devastating consequences of oil drilling in the Niger Delta region is gas flaring. As crude oil is extracted from the ground, associated gases are released.[23] These associated gas are called gas flares. The Nigerian government has unsuccessfully attempted to battle the gas-flaring issue. These attempts have been unsuccessful because of the government's favoritism toward Shell.

Gas-flaring emissions contribute significantly to global warming.[24] They are produced when extra gases are burned off during the oil-drilling process.[25] Gas flares are composed of toxic gases such as sulfur dioxide, nitrogen dioxides, benzapryene, toluene, xylene, and hydrogen

[23]E Ukala, '*Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices'*[2011] (2) *Wash & Lee J. Energy, &Env't*97-103.
[24]BGervet, *Gas Flaring Emission Contributes to Global Warming* 2, 10 (Mar. 2007), available at <http://www.itu.se/polopoly_fs/1.5035!gas%2report%20-%20final.pdf> [explaining that heat emissions explain 55% of global warming and concluding that the energy released by gas flaring in the last 120 years accounts for about 3% of missing heat generation].
[25]Press Release, The World Bank, *supra* note 13 ["*Flaring or burning of gas occurs to dispose of natural gas liberated during crude oil production and processing, most often in remote areas where there is no gas transportation infrastructure or local gas market"].

sulfide.[26] These gases, for example, methane and CO_2, are released into the atmosphere in large quantities, and have a negative effect on the environment.[27]

Gas flaring is harmful to human life and the environment. Nigeria's Niger Delta residents observe visible gases oozing from oil-production sites.[28] Alarmingly, these sites are located in the midst of villages and have become a modern addition to the Niger Delta landscape.[29] Mr. EbereUdeagu, a former deputy governor related the following:

> Gas flaring by oil companies in the oil producing communities has terribly devastated a substantial portion of farmlands leaving the streams polluted. These areas have been turned into ghettos and swamps with the indigenes becoming destitute in their fatherland. Their sources of livelihood, which is farming and fishing, have been closed as the streams have lost life, and thelands are no longer fertile.[30]

Unfortunately, the Niger Delta people's main occupation is farming and fishing. Thus, gas flares not only have a devastating effect on the environment but also on their means of livelihood.

Indeed, the addition of gas flares has not only been detrimental to the environment but also has changed life in the villages. Ken Saro-Wiwa asserted the following:

> [There has been] a disruption of normal life in the village. The people have been used to having 12 hours of day and 12 hours of night. But now, their position is worse than that of the Eskimos in the North Pole for while nature gives the Eskimos six months of daylight followed by six months of night, Shell-

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[26] The Climate Justice Programme and Environmental Rights Action/Friends of the Earth Nigeria, 'Gas Flaring in Nigeria: A Human Rights, Environment, and Economic Monstrosity' 24 (2005) <http://www.climatelaw.org/media/cases/-documents/nigeria/gas-flaring-in-nigeria.pdf> accessed 17 December 2017.

[27] NBassey, '*Gas Flaring: Assaulting Communities, Jeopardizing the World*' 9-11 (Dec. 10, 2008) 9-11 <http://www.eraction.org/publications/presentations/gas-flaring-ncc-abuja.pdf> accessed 20 December 2017. [describing the harmful effects of gas flaring on the health of the people in the Niger Delta, on the economy of the region, and on the world because of gas flaring's relation in climate change].

[28] O Quist-Arcton, '*Gas Flaring Disrupts Life in Oil-Producing Niger Delta'*(Port Harcourt, National Public Radio July 24, 2007). <http://www.npr.org/templates/story/story.php?storyId=12175714> accessed 21 December 2017 [reporting that villagers see huge flames emitted from gas flaring sites and billows of black smoke that leap into the sky].

[29] *Ibid* [describing the villages of Ebocha-Egbema, which are located in the heart of the Niger Delta and where gas flares loom over houses, farms, and shops].

[30] EOkpara, '*Imo Deputy Governor Laments Menace of Gas Flaring'.Daily Times* (Lagos, 27 November 2003) <http://news.biafranigeriaworld.com/archive/2003/nov/27/244.html>accessed 18 December 2017.

> BP has given their people about ten years of continuous daylight. There are no compensations for these inconveniences and there is nothing to show that Shell-BP shields the flame from the people.[31]

Gas flaring in the Niger Delta region has also contributed to numerous diseases among the residents, such as asthma, bronchitis, cancer, blood disorders, and skin diseases; these diseases are directly correlated to gas flaring.[32] As a result of these diseases "[l]ife expectancy in the Niger Delta is markedly lower [in comparison to other parts of Nigeria] ... [the average age of death in the Niger Delta region] stands at about 40 years."[33] These testimonials also suggest that large quantities of gases are flared in the Niger Delta region. Although there is a dearth of sufficient data stipulating the exact amount of gas flaring in Nigeria, it has been reported that Nigeria flares about 75 percent of the gases it produces.[34] Due to the high emission rate, the impact of the flared gases is substantial. On a national and global scale, gas flares are a significant contributor to global warming and climate change.[35] Thus, they not only affect the Niger Delta community but alsocontribute to global greenhouse emissions. In fact, Nigeria's gas flaring produces almost 25 percent of Africa's greenhouse gases.[36]

However, gas flares, also known as associated gas, could be emitted in environmentally safe ways, including re-injecting them into the earth or using them as an energy source.[37] While these alternative methods are practiced in countries like the United States, such

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[31] K S Wiwa, *Genocide in Nigeria: The Ogoni Tragedy* (Port Harcourt: Saros International Publishers 1992) 78.

[32] N Bassey (n 33) 9 [describing the health effects of gas flaring on the people of the Niger Delta region].

[33] *Ibid.*

[34] The Climate Justice Programme (n 32) 11 [stating that "Nigeria currently flares 75percent of the gas it produces"].

[35] Human Rights Watch, The Price of Oil: *Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* 66 (1999)<http://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf> accessed 21 December 2017 [noting that gas flaring is a significant contributor to greenhouse gases].

[36] UN Integrated Regional Information Networks, Should Stopping Gas Flaring be a Priority? (3 September 2008) 2008 WLNR 26858547 [ranking countries by greenhouse emission].

[37] GNurakhment, '*Gas Flaring and Venting: What can Kazakhstan Learn from the Norwegian Experience*?'5-7 (2006) <http://www.dundee.ac.uk/cepmlp/car/html/CAR10_ARTICLE14.PDF> accessed 20 December 2019 [discussing environmentally-safe alternatives to gas flaring].

environmentally safe methods are not practiced in Nigeria. For example, a Niger Delta resident stated "[led by oil giant Shell, [oil companies] have been burning gas for decades when they could be using it to provide energy to the local population. The government must ensure that oil companies stop this destructive practice now."[38] In fact, oil companies have continuously flared gas for nearly 50 years.[39] Moreover, the local population is often left without electricity and has limited access to crude-oil products.[40] This statement suggests that Shell's oil-production practices have been met with resentment by the Niger Delta community and that the Nigerian government has not effectively addressed the problem. In sum, this section illustrates the detrimental effects of gas flaring and the alternatives to minimizing gas flaring. The next section of this essay discusses ways in which the Nigerian government has attempted to combat gas flaring.

[38] P Palmer, *'Emergency Action: Stop Gas Flaring in Nigeria'*(12 January 2009, <http://www.foei.org/en/media/archive/2009/nigeria-to-stop-companies-flaring-gas>accessed 21 December 2017.

[39]'Shell: Guilty of Climate Crimes'<http://www.shellguilty.com/learnmore/climate-crimes/>accessed 15 December 2017 [detailing Shell's oil drilling activities in Nigeria]

[40] P Palmer, '*Mangrove Action Project, 'Niger Delta' Mangrove Communities Threatened by Continued Gas Flaring'*(12 January 2009) <http://mangroveactionproject.org/news/action-alerts/niger-delta-mangrove-communities-threatened-by-continued-gas-flaring>accessed 16 December 2017 [noting that despite the fact that Nigeria's Niger Delta is endowed with crude oil, local residents have limited access to crude-oil by-product(s)].

Figure 3:Gas flaring from an oil facility in the Niger Delta region

Gas flaring is the burning of natural gas that is associated with crude oil when it is pumped up from the ground. In oil and gas producing areas of the Niger Delta region of Nigeria, due to insufficient investment in infrastructure to utilize natural gas flaring is employed to dispose of this associated gas. Also chemical factories, oil refineries, oil wells, rigs and landfills, gaseous waste products and sometimes even non-waste gases are burnt off to protect the processing equipment when unexpected high pressure develops within them. Gas flaring in oil rigs and wells contribute significantly to greenhouse gases in our atmosphere.The Energetic Solution Conference estimates that the Niger Delta region has about 123 flare sites. It has been asserted that about 45.8 billion kilo watts of heat is discharged into the atmosphere from 1.8 billion cubic feet of gas everyday in the Niger Delta region, leading to temperatures that render large areas inhabitable.

The heat generated from gas flaring kills vegetation around flaring area, destroys mangrove swamps and salt marshes, suppresses the growth and flowering of some plants, induces soil degradation and diminishes agricultural productivity. Apart from the above issues the toxicity to humans causing respiratory illness, leading to kidney disease, neurological disease and potential death. Oil exploration and exploitation activities such as this have significantly contributed to the environmental degradation of the Niger Delta region in spite of government measures to stop gas flaring by 2008 and the existence of monitoring agencies, regulations and standards, the flaring activities in the area is still a problem.

In any event, the flares sites are rarely, if ever, relocated, or even made safe by providing secure fencing.[41] A visit to some of the communities in the Niger Delta Region confirms that

[41]*Ibid.*

oil facilities are exposed and flare sites located close to communities as shown in Figures 3 below.

Figure 3: Exposed pipelines flaring gases traversing community in Niger Delta

The effects of gas flaring are many but they can broadly be categorized under environmental, health and other implications. Over the past fifty years, gas flaring and venting associated with petroleum exploration and production in the Nigeria's Niger Delta have continued to generate complex consequences in terms of energy, human health, natural environment, socio-economic environment and sustainable development.[42] Large scale gas flaring has inflicted untold hardship and damage to human, plant and animal life.[43]

The destructive effect of gas flaring on wildlife has also been noted. The bright light of gas flares scares wildlife causing them to migrate[44] to more friendly territories or locations.[45]It has also been acknowledged that gas flaring has been associated with 'disruption of wildlife in the immediate vicinity, 'The implication of gas flaring on human health has equally been identified. The pollutants are associated with a variety of adverse health impacts including

[42]A E Ite and U J Ibok, '*Gas Flaring and Venting Associated with petroleum Exploration and Production in the Nigeria's Niger Delta'*, [2013](1) (4)American Journal of Environmental Protection70-77.
[43]Udok(n 11) 64.
[44]Human Rights Watch Report [1994] 74.
[45] E Hutchful, '*Disarmament and Development: An African View'* [1985](16) (4) *IDS Bulletin* 61-67.

respiratory tract diseases, diseases of the central nervous system and blood steam, cancers. Deformities in children, lung damage and skin problems have also been reported.[46]

3.4 Stages of Pollution in Nigeria's Oil and Gas Industry

In the course of oil and gas production, the indigenous communities are subjected to various acts of environmental degradation at all stages of the production cycle. This has the effect of damaging the ecosystem, destroying the people's sources of livelihood, exacerbating global warming, causing acid rain and corrosion of roofing sheets and other metals, health risks and so forth. This segment examines the stages of pollution caused by oil and gas exploration on the environment of indigenous peoples.

A. The Acquisition of Land Stage

Usually, the first stage in oil exploration is the acquisition of land to carry out exploration activities. SPDC alone has OMLs covering 31,103 square kilometres which is a little less than half of the total 70,000 square kilometres occupied by the Niger Delta region. The company operates 931 producing oil wells, linked by a network of 4,786 kilometre of field pipelines and 1,543 kilometres of trunk lines to 87 flow stations and three oil export terminals.[47] All these projects and facilities require extensive portions of land, thus depriving the indigenous communities of their right to use their lands for their primary occupations of farming and fishing. In the course of constructing these facilities, vast stretches of farmlands and mangrove forests are cut down, thereby resulting in depletion of the fish population. Most of the lands acquired are for long term use, including uses for well sites, pipelines,

[46]S I Ovuakporaye and Others, '*Effects of Gas Flaring on Lung Function among Residents of a Gas Flaring Community in Delta State, Nigeria'* [2012] (4) (5)*Res. J. Env. Earth Sci.* 525-528.

[47]A R Temitope and A AAdedeji, '*Public Participation: An Imperative to the Sustainable Development of the Nigerian Oil Industry''*
<https://www.bhu.ac.in/lawfaculty/blj/2006.../5_RT%20AKO_Public_Participation_1_[1].doc accessed 30 September 2017.

roads, office quarters, waste disposal sites, as well as other short term uses such as seismic lines, drilling sites and temporary project accommodation.[48]

B. The Exploration Stage

After acquisition of land, the next phase in the oil and gas production process is the exploration process which begins with seismic operations when MNOCs seek to discover oil and gas reserves. To carry out seismic survey, vegetation is cut down to ensure that the holes for the dynamites are placed in a straight line known as seismic lines. Mangrove forests cut down in the seismic process have a very low regeneration rate and it has been claimed that it might take up to 30 years for mangrove trees to fully recover from line cutting.[49] In addition, during seismic operations, detonators are sometimes used and SPDC has stated that "in densely populated or environmentally sensitive areas where explosions are not practical, vibrator trucks are used" rather than dynamite. In the riverine communities, aquatic lives of species are affected by the release of chemicals into the sea while regular fishing activities are disturbed.

C. The Drilling of Exploration Well Stage

This is the drilling of exploration well stage. Pollution of the environment is caused during this stage as chemicals and sludge generated, such as oily residues, tank bottom sludge and obsolete chemicals, if not properly treated and disposed of, carry high pollution, health risk, disturbance to economic activities and physical environmental qualities.[50] For example, in *ShellvAmbah*,[51] dredging operations on Shell's property led to the destruction of property on the adjacent land belong to the Wesewese family. Specifically, mud dredged from Shell's

[48] *Ibid.*
[49] A R Temitope and A AAdedeji, '*Public Participation: An Imperative to the Sustainable Development of the Nigerian Oil Industry''*
<https://www.bhu.ac.in/lawfaculty/blj/2006.../5_RT%20AKO_Public_Participation_1_[1].doc accessed 30 September 2017.
[50] *Ibid.*
[51] (1999) 3 NWLR (pt 593) 1.

land reportedly covered and destroyed 16 fish ponds including various fish channels and lakes.

D. The Production Stage

This is the stage with the highest danger of pollution. The production of oil and gas in Nigeria carries with it the risk of oil spillage and gas flaring. According to the official estimates from the NNPC, which is based on the quantity of spilled oil reported by the operating companies, approximately 2,300 cubic metres of oil are spilled into the Niger Delta environment in 300 separate incidents annually. Similarly, statistics from the Department of Petroleum Resources [DPR] indicate that between 1976 and 1996, a total of 4,835 incidents resulted in the spillage of at least 2,466,322 barrels of which an estimated 1,896,930 barrels (representing 77 percent) were lost to the environment.[52] The adverse effects of these oil spillages on the environment include contamination of water sources, destruction of crops and trees, as well as loss of fishing grounds and destruction of mangrove forests which are the natural habitats for vast species of fish population, in addition to the destruction of other marine living resources. Thus, in *Shell v Tiebo VII,*[53] the plaintiffs instituted an action on behalf of the Peremabiri community against Shell for damage occasioned to their environment from an oil spill. The spill reportedly covered much of the River Nun, a tributary of the River Niger which flows through the plaintiffs' community and serves as the source of drinking water. Due to the spill, the water was contaminated, raffia palms were destroyed and fishing activities – the people's occupation, were severely impaired, amongst other damage suffered. Oil spillage has a major impact on the ecosystem into which it is released. Immense tracts of the mangrove forests have been destroyed. An estimated 5 to 10 percent of Nigerian mangrove ecosystems have been wiped out either by settlement or oil. The rainforest which

[52]Environmental Resources Managers Limited, '*Niger Delta Environmental Survey Final Report'*, Phase 1, Volume 1, 249.
[53](1996) 4 NWLR (pt 445) 657.

previously occupied some 7,400 km2 of land has disappeared as well. Spills in populated areas often spread out over a wide area, destroying crops and aquacultures through contamination of the groundwater and soils. The consumption of dissolved oxygen by bacteria feeding on the spilled hydrocarbons also contributes to the death of fish. In agricultural communities, often a year's supply of food can be destroyed instantaneously. Because of the careless nature of oiloperations in the Delta, the environment is growing increasingly uninhabitable.People in the affected areas complain about health issues including breathing problems and skin lesions; many have lost basic human rights such as health, access to food, clean water, and an ability to work.

3.5 The Impact of Pollution on the Environment and Human Health

A. Climate Change

Gas flaring contributes to climate change resulting in deleterious effects to the environment. The emission of carbon dioxide, burning of fossil fuel, mainly coal, oil and gas have led to global warming with more serious implications for developing countries, especially Africa which is highly vulnerable with limited ability to adapt. Furthermore, the flares associated with gas flaring give rise to atmospheric contaminants. These include oxides of Nitrogen, Carbon and Sulphur (NO_2, CO_2, CO, SO_2), particulate matter, hydrocarbons and ash, photochemical oxidants, and hydrogen sulphide (H_2S).[54] These contaminants acidify the soil, deplete soil nutrient and stunt the growth of crops. Agricultural products like palm trees are also affected and water becomes too hot for fish to live in accounting for the depletion of fish stock in our rivers and oceans.

[54]W D Kindzierski, '*Importance of Human Environmental Exposure to Hazardous Air Pollutants from Gas Flares'.* [2000] (8) *Environmental Reviews* 41-62.

B. Acid Rain

Acid rain is another problem within the Niger Delta region caused by gas flaring which has led to loss in biodiversity, with forest and economic crops being destroyed. The dominance of grasses and shrubs in some parts of the region is indication of loss of natural forest. This may be due to acid rain but other factors may be the cause such as agricultural activities and the exploration and exploitation of oil companies. The concentration of acid in rain water appears to be higher in the Niger Delta region and decreases further away from the region.

Acid rains have been linked to the activities of gas flaring. Corrugated roofs in the Delta region have been corroded by the composition of the rain that falls as a result of flaring. The primary causes of acid rain are emissions of sulphur dioxide (SO_2) and nitrogen oxides (NO) which combine with atmospheric moisture to form sulfuric acid and nitric acid respectively. Size and environmental philosophy in the industry have very strong positive impact on the gas-flaring CO_2emission.Another notable effect of gas flaring is acid rain. The primary causes of acid rain are emissions of sulphur dioxide (SO_2) and nitrogen oxides (NO) which combine with atmospheric moisture to form sulfuric acid and nitric acid respectively. Size and environmental philosophy in the industry have very strong positive impact on the gas-flaring-related CO_2 emission.[55] Physically, the corrosive effect of gas flaring were obvious in affected communities such as Ubenekang in Ibeno Local Government Area and Uquo community in EsitEket Local Government Area of AkwaIbom State where roofing sheets have to be replaced almost every two years.[56]

Acid rain acidifies lakes and streams and damages vegetation. In addition, acid rain accelerates the decay of building materials and paints. Prior to falling to the earth, SO_2 and

[55] A Hassan and R Konhy, '*Gas Flaring in Nigeria: Analysis of Changes in its Consequent Carbon Emission and Reporting'* [2013](37) (2)*Accounting Forum* 124-134.
[56]Udok(n 11).

NO_2 gases and their particulate matter derivatives, sulfates and nitrates, contribute to visibility degradation and harm public health.

C. Destruction of Agricultural Plants/Crops

The flares associated with gas flaring give rise to atmospheric contaminants. These include oxides of Nitrogen, Carbon and Sulphur (NO_2, CO_2, CO, SO_7), particulate matter, hydrocarbons and ash, photochemical oxidants, and hydrogen Sulphide (H_2S). These contaminants acidify the soil, hence depleting soil nutrient. Previous studies have shown that the nutritional value of crops within such vicinity arc reduced. In some cases, there is no vegetation in the areas surrounding the flare due partly to the tremendous heat that is produced and acid nature of soil pH.

The effects of the changes in temperature on crops included stunted growth, scotched plants and such other effects as withered young crops. Reference concluded that the soils of the study area are fast losing their fertility and capacity for sustainable agriculture due to the acidification of the soils by the various pollutants associated with gas flaring in the area.

D. Health Implications

The implication of gas flaring on human health are all related to the exposure of those hazardous air pollutants emitted during incomplete combustion of gas flare. These pollutants are associated with a variety of adverse health impacts, including cancer, neurological, reproductive and developmental effects. Deformities in children, lung damage and skin problems have also been reported.

E. Lossof Mangrove Forests

Vegetation in the Niger River Delta consists of extensive mangrove forests, brackish swamp forests, and rainforests. The large expanses of mangrove forests are estimated to cover approximately 5,000 to 8,580 km^2 of land. Mangroves remain very important to the

indigenous people of Nigeria as well as to the various organisms that inhabit these ecosystems.[57]

Human impact from poor land management upstream coupled with the constant pollution of petroleum has caused five to ten percent of these mangrove forests to disappear. The volatile, quickly penetrating, and viscous properties of petroleum have wiped out large areas of vegetation. When spills occur close to and within the drainage basin, the hydrologic force of both the river and tides force spilled petroleum to move up into areas of vegetation.[58]

Mangrove forests are included in a highly complex trophic system. If oil directly affects any organism within an ecosystem, it can indirectly affect a host of other organisms. These floral communities rely on nutrient cycling, clean water, sunlight, and proper substrates. With ideal conditions they offer habitat structure, and input of energy via photosynthesis to the organisms they interact with. The effects of petroleum spills on mangroves are known to acidify the soils, halt cellular respiration, and starve roots of vital oxygen.[59]

The loss of mangrove forests is not only degrading life for plants and animals, but for humans as well. These systems are highly valued by the indigenous people living in the affected areas. Mangrove forests have been a major source of wood for local people.[60] They also are important to a variety of species vital to subsistence practices for local indigenous groups, who unfortunately see little to none of the economic benefits of petroleum. Mangroves also provide essential habitat for rare and endangered species like the manatee and pygmy

[57] S O Adelana and Others, '*Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas'* [2011] (2) (6) *American Journal of Scientific and Industrial Research*834-839, 834.

[58] S O Adelana and Others, '*Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas'* [2011] (2) (6) *American Journal of Scientific and Industrial Research* 834-839, 834.

[59] S O Adelana and Others, *'Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas'* [2011] (2) (6) *American Journal of Scientific and Industrial Research*836.

[60] *Ibid*.

hippopotamus.[61] Poor policy decisions regarding the allocation of petroleum revenue has caused political unrest in Nigeria. This clash among governing bodies, oil corporations, and the people of Nigeria has resulted in sabotage to petroleum pipelines, further exacerbating the threat to mangrove forests.[62]

F. Depletion of Fish Populations

The fishing industry is an essential part of Nigeria's sustainability because it provides much needed protein and nutrients for people, but with the higher demand on fishing, fish populations are declining as they are being depleted faster than they are able to restore their number.[63] Fishing needs to be limited along the Niger River and aquacultures should be created to provide for the growing demand on the fishing industry. Aquaculture allows for fish to be farmed for production and provide more jobs for the local people of Nigeria.[64]

Overfishing is not the only impact on marine communities. Climate change, habitat loss, and pollution are all added pressures to these important ecosystems. The banks of the Niger River are desirable and ideal locations for people to settle. The river provides water for drinking, bathing, cleaning, and fishing for both the dinner table and trading to make a profit.[65] As the people have settled along the shores of the rivers and coasts, marine and terrestrial habitats are being lost and ecosystems are being drastically changed. The shoreline along the Niger River is important in maintaining the temperature of the water because the slightest change in

[61] *Ibid.*
[62] *Ibid.*
[63] S O Adelana and Others, *'Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas'* [2011] (2) (6) *American Journal of Scientific and Industrial Research*834-839, 834.
[64] S O Adelana and Others, *'Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas'* [2011] (2) (6) *American Journal of Scientific and Industrial Research*834-839, 834.
[65] *Ibid.*

watertemperature can be fatal to certain marine species. Trees and shrubs provide shade and habitat for marine species, while reducing fluctuation in water temperature.[66]

The Niger River is an important ecosystem that needs to be protected, for it is home to 36 families and nearly 250 species of fish, of which 20 are endemic, meaning they are found nowhere else on Earth. With the loss of habitat and the climate getting warmer, prevention of temperature increase is necessary to maintain some of the marine environments.[67] Other than restoring habitat, pollution can also be reduced. Problems such as pesticides from agricultural fields could be reduced if a natural pesticide was used, or the fields were moved farther away from the local waterways. Oil pollution can be lowered as well; if spills were reduced then habitat and environmental impacts could be minimized. By limiting the devastation caused by disturbances to the marine environment, such as pollution, overfishing, and habitat loss, the productivity and biodiversity of the marine ecosystems would increase.

3.6 **The Concept of Sustainable Development**

Sustainable development means economic development that is conducted without the depletion of natural resources.The Brundtland Report[68] published in "Our Common Future" gave the definition of as follows:

> Development that meets the needs of the present without compromising the ability of future generations to meet their own needs… A process change in which exploitation of resources, the direction of investments, the orientation of technological development and institutional change are all in

[66] *Ibid.*

[67] S O Adelana and Others, '*Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas'* [2011] (2) (6) *American Journal of Scientific and Industrial Research*834-839, 834.

[68] The Report was prepared by the World Commission on Environment and Development [WCED], a legal experts group set up by the United Nations General Assembly and chaired by the former Norwegian Prime Minister, Gro Harden Brundtland.

> harmony and enhance both current and future potential to meet human needs and aspirations.[69]

The publication of this Report led to the entrenchment of sustainable development in the Rio Declaration.[70] Principle 7 of the Rio Declaration declares:

> States should co-operate in the spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's Ecosystem. In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

The World Conference on the Human Environment[71] actually laid the foundation of what has come to be recognized as sustainable development. Principles 2 and 3 of the Stockholm Declaration state that:

> Natural resources of the earth must be safeguarded for the benefit of the present and future generations through careful planning and management and that of the earth to produce vital renewable resources must be maintained and wherever applicable restored or improved. What is needed now is a new era of economic growth, a growth that is forceful and at the same time socially and environmentally sustainable.

Sustainable development has been described as an implied development without destruction.[72] It is the judicious utilization of non-renewable resources for the present and

[69] World Commission on Environment and Development, Our Common Future (n 35).

[70] The Rio Conference was held from 3 to 14 June 1992 and produced the Rio Declaration.

[71] Also known as the Stockholm Conference 1992 was the first international conference that brought the whole world together to discuss issues facing the human environment and to agree on measures to take to combat environmental pollution and other imminent damage to the environment. The conference was held in Stockholm, Sweden in 1972 and produced a declaration popularly referred to as the Stockholm Declaration, a non-binding instrument.

[72] A T Taiwo, *'Waste Management towards Sustainable Development in Nigeria: A Case Study of Lagos State'* [2009] (4) (4) *International NGO Journal* 173.

future generations.[73] It also entails the use of non-renewable resources at a pace that is neither too fast nor too slow to the end that the natural wealth that they represent is converted into long-term wealth as they are used.[74]

3.7 Need for Attitudinal Change

According to Petroleum (Drilling and Production) Regulations, oil companies are obliged to "adopt all practicable precautions including the provision of up-to-date equipment" to prevent pollution, and must take "prompt steps to control and, if possible, end it" in the event that pollution occurs in the production process.[75]The companies are required to maintain all installations in good repair and condition in order to prevent "the escape or avoidable waste of petroleum" and cause "as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other properties thereon.[76] Oil companies are also required to comply with all local planning laws; they may not enter on any area held to be sacred or destroy any thing that is an object of veneration; and they must allow local inhabitants to have access, at their own risk, to roads constructed in their operating areas.[77] A crucial finding included in UNEP's report is the fact that SPDC failed in conforming to its own Standard Operating Procedures (SOP), Industry Best Practices (IBP), as well as those of the government. This failure is observed in the ramifications of Environmental Management [EM], environmental health, as well as policy and regulations. Also, many research studies have consistently pointed to the inadequate implementation of existing environmental

[73] *Ibid.*
[74] *Ibid.*
[75] O H Yakubu, '*Environmental Health Problems in Ogoniland through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies'* [2017] (4) (28) *Environments* 11-19, 12.
[76] *Ibid*, 12.
[77] *Ibid.*

protection laws such as the EIA Act, as the principal cause of the Niger Delta environmental degradation.[78]

Unless the responsible parties - the Nigerian government and MNOCs, as well as SPDC - take adequate action, environmental and public health, as well as policy and socioeconomic problems, which have consistently plagued the region may remain unabated. Attitudinal change is recommended in the following areas. The extent to which Environmental Management System [EMS] is adopted determines what the outcome for pollution preventionis. According to the US Pollution Prevention Act of 1990 1781, pollution prevention also referred to as source reduction, describes the practice of reducing to the barest minimum, the amount of hazardous substances or contaminants introduced into any waste stream, or otherwise discharged into multimedia (air, water and land), prior to recycling, treatment or disposal. It also emphasizes to reduction of hazards to environment and public health, by operations involving the discharge of such contaminants or pollutants.[79]

ISO 14001, the International Organization for Standardization on Environmental Management Systems emphasizes the need to prevent pollution which involves the adoption of processes, practices, techniques, materials, products, services, substances or energy that avoid or minimize or control (separately or in combination) the creation, emission or discharge of any type of pollutants or wastes thus reducing adverse environmental impacts. MNOCs operating in Nigeria can achieve pollution prevention by process or procedure modification, equipment and technology redesign as well as reformulation of products. Improvements in maintenance, housekeeping, inventory control and training programs are all pollution prevention efforts that can be enforced by the Nigerian oil and gas industry

[78]O H Yakubu, '*Environmental Health Problems in Ogoniland through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies'* [2017] (4) (28) *Environments* 11-19, 12.
[79]*Ibid.*

regulators to reduce adverse environmental impacts. The benefits of pollution prevention cannot be over-emphasized.[80] The MNOCs will enjoy substantial benefits from pollution prevention programs including costs savings from reduced raw material, pollution control, and liability costs, as well as environmental preservation, and risks reduction among workers in terms health and safety. It is crucial that pollution prevention be prioritized while pollution control been considered a last resort in EM.[81]

The government must empower existing regulatory bodies and ensure that they adopt established environmental laws in overseeing the MNOCs.[82] It is important that existing laws requiring updates should be reviewed and validated to address the prevailing issues. SPDC must undergo organizational change in terms of obligations to the environment for EM/EMS model to be viable.[83] With an EMS in place, emphasis is on pollution prevention, thus control measures including its accompanying obligations such as compensation could be reduced to a barest minimum.

[80] O H Yakubu, '*Environmental Health Problems in Ogoniland through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies'* [2017] (4) (28) *Environments* 11-19, 15.
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*

CHAPTER FOUR: THE INDIGENOUS PEOPLE IN RELATION TO OIL AND GAS INDUSTRY IN NIGERIA

4.1 Indigenous Peoples in the Niger Delta Region

There are three major ethnic groups in Nigeria, they are the Hausa/Fulani, Yoruba and Igbo leading to the coinage 'WAZOBIA' but apart from these three major ethnic groups, there are other ethnic groups .In this study, the ethnic group that is referred to are the Ogoni, Ijaw (Izon), the Egiand the Ibani (Bonny) people of Rivers State will be regarded as indigenous peoples. The Niger Delta region is located in the southern part of Nigeria along the coastal part of the country. It covers an area of approximately 112,110 kilometres and is home to a population of over 31 million people according to the 2006 National Population Census.[1] The region comprises nine States which traverse the south-south, south-east and south-west geopolitical zones in the country, although the core States are in the south-south. These States are Abia, AkwaIbom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers as shown in the map.[2]

The Niger Delta region shoulders the economic survival of Nigeria by accounting for 95 percent of the country's total foreign exchange as well as 80 percent of Nigeria's budget.[3] An estimated $300 billion have been reported to have been generated from the region from oil-related activities, though the revenue has not trickled down to the 'goose that lays the golden egg'.[4] The Movement for the Survival of the Ogoni People [MOSOP] claimed that Ogoniland alone has contributed over $30 billion in oil and gas revenue to the Federal government of

[1]Cited in African Centre for the Constructive Resolution of Disputes, *'Towards Ending Conflict and Insecurity in the Niger Delta Region'*<hhtps://www.reliefweb.int/report/Nigeria/towards-ending-conflict-and- insecurity-in- the-niger-delta-region> accessed 3 September 2017.
[2]Niger Delta Development Commission (Establishment) Act [NDDC Act] 1999, s 1; See also S Lebura (n 2) 33.
[3] S Lebura, *'Stakeholder Relationships in the Nigerian Oil Industry'* (Ph.DDessertation, De Montfort University2013) 34.
[4]*Ibid*; B R Konne, *'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland* [2014](47) *Cornell International Law Journal* 181, 182.

Nigeria from 1958 when commercial oil production began in Ogoniland to 1990 when oil production ceased.[5] Despite this huge contribution to national survival, the region remains the poorest and impoverished in the country, apparently because it is the abode of the minority ethnic groups who had been and still are economically strangulated, politically marginalized and ecologically devastated.

The Niger Delta region is one of the most densely populated regions in Africa. It is regarded as one of the ten most important wetlands and marine ecosystems in the world and serves as a habitat for many rare species, including several primates, ungulates and birds.[6] The Niger Delta is also home to a vast mangrove ecosystem which serves as an important habitat for vast fish population found along the West African coastline.[7] Nigeria's oil production takes place in this region, with Royal Dutch Shell (now Shell Petroleum Development Company of Nigeria Limited) [SPDC] as the largest operator.[8]

The major occupations of the people of the Niger Delta are farming and fishing. The region is home to many indigenous groups including the Ogoni, Ijaw (Izon), Itshekiri, Urhobo, Isoko, Esan, Egi, Ikwerre, Ibani, Ibibio, Efik and many others. These indigenous groups rely heavily on their natural resources for survival. However, oil and gas production in the Niger Delta has caused ecological devastation of epic proportion to their lands as communities have been forced to relocate from their original lands in search of food due to pollution.[9] Due to feelings of injustice and poverty in the midst of plenty, the Niger Delta region began waves of

[5]See statement by Dr. G.B. Leton, President of the Movement for the Survival of the People in the preamble to the Ogoni Bill of Rights [OBR] <https://www.mosop.org/ogoni_bill_of_Rights_1990.pdf> accessed 2 October 2017.

[6] B R Konne (n 18) 182; U C Anochie and O M Onyinye, *'Evaluation of Some Oil Companies in the Niger Delta Region of Nigeria: An Environmental Impact Approach'* [2016](3)(2) *International Journal of Environment*
and Pollution Research 13, 19.

[7]B R Konne (n 18) 182.

[8] B R Konne (n 18) 182; U C Anochie and O M Onyinye, *'Evaluation of Some Oil Companies in the Niger Delta Region of Nigeria: An Environmental Impact Approach'* [2016](3)(2) *International Journal of Environment and Pollution Research* 13, 19.

[9]U C Anochie and O M Onyinye (n 1) 27.

agitation particularly in the 1990s, first by the MOSOP led by renowned author and environmentalist, Ken SaroWiwa.[10] This agitation which adopted a non-violent approach was replaced by violent agitations and later full-scale militancy as Niger Delta militias targeted oil facilities, staff and expatriates.[11]

Ever since, there have been armed agitations after another and despite the amnesty granted to the militants by the President Musa Yar'Adua-led government in 2009, militancy and hostility has not abated in the region.[12] Recently, a group known as the Niger Delta Avengers [NDA] embarked on series of co-ordinated attacks against the installations and facilities of MNOCs, leading to a declaration of force majeure in a number of facilities.[13] Talks and dialogues have been held but it appears no concrete agreement has been hatched. In the recent 1st October 2014 Independence-day broadcast, the President of the Federal Republic of Nigeria, Muhammadu Buhari announced the Federal Government's commitment towards dialoguing with all agitating groups in the Niger Delta with a view to amicably resolving all contentious issues.[14] It is only hoped that such dialogue will actually hold in an atmosphere of transparency, inclusivity and sincerity of purpose, and that agreements reached will be implemented to pave way for peace to return to the troubled region. Meanwhile, the Nigerian National Petroleum Corporation [NNPC] has reported that oil production due to the insecurity in the Niger Delta region has dropped significantly from 2.2 million b/pd to 1

[10] See generally, O Shoaga, *'Human Rights Concerns and Corporate Social Responsibility in Nigeria'* <https://www/epcr.eu/Files/PaperProposal/52e7e104-26f1-4c91-90ce-0194e84e98f7.pdf accessed 13 October 2017.

[11] U S Energy Information Administration, Country Analysis Brief: Nigeria (2016) 6 <https://www.marcon.com/librarycountry-briefsNigeria/nigeria.pdf> accessed 15 September 2017.

[12] *Ibid.*

[13] U S Energy Information Administration, Country Analysis Brief: Nigeria (2016) 6 <https://www.marcon.com/librarycountry-briefsNigeria/nigeria.pdf> accessed 15 September 2017.

[14] *Ibid.*

million 1/pd.[15] A total revenue of between $50 - $100 billion has been reportedly lost due to Niger Delta militancy between 2006 and 2016.[16]

The Niger Delta region is home to numerous indigenous peoples. According to the International Labour Organization [ILO] and the African Commission on Human and Peoples' Rights [ACHPR], there are numerous but open-ended criteria for identifying indigenous peoples. The generally acceptable ones are: cultural distinctiveness; the extent to which their culture and way of life are under threat, their dependence on their immediate and natural environment; a history of suffering from exploitation, colonization, discrimination and dominance; self-identification, as well as political and social marginalization.[17] Based on the foregoing criteria, the Ogoni, Egi, Ijaw and Ibani are identified in this study as indigenous groups. It should be noted that the Niger Delta has a uniquely complex ethnic composition and therefore there are arrays of indigenous populations scattered along the length and breadth of the nine States of the region. For instance, the Isoko, Urhobo, Itshekiri, Okrika, Kalabari, Ikwerre, Ogba, Ekpeye, Abua/Odual, Etche, Anmang, Ibibio, Biase and numerous other groups which also meet the foregoing criteria.[18]

4.2 Overview of the indigenous People

In this study, four indigenous groups – the Ogoni, Ogba/Egi, Ijaw and Ibani (Bonny) are chosen to represent the indigenous people of the Niger Delta. These four groups are chosen due to their being key oil producing areas of the Niger Delta. Virtually all the major players in the oil and gas industry operate in these cardinal points which are all located in Rivers, Bayelsa and Delta States. They serve as transit, production and terminal points in the oil and

[15] U S Energy Information Administration, Country Analysis Brief: Nigeria (2016) 6 <https://www.marcon.com/librarycountry-briefsNigeria/nigeria.pdf> accessed 15 September 2017.
[16] *Ibid.*
[17] ILO/ACHPR, Nigeria: Constitutional, Legal and Administrative Provisions concerning Indigenous Peoples (ILO, Geneva 2009) 3.
[18] ILO/ACHPR, Nigeria: Constitutional, Legal and Administrative Provisions concerning Indigenous Peoples (ILO, Geneva 2009) 3.

gas exploration and exploitation cycle. They are also renowned for the most coordinated and sustained agitations for resource control and environmental justice against the MNOCs and the Nigerian governments, and till today appear to be the most vocal of the ethnic minorities in the region. In the following segment each of these indigenous groups is examined more closely.

4.2.1 The Ogoni

Ogoni is located in the south-eastern part of Rivers State. It is presently found in the Rivers South-East Senatorial District. Ogoni comprises four local government areas of Khana, Gokana, Tai and Eleme. According to the 1990 National Population Census figure, the Ogoni people number approximately 832,000 people,[19] and are said to have settled in the area well before the 15th century.[20] In terms of landmass, the Ogoni occupy an area of approximately 404 square miles in the Niger Delta region of Nigeria.[21]Ogoniland has six kingdoms, namely: Ken-Khana, Nyon-Khana, Babbe, Gokana, Tai and Eleme, with four main languages – related but mutually unintelligible – spoken.[22] This is shown in Figure 6 below.

Traditionally, the Ogoni economy depends exclusively on agriculture – farming and fishing.[23] They revere the land on which they live as well as the rivers that surround them. In the Ogoni local language, a tradition of "honouring the land', also called 'land rites' is referred to as 'DoonuKuneke'. Land means everything to the Ogoni. It serves as the god of the people and as such is worshipped.[24] Land is regarded as the provider of food. The planting season which begins in October every year is observed not just as an agricultural activity in Ogoniland, but

[19]United Nations Environment Programme, *Environmental Assessment of Ogoniland* (UNEP, Nairobi 2011) 22.
[20]K S Wiwa, *Genocide in Nigeria: The Ogoni Tragedy* (Port Harcourt: Saros International Publishers 1992).
[21]ILO/ACHPR (n 36) 3.
[22]'The Ogoni Nation' <https://www.mosop.net/mosopogoniKhtm/> accessed 4 October 2017.
[23]K S Wiwa (n 38).
[24]R Boele, *Report of the UNPO Mission to Investigate the Situation of the Ogoni of Nigeria* (UNPO, The Hague 1995) 7.

also as a spiritual, religious and social occasion interspersed with festivities.[25] As is the norm in other parts of Nigeria, the land tenure system of the Ogoni people is based on native law and custom. Under the customary law of the people, land belongs to the community.[26] Individuals only have rights of usufruct and as such may not sell or alienate interest in land.[27] Only the community could sell or alienate land.[28] However, land could be partitioned to the various families constituting a community, and land partitioned to a family may pass to the individual members of such family who may validly alienate same.

In 1958, oil was discovered in Ogoniland. SPDC and its joint venture partners operate five major oil fields in Ogoniland, each with its flow stations. In 1993, the total production potential from SPDC's Ogoni fields was approximately 28,000 barrels per day which translates to roughly 3 percent of SPDC's overall production at the time. CNL also operated in Ogoniland until 1993 but on a smaller scale.[29] As in other parts of the Niger Delta, the environment in Ogoniland has been damaged by oil production. Ken SaroWiwa, an internationally known author, environmentalist and leader of the Ogoni people, claimed that the environment in Ogoniland had been 'completely devastated by three decades of reckless oil exploitation or ecological warfare by Shell.[30] The Ogoni people felt that the prevailing revenue allocation formula which places the control of oil revenue in the hands of the federal government of Nigeria dominated by the major ethnic groups which contribute little to the nation's revenue, while subjecting the Ogoni people to environmental abuse and degradation, was discriminatory.[31] In order to seek justice from the Nigerian State, the leaders of Ogoni

[25] L S Pyagbara, *'The Ogoni of Nigeria: Oil and Exploration'*<https://www.refworld.org/pdfid/469cbfce0.pdf accessed 16 September 2017.
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.*
[29] B Manby, *Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis* (New York: Carnegie Council on Ethics and International Affairs) 5.
[30] *Ibid.*
[31] ILO/ACHPR (n 36) 4.

founded the Movement for the Survival of the Ogoni People [MOSOP], which was used to specifically highlight the grievances of the Ogoni people against SPDC and the Nigerian government, on the national and international stage. As a result, MOSOP's activities directly threatened the foundations of the Nigerian military government, which responded swiftly by unleashing terror, mayhem and repression on the Ogoni people.[32] Still in agitations for their rights as indigenous peoples under international law and in search of justice from the Nigerian State, MOSOP adopted the Ogoni Bill of Rights [OBR] in 1990, a document which chronicled the grievances of the Ogoni people and their demand for political autonomy to participate in the affairs of the Nigerian government as a distinct and separate unit, including the right to the control and use of a fair proportion of Ogoni economic resources for Ogoni development. MOSOP's political demands were targeted at the Nigerian Federal Government, but it also accused Shell of full responsibility for the genocide in Ogoniland. In October 1990, MOSOP presented the OBR to the then military Head of State, General Ibrahim BadamosiBabangida, but received no response.[33] In December 1992, after about two years of waiting, MOSOP sent its demands to Shell, Chevron and the NNPC, together with an ultimatum that they pay back royalties and compensation for the use and exploitation of Ogoni economic resources, within 30 days or quit Ogoniland.[34] On January 4, 1993, a date afterwards known as "Ogoni Day", MOSOP held a mass rally in Ogoniland, followed by series of non-violent protests against Shell and its cronies. Shell withdrew its staff from Ogoniland in January 1993 and ceased production at its facilities in Ogoniland in mid-1993, citing intimidation and attacks on its staff.[35] These demonstrations of organized political opposition to both government and oil companies provoked a military crackdown in Ogoniland. Ken SaroWiwa and other MOSOP leaders were detained severally in 1993. In

[32]*Ibid.*
[33]ILO/ACHPR, Nigeria: Constitutional, Legal and Administrative Provisions concerning Indigenous Peoples (ILO, Geneva 2009) 3.
[34]*Ibid.*
[35]*Ibid.*

1995, the new military Head of State, General SaniAbacha, and the Military administrator of Rivers State, Lieutenant Colonel Musa Komo, set up the Rivers State Internal Security Task Force, a special military unit in 1994 headed by the dreaded major Paul Okuntimo specifically to deal with the Ogoni crisis. The task force committed grave human rights abuses in Ogoniland ranging from detentions, harassments, extra-judicial execution of MOSOP leaders and activists as well as involvement in promoting violent clashes between the Ogoni and neighbouring ethnic groups, particularly the Okrika and Andoni.[36]

In May 1994, four prominent Ogoni leaders were brutally murdered. The Nigerian authorities claimed that the murder of the Ogoni leaders was instigated by Ken SaroWiwa and other MOSOP leaders, and this led to their arrest, detention and trial before a Kangaroo tribunal. Sixteen members of the MOSOP leadership were put on trial, and nine including Ken SaroWiwa, were eventually convicted and sentenced to death by the special military tribunal specially constituted for the case and whose procedures blatantly violated all known international standards of due process. Denuded of the right of appeal, the Ogoni nine were executed on 10th November 1995 amidst intense international condemnation and protests.[37]

4.2.2 The Ogba Nation

The Ogba nation or kingdom, also called ‘Ali-Ogba which is the local name for Ogba Kingdom, is one of the indigenous groups in the Niger Delta region. Ogbaland is located in the central Orashi-Sombreiro plains of south-west Rivers State. Geographically, Ali-Ogba stretches from about 4 50^0N to 5 30^0N and extends from about 625^0E to about 640^0E.[38] Spatially, it covers an area of 920 square kilometres in the northern part of the Niger Delta

[36]*Ibid*, 6.
[37]ILO/ACHPR, Nigeria: Constitutional, Legal and Administrative Provisions concerning Indigenous Peoples (ILO, Geneva 2009) 3.
[38]F J Ellah, *Ali-Ogba: A History of Ogba People* (Enugu: Fourth Dimension Publishers 1995) 4.

region situated within the River Niger flood plains. Ali-Ogba is bordered on the West by the Orashiriver and on the east by the Sombreiro River.[39] The ancestors of the present-day Ali-Ogba communities are believed to have migrated from the ancient Benin Kingdom to their present location during the period 3015 BC to circa 1600 AD. Ali-Ogba is divided into three main village or community groups, namely: Egi (meaning dry land); Igburu (meaning swamp or wetland) and Usomini (meaning water side). These three community groups are made up of 14 extended family systems. The population of Ali-Ogba was estimated to have increased to 157,205 people in 2002.[40]

The physical landscape of Ali-Ogba – a relatively well-drained land and rich soil, fresh water, rivers, creeks and wetlands, secondary forests and abundant sunshine and rainfall all year round, predisposes the people to a life of farming and agriculture. Food crops such as cassava, plantain, potato, maize, yam, cocoyam, banana as well as vegetables like okra, pepper, melon and pumpkin, among other crops, are grown extensively in the rich soil. Similarly, fruit trees such as paw-paw, orange, guava, coconut, mango, pineapple, pear, apple, etc are widely cultivated in gardens, orchards, plantations and around communities' farmlands and surroundings. The land of Ali-Ogba is also rich and heavily endowed with mineral resources, notably oil and gas.[41]

The oil producing communities in Ogba/Egbema/Ndoni Local Government Area of Rivers State are mostly rural communities. Ogbaland currently hosts SPDC (Shell), NAOC and Elf Nigeria in the Obagi fields. Ogba communities account for 101 out of the 416 oil wells

[39] *Ibid.*
[40] Umuogba USA Inc, 'Ali-Ogba: Legend of Origin, Indigenous Political Structure, and Economy (2006) <https://www.umuogbausa.org/forms/aloi-ogba%20origin.html> accessed 4 October 2017.
[41] Umuogba USA Inc, 'Ali-Ogba: Legend of Origin, Indigenous Political Structure, and Economy (2006) <https://www.umuogbausa.org/forms/aloi-ogba%20origin.html> accessed 4 October 2017.

belonging to Rivers State representing about 24.3 percent of Rivers State oil wells or 8.4 percent of Nigeria's total oil wells.[42]

In terms of volume of production, it is estimated that between1976 and 1979, NAOC Ali-Ogba fields produced 90.2 million barrels out of the company's total output of 310.4 million barrels, while Elf's Ogba production was 77.1 million barrels out of a total of 113 million barrels. Between 1971 and 1975, Elf's Obagi field located within Obagi, Ogbogu, Oboburu, Idu, Erema and Akabuka communities contributed 108.8 million barrels of oil representing 90 percent of Elf's total oil output.[43] However, the activities of oil and gas communities in Ali-Ogba has impacted negatively on the people as frequent oil spills and gas flaring have been daily occurrences. The peoples' sources of livelihood, namely, fishing and farming have been affected adversely as oil wastes are discharged directly into the river and on land. Despite the contributions of Ali-Ogba to the Federal Government's revenue base since the commencement of exploration activities in the area, there have been little or no significant community development projects undertaken by the MNOCs in many of the communities.[44] The land wears a face of poverty and lack even as vast expanses of community lands have been forcefully acquired by government for oil and gas production. There is no federal government presence in the land.

4.2.3 The Ijaw (Izon)

The Ijaws also known as "Ijo" or "Izon" are regarded as the oldest settlers in the Niger Delta area of Nigeria.[45] The Ijaws are the fourth largest ethnic groups in Nigeria, numbering 14,

[42] *Ibid.*
[43] *Ibid.*
[44] Umuogba USA Inc, 'Ali-Ogba: Legend of Origin, Indigenous Political Structure, and Economy (2006) <https://www.umuogbausa.org/forms/aloi-ogba%20origin.html> accessed 4 October 2017.
[45] J Alagoa, *A History of the Niger Delta* (Enugu: OnyomaResearch Publications1972) 17.

825,211.[46] They are found in 5 out of the 36 states of Nigeria.[47] As with other indigenous peoples, the Ijaws have close inseparable ties with their environment, and their survival absolutely depends on their land.[48] The land provides all their needs and is revered as sacred. The land tenure system is communal in nature. Under this system, land is owned and managed by the community and extended family.[49] Like the Ogonis, Ijaw communities engage in fishing and aqua-cultural economy, though farming is also practiced on a smaller scale.[50]Ijaw communities are hosts to a number of MNOCs, notably SPDC, NAOC, Texaco-Chevron, among others. It is claimed that due to oil pollution and environmental degradation there has been a dislocation of the traditional economy of the Ijaw communities. The Ijaws also feel aggrieved because of their perennial marginalization, neglect and exploitation in the hands of the majorities-dominated-federal Government,[51] despite their huge contributions to the sustenance of the country's survival, while at the same time being forced to bear the brunt of the environmental degradation and ecological devastation associated with the MNOCs largely poorly monitored activities which the United Nations Environment Programme [UNEP] refers to as grossly below both national standards and international best practices.[52]

4.2.4 The Ibani (Bonny)

Bonny, also known as "Ibani" or "Ubani" kingdom is an ancient kingdom founded in the 13th century. It is a traditional state based on the town of Bonny which is located in Rivers State, Nigeria. It became an important trading slave port, and later the trading of palm oil products.

[46]<https://www.ijaw.net/people.html> accessed 4, October 2017.
[47] These are Rivers, Bayelsa, Delta, AkwaIbom and Ondo States. See <https://www.minorityrights.org/Dev/mrg_dev_title6_nigeria> accessed 4, October 2017.
[48]Y Banigo, '*The State, INCs and Indigenous Peoples: The Case of the Ijo-Speaking People'* (Unpublished Ph.DDessertation, University of Port Harcourt, Port Harcourt 2006) 200.
[49]*Ibid*, 201.
[50]*Ibid*.
[51]Y Banigo (n 66) 185.
[52] UNEP, Environmental Assessment of Ogoniland (UNEP, Nairobi 2011) 12 <https://ww.postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 4 October 2017. [UNEP REPORT]

The Bonny people are classified as one of the sub-tribes within the larger Ijaw group. The Kingdom of Bonny is located 40 kilometres south-west of Port Harcourt, the capital of Rivers State and currently constitutes one of the 23 local government areas of the State. It lies within latitudes 40^0 278^8 and longitude of 7^0 1000^0 and borders the shores of the southern Atlantic Ocean into which its main river, the Bonny Estuary, finally empties itself. Bonny kingdom shares boundary with the Billes and the Kalabaris in the West, the Andonis in the East, the Okrikas and the Ogonis in the North and the Atlantic Ocean in the South.[53]

As with the other indigenous groups already discussed, the Ibanis are predominantly fishermen and fisherwomen. They depend on their environment for their livelihood and survival. In the 1990s, the Federal Government of Nigeria, in collaboration with 3 multinational partners, Shell Gas BV, CLEAG Limited (ELF) and Agip International BV started the multi-billion-dollar project – known as the Nigeria Liquefied Natural Gas Limited (NLNG). Due to its strategic location, Bonny Island, especially Finima community area, are hosts to a number of MNOCs, including SPDC, NAOC, CNL, MPNU AND ELF. The Nigeria LNG plant is operated by the NLNG Limited with the following partners: NNPC (40%); SPDC (25.6 percent); Total (15 percent) and Eni (10.4 percent).[54]

4.3 Indigenous People's Agitation for Environmental Protection in Nigeria

Indigenous peoples' demand for a better protection in Nigeria dates back to the colonial times. In all the three regions of the country, minority fears were wide-spread, precipitating the publication of various charters of demand. Such charters of demand began with the demands for the creation of the Calabar-Ogoja-Rivers State in the East and the creation of the Mid-West State in the West. Their counterparts in the Middle-Belt demanded the creation of

[53]Bonny Historical Society, 'About Bonny Kingdom' <https://www.bonnyhistoricalsociety.com/about-bonny-kingdom> accessed 4 October 2017.

[54] U S Energy Information Administration, Country Analysis Brief: Nigeria (2016) 16 <https://www.marcon.com/librarycountry-briefsNigeria/nigeria.pdf> accessed 15 September 2017.

a similar State as a sanctuary for the minorities in the North which they believed would guarantee their post-independence autonomy. They argued for constitutional safeguards as an alternative in pursuit of this objective. Through the medium of their newly founded political parties - United Middle Belt Congress (UMBC), the United Nigeria Independence Party (UNIP) and the Borno Youth Movement (BYM) demanded that the problems of the minorities be resolved before independence. They advocated that the minority problems should be resolved either by new States being created, or the map of Nigeria should be redrawn to annul their minority status. The Niger Delta indigenous groups led by Late Chief Harold DappaBiriye also demanded that States should be created for the Niger Delta to allay their fears of domination by the majority tribes in the emergent Nigeria. Therefore, the subject of State creation was a turbulent one throughout the constitutional conferences of the early 1950s.

The colonial authorities ultimately set upa commission of inquiry headed by Sir Henry Willink in 1957 to look into the fears expressed by the minorities and make appropriate recommendationsand strengthen their confidence in the soon to be independent Nigeria State.[55] Specifically, the terms of reference of the Commission were as follows:

1) To ascertain the facts about the fears of minorities in any part of Nigeria and to propose means of allaying those fears whether well or ill founded.

2) To advise what safeguards should be included for this purpose in the consultation of Nigeria.

3) If no other solution but as a last resort to make detailed recommendations for the creation of one or more new States and in that case:

    a) to specify the precise area to be included in such a State or States;

[55] This commission became known as the Willink'sCommission.

b) to recommend the governmental and administrative structure most appropriate.

c) to assess whether any State recommended would be viable from an economic and

administrative point of view and what the effect of its created and on the federation.

4) To report its findings and recommendations to the Secretary of States for the Colonies.

Among other recommendations, the Commission noted that the fears haboured by the minorities were genuine fears and the future was regarded with real apprehensionbut rejected the demands for State creation on two grounds, first, onthe potentially divisive character of State creation; and second, the cost and associated various implications involved in creation of new States. The Commission, instead, recommended thata "Bill of Rights" be included in the independence constitution as a way of promoting national integration and guaranteeing minority rights.

The Commission also recognized the Niger Delta area as a "special area" and recommended the establishment of the Niger Delta Development Board [NDDB] to address the developmental imbalance and special needs of the region. The Commission acknowledged the topography of the Niger Delta and its need for accelerated development, both infrastructural and economic.

The NDDB established under the 1960 Constitution has undergone several changes. Ever since the Willink's Commission made its recommendation, indigenous people in the Niger Delta have continued to agitate for better economic, infrastructural and environmental

conditions. Successive administrations in Nigeria have devised various programmes and interventions to address the demands of the indigenous people in the Niger Delta. In 1992, the NDDB was scrapped and in its place the Oil Mineral Producing Areas Development Commission [OMPADEC] was established with the objectives of embarking on human and infrastructural development of the area. Due to certain administrative issues and non-performance, OMPADEC was scrapped and in its place, the Niger Delta Development Commission [NDDC] has been established. The core mandates of the NDDC include, among others, formulate policies and guidelines for the development of the Niger Delta area;[56] to conceive, plan and implement projects and programmes for the sustainable development of the Niger Delta;[57] and tackle the ecological and environmental problems that arise from oil exploration and exploitation in the Niger Delta and advise the Federal Government and the member States on the prevention and control of oil spillages, gas flaring and environmental pollution.[58]

4.4 **The Indigenous People's Experience**

It is a notorious fact that series of pollution resulting from the activities of Oil and Gas industry no doubt has become visible problem of the terrain.

The United Nations Environment Programme [UNEP] carried out an environmental assessment of Ogoniland. The report of the study published in 2011[59] showed that despite the bogus claims of Shell Nigeria and other MNOCs that their operations meet international standards, they have violated the right of indigenous peoples to a healthy environment. UNEPs field observations and scientific investigations reveal that oil contamination in

[56] Niger Delta Development Commission (Establishment, Etc) Act No. 6 of 2000 [NDDC Act], s 7(1)(a).
[57] *Ibid*, s 7(1)(b).
[58] *Ibid*, s 7(1)(k).
[59] UNEP, Environmental Assessment of Ogoniland (UNEP, Nairobi Kenya 2011) <https://www.pastconflict.uncp.ch/publications/OEA/UNEP_OEA_pdf> accessed 15 September 2017 [UNEP Report].

Ogoniland is widespread and severely impacts different components of the environment.[60] The study establishes that even though the oil industries are no longer active in Ogoniland, oil spills have continued to be a regular occurrence in the area.[61] The report notes that the Ogoni people live with this pollution every day.[62] In this segment, evidence from the UNEP Report showing MNOCs abysmal failure in observing environmental protection standards in their operations in the Niger Delta region of Nigeria are presented under the following headings:

A. Contaminated Soil and Groundwater

In respect of contaminated soil and groundwater, the UNEP team found as follows:

(i) The UNEP Report indicates that soil pollution by petroleum hydrocarbons in Ogoniland is extensive in land areas.[63]

(ii) At two-thirds of the contaminated land sites close to oil industry facilities which were assessed in detail, the oil contamination exceeds Nigerian national standards as stipulated in the EGASPIN.[64]

(iii) At 44 sites, the hydrocarbon pollution has reached groundwater at levels on excess of the

Nigeria standards as stipulated in the EGASPIN.[65]

(iv) The most serious case of groundwater contamination is at Nsisi-OkenOgale in Eleme Local Government Area [LGA], close to the Nigerian National Petroleum Company

[60] UNEP Report, 9.
[61] *Ibid.*
[62] *Ibid.*
[63] UNEP, Environmental Assessment of Ogoniland (UNEP, Nairobi Kenya 2011) <https://www.pastconflict.uncp.ch/publications/OEA/UNEP_OEA_pdf> accessed 15 September 2017 [UNEP Report].
[64] *Ibid.*
[65] *Ibid*, 10.

{NNPC] product line where an 8cm layer of refined oil was observed floating on the groundwater which served the community wells.[66]

B. Aquatic Lives and Marine Living Resources

In respect of aquatic resources, the UNEP team found as follows:

(i) The surface water throughout the creeks contains hydrocarbons. Floating layers of oil vary from thick black oil sheens. The highest reading of dissolved hydrocarbon in the water column of 7,420µg/l was detected at Araba-Otokroma, bordering Gokana and Andoni LGAs.

(ii) Fish tend to leave polluted areas in search of cleaner water, and fishermen must therefore also move to less contaminated areas in search of fish.[67]

(iii) The fisheries sector is suffering due to the destruction of fish habitat in the mangroves and highly persistent contamination of many of the creeks, making them unsuitable for fishing.[68]

C. Public Health

In the area of public health, the UNEP team made the following findings:

(i) The Ogoni community is exposed to petroleum/hydrocarbons in outdoor air and drinking water, sometimes at elevated concentrations. They are also exposed through dermal contacts from contaminated soil, sediments and surface water.[69]

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[66] *Ibid*, 10.
[67] UNEP, Environmental Assessment of Ogoniland (UNEP, Nairobi Kenya 2011) <https://www.pastconflict.uncp.ch/publications/OEA/UNEP_OEA_pdf> accessed 15 September 2017 [UNEP Report].
[68] *Ibid.*
[69] *Ibid.*

(ii) Community members of Nsisi-okenOgale are drinking water from wells that are contaminated with benzene, a known carcinogen, at levels over 900 times above the World Health Organization [WHO] guideline.[70]

(iii) Hydrocarbon contamination was found in water taken from 28 wells at 10 communities adjacent to contaminated sites. At seven wells the samples are at least 1000 times higher than the Nigerian drinking water standard of 3µg/l. Local communities are aware of the pollution and its dangers but state that they continue to use the water for drinking, bathing, wasting and cooking because they have no alternative.[71]

(iv) Benzene was detected in all air samples at concentrations ranging from 0.155 to 48.2µg/m^3. Approximately 10 percent of detected benzene concentrations in Ogoniland were higher than the concentrations WHO and the United States Environmental Protection Agency {USEPA] report as corresponding to a 1 in 10,000 cancer risk. Many of the benzene contaminations detected in Ogoniland were similar to those measured elsewhere in the world, given the prevalence of fuel use and other sources of benzene. Some benzene concentrations in Ogoniland were higher than those being measured in more economically developed regions where benzene concentrations are declining as a result of efforts to reduce benzene exposure.[72]

4.4.1 Lack of Government Monitoring Will

The weakness and porosity of the Nigerian monitoring and enforcement mechanisms in the oil and gas industry has been established in the UNEP Study. In respect of the standard of operations and technology adopted in oil and gas production in Ogoniland, UNEP found that:

[70] *Ibid*, 11.
[71] UNEP, Environmental Assessment of Ogoniland (UNEP, Nairobi Kenya 2011) <https://www.pastconflict.uncp.ch/publications/OEA/UNEP_OEA_pdf> accessed 15 September 2017 [UNEP Report].
[72] *Ibid.*

(i) The control, maintenance and decommissioning of oilfield infrastructure in Ogoniland are inadequate. Industry best practices and SPDC's own procedures have not been applied and thereby resulting in public safety issues.[73]

(ii) Remediation by enhanced natural attenuation [RENA] – so far the only remediation4method observed by UNEP in Ogoniland has not proven to be effective. Currently, SPDC applies this technique on the land surface layer only based on the assumption that given the nature of the oil, temperature and an underlying layer of clay, hydrocarbons will not move deeper. However, this basic assumption has proved unsustainable as observations made by UNEP show that contamination can often penetrate deeper than 5 metres and has reached the groundwater in numerous locations.[74]

(iii) Ten out of fifteen investigated sites which SPDC records show as having completed remediation still have pollution exceeding the SPDC and Federal Government remediation closure values. The study found that the contamination at eight of these sites has migrated to the groundwater.[75]

(iv) The new Remediation Management System [RMS] introduced in January 2010 and adopted by all Shell Exploration and Production Companies in Nigeria still do not meet the Nigerian regulatory requirements or international best practices.[76]

[73] UNEP, Environmental Assessment of Ogoniland (UNEP, Nairobi Kenya 2011) <https://www.pastconflict.uncp.ch/publications/OEA/UNEP_OEA_pdf> accessed 15 September 2017 [UNEP Report] 12.
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*

4.4.2 Lack of Political Will to Enforce Environmental Standards

The Federal Government of Nigeria is both a partner in the oil industry and doubles as the enforcer of environmental laws and standards in the oil and gas industry. Specifically, the Federal Government holds a 55 per cent stake of every joint venture with SPDC.[77] This makes it the majority shareholder in the oil and gas business in the country. This has made it difficult for the Nigerian State to take decisive actions towards ending or preventing pollution to the environment of the indigenous peoples. For instance, the Associated Gas Re-Injection Act[78] was conceived of as early as 1979 to phase out gas flaring by MNOCs operating in the oil and gas industry by 1st January 1984.[79] However, Section 3(1) of the Act watered down the prohibition by the phrase "without the permission in writing of the Minister". Subsection (2) says where the Minister is satisfied that the 1st January 1984 is not feasible, he may authorize a company to continue to flare associated gas from the field provided the company agrees to pay the penalty the Minister may specify from time to time for every 28.317 SCM of gas flared.[80]

In addition, the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations[81] was made by the Minister of Petroleum Resources to legally extend the 1st January 1984 cut-off date for the cessation of all forms of flaring of gases by oil and gas companies specified under section 3(1) of the Act. Instead of mustering the political will to enforce the deadline so that the air quality of the environment of indigenous peoples would be restored, the Federal Government in a somersault turned gas flaring activities into a revenue-spinning policy. To date, gas flaring is still legal in Nigeria. Abdul-Gafaru reports that in 2000 alone, 95 percent

[77] B R Konne, *'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell on and Ogoniland'* [2014] (47) 195 Cornell International Law Journal 181, 186.
[78] [AGRA] Cap A10 LFN 2004.
[79] *Ibid*, s 3(1).
[80] AGRA 2004, s 3(2)(b).
[81] No. 43 of 1984.

of associated gas was flared in Ogoni land, compared to a mere 0.4 percent flared in the entire United States [US].[82]

This lack of political will to enforce environmental standards is exemplified by the delay in passing the bill to prohibit gas flaring in Nigeria sponsored by Senator OsitaIzunaso of Imo West Senatorial District into law.[83] The Bill had specified 31st December 2008 as the cut-off date to phase out gas flaring in the country with provisions on penalty for flaring gas after the deadline and without the Minister's permit[84] calculated at the current cost of each SCM of gas at the international market.[85]

Furthermore, it is the same lack of political will that had dribbled the passage of the Petroleum Industry Bill in the National Assembly which was introduced in 2008 to effect a comprehensive overhaul and review of the oil and gas industry regulatory and policy frameworks, to among other things, monitor and enforce environmental standards. Politics and lack of political will cum pressure and intense lobbying from MNOCs stalled progress on this all-important Bill until as recently as 2017 when the Senate passed the governance version of it.[86] The House of Representatives also passed its version of the PIGB in December 2017.[87]

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[82] A Abdul-Gafaru, '*Are Multinational Corporations Compatible with Sustainable Development? The Experience of Developing Countries'*, 16 <https://www.scheller.gatech.edu/centers-initiatives/aciber/projects/workingpaper/2007/001-07-08.pdf> accessed 19 October 2017.

[83] A Bill for An Act to Prohibit Flaring of Natural Gas in Nigeria and for Matters Connected Therewith [SB 126] <https://www.nass.gov.ng/document/download/1039> accessed 12 October 2017.

[84]Under Section 3(i) of the Bill, the Minister of Petroleum Resources may permit gas flare in cases of start-up, equipment failure or shut down. It is submitted that there grounds are reasonable and logical when compared with the grounds for authorizing gas flare under the Associated Gas Re-Injection (Continued flaring of Gas) Regulations No. 43 of 1984.

[85]Gas Flaring (Prohibition and Punishment) Bill 2008, ss 1 and 2.

[86] It was passed as the Petroleum Industry Governance Bill [SB 237] 2017 <https://www.nass.gov.ng/document/download/1039> accessed 25 December 2017.

[87]E Ovuakporie, 'At Last, Reps Pass PIGB' <https://www.vanguardngr.com/2018/01/last-reps-pass-pigb-2/>
accessed 18 January 2018.

It does appear that this lack of political will is caused by the desperation of the Nigerian Government to attract foreign investors to invest in the development of oil and gas in Nigeria. Nigeria operates a mono-economy in which revenue from oil and gas operations constitutes more than 90 percent of the country's foreign exchange and over 80 percent of her total earning. Being a majority shareholder and at the same time a regulator of the industry also presents a situation of conflict of interest. It is submitted that the health and environment of the indigenous peoples ought to override every other narrow and parochial considerations which render it difficult for the government to muster the needed political will to enforce environmental standards.

4.4.3 Institutional Issues

The UNEP Report also assessed the effectiveness of the various Nigerian institutions charged with the responsibility of regulating oil and gas operations in the country to ensure that such operations comply with good oil field practice and international standards, particularly with respect to environmental protection and the protection of the life and health of indigenous peoples, and found as follows:

(i) The EGASPIN (which was first issued in 1992) and revised in 2002 forms the operational basis for the regulation of the environment in the oil and gas industry in the Niger Delta region of Nigeria. However, the key guideline is internally inconsistent with respect to the criteria which trigger remediation or indicate its closure popularly referred to as "intervention" and "target" values respectively. The 'intervention' and 'target' values are one of the most important criteria for oil spill and contaminated site management.[88]

[88] UNEP, Environmental Assessment of Ogoniland (UNEP, Nairobi Kenya 2011) <https://www.pastconflict.uncp.ch/publications/OEA/UNEP_OEA_pdf> accessed 15 September 2017 [UNEP Report]11.

(ii) The Department of Petroleum Resources [DPR] and the National Oil Spill Detection and Response Agency [NOSDRA] have differing interpretations of EGASPIN. This enables oil industry operators to close down remediation process well before contamination has been eliminated and soil quality has been restored to achieve functionality for human, animal and plant life.[89]

(iii) The Nigerian Government agencies concerned lack qualified technical experts and resources with which to discharge their duties effectively. In the five years since NOSDRA was established so few resources have been allocated that the agency has no proactive capacity for oil-spill detection. This makes the regulatory authorizes to be wholly reliant on the oil and gas industry operators (i.e spillers) for logistical support when planning their inspection visits to some spill sites.[90]

(iv) The oilfield in Ogoniland is interwoven with the Ogoni community. The fact that communities have set up houses and forms along rights of way [ROW] is one indicator of the loss of control on the part of the pipeline operator and the government regulator.

(v) The UNEP project team observed hundreds of industrial packing bags containing 1,000-1,500m^3 of waste believed to be cuttings from oil drilling operations dumped at a former sand mine in OkenOyaa in Eleme LGA. The open disposal of such waste in an unlined pit shows that the chain of custody in the region between the waste generator, transporter and disposal facility is not being followed.[91]

Thus, contrary to the claims of the oil and gas companies operating in the Niger Delta region of Nigeria, particularly the MNOCs to the effect that their operations are carried out in

[89] *Ibid,* 12.
[90] *Ibid.*
[91] UNEP, Environmental Assessment of Ogoniland (UNEP, Nairobi Kenya 2011) <https://www.pastconflict.uncp.ch/publications/OEA/UNEP_OEA_pdf> accessed 15 September 2017 [UNEP Report].

compliance with environmental friendly standards and good oil field practices, reports of studies conducted by expert groups, in the region have disputed such claims. Two of such reports are based on a study conducted by Amnesty International[92] and the findings of the African Commission on Human and Peoples' Rights in the case of SERAC v Nigeria[93]

4.4.4 Amnesty International Report[94]

This study reveals that oil spills, waste dumping and gas flaring are endemic in the Niger Delta. The Report indicates that this pollution which has plagued the Niger Delta region for decades has caused damage to the soil, water and air quality. The livelihoods of thousands of people who depend on farming and fishing have also been badly affected.[95] It states that these unabated pollution and degradation have far-reaching implications and have been under-reported and received little attention from the Nigerian government and the oil companies.[96] The Amnesty International Report lists the main human rights issues thrown up by pollution in the Niger Delta to include: Violations of the right to adequate standard of living, including the right to food which is a direct consequence of oil-related pollution and environmental damage on agriculture and fisheries – two main sources of livelihood of the Niger Delta people;[97] violations of the right to livelihood through widespread damage to agriculture and fisheries which are the main sources of survival of the people;[98] violations of the right to water. This occurs when petroleum hydrocarbon and waste materials are discharged or spilled

[92]Amnesty International is a global movement of about 2.2 million people in more than 150 countries and territories who campaign to end grave abuses of human rights.
[93]Case No. ACHPR/COMM/AO44/1,Afr. Comm'n Hum. & Peoples Rights, 51-53 delivered on 27 May 2002.
[94]Amnesty International, Nigeria: Petroleum, Pollution and Poverty in the Niger Delta (Amnesty International Publications 2009) <hhps://www.es.amnesty.org/uploads/media/REPORT_Petroleum_Pollution_and_Poverty_in_the_Niger_Delta.pdf> accessed 4 December 2017.
[95]Amnesty International, Nigeria: Petroleum, Pollution and Poverty in the Niger Delta (Amnesty International Publications 2009) <hhps://www.es.amnesty.org/uploads/media/REPORT_Petroleum_Pollution_and_Poverty_in_the_Niger_Delta.pdf> accessed 4 December 2017, 9.
[96]*Ibid.*
[97]*Ibid*, 10.
[98]*Ibid.*

into the water used for both domestic and industrial applications;[99] violations of the right to health. This is brought about by the failure to protect the underlying determinants of health such as a healthy environment, and failure to enforce laws which protect the environment and prevent pollution;[100] the absence of any adequate monitoring of the human impact of oil-related pollution notwithstanding the fact that the oil industry operates in a relatively densely populated Niger Delta region;[101] failure to provide affected communities with adequate information or ensure consultation on the impacts of oil operations on their human rights;[102] failure to ensure access to effective remedy for people whose human rights have been breached.[103]

Amnesty international concludes that the Federal Government of Nigeria as regulator of the oil and gas industry and the oil and gas companies as operators are to blame for the weak environmental standards guiding MNOCs in their operations in Nigeria.

4.4.5 Federal Government's Failure to Protect the Right of Indigenous People to a Healthy Environment

The Commission found Nigeria in breach of her obligations to respect, protect and fulfill the right to health and the right to a healthy environment under the African Charter on Human and Peoples' Rights.[104] The Commission held that under the duty to protect, governments are under obligation not to threaten the health and environment of their citizens as well as refraining from interfering with the best attainable state of physical and mental health of the

[99] *Ibid.*
[100] *Ibid.*
[101] *Ibid.*
[102] Amnesty International, Nigeria: Petroleum, Pollution and Poverty in the Niger Delta (Amnesty International Publications 2009) <hhps://www.es.amnesty.org/uploads/media/REPORT_Petroleum_Pollution_and_Poverty_in_the_Niger_Delta.pdf> accessed 4 December 2017, 9.
[103] *Ibid.*
[104] ACHPR 1981, arts 16 and 24.

people.[105] In the view of the Commission, this obligation entails that Parties to the African Charter may not engage in conduct which undermines the right to health and the right to a healthy environment.[106]

As regards the obligation to fulfill, the Commission recognized that this duty requires State Parties to take reasonable steps to prevent pollution and ecological degradation as well as to promote the sustainable development and use of natural resources.[107] The Commission notes that compliance with this obligation entails that State Parties require the conduct of environmental impact assessments for the purpose of providing communities with information regarding their exposure to hazardous substances.[108]

With respect to the duty or obligation to protect the environmental rights of citizens, the Commission declared that the ACHPR requires States Parties to adopt reasonable and adequate measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecological sustainable development and use of natural resources.[109] Consequently, the Commission held that failure on the part of a State Party to the Charter to regulate the conduct of third parties, including corporations whose operations and activities interfere with the rights to health and a healthy environment is contravention of its obligation to protect.[110]

The Commission found the Nigerian Government in violation of its duty to respect, fulfill and protect the human and environmental rights of the Ogoni people by failing to: monitor the oil production activities of SPDC and other MNOCs operating in Ogoniland; by failing to

[105]*Ibid*, art 16.
[106]*SERAC* v *Nigeria*, Comm. No.ACHPR/COMM/1044/1, African Commission on Human and People's Rights (27 May 2002) 52.
[107]*Ibid.*
[108]*SERAC* v *Nigeria*, Comm. No.ACHPR/COMM/1044/1, African Commission on Human and People's Rights (27 May 2002) 53.
[109]*Ibid*, 52.
[110]*Ibid*, 57.

enforce domestic and international environmental standards which require safety measures and prompt oil spill response to prevent further environmental pollution and ecological degradation; and by failing to consult with indigenous communities before commencing oil operations.[111]

A critical examination of the findings of the UNEP expert team during the environmental assessment of Ogoniland shows that the claims of MNOCs operating in the Niger Delta region of Nigeria regarding their high standards of operations do not hold water but are mere face-saving and image-laundering claims. In several areas of oil operations, the expert team found MNOCs operating in Ogoniland to be in breach of Nigeria's environmental standards in the oil and gas industry. If the operations of MNOCs were adjudged not to have met even the porous local standards of Nigeria, it becomes evident that such operational procedures and techniques cannot be expected to pass the test of good oil field practice. Specifically, the Mineral Oils (safety) Regulations[112] and Regulations 25 and 36 of the Petroleum (Drilling and Production) Regulations[113] require oil and gas companies operating in the country to ensure good oil field practice in their operations. Regulation 7 of the Oil Safety Regulations provides that 'good oil field practice' 'shall be considered to be adequately covered by the appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute's [API] Codes or the American Society of Mechanical Engineers [ASME] Codes'.

Interestingly, the API, ASME and the United States [US] Integrity Management [IM] for High Consequence Areas [HCAs] as well as the Alaska Best Available Technology [BAT] industry practice represent a widely accepted 'good oil field practice' standard in the petroleum industry all over the world. The UNEP expert team found that the MNOCs operating in Ogoniland, particularly SPDC did not even comply with its own procedure and

[111] *Ibid*, 54-55.
[112] [Oil Safety Regulations] 1962.
[113] [Petroleum Drilling and Production Regulations] 1969.

industry best practices in the control, maintenance and decommissioning of oil field infrastructure in the area. The study also pointed out that the RMS procedure for remediation adopted by SPDC in its oil spill response in Ogoniland falls squarely far below the Nigerian regulatory requirements and international best practices.

With respect to the preparedness of Nigeria's regulatory, monitoring and enforcement authorities to ensure compliance with regulatory standards, the UNEP team found DPR and NOSDRA technically deficient. This shows a clear intention not to be capable of protecting the right of indigenous peoples to a healthy environment. It should be noted that even though the above study was restricted to Ogoniland, its findings can be extrapolated to other parts of the Niger Delta where oil and gas production is taking place. In fact, it can be asserted that if the UNEP study made these damning findings in Ogoniland where active oil operations had ceased for more than two and a half decades, a study conducted in other indigenous communities where active oil and gas operations are carried out daily since the late 1950s will reveal even a more devastating extent and scale of pollution of the environment and its effect on the lives and health of the people.

CHAPTER FIVE: LEGAL AND CONVENTIONALFRAMEWORK FOR HEALTHY ENVIRONMENT IN EXPLORATION AND EXPLOITATION OF OIL AND GAS AND SOME JURISDICTION

5.1 Nigerian Regulatory Regime of CSR of Oil and Gas Company

Nigeria, has through laws and regulations attempted to regulate the MNOCs operations in the country's oil and gas industry, particularly in the area of environmental standards as well as good oilfield practice. This is because of the deleterious impacts their operations have on not only human health in their areas of operation but also on the wider ecosystem. There are several provisions in the Nigerian oil and gas regulatory framework that require oil and gas companies to observe good oil field practice.[517] This segment examines Nigeria's legal framework in the oil and gas industry, highlighting those provisions requiring MNOCs to observe good oil field practice as well as pointing out their weaknesses and also looking into international convention on environmental protection. The applicable laws and regulations are as follows:

i. Constitution of the Federal Republic of Nigeria 1999 (as amended);
ii. National Environmental Standards and Regulations Enforcement Agency Act**;**
iii. National Oil Spill Detection and Response Agency (Establishment) Act;
iv. Environmental Impact Assessment Act;
v. Oil and Navigable Waters Act;
vi. Petroleum Act;
vii. Petroleum (Drilling and Production) Regulations 1969;

[517]O F Oluduro and O Oluduro, '*Oil Exploitation and Compliance with International Environmental Standards: The Case of Double Standards in the Niger Delta of Nigeria'* [2015](37) *Journal Law, Policy and Globalization* 68.

viii. Environmental Guidelines and Standards for the Petroleum Industry;

ix. Associated Gas Re-Injection Act;

x. Associated Gas Re-Injection (Continued Flaring of Gas) Regulations;

xi. Petroleum Industry Governance Bill.

Each of these laws and regulations is discussed below.

5.1.1 Constitution of the Federal Republic of Nigeria, 1999[518]

Environmental protection is not expressed as an absolute responsibility of the government. Nor is the right to a clean, safe and healthy environment recognized under the 1999 Constitution. The closest reference to the word 'environment' in the Constitution is in chapter two which is christened "Fundamental Objectives and Directive Principles of State Policy'. Section 20 declares the environmental objectives of the Nigerian State as "the protection and improvement of the environment as well as safeguarding the water, air, land, forest and wildlife of Nigeria". The provision did not confer any right on any person as far as the protection of the environment and conservation of the natural resources of the country is concerned. Section 20 of the 1999 Constitution is contained in chapter two of the same Constitution. Section 6(6)(c) of the Constitution provides to the effect that:

> 6(6) The judicial powers vested in accordance with the foregoing provisions of this section-
>
> Shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in chapter II of the Constitution.

The import of Section 6(6)(c) is that environmental objectives and indeed all other objectives and directive principles of State policy enumerated in chapter II are not enforceable at law in

[518](As Amended) [1999 Constitution].

Nigeria.[519] At best, they remain as mere aspirations which government should endeavour to attain. Courts in Nigeria have had cause to pronounce on the status of chapter II provisions of the 1999 Constitution, including its predecessor in a plethora of cases. In *Okogiev Attorney-General of Lagos State*,[520] the plaintiff as trustee of the Roman Catholic Schools challenged the decision of the Lagos State government to abolish private primary schools in the State. Plaintiff premised his action on the ground that government's policy violated the right to expression guaranteed in the 1979 Constitution, among other grounds. However, it was the defendant's contention that government's policy was lawful as the operation of private schools run contrary to the State's obligation to provide "equal and adequate educational opportunities" under Section 18(1) of the 1979 Constitution. It was held that while the phrase "equal and adequate educational opportunities" did not necessarily restrict the right of private institutions or other persons to provide similar or different educational facilities at their own expense, taste and preferences; that the Directive Principles must have to conform to and run subsidiary to the fundamental human rights provisions. This position was also reiterated in *Jakandev Governor of Lagos State*[521]where the court stated that fundamental objectives and directive principles of State policy are not justiciable except as otherwise provided by the Constitution. Similarly, in *UzokwuvEzeonu* II,[522]the Supreme Court made a very useful statement of the law when it observed.

> As to the non-justiciability of the Fundamental Objectives and Directives Principles of State Policy, section 6(6)(c)… says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of state organs if they acted in clear disregard of them… the Directive principles can be made justiciable by legislation.

[519]OV C Ikpeze, *'Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development'* [2015](5)(18) Developing Country Studies 48.
[520](1981) 1 NCLR 218.
[521](1981) 1 NCLR 152.See also Attorney General of Ondo State v Attorney General of the Federation(2002) 9 NWLR (Pt 772).
[522](1991) 6 NWLR (pt 200) 781.

Thus, the provisions of chapter II can be made justiciable where appropriate laws are made to give life to it. In this connection, the 1999 Constitution vests upon the National Assembly the exclusive legislative power to make laws for the establishment and regulation of authorities for the Federation or any part thereof "to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in the Constitution."[523]

With respect to environmental rights, the 1999 Constitution did not recognize the right of Nigerians to a clean safe and healthy environment. This means that no human rights enforcement action can be founded on activities that cause harm to the environment or affect the health and well-being of Nigerians, particularly with regard to the activities of MNOCs. Attempts to enforce environmental right as a component of the right to life have not been completely successful.[524] Courts in other jurisdictions have adopted a progressive and expansive approach to the interpretation of third generation rights, especially the right to a healthy environment clustered under fundamental principles of state policy in their constitutions. For instance, Section 48A of the Constitution of India is worded in similar fashion as Section 20 of the 1999 Constitution. It declares that "the state shall endeavour to improve and protect the environment and to safeguard the forest and wildlife of the country,[525] including forests, lakes and wild life and to have compassion on living creatures".[526] Indian courts have interpreted this provision in conjunction with the fundamental right to life and consistently held that right to life will be illusory if the environment on which life itself depends is polluted, such that life can no longer be

[523]1999 Constitution, item 60, Part 1 of the Second Schedule to the Constitution.
[524]*Gbemre* v *SPDC,* Suit No.FHC/CS/B/153/2005 (Unreported). The Decision was given on 14 November 2005; *Okpara* v *SPDC,* Suit No. FHC/PHC/518/2005 [unreported]. Judgment of the Federal High Court, Port Harcourt Division, delivered on 29 September 2006.
[525]Constitution of India 1948 (As Amended by the 52nd Amendment 1985), art 48A.
[526]*Ibid*, art 51 A.

sustained.[527] In other words, Indian courts have held that the full enjoyment of the right to life protected as a fundamental right is wholly dependent on the enjoyment of a pollution-free and poison-free environment. Thus, the right to a clean, safe and healthy environment is implied in the right to life.

5.1.2 National Environmental Standards and Regulations Enforcement Agency Act[528]

Environmental objectives is one of the fundamental objectives and direct principles of State policy and by virtue of Part 1 of the Second Schedule to the 1999 Constitution, the legislative competence to enact laws for the establishment and regulation of authorities whether for the Federation of Nigeria or any part of it, for the purpose of promoting and enforcing the observance of environmental protection resides exclusively with the National Assembly.[529] Pursuant to this mandate, the National Assembly enacted the Federal Environmental Protection Agency [FEPA] Act[530] to establish and enforce environmental standards in all sectors of national life. The FEPA Act was replaced in 2007 by the National Environmental Standards and Regulations Enforcement Agency [NESREA] Act. Thus, NESREA Act is the principal statute on environmental protection in Nigeria. The Act establishes the National Environmental Standards Regulations Enforcement Agency [NESREA] as the co-coordinating federal agency and charged it with the responsibility of protection and development of the environment; biodiversity conservation, as well as the sustainable development of Nigeria's natural resources, in general, and environmental technology, in particular. NESREA is also empowered to co-ordinate and liaise with relevant stakeholders

[527] *M C Mehta* v *Union of India* AIR 1988 SC 1037 [the grange water pollution Case]; *RLEK* v *State of UttarPradesh* AIR 1985 SC 652; *Vellore Citizens' Welfare Forum* v *Union of India* AIR 1996 SC 2716; *Narmada BachaoAndolan* v *Union of India* AIR 2000 SC 3753.
[528] [NESREA Act] No.25 of 2007.
[529] Item 60, Part 1 of Second Schedule to the 1999 Constitution.
[530] [FEPA Act] Cap F10, LFN 2004.

within and outside Nigeria in relation to matters of environmental standards, regulations, rules, laws, policies and guidelines.[531]

Furthermore, NESREA is given specific mandates to:

(a) Enforce compliance with laws, guidelines, policies and standards on environmental matters;[532]

(b) Co-ordinate and liaise with relevant stakeholders both within and without Nigeria on issues of environmental standards, regulations and enforcement;[533]

(c) Enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment, including climate change, biodiversity conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wild life, pollution, sanitation and such other environmental agreements as may come into force from time to time;[534]

(d) Enforce compliance with policies, standards, legislations and guidelines on water quality, environmental health and sanitation, including pollution abatement;[535]

(e) Enforce compliance with guidelines and legislations on sustainable management of the ecosystem, biodiversity conservation and the development of Nigeria's natural resources;[536]

(f) Enforce compliance with any legislation on sound chemical management, safe use of pesticides and disposal of spent packages of chemicals and pesticides;[537]

[531]NESREA Act 2007, ss 1(1) and 2.
[532]NESREA Act 2007, s 7.
[533]*Ibid*, s 7(b).
[534]NESREA Act 2007, s 7(c).
[535]*Ibid*, s 7(d)
[536]*Ibid*, s 7(e).

(g) Enforce compliance with regulations on the importation, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and wastes other than in the oil and gas sector;[538]

(h) Enforce through compliance monitoring, the environmental regulations and standards on noise, air, land, seas, oceans and other water bodies other than the oil and gas sector;[539]

(i) Enforce environment control measures through registration, licensing and permitting systems other than in the oil and gas sector;[540]

(j) Conduct environmental audit and establish data bank on regulatory and enforcement mechanisms of environmental standards other than in the oil and gas sector;[541] among other functions.

To carry out the foregoing mandates effectively, NESREA is given power to, inter alia, prohibit procedures and use of equipment or technology that undermines environmental quality;[542] conduct field follow-up of compliance with set standards and take procedures prescribed by law against any violator;[543] and to conduct public investigations on pollution and the degradation of natural resources, other than investigations on oil spillage.[544] NESREA is further empowered to submit for the approval of the Minister of Environment, proposals for the evolution and review of existing guidelines, regulations and standards on

[537]*Ibid*, s 7(f).
[538]NESREA Act 2007, s 7(g).
[539]*Ibid*, s 7(h).
[540]NESREA Act 2007, s 7(j).
[541]*Ibid*, s 7(k).
[542]*Ibid*, s 8(d).
[543]*Ibid*, s 8(e)
[544]*Ibid*, s 8(g).

environment other than in the oil and gas sector, with respect to specific aspects of environmental quality.[545]

A careful look at the foregoing provisions of the NESREA Act shows without doubt that the functions of the Agency are to co-ordinate and enforce all extant laws, rules, regulations, and standards on all aspects of the environment except in the oil and gas sector. The Agency also has the function of monitoring and policing compliance among stakeholders with relevant environmental policies, laws, regulations and standards applicable to their spheres of operation. One notable provision in the functions of NESREA is the removal of the oil and gas sector from the searchlight of the Agency. It is not clear why NESREA is prevented from enforcing compliance with laws, guidelines, policies and standards on environmental quality in the oil and gas industry.[546] It appears that enforcement of environmental standards in the oil and gas industry is currently undertaken by the Department of Petroleum Resources [DPR] which is an agency under the Ministry of Petroleum Resources and so it will amount to a duplication of enforcement efforts. It is also probable that due to the complex nature of the oil and gas industry and the many standards and guidelines to enforce and monitor, adding monitoring and enforcement of standards in the oil and gas industry to NESREA's already congested functions will totally break it down as the Agency lacks the resources to carry out its present obligations. However, the inclusion of oil and gas among the international treaties on the environment to be enforced by NESREA under Section 7(c) is contradictory in the light of Section 7(g)(h)(j) and (k) which clearly excludes the oil and gas industry from the circumference of NESREA's powers.[547] It is therefore submitted that necessary amendment be made to expunge the phrase, 'oil and gas' from Section 7(c) of the

[545] NESREA Act 2007, s 8 k(i)-(xiv).
[546] M T Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: *A New Dawn in Environmental Compliance and Enforcement in Nigeria' [*2012](8)(1) Law, Environment and Development Journal118, 123.
[547] M T Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: *A New Dawn in Environmental Compliance and Enforcement in Nig*eria' [2012](8)(1) Law, Environment and Development Journal 118, 123.

Act to accord with its clear intents.[548] The main limitation of this Act to the present study is that it does not apply to the oil and gas industry which is the environment of this study.

5.1.3 National Oil Spill Detection and Response Agency (Establishment) Act[549]

This Act establishes the National Oil Spill Detection and Response Agency [NOSDRA] as the Agency responsible for the co-ordination and implementation of the National Oil Spill Contingency Plan for Nigeria.[550] Specifically, the Agency is required to:

(a) Establish a viable national operational organization that ensures a safe, timely, effective and appropriate response to major or disastrous pollution;[551]

(b) Identify high-risk areas as well as priority areas for protection and clean up;[552]

(c) Establish the mechanism to monitor and assist and where expedient direct the response, including the capability to mobilize the necessary resources to save lives, protect threatened environment and clean up to the best practical extent of the impacted site;[553]

(d) Maximize the effective use of the available facilities and resources of corporate bodies, their international connections and oil spill co-operatives, that is clean Nigeria Associates [CNA] in implementing appropriate spill response;[554]

(e) Ensure funding and appropriate and sufficient pre-positioned pollution combating equipment and materials, as well as functional communication network system required for effective response to major oil pollution;[555]

[548] *Ibid*, 124.
[549] [NOSDRA Act] No.15 of 2006.
[550] NOSDRA Act 2006, s 5.
[551] *Ibid*, 5(a).
[552] *Ibid*, s 5(b).
[553] *Ibid*, s 5(c).
[554] *Ibid*, s 5(d).
[555] NOSDRA Act 2006, s 5(c).

(f) Provide a programme of activities, training and drill exercises to ensure readiness to oil pollution preparedness and response and the management of operational personnel;[556]

(g) Co-operate and provide advisory services, technical support and equipment for purposes of responding to major oil pollution incident in the West African sub-region upon request by any neighbouring country, particularly where a part of the Nigerian territory may be threatened;[557]

(h) Provide support for research and development in the local development of methods, materials and equipment for oil spill detection and response;[558]

(i) Co-operate with the International Maritime Organization and other national, regional and international organizations in the promotion and exchange of results of research and development programmes relating to the enhancement of the state-of-the-art of the oil pollution preparedness and response, including technologies, techniques for surveillance, containment, recovery, disposal and clean up to the best practical extent, among other objectives.[559]

In order to realize the objectives stated above, the Agency is empowered to undertake surveillance and ensure compliance with all existing environmental legislation and the detection of oil spills in the petroleum sector;[560] to receive reports of oil spill spillages and co-ordinate oil spill response activities throughout Nigeria; [561] to co-ordinate the implementation of the National Contingency Plan [NCP] as may be formulated from time to time by the Federal Government, among other functions.[562]

[556]*Ibid*, s 5(f).
[557]*Ibid*, s 5(g).
[558]NOSDRA Act 2006, s 5(h).
[559]*Ibid*, s 5(i).
[560]*Ibid*, s 6(1)(a).
[561] NOSDRA Act 2006, s 6(1)(b).
[562]*Ibid*, s 6(1)(c).

The NOSDRA Act lays down the procedure for reporting of oil spill and requires that the oil spiller report an oil spill to NOSDRA in writing within 24 hours after the occurrence of an oil spill.[563] Where an oil spiller defaults in making the report within the period aforesaid, it shall be liable to pay a penalty of N500, 000.00 for each day of default.[564] Another salient provision of the Act is the obligation to clean up an impacted site to all practical extent, including remediation which is imposed on an oil spiller. Failure to clean up the impacted site by the oil spiller attracts a penalty of N1 million.[565] An oil spiller is deemed to have given the report of spill referred to in Section 6(2) where the notice is delivered at the nearest zonal office of the Agency.[566]

The special functions of the Agency are enumerated in Section 7 of the NOSDRA Act. The Agency shall ensure the co-ordination and implementation of the NCP within Nigeria, including within 200 nautical miles from the baseline from which the breadth of the territorial waters of Nigeria is measured;[567] undertake surveillance, reporting, alerting and other response activities relating to oil spillages,[568] encourage regional co-operation among member States of West African sub-region and the Gulf of Guinea for combating oil spillage and pollution in Nigeria's contiguous rivers;[569] strengthen national capacity and regional action to prevent, control, combat and mitigate marine pollution;[570] promote technical co-operation between Nigeria and member States of the West African sub-region.[571]

The Act confers on the Ministry of Environment through the Minister of Environment power to issue the National Oil Spill Contingency Plan [NOSCP] to ensure a timely, effective and

[563]*Ibid*, s 6(2).
[564]*Ibid*.
[565]NOSDRA Act 2006, s 6(3).
[566]*Ibid*, s 6(4).
[567]*Ibid*, s 7(a).
[568]*Ibid*, s 7(b).
[569]*Ibid*, s 7(c).
[570]*Ibid*,NOSDRA Act 2006, s 7(d).
[571]*Ibid*, s 7(e).

appropriate response to major or disastrous oil spill incidents in Nigeria.[572] The plan defines the role of government in respect of its responsibility regarding oil spillages, whether deliberate or accidental, from whatever source and irrespective of size, which threaten the country.[573] In order to mitigate the adverse effect of oil pollution arising from any spillages on the environment and the health of the people, the plan recognizes three levels of oil spill contingency planning for the oil industry. These include: Tier one (company plans); Tier two (co-operative plans) and Tier three (Government plan for major or disastrous oil spills). While tier one is compulsory for each oil producing and marketing company, tier two is formed by the oil producing companies to assist member companies in handling oil spillage cases that an individual company is unable to combat. The Government Plan/Tier three provides for a response capability to major or disastrous oil pollution which is beyond the response capabilities of individual companies or their co-operative.[574]

From the foregoing discussion, it seems clear that NOSDRA was established to address the issue of oil spill which is associated with every stage of oil production, from the exploratory stage to the marketing stage. The Agency was designed to respond swiftly to oil spill occurrences which could threaten the nation, considering its impact on the fragile ecosystem of the country, particularly the Niger Delta where oil and gas are produced. Judging from the functions and powers of NOSDRA, effective performance of its mandates can go a long way in addressing environmental pollution in the oil industry.

Its limitations are that the Act does not empower NOSDRA to enforce preventive measures. In other words, the act is more reactionary than preventative as it focuses on the capability to respond to a spill after it has occurred. Thus, its process begins with the notification of a spill

[572]National Oil Spill Contingency Plan [NOSCP] for Nigeria (Revised) 2010<https://www.giwacaf.net/wp-content/uploads/pdf/plan_ng_en.pdf> accessed 4 October 2017.
[573]*Ibid*, 2.
[574]National Oil Spill Contingency Plan [NOSCP] for Nigeria (Revised) 2010<https://www.giwacaf.net/wp-content/uploads/pdf/plan_ng_en.pdf> accessed 4 October 2017.

incident by the polluter to the Agency. The penalty of N500, 000.00 for each day of default in reporting oil spill appears not deterrent enough as the MNOCs operating in the Niger Delta can easily afford to pay the penalty instead of reporting and incurring huge remediation cost. In addition, the penalty for failure to clean up is the payment by the polluter of a paltry sum of N1 million by a polluter MNOC that rakes in billions of dollars in profits annually. It is fair to assume that with this watery penalty, all an MNOC will do is to pay N1 million which is paid to the Agency to boost government revenue and not to the indigenous peoples directly who exposed to the hazards associated with oil spill. It is submitted that the revocation of the operating licence of a polluter for failure to clean up an impacted site would serve as sufficient deterrence and accords with global best practices in the oil and gas industry. It is further submitted that Section 6(2) of the NOSDRA Act encourages indirectly the pollution of the Niger Delta environment and ought to be amended.

However, the Act empowers NOSDRA to mobilize resources and personnel to contain oil spill. Through the NOSCP, MNOCs are mandatorily required to develop a plan for the containment of oil spill in the event that one occurs in the course of their operations. To that extent, NOSDRA Act at least represents a modest effort on the part of government to secure the safety of the environment and health of the people of Nigeria. The NOSCP also provides for collaboration among the various stakeholders who have one contribution or the other to make in the task of responding to oil spill incidents.

5.1.4 Environmental Impact Assessment Act[575]

The United Nations Conference on Environment and Development [UNCED] articulated a significant step towards the integration of environmental protection concerns into development projects. The Conference introduced new techniques for implementing

[575] [EIA Act] Cap.E12 LFN, 2004.

environmental standards, such as Environment Impact Assessment [EIA] study, access to information and the formal integration of environment and development in the pursuit of better standard of living. Thus, the EIA Act adopts a preventative and precautionary approach to environmental protection by requiring a mandatory Environmental Impact Study [EIS] of all proposed projects which portend the likelihood of inflicting damage on human health and the environment before such projects are approved for execution. The objectives of an EIA are stated to be:

(a) To establish before a decision is taken by any person, authority, corporate body or unincorporated, including the Federal government, State government or Local Government intending to undertake or authorize the undertaking of any activity that may likely or to a significant extent affect the environment or have environmental effects on those activities shall first be taken into consideration;[576]

(b) To promote the implementation of appropriate policy in all federal lands (howsoever acquired), States and Local Government Areas consistent with all laws and decision making processes through which the goal and objective in paragraph (a) above may be realized;[577] and

(c) To encourage the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant environmental effects on boundary or inter-State or on the environment of bordering towns and villages.[578]

From the above objective, it is clear that the Act seeks to hold both the government and private sector to a high degree of environmental consciousness and accountability by insisting

[576]EIA Act 2004, s 1(a).
[577]EIA Act 2004, s 1(b).
[578]*Ibid*, s 1(c).

that every project which has the effect or likelihood of impacting the human environment adversely should not be approved for execution unless the proponent carries out an EIS to determine the likely impacts of such project on the environment as well as the remedial measures.

The EIA Act prohibits the public or private sector of the nation's economy from undertaking any project or authorize projects or activities without prior consideration of their environmental impacts, at an early stage.[579] Where from the extent, nature or location of a proposed project or activity, there is a likelihood of a significant effect on the environment an EIA must first be carried out before its approval and eventual execution.[580]

The Schedule to the Act contains mandatory study activities. These are activities or projects in respect of which an EIA study must be conducted before such projects are to be approved for implementation. One notable inclusion in the list is activities relating to petroleum exploration, production and development. For instance, projects relating to oil and gas fields development; construction of off-shore pipelines in excess of 50 kilometres in length; construction of oil and gas separation, processing, handling, and storage facilities; construction of oil refineries, as well as construction of product depots for the storage of petrol, gas or diesel (excluding service stations) which are located within 3 kilometres of any commercial, industrial or residential areas and which have a combined storage capacity of 60,000 barrels or more, require mandatory EIA study.[581]

The EIA Act requires a proponent of any project to apply in writing to NESREA to undertake an EIA study. The EIA shall, among other things, include:

[579]EIA Act 2004, s 2(1).
[580]*Ibid*, s 2(2).
[581] EIA Act 2004, Schedule to EIA Act, para 12(a)-(e).

(a) A description of the proposed activities;[582]

(b) A description of the potential affected environment including specific information necessary to identify and assess the environmental effects of the proposed activities;[583]

(c) A description of the practical activities, as appropriate;[584]

(d) An assessment of the likely or potential environmental impacts on the proposed activity and the alternatives, including the direct or indirect cumulative, short-term and long-term effects;[585]

(e) An identification and description of measures available to mitigate adverse environmental impacts of proposed activity and assessment of those measures;[586]

(f) An indication of gaps in knowledge and uncertainty which may be encountered in computing the required information;[587]

(g) An indication of whether the environment of any other State, Local Government Area or areas outside Nigeria is likely to be affected by the proposed activity or its alternatives;[588] and

(h) A brief and non-technical summary of the information required under paragraphs (a)-(g) above.[589]

The NESREA is required to afford a wide spectrum of stakeholders the opportunity to make comments on the EIA of the activity before reaching a decision whether to approve the proposed project or not.[590] The relevant stakeholders include government agencies, members of the public, experts in any discipline relevant to the area of study, as well as interest

[582]EIA Act 2004, s 4(a).
[583]*Ibid*, s 4(b).
[584]*Ibid*, s 4(c).
[585]*Ibid*, s 4(d).
[586]*Ibid*, s 4(e).
[587]EIA Act 2004, s 4(f).
[588]*Ibid*, s 4(g).
[589]*Ibid*, s 4(h).
[590]EIA Act 2004, s 7.

groups.[591] Indigenous communities are not expressly mentioned but it can safely be assumed that they fall under the category of "interest groups". However, it is not clear what weight their comments will command as they are not involved in the decision process. The decision to approve the implementation of the proposed project rests squarely with NESREA. What is worrisome still is that there is no opportunity to challenge the decision of the Agency where affected communities are not satisfied with the process. This is even more so as the Federal Government in which the approving Agency, NESREA, is resident holds a major stake in all oil and gas exploration and production project undertaken by MNOCs in the Niger Delta, thus creating a situation of conflict of interest which could affect the transparency of the process. In Douglas v SPDC,[592] the plaintiff sought, inter alia, a declaration that SPDC could not lawfully commission, carry out or operate their Liquefied Natural Gas [LNG] projects without first complying with the EIA Act. The court struck out the action on the ground that the plaintiff lacked the locus standi to maintain the suit. By this decision, it appears the court has placed the final decision on whether or not to approve an EIA report in the NESREA.

The EIA Act represents an important improvement on the efforts of the Nigerian State to protect the environment from pollution and destruction of the major components of the ecosystem. This is aimed at ensuring that in our quest for development, the interest of the environment and the future generation of Nigerians is protected. The major weakness of the Act is that it does not recognize the right of the affected communities to seek redress in the event that they are aggrieved by the decision of the Agency. In other words, apart from the mere right to comment on the EIA report, host communities of proposed projects have no participatory right in the EIA process. Again, the Act dispenses with the need for EIA where in the opinion of the Agency, the project is in the list of projects which the President of Nigeria is of the opinion that the environmental effects of the project is likely to be minimal;

[591] *Ibid.*
[592] (1995) 6 NWLR (Pt 350) 258.

where the project is to be carried out during national emergency for which temporary measures have been taken by the Government; and where the Agency is of the opinion that the proposed project is to be carried out in response to the need for public health or safety.[593]

It is not clear what parameter the President of Nigeria will adopt in coming to the conclusion that a proposed project will have a minimal impact on the environment and so such be excluded from EIA study. The same applies to projects to be carried out by the Federal, State and Local Government authorities where it is stated that such projects to be executed in the exercise of powers or functions conferred on each tier of government may dispense with EIA study.[594] It is submitted that these discretions should be removed or qualified and appropriate guidelines prescribed for the exercise of such discretions for the greater protection of the environment.

5.1.5 Oil and Navigable Waters Act[595]

This Act was specifically enacted to domesticate the International Convention for the Prevention of Pollution of the Sea by Oil.[596] ONWA addresses exclusively industrial wastes generated through air pollution. Under the Act, it is an offence for any owner or master of a ship to discharge crude oil, fuel and lubricating oil or heavy duty oil from a Nigerian ship into a prohibited sea area.[597] Similarly, the discharge of oil into any of the prohibited sea areas through the transfer of oil from any apparatus either to or from land by a master or owner of vessel or an occupier of land on which a vessel is kept is an offence under the Act.[598] The Act defines the phrase 'prohibited sea areas' to include the whole of the sea within the seaward

[593]EIA Act 2004s 15(1)(a)-(c).
[594]*Ibid*, s 15(2)(a)-(b).
[595] [ONWA] Cap 06, LFN 2004.
[596][London Convention] 1954. It was adopted in London, England on 12 May 1954.
[597]ONWA 2004, s 1(1) and (2).
[598]*Ibid*, s 3(1).

limits of the territorial waters of Nigeria and all other waters (including inland waters) which are within those limits and are navigable by sea going ships.[599]

By the foregoing provisions, ONWA intends to protect the country's marine environment from pollution arising from oil spillages which have been a recurring decimal in the operations of MNOCs in the Niger Delta. This is to protect the environment, the aquatic life, biological and marine living resources and the mangrove forests from being destroyed. The prohibition against discharge of oil into the prohibited sea areas is to ensure that ship owners or masters or the occupiers of land on which vessels are kept exercise caution in carrying or transporting oil in the marine environment.

Quite surprisingly, the Act creates two sets of defences to the offences under Sections 1 and 3. The first set of defences avails on owner or master of a ship or vessel. Thus, the Act declares that there will be no liability in the following cases:

(a) where the oil or mixture escaped as a result of damage to the vessel and reasonable steps were taken to prevent damage, or to stop the escape, or to reduce escape;[600]

(b) where the escape of the oil was due to leakage and not due to negligence on the part of the owner or master of the vessel, and reasonable steps were taken as soon as practicable to stop or reduce it;[601]

(c) where the discharge or mixture was done in order to secure the safety of any vessel or of preventing damage to any vessel or cargo to save life.[602] Where however the court forms the opinion that the step taken was not reasonable in the circumstance, this defence will not apply.

[599] *Ibid*, s 3(2).
[600] ONWA 2004, s 4(2)(a).
[601] ONWA 2004, s 4(2)(b).
[602] *Ibid*, s 4(1).

The second set of defences under the act can be found in Section 3 and inures in favour of the occupier of land or person in charge of any apparatus used in transferring oil and from which oil or a mixture containing oil is alleged to have escaped. Such an occupier of land or person in custody of the apparatus will escape liability if he or she proves any of the following:

(a) that the escape was not due to any negligence on his part and that as soon as the escape was discovered, that all reasonable steps were taken to stop or reduce the escape;[603]

(b) That the discharge was caused by a person on the land without the occupier's consent, express or implied;[604]

(c) That the oil was contained in an effluent produced by operations from the refining of oil;[605]

(d) That it was not practicable to dispose of the effluent otherwise than by discharging it into the prohibited sea areas;[606]

(e) That all reasonably practicable steps have been taken to eliminate oil from the effluents.[607]

Where the above defences are successfully raised, the oil spiller, according to the Act will escape liability. One major weakness of this Act is that the defences are too widely drafted and appear to actually encourage the pollution of Nigeria's marine environment. The Niger Delta environment where oil and gas production is carried out has been described as a delicate wetland. The mangrove forests, the swamps, the rivers and the marine living resources, all demand stricter measures for their protection. To permit the discharge of oil

[603] *Ibid*, s 4(3).
[604] ONWA 2004, s 4(4).
[605] *Ibid*, s 4(5)(a).
[606] ONWA 2004, s 4(5)(b).
[607] *Ibid*, s 4(5)(c).

from vessels or ships into the sea area in the manner done by ONWA smacks of gross insensitivity to the environment, health and safety of the Niger Delta people who bear the brunt of oil pollution whenever it occurs. It is submitted that there is no basis for the defences under international law. ONWA should be amended to reflect the seriousness and gravity of oil spillage, especially in a marine environment. In addition, the Act prescribes a fine of two thousand naira as punishment for committing any of the offences created under the Act. This is ridiculous and cannot reasonably be expected to deter the fouling of the country's water bodies through reckless acts. Stiffer monetary penalties, in addition to imprisonment and revocation of operating licences/permits, are recommended.

5.1.6 Petroleum Act[608]

This is the principal statute regulating the operation of the Nigeria's oil and gas industry. Under the Act, the Minister of Petroleum Resources is empowered to grant Oil Exploration Licence [OEL], Oil Prospecting Licence [OPL] and Oil Mining Lease [OML] to companies incorporated in Nigeria.[609] The Act also empowers the Minister of Petroleum Resources to grant licences for the construction and operation of refineries in Nigeria.[610] These provisions on licence regimes are designed to ensure stricter control of oil and gas exploration, prospecting, mining, refining and distribution. The Minister is required to impose terms and conditions under which the licences granted are to be operated.[611] These terms and conditions prescribe environmental standards licence holders must comply with in their operations, bearing in mind the devastating effect of unregulated oil and gas production activities on the nation's environment.

[608] [PA] Cap. P10, LFN 2004.
[609] PA 2004, s 2(1)(a)-(c) and (2).
[610] *Ibid*, s 3(1).
[611] *Ibid*, s 3(2).

Section 8 enumerates the powers of the Minister which includes the exercise of general supervision over all operations carried out under licences and leases granted under the Act.[612] The Minister is also given power to access at all times the areas covered by OEL, OPL and OML, and all refineries and installations for the purpose of inspecting the operations carried out in them as well as enforcing the regulations made under the Act and the terms and conditions of any licences or leases granted under the Act.[613] An important aspect of the Minister's power is the power to order the suspension of operations which do not satisfy the conditions of grant. For instance, the Minister may direct in writing the suspension of operations under a licence or lease granted under the Act if such operations endanger life or property.[614] The suspension is to last until adequate and appropriate arrangements have been made which the Minister regards as sufficient to prevent danger to life or property.[615]

Also, the minister may direct in writing the suspension of any operations which in his opinion are not being carried out in accordance with good oil field practice.[616] Furthermore, the minister may direct in writing the suspension of any operations where he is of the opinion that a breach of the Act or any regulations made under it has been, may have been or is likely to be committed.[617] The purpose of these wide discretionary powers conferred on the Minister is to enable him take proactive steps in nipping the occurrence of environmental pollution in the course of oil and gas operation in the bud. Lack of observance of good oil field practice or breach of regulations made under the Act are grounds for suspending operations until appropriate and adequate measures are put in place to comply with the regulations.

The Minister of Petroleum Resources is empowered to make regulations providing generally for matters relating to licences and leases granted under the Act and operations carried out

[612] *Ibid*, s 8(1)(a)
[613] *Ibid*, s 8(1)(c).
[614] PA 2004, s 8(1)(f).
[615] *Ibid.*
[616] PA 2004, s 8(1)(g)
[617] *Ibid*, s 8(1)(h).

under it.[618] Such regulations are required to cover safe working; the conservation of petroleum resources; the prevention of pollution of water courses and the atmosphere.[619] The essence of these regulations is to ensure that operators in the country's oil and gas industry observe good oil field practices in their operations. The Act contains some important provisions under which the Minister can control the activities of the oil and gas industry, including the protection and preservation of the environment. The Minister is given the power to make regulations regarding the prevention of pollution, not only of the water courses but also of the atmosphere. This means under the regulations, the Minister has power to prescribe preventative measures to be adopted in oil and gas exploration and production in order to avert oil spills and gas flaring. The shortcoming of the Act is that the regulations the Minister is empowered to make are subordinate to other oil and gas laws which expressly permit gas flaring and oil spillage.

5.1.7 Petroleum (Drilling and Production) Regulations 1969

In exercise of the power conferred on the Minister of Petroleum Resources pursuant to Section 9 of the Petroleum Act, the Minister has made a number of regulations dealing with various subject-matters,[620] among which is the regulation covering drilling and production operations in the oil and gas industry.[621] Regulation 25 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 [DrPR], 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

[618] *Ibid*, s 9(1).
[619] *Ibid*, s 9(1)(b)(i)-(iii).
[620] These Regulations include: Minerals Oil (Safety) Regulations 1963; Petroleum Regulations 1967; Petroleum (Drilling and Production) Regulations 1969; Petroleum Refining Regulations 1974; Crude Oil (Transportation and Shipment) Regulations 1984; Deep Water Block Allocation to Companies (Back-in-Rights) Regulations 2003;
[621] Petroleum (Drilling and Production) Regulations, 1969.

might cause harm or destruction to fresh water or marine life, and where such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it. The above regulation is intended to prevent pollution, particularly of the marine environment arising out of drilling and production operations. Under this regulation, a holder of an OEL, OPL or OML is required to take all practical precautions which include the provision of modern equipment approved by the DrPR to ensure that oil, mud or other fluids or substances do not spill into the water bodies.

The regulation requires the adoption of the preventive approach. Where pollution occurs or has occurred, the regulations require the licensee or lessee to take prompt actions to control its flow or dispersal, and if possible, to stop it. These regulations are commendable in view of their provisions for licensees and lessees to observe standard practices in oil and gas exploration and production to prevent damage to the seas and marine ecosystem. However, Regulation 25 falls short of adequately protecting the environment since it permits the spilling of oil, mud or other fluids into the marine environment in the course of operations. Regulation 25 says that in the event of a spill the polluter should "take prompt steps to control it and, if possible, end it". One is tempted to ask: What if it is not possible to end the spill? Should the flow continue? It is unthinkable that the Regulation did not prohibit spilling of oil into the marine environment. It is recommended that Regulation 25 be amended to prohibit oil spillage. Where oil spillage cannot be avoided completely despite best efforts, the polluter should be required to stop it no matter the cost, in addition to the payment of adequate compensation and clean-up/remediation of the impacted environment.

Similarly, with respect to the maintenance of apparatus and conduct of operations, Regulation 37 requires the licensee or lessee to carry out all its operations in a proper and workmanlike manner in accordance with the Regulations and other relevant regulations and methods and practices accepted by the DPR "as good oilfield practice". In accordance with such good

oilfield practice, the licensee or lessee is required to take all practicable steps to control the flow and to prevent the escape of avoidable waste of petroleum discovered or obtained from the relevant area; to prevent the escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuary or harbour; and to cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property on land in the relevant.

5.1.8 Environmental Guidelines and Standards for the Petroleum Industry[622]

Environmental Guidelines and Standards for the Petroleum Industry [EGASPIN] was first issued by the DPR in 1991 and subsequently revised in 2002. Its objectives are stated as follows:

(1) To establish guidelines and standards for environmental quality control of the petroleum industry taking into consideration existing local conditions and planned programmes;

(2) To provide in one volume, for the operator and other interested persons a comprehensive integrated document on pollution abatement technology, guidelines and standards for the Nigerian petroleum industry;

(3) To standardize the environmental pollution abatement and monitoring procedures, including the analytical methods for various parameters.

In order to properly evaluate and monitor discharges into the environment, EGASPIN divides petroleum industry operations into six, namely: exploration, production, terminal operation, hydrocarbon processing, oil transportation and marketing operations.

[622][EGASPIN] 1991 (as revised in 2002).

Paragraph 4 of Part II requires licensees and operators to conduct environmental audits to facilitate the management and control of environmental practices and assessing compliance with the management system and regulatory requirements. It also requires drilling operations to have comprehensive spill prevention and counter measure plans approved by the DPR. Similarly, paragraph 5.1.1 of Part II requires all spillage of crude oil, chemical or oil product to be reported to the DPR in accordance with the oil spillage notification reporting format provided in Schedules A-C. A Joint Spillage Investigation [JSI] team comprising the licensee or operator, the community and the DPR shall be set up within 24 hours of notification of spillage in order to carry out investigation into the spill.

Paragraph 5.1.2 provides for crude oil/chemical spillage and contamination clean-up certification. Clean-up efforts for all inland and near-shore spillage of crude oil, product and chemicals, shall be subjected to clean-up certification which is to be granted by the DPR. The DPR is further required to keep a register of Potentially Polluted Sites [PPS] or Past Impacted Sites [PIS] which are to be cleaned up, remediated and certified accordingly by the DPR.

The DPR is required to take necessary and appropriate action to safeguard human health and welfare if the response by the licensee in the case of a disaster or emergency emanating from spillage of any of those chemicals/materials which is likely to affect and/or impact a third party, is inadequate. Part VIII provides for standardization of environmental abatement procedures. Paragraph 1.3 of Part VIII provides two tools which are to be used in achieving the goals of preventing environmental pollution. These are EIA and Environmental Evaluation (Post-Impact) Report [EER]. Paragraph B of Part VIII covers contingency planning for the prevention, control and combating of oil and hazardous substances spills by requiring all operators in the petroleum industry to compile in a document its orderly arrangement of events to contain and control oil spill incidents (otherwise known as Oil Spill Contingency Plan).

EGASPIN requires that the Oil Spill Contingency Plan [OSCP] must be submitted to the DPR for approval. The function of the OSCP is to ensure that the environment is protected and to ensure that manpower, equipment and funds are available to effectively complete and clean-up oil spills. Generally, Part VIII imposes on the spiller the responsibility of restoring an impacted environment as much as possible to its original state. Also, any restorative process carried out is required to adequately evaluate the biological sensitivities of the impacted environment. Where a sensitive environment is impacted, it shall be required that a post spill impact assessment study be conducted to determine the extent of damage and the estimated duration for complete recovery of such an environment.

Any operator or owner of a facility that is responsible for a spill which results in impact to an environment are required to monitor the impacted environment as well as the restoration activities. Part VIII also provides that an operator is to be responsible for the containment and recovery of any spill discovered within its operational area, regardless of the source. Furthermore, Paragraph B of Part VIII establishes a liability and compensation regime which provides that a spiller shall be liable for the damage from a spill for which it is responsible. Where more than one spiller is responsible, then, the liability shall be joint and several. Damages and compensation shall be determined by direct negotiation between operator(s) and landlord(s), and where direct settlement fails, such other methods of settlement, such as arbitration or judicial settlement shall be invoked.

Part IX deals with implementation, enforcement, powers and sanctions. The duty to enforce compliance with the provisions of EGASPIN is placed on an authorized inspector. It has been suggested that though the phrase ‘authorized inspector’ is not defined, it can be fairly assumed that an authorized inspector is a person recognized or designated as such by the DPR. Without doubt, EGASPIN is a comprehensive piece of regulations intended for the protection of the environment. The guidelines and regulations, if implemented, will enhance

the protection of the environment of indigenous peoples from the perennial problem of oil spillage and gas flaring. The major shortcoming of EGASPIN is that all powers relating to monitoring, compliance and enforcement are resident in the DPR and its Director without corresponding checks and balances. This situation is unhealthy and may breed inefficiency.[623]

5.1.9 Associated Gas Re-Injection Act[624]

This Act regulates the flaring of associated gas in the course of oil and gas production in Nigeria. According to the Long Title, the objective of the Act is to compel every company producing oil and gas in Nigeria to submit preliminary programmes for gas re-injection and detailed plans for implementation of gas re-injection. The Act was enacted in 1979 and entered into force the same year.[625] The Act requires every company producing oil and gas in Nigeria to submit to the Minister of Petroleum Resources a preliminary programme, not later than 1st April 1980.[626] The preliminary programme should contain schemes for the viable utilization of all associated gas produced from a field or group of fields and project(s) to re-inject all gas produced in association with oil but not utilized in an industrial project.[627] The Act also set the 1st of January 1984 as the deadline for the flaring of associated gas in Nigeria.[628] However, Section 3(1) diluted this gas flaring prohibition with the requirement that gas can be flared if the written permission of the Minister of Petroleum Resources is obtained. Thus, if after 1st January 1984, the Minister satisfies himself that utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields, he may issue a certificate in that regard to a company engaged in the production of oil and gas. The certificate is required to specify such terms and conditions which he may in his

[623] O Fagbohum, *The Law of Oil Pollution and Environmental Restoration: A Comparative Review* (Odade Publishers, Lagos 2010) 328.
[624][AGRA] Cap A10, LFN 2004.
[625] See the Commencement Clause.
[626]AGRA 2004, s 1.
[627]*Ibid*, s 1(a)(b).
[628]*Ibid*, s 3(1).

discretion impose for the continued flaring of gas in the particular field or fields[629] or permit the company to continue to flare gas in the particular field or fields if the company pays such sum as the Minister may from time to time prescribe for every 28.317 Standard Cubic Metres (SCM) of gas flared.[630]

The penalty for violating the Act is forfeiture of the concessions granted to the violator in the particular field or fields in respect of which the offence was committed.[631] In addition to the forfeiture of concessionary rights, the Minister may order the withholding of all or part of any entitlements of the offender to be utilized towards the cost of completion or implementation of a desirable re-injection scheme, or the repair or restoration of any reservoir in the field in accordance with good oilfield practice.[632]

While this Act would have been an excellent piece of legislation targeted at curbing the perennial problem of gas flaring with its attendant deleterious effect on the lives, health and environment of the indigenous peoples after over 40 years of oil exploration and unabated gas flaring, Section 3 took with the left hand what Sections 1 and 2 gave with the right. In other words, while Sections 1 and 2 of the Act require oil and gas companies to develop plans and programmes for the effective utilization of associated gas or its re-injection not later than 1980, Section 3(1) permits continued flaring of gas on flimsy reasons if the Minster issues a certificate to that effect. The Minister is empowered to issue the certificate where in his opinion it is not appropriate or feasible for a company to utilize or re-inject associated gas in respect of any particular field or set of fields.

It is not clear what the meaning of the phrase "appropriate" is. Does it mean proper? It is submitted that there exists no reason or situation whatsoever that will make flaring of gas a

[629] AGRA 2004, s 3(2)(a).
[630] *Ibid*, s 3(2)(b).
[631] *Ibid*, s 4(1).
[632] *Ibid*, s 4(2).

better option than its utilization or re-injection, at least from the economic aspect of it as well as its health and environmental implications. There are no guidelines against which the Minister's discretion can be weighed. For example, how will he come to the opinion that gas utilization or re-injection is not feasible? Such blanket discretion, it is submitted, is bound to gravitate towards absolutism. The Act empowers the Minister to specify conditions in his certificate for the continued flaring of gas, including the prescription of monetary fines to be paid to the Federal Government of Nigeria per 28.317 SCM of gas flared. Thus, instead of striving to protect the lives, health and environment of the indigenous peoples by expressly abolishing the flaring of gas, the Federal Government has used the Act as a revenue generating avenue, exchanging the health and well-being of its people with fine/penalty. It is inconceivable that in this 21st century, in the era of global consciousness towards the curbing of climate change, Nigeria will continue to keep a law that shows blatant disregard for the lives, health and environment of indigenous peoples in her statute books. It is submitted that legislative actions should be expedited to expunge this Act from Nigeria's statute books for its gross insensitivity to human life, health and dignity.

5.1.10 Associated Gas Re-Injection (Continued Flaring of Gas) Regulations[633]

Section 5 of the AGRA gives the Minister of Petroleum Resources power to make regulations prescribing anything which requires to be prescribed for the purpose of the Act. Acting under this mandate, the Minister made the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations. The main objective of the Regulations is to lay down the conditions or guidelines which will govern the issuance of gas flaring permit by the Minister to an oil and

[633]No.43 of 1984 [Associated Gas Regulations].

gas company.[634] Thus, the Minister is entitled to grant a gas flaring certificate or permit in the following circumstances:

(a) Where more than 75 percent of the produced gas is effectively utilized or conserved; this means that the remaining 25 percent can be flared.[635]

(b) Where the produced gas contained more than 15 percent impurities, such as N_2, H_2S, CO_2, etc which render the gas unsuitable for industrial purposes;[636] This is ridiculous to say the least. What about the impact of the flaring of gas with such percentage of impurities on the life, health and ecosystem of the host communities or those in the company's area of operation? Under this condition, once produced gas has 15 percent impurity content, the company is given blanket cheque to flare all of them into the environment, its disastrous consequences on the indigenous peoples notwithstanding. What matters to the Federal Government is the economic viability of the gas produced. Where its impurity content is low, utilization or re-injection can be enforced because it will generate revenue to the Federal Government;

(c) Where an on-going utilization programme is interrupted by equipment failure;[637] it is submitted that where equipment failure is due to the negligence of the operator by not taking appropriate and adequate precautionary and preventative measures consistent with good oilfield practices, such operator ought to be punished in terms of Section 4 of the AGRA and not exempted under these Regulations. However, as it sometimes happen, where equipment failure is due to an act of God, or occurs despite all good oilfield practices adopted, the exemption could be tenable.

[634] Associated Gas Regulations 1984, Reg. 1.
[635] *Ibid*, Reg. 1(a).
[636] *Ibid*, Reg 1(b)
[637] *Ibid*, Reg 1(c).

(d) Where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or possible utilization point is less than 50,000 standard cubic feet per kilometer.[638] This is the most laughable of the conditions for exemption. Distance, it is submitted, ought not to be a consideration when considering the implication of gas flaring on the life, health and environment of the host communities, and indeed, communities located around the operation area. The Federal Government should rather compensate the operator through reducing the royalty payable or increasing the operators' equity share in the JV or PSC or utilize other appropriate reimbursement scheme to compensate for the expenses incurred by the operator in transporting associated gas over long distance to a gas utilization plant. The proviso that the exemption applies where the oil-to-gas ratio of the field is less than 3,500 SCF/bbl and it is not technically advisable to re-inject the gas in that field, is equally watery and ought to be expunged.

(e) Where the Minister, in appropriate cases as he may deem fit, orders the production of oil from a field that does not satisfy any of the conditions specified in these Regulations.[639]

It has been contended that the Associated Gas Regulations, no doubt, defeats the noble intention of the AGRA and therefore ought to be expunged from Nigeria's statute books.

[638]Associated Gas Regulations 1984, Reg 1(d).
[639]*Ibid*, Reg 1(e).

5.2 Necessary Conventional Framework on Ingenious People's Rights to healthy Environment

A host of international norms, guidelines and principles have evolved under international law to set a standard for what corporations or businesses ought to do or ought not to do, in their operations.[640] The standards touch on labour relations, transparency and accountability, environmental protection and conservation as well as respect for the law. The standards adopt minimal human rights approach to CSR and require businesses to respect the laws of countries in which they operate. The standards require that where there are no laws, or where there are laws but the enforcement mechanism is weak, businesses should take reasonable precautions consistent with global best practices to ensure that they do no harm.[641]

These norms were developed because of the gaps noticed between legal obligations and concrete action to respect and protect human rights in many jurisdictions, notably the developing countries. It has been discovered that in some cases, the legal regime might guarantee the protection and promotion of human rights, and impose certain obligations on both State and non-State actors, but the mechanisms and regulatory institutions might be too weak or ill-equipped to carry out their monitoring and enforcement obligations.[642] This has been attributed to States' willingness to trade the human rights of their peoples for foreign investments, and this is true of Nigeria.

Norms and guidelines developed under international law fall into three main categories, namely: those prepared and adopted under the auspices of the UN; those organized, prepared and adopted under the auspices of the ILO; and those voluntarily adopted by business/professional organizations as code of conduct governing their industry practice. The

[640]O Shoaga, '*Human Rights Concerns and Corporate Social Responsibility in Nigeria'*<https://www.epcr.eu/Filestore/PaperProposal/52e7e104-26f1-4c91-90ce-0194e84e98f7.pdf> accessed 11 September 2017.
[641]*Ibid.*
[642]*Ibid.*

next segment examines each of these categories of international norms with a view to having a full grasp of what the CSR of MNOCs in Nigeria's oil and gas industry should be.

International law in its evolution did not respond early to environmental issues. That is why environmental rights are treated as third generation rights. The reason appears to be that the world was more concerned with issues of civil and political rights and second generation rights such as social, economic and cultural rights which were the pressing problems of mankind following the end of the two World Wars. The Charter of the United Nations which evolved after the Second World War did not address environmental rights or issues. It was only as late as 1972 that the first global document which substantially raised serious concern over the threats human activities are posing to the environment and the need for world leaders to take urgent action, emerged.[643]

Thus, environmental consciousness across the globe occupied the front-burner of global discourse and conferences in the 1970s. Since then, the tempo has been sustained as the world experiences one form of environmental problem or the other. This consciousness has led to the adoption of several declarations, agreements, protocols and conventions. This segment examines them.

5.2.1 United Nations Declaration on the Human Environment[644]

This represents the very first stock taking of the human impact on the environment on a global scale and an attempt to forge a basic common outlook on how to address the challenge of preserving and enhancing the human environment.[645] Stockholm Declaration contains 26

[643] T Okonkwo, *International Protection of the Environment: Law and Practice* (Fine Finishing Limited, Lagos 2014) 33, G Handi, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' [2012] *United Nations Audiovisual Library of International Law* 1.
[644][Stockholm Declaration] 1972. This Declaration was adopted in Stockholm, Sweden on 16 June 1972.
[645]G Handi (n 214) 1.

principles which countries of the world are required to observe and/or abide by. In its preamble, the world leaders proclaimed that:

> Man is both creature and moulder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform the environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man made, are essential to his well-being and to the enjoyment of basic human rights and the right to life itself.[646]

The above is a call on mankind to halt activities that are capable of destroying the very basis of human existence and to take actions to protect and preserve the environment.

Principle 1 of the Stockholm Declaration declares that man has the fundamental right to adequate conditions of life in an environment of a quality that permits a life of dignity and well-being. Man bears the solemn duty to protect and improve the environment for present and future generations. This is a clear recognition of the right of every individual to a healthy environment favourable to his health, well-being and development. Natural resources such as the air, water, land, flora and fauna, particularly the representative samples of the ecosystem are required to be protected not only for the benefit of the present generation but also for future generations.[647] With respect to pollution of the environment, Principle 6 prohibits the discharge of toxic substances or of other substances and the release of heat in such quantities or concentrations which exceed the capacity of the environment to neutralize them. This is to avert serious or irreversible impairment of the human environment. The Principle urges world support for the just struggles of the peoples of all countries against pollution.[648] Pollution at sea by substances capable of creating hazards to human health, living organisms and marine

[646] Stockholm Declaration, Preamble 1.
[647] Stockholm Declaration 1972, princ 2.
[648] *Ibid*.

life or which damages amenities or which interferes with the legitimate use of the sea are to be prevented by all countries.[649] Furthermore, Principle 11 urges States to ensure that their policies enhance and not adversely affect or hamper the living attainment of better living conditions for all persons.

From the above, it can be established that the Stockholm Declaration recognizes the right of all human beings irrespective of the countries where they live to a healthy environment. The Declaration calls for a halt to activities such as oil spillage, gas flaring as well as unregulated and environmentally unfriendly oil and gas operations, as is carried out in the Niger delta area. The Declaration imposes on States the obligation to take appropriate steps – legislative, monitoring, policy or otherwise, to arrest cases of pollution of the air, land and water sources as well as the protection and preservation of flora and fauna. The main problem with the Stockholm Declaration is that it is not a binding treaty. It is merely aspirational and depicts the aspirations of global leaders. Failure to observe the principles enunciated therein may not attract sanction. However, its relevance is that it serves as the rallying point for the conclusion and adoption of more specific binding treaties in the field of environmental law.

RIO Principle 22 echoed the vital role of indigenous people and their communities in conservation and sustainable management of the environment given their knowledge and traditional practices, and P 23,25, 26 says the environment and natural resources of people under oppression, domination and occupation shall be protected

Principle 2,3 and 6 of Stockholm declaration express the need to protect and carfully manage them for the benefit of present and future generation. Principle 3 address the need to restore and even improve earth's ability to produce vital renewable resouces

[649]Stockholm Declaration 1972,princ 7.

Principle 1 RIO states human beings are the centre of concerns for sustainable development, they are entitled to a healthy and productive life in harmony with nature.

Principle 2 of Stockholm and Principle 3 of RIO address the fact that natural resource must be safeguard and the right to development must be fulfill so as to equitably meet development and environmental needs of the present and future generation.

Principle 3 and Principle 4,8 RIO Stress the need for sustainable development.

Principle 10 RIO stress the need for participation of all citizen concern in environmental issue and Principle 11 says it is the duty of state to enact effective environmental legislation and P 13 also say state should develop national law regarding liability and compensation for the victims of pollution and other environmental damage. P15 emphasis the need for a precautionary approach to be applied by state according to its capability.P16 echoed the polluter must pay principle, P 17 emphasis the need for environment impact assessment before for proposed activity that are likely to have a significant adverse impact on the environment

5.2.2 African Charter on Human and Peoples' Rights[650]

The African Charter on Human and Peoples' Rights [ACHPR] is the document that embodies the human rights of all persons in Africa. It was the very first regional instrument to expressly recognize the right to environmental health as a human right. Article 4 of the Charter declares the inviolability of the human person and provides for the right of every human being to respect for his life and the integrity of his person. It is declared under the Charter that no person may be arbitrarily deprived of his life. This provision is a pointer to the fact that the right to life is the pre-condition to the enjoyment of the remaining rights and guarantees.

[650][ACHPR] 1981. The ACHPR was adopted by the eighteenth Assembly of Heads of States and Government in Nairobi, Kenya on 27 June 1981 and entered into force on 21 October 1986.

On its part, Article 24 provides that "[all peoples shall have the right to a general satisfactory environment favourable to their development'. Nigeria has domesticated the ACHPR through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[651] But the Constitution of the Federal Republic of Nigeria[652] does not recognize the right to healthy environment.[653] Section 1 of the 1999 Constitution proclaims the supremacy of the Constitution over all authorities and persons in Nigeria. It further enacts that if any other law is inconsistent with the provisions of the 1999 Constitution, the Constitution shall prevail and that other law shall to the extent of the inconsistency be void. Based on this provision, the Supreme Court in the Nigerian case of *AbachavFawehinmi*[654] held that the provisions of the ACHPR as domesticated in Nigeria are secondary or inferior to the 1999 Constitution. Though, the ACHPR is a statute with international flavour, the Supreme Court stated that the Charter is only superior to other statutes in Nigeria but remains inferior to the 1999 Constitution.

But the African Commission on Human and Peoples' Rights illustrated the close relationship between the right to health and the right to a healthy environment in *SERAC v Nigeria.*[655] In that case, the plaintiff, a non-Governmental Organization representing the interests of the Ogoni people of Niger Delta Nigeria, claimed that the Nigerian government caused severe environmental degradation and health problems for the Ogoni people as a result of its joint venture operations with the Shell Petroleum Development Company of Nigeria Limited [SPDC] in the area. It was the plaintiffs contention before the African Commission on Human and Peoples' Rights that the Nigerian government's failure to monitor the operations of oil companies operating in Ogoniland and the failure to require standard industry safety

[651]Cap A10, Laws of the Federation of Nigeria [LFN] 2004.
[652][1999 Constitution]
[653]*Ibid*, ss 20 and 6 respectively.
[654](2000) FWLR (pt 4) 557.
[655]Case No. ACHPR/COMM/A044/1, AfrComm'n Hum. & Peoples' Rights 51-53 (27 May 2002).

measures in the course of exploration and exploitation of oil and gas in the area was the direct cause of environmental damage caused to the people.

The Commission upheld SERAC's claims and held the Nigeria breached her obligations to respect, protect and fulfill the right to health and the right to healthy environment guaranteed under the ACHPR.[656] The Commission further expatiated that as regards the obligation on States Parties to respect the fundamental right to a general satisfactory environment conducive to a peoples' development, States are under obligation to refrain from threatening the health and environment of their citizens and must refrain from interfering with the enjoyment of the best attainable standard of physical and mental health.[657]

5.2.3 Indigenous and Tribal Peoples Convention[658]

This Convention, otherwise known as ILO Convention 169 was adopted under the auspices of the International Labour Organization [ILO]. It is a revision of the Indigenous and Tribal Populations Convention [ILO Convention 107] of 1957. At present, ILO Convention 169 of 1989 has been ratified by only 20 countries. However, it is the most important and legally binding international instrument on the rights of indigenous peoples.[659] Article 4 of the Convention requires States to take special measures which are appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of peoples concerned.[660] Such measures must be with the freely expressed consent of the peoples to be affected.[661] Article 7 confers on indigenous peoples the right to decide their priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being as well as the lands they occupy. This right also extends to control over the economic, social and

[656]Case No. ACHPR/COMM/A044/1, AfrComm'n Hum. & Peoples' Rights 51-53 (27 May 2002), 52.
[657]*Ibid*.
[658][ILO Convention 169] 1989.
[659] P Hanna and F Vanclay, 'Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent [2013](31)(2) *Impact Assessment and Project Appraisal* 146, 147
[660] ILO Convention 169, art 4(1)
[661]*Ibid*, art 4(2).

cultural development of indigenous peoples, to the extent possible. Similarly, indigenous peoples have the right to participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.[662]

Governments are required to carry out studies to assess the social, spiritual, cultural and environmental impact of planned developmental projects or activities on the lives, health and environment of the indigenous peoples.[663] Government authorities undertaking such studies are required to co-operate with the people to be affected by the planned development activities in respect of which the studies are carried out. This includes affording them the opportunity of making inputs into the entire process leading to the approval or otherwise of the studies. The results of such studies are to be considered as fundamental criteria for the implementation of planned development activities.[664]Governments are required to co-operate with indigenous peoples in the adoption of measures to protect and preserve the environment of their territories.[665]

Article 14 grants to indigenous peoples the rights of ownership and possession over the lands which they traditionally occupy. These rights are to be recognized. States are under obligation to adopt measures aimed at safeguarding these rights in appropriate circumstances.[666] Also, indigenous peoples have right over the natural resources found on their lands. They are to participate in the use, management and conservation of these resources.[667] In situations where the State retains ownership of natural resources, appropriate and adequate procedures are required to be established by government to provide avenues for the affected indigenous populations to participate in the decisions regarding the exploration

[662]*Ibid*, art 7(1).
[663] ILO Convention 169, art 7(3).
[664]*Ibid*.
[665]ILO Convention 169, art 7(4).
[666]*Ibid*, art 14(1).
[667]*Ibid*, art 15(1).

and exploitation of such resources.[668] The people should have the opportunity of making representations concerning the extent to which their interests will be affected before the decision on whether or not to undertake any exploration or exploitation activities can be taken. Where possible, the affected peoples are to participate in the benefits of such activities. They are further entitled to receive fair compensation for any damage which they may sustain as a result of such activities.[669]

The provisions of this Convention are laudable as they give greater control to indigenous peoples over their lands and resources found on their land. Within the context of healthy environment, the Convention emphasizes the protection of the health and environment of the people. It requires that all government actions and policies regarding the development of natural resources in the territory of indigenous peoples must be with the free, prior and informed consent of the people. The requirement that studies should first be conducted before the implementation of development programmes on indigenous peoples' lands and territories is to ensure that the likely impact of such projects on the lives, health, livelihood, culture, religion and general environment of the people is determined in advance and addressed.

The people are given the right to participate in all the processes and this ensures that their interests are well protected. These provisions are commendable and ought to be replicated in all countries of the world where indigenous peoples are still waging war against ecological genocide against State authorities manned by dominant majority groups and tribes. The major constraint of this Convention is that it is not applicable to Nigeria. Nigeria is neither a party nor a signatory to the Convention. It is an elementary principle of international law that a treaty is binding on only parties to it.[670] The implication of this failure to adopt or sign this

[668] *Ibid*, art 15(2).
[669] ILO Convention 169, art 15(2).
[670] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, arts 1, 2 and 6.

Convention is that indigenous peoples in the Niger Delta region of Nigeria where the country's oil and gas exploration and production activities are carried out daily with their adverse environmental consequences cannot take advantage of the humane and progressive provisions of the Convention. It is submitted that this failure smacks of discrimination. Nigeria should adopt and domesticate this Convention.

5.2.4 United Nations Declaration on Environment and Development[671]

The Rio Declaration is the next in line after the Stockholm Declaration of 1972. It is an improvement on the Stockholm Declaration. The Rio Declaration advocates for environmental protection in every development efforts of mankind. The Preambular provisions of the Rio Declaration reaffirm the Stockholm Declaration and seek to build upon it. The Preambles declare the resolve of global leaders to work towards international agreements that respect the interests of all and protect the integrity of the global environmental and developmental system as well as the recognition of the integral role of the earth and its interdependence.[672] Principle 1 declares that human beings are at the centre of concerns for sustainable development. Accordingly, the Declaration emphasizes the entitlement of all human beings to a healthy and productive life which is in harmony with nature.

In order to achieve sustainable development, the Declaration emphasizes that environmental protection shall constitute an integral part of the development process. It states that under no circumstance should development process be considered in isolation from environmental protection.[673] Another important provision in the Rio Declaration is the recognition of the

[671][Rio Declaration] 1992. It was adopted in Rio de Janeiro, Brazil on 14 June 1992.
[672] Rio Declaration 1992, Preamble to the Declaration.
[673]*Ibid*, princ 4.

right to information and the right to participate in decision-making processes regarding the environment.[674] Specifically, States are enjoined at national level to ensure that each individual has appropriate access to information concerning the environment in the custody of public authorities.[675] This includes information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.[676] Principle 11 requires States to enact effective environmental laws. The principle goes further to state that in enacting such environmental protection focused legislations environmental standards stipulated should reflect the environmental and developmental context to which they apply.

In addition, the Declaration emphasizes the importance of environmental impact study before the undertaking of proposed activity which has the likelihood of significantly affecting the environment.[677] The decision whether or not to approve the project should be made by a competent national authority.[678] The most important provision of the Rio Declaration which is relevant to this study is Principle 22 which recognizes the role of indigenous peoples and communities in environmental management and development. Accordingly, the Declaration enjoins States to recognize indigenous peoples' and communities' role in environmental management and development as well as duly supporting their identity, culture, interests and enable their effective participation in the achievement of sustainable development.

No doubt, the Rio Declaration addresses the need to ensure that the environment of indigenous peoples is protected from harm. The Declaration lays the foundation for development decisions to be taken by national governments in the exploitation of their natural resources by stipulating that environmental consciousness, probity and accountability

[674] *Ibid*, princ 10.
[675] Rio Declaration 1992, art 10.
[676] *Ibid.*
[677] *Ibid*, princ 17.
[678] Rio Declaration 1992

must form the basis of every development decisions. If implemented by States, there is no doubt that the health of the human environment would be enhanced. However, like the Stockholm Declaration, the Declaration is non-binding and cannot found the basis of any enforceable right. At best, it is declarative of the aspirations of world leaders for an ideal world, though its precepts have given rise to several treaty documents.

5.2.5 The World Summit on Sustainable Development (WSSD) (RIO+10) 2002

The summit took place in Johannesburg South Africa 2002 , 10 years after the first Earth Summit in Rio de Janeiro.It was held to look into the issue of environmental degradation caused by human actions to achieve speedy economic growth, threatening the course of life sustaining natural process and depleting the resources that the future generations will need for their progress and prosperity. This summit reiterated the global commitment to sustainable development to ensure the relationship between the nature's resources and human needs which meant that the development which comes at the cost of natural resources should not exceed the planet's carrying capacity. It resolved to build a humane equitable and caring global society cognizant of the need for human dignity for all. The summit recognized that poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development are overarching objectives of the essential requirements for sustainable development

5.2.6 United Nations Declaration on the Rights of Indigenous Peoples[679]

Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP] declares that indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights as well as under international

[679][UNDRIP] 2007. Adopted at the 107th plenary meeting of the United Nations General Assembly on 13 September 2007.

human rights law. Article 1 lays a solid foundation for the rights enunciated in the UNDRIP by providing that indigenous peoples shall, whether as individuals or as groups, enjoy all the rights enshrined in the International Bill of Rights, including the UN Charter. UNDRIP also contains rights that seek to protect the health and environment of indigenous peoples from harm or damage. In this regard, UNDRIP recognizes the right of indigenous peoples to their natural medicines, to the maintenance of their health practices and this includes the right to the conservation of their vital medicinal plants, animals and minerals.[680]

The UNDRIP also recognizes the right of indigenous peoples to access all social and health services.[681] Indigenous individuals are entitled, in equally with other majority and dominant tribes in their state, to the enjoyment of the highest attainable standard of physical and mental health. States are mandated to adopt all necessary measures towards the progressive realization of this right.[682]

Furthermore, UNDRIP accords indigenous peoples the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources as well as upholding their responsibilities to conserve these resources for future generations.[683] This implies that whatever link indigenous peoples have with their lands, resources and territories are to be strengthened and maintained. Indigenous peoples also have the right to the lands, territories and other resources owned, occupied or otherwise used or acquired by them.[684] With regard to the use of their resources, UNDRIP gives indigenous peoples the right to own, use, develop and control the lands, territories and resources that they possess as a result of traditional ownership or other traditional occupation or use, including lands, territories and

[680]UNDRIP 2007, art 24(1).
[681]*Ibid*.
[682]UNDRIP 2007, art 24(2).
[683]UNDRIP 2007, art 25.
[684]*Ibid*, art 26(1).

resources which they have otherwise acquired.[685] The Declaration imposes a duty on States to give legal recognition and protection to such lands, territories and resources.[686]

In addition, UNDRIP recognizes the right of indigenous peoples to the conservation of their natural resources and the protection of their environment from pollution. Specifically, it provides for the right of indigenous peoples to conserve and protect their environment, including the productive capacity of their lands, territories and resources.[687] States are placed under obligation to establish and enforce programmes for assisting indigenous peoples to conserve and protect their environment.[688] Accordingly, States are required to take effective measures towards ensuring that no storage or disposal of hazardous materials takes place in the lands or territories inhabited by indigenous peoples without their free, prior and informed consent.[689] Similarly, States are required to adopt appropriate and adequate measures so that programmes for the monitoring, maintenance and restoration of the health of indigenous peoples are duly implemented.[690] Such programmes are to be developed and implemented by the indigenous peoples.[691]

States are further required to consult and co-operate with indigenous peoples in good faith through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, especially in relation to the development, utilization or exploitation of mineral, water or other resources.[692] This represents the most potent and auspicious recognition of the right of a people. Development projects or utilization of their lands and resources can only be approved by the State after the people concerned had been consulted and their free and

[685] *Ibid*, art 26(2).
[686] *Ibid*, art 26(2).
[687] *Ibid*, art 29(1).
[688] UNDRIP 2007, art 29(1).
[689] *Ibid*, art 29(2).
[690] UNDRIP 2007, art 29(3).
[691] *Ibid*.
[692] *Ibid*, art 32(2).

informed consent duly obtained in a transparent manner that affords them the opportunity of making inputs into the decision-making process. Even after the free, prior and informed consent of the indigenous peoples have been obtained for the utilization of their resources, including land, UNDRIP mandates States to provide effective mechanisms for just and fair redress for any such activities, and to take appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impact of such utilization of resources.[693]

The UNDRIP is commendable in recognizing the rights of indigenous peoples in various countries across the world. The rights guaranteed in this Declaration are at variance with the position in Nigeria. The Ogonis, Ogbas, Ijaws and the Ibanis have been identified as indigenous peoples in Nigeria.[694] Oil and gas exploration and exploitation activities are carried out on the lands of these indigenous groups. Nigeria depends on revenue derived from oil and gas production as this source of revenue accounts for more than 95 percent of the country's total foreign exchange.[695] The Constitution of the Federal Republic of Nigeria 1999[696] and the Petroleum Act[697] vests the ownership and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria, including those in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria in the Federal Government and are to be managed in the manner prescribed by the National Assembly. Similarly, the Land Use Act[698] vests title over all lands comprised in the territory of a State of the Federation of Nigeria in the Governor of such State, to be administered for the benefit of Nigerians in the State. These three key statutes effectively expropriate the land and natural

[693] UNDRIP 2007art 32(3).
[694] See Chapter 2, para 2.2 supra.
[695]US Energy Information Administration, 'Country Analysis Brief: Nigeria', 2 <https://www.marcon.com/library/country_briefs,/Nigeria/nigeria.pdf> accessed 15 September 2017.
[696](As Amended) [1999 Constitution] Cap C23, Laws of the Federation of Nigeria [LFN] 2004, s 44(3).
[697] Petroleum Act [PA] 1969, Cap P10, LFN 2004, s 1.
[698] Land Use Act [LUA], Cap L 5, LFN 2004, s 1.

resources of the indigenous peoples and vest them in the Federal Government in which they have no say.

The indigenous groups are not consulted in the process of application and approval of oil exploration, prospecting and mining licences to MNOCs,[699] neither are they made part of the decision-making process when approving Environmental Impact Assessment [EIA] [700] in respect of oil and gas exploration and production activities that will alter the social, economic, cultural and spiritual life as well as their environment. This is a clear breach of Article 29 of UNDRIP which requires that in any development projects which will impact on the life, resources and environment of indigenous peoples, their free, prior and informed consent must be had before the necessary approvals can be granted. Despite this lack of consultation and forcible expropriation of proprietary rights, the indigenous communities are allowed to shoulder and groan under the excruciating and devastating impact of oil and gas production, including large scale oil spillage, gas flaring, depletion and destruction of the fragile wetland ecosystem, pollution of water bodies, dislocation of the occupations of the people, destruction of their herbs, medicines, shrubs, places of worship and the appropriation of vast stretches of their lands for oil field development.[701]

This declaration is therefore a step in the right direction towards protecting the rights of indigenous peoples all over the world. The UNDRIP, however, suffer two setbacks. In the first place, it is a non-binding document and as such does not impose a treaty obligation on

[699] This power resides in the Federal Government and is exercised through the Minister of Petroleum Resources.
See PA 2004, ss 2-9.
[700] This power is currently exercised by the National Environmental Standards Regulation and Enforcement Agency [NESREA]. See Environmental Impact Assessment Act, Cap E12 LFN 2004, s 7.
[701] B R Konne, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland [2014](47) *Cornell International Law Journal* 181, 182; R Boele, H Fabig and D Wheeler, 'Shell, Nigeria and the Ogoni. A Study in Unsustainable Development: The Story of Shell, Nigeria and the Ogoni People – Environment,, Economy, Relationships: Conflict and Prospects for Resolution' [2001](9) *Sustainable Development* 74, 76.

States.[702] Second, Nigeria is neither a party to it nor has she signed or ratified it. The implication is that at present, UNDRIP is not binding on Nigeria.

5.2.7 Paris Agreement[703]

However, most of the commitments are still voluntary in nature. Information obtained from the UNFCCC website shows that Nigeria signed the Paris Agreement on 22 September 2016 and ratified it on 16 May 2017.[704] Notwithstanding this ratification of the Agreement, little has been done to halt the unabated gas flaring practiced in the nation's oil and gas industry. A genuine commitment to reduce GHG emission would necessarily require an amendment of extant porous statutes regulating the oil and gas industry. To date, it appears no such effort is in the offing. The current legal framework permits large-scale flaring of associated gas. Under Nigeria's intended nationally determined contribution [NDC], the country is working towards ending gas flaring in 2030.[705] This shows lack of seriousness on her part to join the rest of the world in combating the adverse impacts of climate change.

5.3 The Right To A Healthy Environment In Other Jurisdiction

The supreme court of India in *Minerva Mills v Union of India*[706] elevated the constitutional status of the Directive Principles. The Indian Supreme court began interpreting fundamental

[702]United Nations Human Rights, *Indigenous Peoples and the United Nations Human Rights System* (United Nations, New York and Geneva 2013) 8.
[703][Paris Agreement] 2015. It was done in Paris, France on 12 December 2015 and entered into force on 4 November, 2016.
[704]United nations Framework Convention on Climate Change, Paris Agreement – Status of Ratification <https.//www.unfccc.int/paris_agreement/items/9444.php> accessed 19 December 2017.
[705]Nigeria's Intended Nationally Determined Contribution <https://www.unfccc.int/ndcregistry/publisheddocument/Nigeria%20first/Approved%20Nigeria's%20INDC_271115.pdf> accessed 10 December 2017.
[706] (1980)AIR (SC) 1789

rights under Part III in the light of the provisions of Part IV[707]. In the area of environment protection, the court recognized the right of every Indian to live in a healthy or pollution free environment by utilizing the environmental provision of Part IV to flesh out the constitutional right to life[708]. In recognizing the right to a clean environment, the Indian court drew inspiration from article 48A of the Indian constitution enjoining upon the state a duty to protect the environment and a similar fundamental duty of every citizen under article 51A of the constitution. The recognition of the right to a clean environment and consequently the right to clean air and water was a culmination of the series of judgments that recognize the duty of the state and individual to protect and preserve the environment. It is expected that the appellate courts in Nigeria will seize the gauntlet provided by *Gbemre* to toe the line of the supreme court of India and entrench environmental rights as justiciable right in Nigeria.

One striking nexus between India and Nigeria is that India, like Nigeria also has non-justiciable provisions in respect of environment rights. However, the court has utilized its interpretative powers to extend the frontiers of enforceable rights in the country. Using the example of right to life guaranteed and justiciable under both the Indian and Nigerian constitutions, Indian courts have consistently held that good health is cardinal to the enjoyment of the right to life.[709]

5.3.1The USA Recognition of Right to Clean Environment

In the USA, there is a statutory rule of strict liability for oil pollution under the Federal Water Pollution Control Act 1972.[710]

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[707]Shubhankar Dam and VivekTewary, polluting constitution: is a polluted constitution worse than a polluted environment 17/3Journal of Environmental law 383,386(2005)

[708]*M.C.Mehta v Kamal Nath*(2000)6 SCC 213

[709]*ParamandKatra v Union of India* (1989) AIR ,SC 2039 The court stated that Art 21 of the Indian constitution casts the obligation on the state to preserve life.

[710] As amended in 1977 and under the comprehensive response compensation and liability Act, 1989, as well as the oil pollution Act 1990,all of which make liability strict whether or not the defendant was negligent

The US supported the adoption of the Rio Declaration on Environment and Development, which recognizes the right to a clean environment and provides over-arching principles for environmental protection and sustainable development, but the declaration is not legally binding.[711] The US has ratified some international environmental treaties,[712] but refused to ratify the Kyoto Protocol, the key international environmental treaty requiring reduced greenhouse gas emissions by 2010. Meanwhile, the US remains among the top polluters in the world. In the absence of national recognition, some States in the US recognize the right to a clean environment. The US has made commendable efforts towards protecting the environment. In the area of control of oil spillage, gas flaring and environmental impact assessment, the US serves as a role model. This success has been achieved through a mixture of legislative, policy, monitoring, environmental audit as well as implementation strategies which aim at arrestingranges of environmental pollution in the country. These laws include: National Environmental Policy Act,[713] Clean Air Act,[714] Clean Water Act,[715]Safe Drinking Water Act[716] Resource Conservation and Recovery Act,[717] Comprehensive Environmental Response, Compensation, and Liability Act/Superfund Amendments and Reauthorization Act[718]

A. National Environmental Policy Act[719]

The effectiveness of NEPA originates in its requirement of federal agencies to prepare an environmental statement to accompany reports and recommendations for funding from

[711]United Nations Environment Programme, 'Rio Declaration on Environment and Development' <hhps://www.unep.org/Documents.Multilingual/Default.asp?documentID78articleID=1163> accessed 31 May 2018.
[712] United nations, 'Montreal Protocol on Substances that Deplete the Ozone Layer' 1987 <https://www.treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-2-a&chapter=27&lang=en;United Nations Framework Convention on Climate Change.'Status of
[713]NEPA 1969.
[714]CAA 1970.
[715]CWA 1972.
[716]SDWA 1974
[717]RCRA 1976.
[718]CERCLA 1980.
[719]NEPA 1969.

Congress. This document is called an Environmental Impact Statement [EIS]. NEPA is an action- forcing piece of legislation, meaning that the act itself does not carry any criminal or civil sanctions. All enforcement of NEPA is to be obtained through the process of the court system. NEPA has been expanded to include most activities that a federal agency could prohibit or regulate. In practice, a project is required to meet NEPA guidelines when a federal agency provides any portion of the financing for the project. Sometimes, however, review of a project by a federal employee can be viewed as a federal action and would then, therefore, require NEPA-compliant analysis.[720]

B. Clean Air Act[721]

The CAA divides the country into air quality regions and sets goals for the concentration of various pollutants in the air in order to minimise the risk for health. The regulated ambient air pollutants are Carbon Monoxide (CO), Hydrocarbons (HCs), Lead (Pb), Nitrogen oxides (NOx), Sulphur oxides (SOx), Ozone, and particulates. The CAA established technology-based emission standards for specific industry categories (SICs). These standards specify the technology and the emission limits that are allowed for pollutants discharged to the air.[722]

A major amendment was enacted by Congress in 1990 when air toxins, such as mercury and polychlorinated biphenyls where added to the regulation. The 1990 amendments required EPA to identify categories of industrial sources for 187 listed toxic air pollutants and to take steps to reduce pollution by requiring sources to install controls or change production

[720] *Ibid.*
[721] CAA 1970.
[722] *Ibid.*

processes. There are no ambient air goals for air toxics. The revision of 1990 also established a programme to phase out the use of chemicals that deplete the ozone layer.[723]

C. Clean Water Act[724]

The Clean Water Act [CWA] establishes the basic structure for regulating discharges of pollutants into the waters and regulating quality standards for surface waters. The current trend is towards regions setting watershed specific goals for principal pollutants[725]. The CWA established technology-based effluent standards for specific industry categories. These standards specify the technology and effluent limits that should be used to treat wastewater prior to disposal in a water body.

D. Safe Drinking Water Act[726]

The Safe Drinking Water Act [SDWA] is the main federal law that ensures the quality of drinking water in the US. SDWA was originally passed by Congress in 1974 to protect public health by regulating the nation's public drinking water supply. The law was amended in 1986 and 1996 and requires many actions to protect drinking water and its sources.[727] The SDWA does not regulate private wells which serve fewer than 25 individuals.[728]

The SDWA has four categories of standards that water suppliers must meet. The categories are physical, chemical, microbiological, and radiological.

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[723]Policy Department A, 'The United States Environmental Policy' <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536323/IPOL_IDA(2015)536323_EN.pdf> accessed 31 May 2018.
[724]CWA 1972.
[725]Oxygen demand, nutrients, pathogens, suspended solids, salts, toxic metals, toxic organics, heat, and pH.
[726] SDWA 1974
[727]Rivers, lakes, reservoirs, springs, and ground water wells.
[728]Policy Department A, 'The United States Environmental Policy' <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536323/IPOL_IDA(2015)536323_EN.pdf> accessed 31 May 2018.

E. Resource Conservation and Recovery Act[729]

The Resource Conservation and Recovery Act (RCRA) is the US primary law governing the disposal of solid and hazardous waste. Congress passed RCRA on October 21, 1976 to address the increasing problems the US faced from the growing volume of municipal and industrial wastes. RCRA, which amended the Solid Waste Disposal Act of 1965, set national goals for: protecting human health and the environment from the potential hazards of waste disposal; conserving energy and natural resources; reducing the amount of waste generated; and ensuring that wastes are managed in an environmentally-sound manner.[730]

Some of the other mandates of this strict law include increased enforcement authority for EPA, more stringent hazardous waste management standards, and a comprehensive underground storage tank programme.[731]

F. Comprehensive Environmental Response, Compensation, and Liability Act/Superfund Amendments and Reauthorization Act[732]

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 [CERCLA] is popularly referred to as superfund. This federal law is designated to cleanup sites contaminated with hazardous substances. The law authorizes the EPA to identify parties responsible for contamination of sites and compel the parties to clean up the sites. Where responsible parties cannot be found, the Agency is authorized to clean up sites itself, using a special trust fund. In addition to cleanup, CERCLA has a community right-to-know provision. This provision known as the Toxics Release Inventory [TRI] requires industry

[729]RCRA 1976.
[730]Policy Department A, '*The United States Environmental Policy'* <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536323/IPOL_IDA(2015)536323_EN.pdf> accessed 31 May 2018.
[731]Policy Department A, 'The United States Environmental Policy' <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536323/IPOL_IDA(2015)536323_EN.pdf> accessed 31 May 2018.
[732]CERCLA 1980.

operators to report biennially the emissions and management of regulated chemicals to the public.[733]

- Formulation and Implementation of Mandatory Codes of Best Practices in the Oil and Gas Industry in the US

The major and environmentally devastating source of pollution in the world today is operations from the oil and gas industry. To ensure that pollution from oil and gas operations is minimized, the US developed mandatory and enforceable codes of operations which every industry player must abide by in the conduct of their operations. These are discussed below.

- American Petroleum Institute[734]

The American Petroleum Institute [API] together with the American Society of Mechanical Engineers [ASME], the US Integrity Management [IM] for High Consequence Areas [HCAs], and the Alaska Best Available Technology [BAT] collectively form the internationally recognized standards for pipeline management and good oilfield practice. The API publishes periodically standards relating to recommended practices and equipment specifications to help the oil and gas industry to carry out safe, efficient and responsible operations. The most current API publication is the 2016 edition. The API standards cover both upstream and downstream oil and gas operations.

- US Integrity Management for High Consequence Areas [IMHCAs]

Another universally accepted standard and best practice in the oil and gas industry is the US IMHCAs. The US pipeline and Hazardous Materials Safety Administration [PHMSA]

[733]Policy Department A, 'The United States Environmental Policy' <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536323/IPOL_IDA(2015)536323_EN.pdf> accessed 31 May 2018.

[734]API, 'Publications, Programs, Services' <http://www.api.org/products-and-services/standards/~/media/Files/Publications/Catalog/2016_catalog/2016%20API%20Catalog_Full%20final.pdf?la=en> accessed 19 December 2017 [API].

requires pipeline operators to develop and implement integrity management programmes, to ensure the physical integrity of their systems in High Consequence Areas [HCAs].[735] The key programme elements of the oil and gas pipeline integrity management [IM] rule include: HCAs identification, threat identification, risk assessment, integrity assessment and continual assessment and data integration. The IM regulations primarily protect HCAs, which include highly populated areas, navigable waterways, and environments that are unusually sensitive to oil spills or gas explosions. It therefore requires operators to assess the strength and adequacy of all pipelines in HCAs in case of failure, ensure a continual process for monitoring and evaluating pipelines integrity, and adopt preventative measures to reduce damage to HCAs environment.[736]

-MNOC Low Standard of Oilfield Practice in Nigeria

MNOCs in Nigeria are required to adopt good oilfield practice in their operations and the US IM for HCAs qualifies as an internationally recognized standard for pipeline management.[737] However, it is clear MNOCs in Nigeria do not adopt this good oilfield practice, and this can be seen from the careless attitudes adopted by MNOCs in the management of their pipelines. There is no indication that HCAs are identified; there is equally no indication that threats are identified or that risks are assessed or that pipeline integrity is practiced, with the frequency of oil spillages and gas explosions from pipelines in the Niger Delta region of Nigeria. Recently, the UNEP in their Report published on the environmental assessment of Ogoniland found that "oilfields are interwoven with Ogoni communities…pipelines are exposed to the surface across community centres and homes and hydrocarbon pollution are visible in surface

[735] National Transportation Safety Board, *Integrity Management of Gas Transmission Pipelines in High Consequence Areas* (Safety Study NTSB/SS-15/01, Washington DC 2015) 5.
[736] B R Konne (n 12) 193.
[737] *Ibid.*

and underground waters". This shows clearly that MNOCs' operations in Nigeria fall below international standards.[738]

Ogoniland and other Niger Delta communities are highly populated wetlands with unusual sensitivity to environmental pollution, and thus ought to be classified as HCAs.[739] However, MNOCs have failed to observe this good oilfield practice in their operations in Nigeria, even though they comply with such standards in the US and other developed economies where they operate. For instance, between 1989 and 1994, SPDC alone reported an average of 221 oil spills yearly in the Niger Delta.[740] Out of this figure, SPDC claimed that only half was due to corrosion of ageing facilities, while declaring that 28 percent were due to sabotage by third parties.[741] At present, SPDC claims that over 70 percent of all oil spilled from its facilities in the Niger Delta is caused by sabotage, crude oil theft and illegal refining, as opposed to equipment failure.[742] While it cannot be disputed that oil theft and sabotage have had their toll on the oil and gas industry in the Niger Delta for some time since the emergence of armed agitation for resource control and environmental justice against the MNOCs and the Nigerian State, this identification of the cause of spills has been largely done by SPDC's own assessment due to poor monitoring by the Department of Petroleum Resources [DPR] and the National Oil Spill Detection and Response Agency [NOSDRA].[743] It could safely be concluded that SPDC's claims could well have been exaggerated[744]

Furthermore, it has been asserted that even if the 70 percent sabotage figure is correct, SPDC would still be in violation of good oilfield practice by failing to guard against the risk of

[738]United Nations Environment Programme (n 31) 12.
[739]Konne B R, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland' [2014] (47) *Cornell International Law Journal*, 181, 194.
[740]Konne B R, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland' [2014] (47) *Cornell International Law Journal*, 181, 194.
[741]*Ibid.*
[742]*Ibid.*
[743]*Ibid.*
[744]*Ibid.*

third-party damage.[745] This is because API standards require that operators internalize third party risks by adopting measures to protect against vandalism and theft, and their resulting environmental damage.[746] These recommended measures include using robust design factors such as thick-walled pipes, sabotage-resistant pipe specifications, deeper-buried pipeline segments, as well as enhanced leak detection systems.[747]

5.3.2 India Recognition of Right to Clean Environment

India has done considerably well in the area of protection of the rights of her citizens to an environment that is healthy to their lives and health, as well as conducive to their development. This has been achieved through a mixture of legislative efforts and judicial responsiveness and activism. Subsequent legislative efforts in the later years in the country introduced the right to environment as a fundamental right under Article 21 of the Constitution of India.[748] The Courts in India have played a distinguishing role in gradually enlarging the scope of a qualitative living by engaging themselves into, and resolving various issues of environmental protection. Consequently, activities posing a major threat to the environment were curtailed so as to protect the individual's inherent right to wholesome environment as guaranteed under various instruments for protection of legal and human rights. Some of the basic environmental protection laws in India are: Water (Prevention and Control of Pollution) Act,[749] Water (Prevention and Control of Pollution) Cess Act,[750] Air

[745] *Ibid.*
[746] Konne B R, '*Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland'* [2014] (47) *Cornell International Law Journal*, 181, 194.
[747] *Ibid.*
[748] Lexpress Admin, ''*Right to Clean and Healthy Environment'' as a Fundamental Right in India'* <http://lexpress.in/environment/right-clean-healthy-environment-fundamental-right-india> accessed 30 May 2018.
[749] Water (Prevention and Control of Pollution) Act, 1974.
[750] Water (Prevention and Control of Pollution) Cess Act, 1977.

(Prevention and Control of Pollution) Act,[751] Environment (Protection) Act[752] and the National Environment Appellate Authority Act[753]

- Right to Clean and Healthy Environment as a Fundamental Right in India through the Courts

The right to live in a clean and healthy environment is not a recent invention of the courts in India. The right has been recognized by the legal system and the judiciary in particular for over a century or so. The judiciary has managed to increase the ambit of Article 21 of the constitution of India, through various judicial pronouncements, to include the Right to healthy and clean environment to be a fundamental right under right to life.[754]

Article 21 of the Constitution of India provides for right to life and personal liberty, it states "No person shall be deprived of his life or personal liberty except according to procedure established by law." this article imposes a duty on the state to protect the life and liberty of the people. The concept of the right to life has been broadened through the judicial pronouncements. While resolving cases relating to environment, the judiciary considered the right to clean or good environmental as fundamental to life and upheld as fundamental right. The judiciary has played a vital role in interpreting the Article 21 of the Indian Constitution. The scope of Article 21 of the Constitution has been considerably expanded by the Indian Supreme.[755]

[751]Air (Prevention and Control of Pollution) Act, 1981.
[752] EPA 1986
[753]NEAAA, 1997.
[754]Lexpress Admin, ''*Right to Clean and Healthy Environment'' as a Fundamental Right in India'* <http://lexpress.in/environment/right-clean-healthy-environment-fundamental-right-india> accessed 30 May 2018.
[755]Lexpress Admin, ''*Right to Clean and Healthy Environment'' as a Fundamental Right in India'* <http://lexpress.in/environment/right-clean-healthy-environment-fundamental-right-india> accessed 30 May 2018.

In *Subhash Kumar v State Bihar,*[756]the court observed that 'right to life guaranteed by Article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.' Through this case, the Court recognized the right to a wholesome environment as part of the fundamental right to life. This case also indicated that the municipalities and a large number of other concerned governmental agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measures to improve the environment.

In *Rural Litigation and Environment Kendra, Dehradun v State of Uttar Pradesh*,[757] the representatives of the Rural Litigation and Entitlement Kendra, Dehradun wrote to the Supreme Court alleging that illegal lime stone mining in the Mussorie-Dehradun region was causing damage to the fragile eco-systems in the area. The Court treated this letter as a public interest petition under Article 32 of the Constitution. And also several committees have been appointed for the full inspection of illegal mining sites. All the committees came at the conclusion that the lime stone quarries whose adverse effects are very less, only those should be allowed to operate but that too after further inspection and all. Therefore, the court ordered the closure of a number of limestone quarries. Although the court did not mention any violation of fundamental right explicitly but and impliedly admitted the adverse effects to the life of people and involved a violation of Article 21 of the Constitution.

M.C. Mehta v Union of India[758]is a matter regarding the vehicular pollution in Delhi City. The court held that it is the duty of the Government to see that the air did not become contaminated due to vehicular pollution. The Apex court again confirming the right to healthy environment as a basic human right and stated that the right to clean air also stemmed from Art 21 which referred to right to life. This case has served to be a major landmark

[756](1991) 1 SCC 598.
[757](1988) 1 NSC 254.
[758]1987 SCR (1) 819.

because of which lead-free petrol supply was introduced in Delhi. There was a complete phasing out old commercial vehicles more than 5 years old as directed by the courts.

In this very recent case concerning conservation of forests, Justice Y.K. Sabharwal, held that, considering the compulsions of the states and the depletion of forest, legislative measures have shifted the responsibility from states to the centre. Moreover any threat to the ecology can lead to violation of the right of enjoyment of healthy life guaranteed under Art 21, which is required to be protected. The constitution enjoins upon this court a duty to protect the environment.

Deorav Union of India,[759] it was pointed out by the Court that:

> since article 21 of the Constitution guarantees that none should be deprived of their life, then why should a non-smoker become the victim of the whole process? It was contended that smoking is injurious to health and may affect the health of smokers but there is no reason that health of passive smokers should also be injuriously affected. So, till the statutory provision is made and implemented by the legislative enactment, it was held that it would be in the interest of the citizens to prohibit smoking in public places and the person not indulging in smoking cannot be compelled to passive smoking on account of the acts of the smokers.

5.4 Gaps in the Regulatory Regime of CSR of MNOCs in Nigeria

This segment explores the gaps in Nigeria's regulatory framework which are exploited by MNOCs to evade their environmental responsibility to their host communities. The discussions so far have revealed that SPDC and other MNOCs operating in the Niger Delta have not integrated environmental protection and accountability into their CSR. The MNOCs have demonstrated from the UNEP report on Ogoniland that they have not complied with Nigeria's regulatory requirements which require them to adopt good oil field practice in their operations. Since CSR means going beyond the legal minimum to adopt environmentally sustainable practices in the pursuit of profit, MNOCs in Nigeria cannot be trusted to adopt

[759](2001) 8 SCC 765.

voluntary codes of conduct in a weak system like Nigeria. This calls for government regulation in order to protect the rights of the people to a healthy environment.

5.4.1 Absence of Constitutional Recognition and Enforcement of the Rights to a Healthy Environment

One serious gap in Nigerian law which makes it easy for MNOCs to exhibit carelessness towards protecting the environment of their host communities is their awareness that beyond suing under the tort of negligence and the rule in *Rylands v Fletcher*[760] for compensation, there is no positive recognition of environmental rights under the 1999 Constitution. This contrasts heavily with the position in other African countries as well as countries in Europe, Asia and the Americas. In Kenya, for example, the Constitution[761] expressly recognizes the right of the people of Kenya to a clean, safe and healthy environment. Section 69 of the Constitution imposes on the State the duty to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits;[762] work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya;[763] protect and enhance intellectual property in, and indigenous knowledge of biodiversity on the genetic resources of the communities;[764] encourage public participation in the management, protection and conservation of the environment;[765] protect genetic resources and biological diversity;[766] establish systems of environmental impact assessment, environmental audit and monitoring of the environment; [767] eliminate processes and activities that are likely to endanger the

[760](1868) LR 3 H L 330.
[761]The Constitution of Kenya, 2010.
[762]*Ibid*, art 69(1)(a).
[763] Art 69(1)(b).
[764] Art 69(1)(c).
[765] Art 69(1)(d).
[766]Art 69(e).
[767] Art 69(1)(f).

environment;[768] and utilize the environment and natural resources for the benefit of the people of Kenya.[769]

From the provisions above, it can be seen clearly that the Constitution of Kenya takes the environment and health of the people seriously by imposing on the State the obligation to ensure that the exploitation, utilization, management and conservation of the environment and the natural resources of the country are done in a sustainable manner. It also requires the State to take active measures to preserve the tree cover of at least ten percent of the country's land area. This is apparently to conserve timber for lumbering industries, to prevent erosion and leaching through the loss of tree cover and to arrest the adverse effect of erosion and global warming. The Constitution further mandates the State – the government and institutions of Kenya, to conserve biological diversity and genetic resources, to establish a system of environmental impact assessment, environmental audit and monitoring. The State is under a duty to eliminate processes and activities that are likely to endanger the environment.

Under Article 69(2), every person in Kenya bears the responsibility to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. To ensure that these provisions are not mere paper tigers with bare rights without enforcement, Article 70(1) gives the right of access to the court for redress to any person who alleges that any of his environmental rights have been infringed upon. Article 70(1) provides:

> If any person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to a court for redress in

[768] Art 69(1)(g).
[769] Art 69(1)(h).

> addition to any other legal remedies that are available in respect to the same matter.

This means that such person need not wait until the harm to the environment or his health has been completed. A person who alleges that his right to clean and healthy environment has been denied, violated, infringed or merely threatened can approach the court for redness, and whatever redress obtained is complementary to other common law remedies for trespass, negligence, nuisance or the rule in *Rylands v Fletcher*[770] to which the applicant is also entitled.

Clause (2) of Article 70 provides for the orders or directions the court may make where an application under clause (1) is made. It says the court may make an order: to prevent, stop or discontinue any act or omission that is harmful to the environment;[771] to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment;[772] or to provide compensation for any victim of a violation of the right to a clean and healthy environment.[773] As regards the quantum of interest an applicant must show to have locus standi to make the application under clause (2) of Article 70, the Constitution provides authoritatively that such applicant need not demonstrate that he has incurred any loss or suffered any damage.[774]

Furthermore, Article 42 of the Constitution recognizes and guarantees the right to a clean and healthy environment as a fundamental right and requires the State to take appropriate legislative and other actions to give effect to such rights.

[770](1868) LR 3 H L 330.

[771] The Constitution of Kenya 2010, art 70(2)(a).
[772]*Ibid*, art 70(2)(b).
[773]*Ibid*, art 70(2)(c).
[774]*Ibid*, art 70(3).

The right to a clean, safe and healthy environment is also recognized, guaranteed and protected under the South African Constitution.[775] Under the Constitution, environmental rights are recognized and enforced as fundamental rights. Section 24 provides as follows:

> Everyone has the rights:-
>
> (a) To an environment that is not harmful to their health or wellbeing; and
> (b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:-
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The foregoing demonstrates the seriousness with which South Africa handles environmental rights and values the lives and health of her citizens. Section 38 provides for the right of access to the court for seeking of redress in the event of the violation of any of the rights enumerated in the Bill of Rights, including the right to a clean and healthy environment. Apart from that, the Constitution expanded the range of persons who can approach the court to enforce environmental rights. Thus, anyone acting in his own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members,[776] can approach the courts to seek redress for the violation of environmental rights.

At present, about 130 countries of the world have provisions in their constitutions which recognize and protect the right to a clean, safe and healthy environment. Of this figure, about 60 of these constitutions recognize environmental rights as a fundamental right while the rest include it in their constitutions only as fundamental objectives and directive principles of

[775]Constitution of the Republic of South Africa No. 103 of 1996 [1996 Constitution].
[776]Constitution of the Republic of South Africa No. 103 of 1996, s 38(a)-(e).

State.[777] Nigeria falls into the category of States which do not recognize environmental rights. Despite the country's over five decades of dependence on oil and gas production with its disastrous effect on the environment, Nigeria still continues to regard environmental protection as a mere directive principle of State policy which is unenforceable.

Section 20 of the 1999 Constitution declares that "the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria". As observed earlier, this is merely a declaration of intention to protect the environment of the State which does not give rise to any enforceable right. In any case, Section 6(6)(c) of the 1999 Constitution lays to rest any confusion surrounding the enforceability of environmental rights in Nigeria when it declares that the judicial powers of the courts in the country shall not be exercised in relation to the question as to whether any provisions of chapter two[778] has been observed. In other words, Section 6(6)(c) bars the courts in Nigeria from entertaining any claim or cause of action founded on the provisions of chapter two. Therefore, the conclusion to be drawn from the foregoing analysis is that Nigeria is yet to give legal recognition to the right of her people to enjoy a clean and healthy environment as is the case in other countries. This explains why MNOCs operating in Nigeria's oil and gas sector engage in coordinated pollution on the Nigerian environment without serious repercussions.

5.4.2 Poorly Developed and Lax Oil and Gas Regulatory Regime

It will amount to stating the obvious to say that Nigeria's regulatory regime in the oil and gas industry is archaic, retrogressive, anti-people and constitutes gross violation of the rights of the indigenous peoples to a clean, safe and healthy environment. For instance, the principal

[777] B AOloworaran, '*The Right to a Clean and Healthy Environment and the Fundamental Rights Provisions of the Constitution of the Federal Republic of Nigeria 1999'* [2009] (1) (2) Petroleum, Natural Resources and Environmental Law Journal 53, 60.

[778]Chapter two of the 1999 Constitution deals with the Fundamental Objectives and Directive Principles of State Policy. Protection of the Environment is one of the objectives of the Nigerian State.

statute regulating oil and gas production in Nigeria is the Petroleum Act[779] which was enacted as far back as 1969. Apart from a few provisions of the Act which empower the Minister of Petroleum Resources to make regulations relating to the prevention of pollution,[780] the Act did not appear to prohibit or specify the bar for gas flares or oil spillages. In fact, the Associated Gas Re-injection Act[781] permits MNOCs to flare gases directly into the environment if written permission to flare is obtained from the Minister of Petroleum Resources.[782] One of the conditions required to be specified by the Minister in his certificate of permission is the amount the polluter will pay for every 28.317 standard cubic metres of gas flared.[783] The Associated Gas Re-injection (Continued Flaring of Gas) Regulations,[784] on its part, provides circumstances or factors which are required to guide the Minister in his decision whether or not to grant the exemption certificate to flare associated gas.

From the foregoing, it is clear that the regulatory regime in Nigeria's oil and gas industry is too lax and probably made so with the hope of attracting more foreign direct investments into the country without regard for the health and environment of the indigenous communities on whose lands the MNOCs operate.

5.4.3 Non-Domestication of Relevant Environmental Protection Treaties

Nigeria has made it a duty to attend all international conferences on the environment and further boasts an impressive record in the number of treaties signed and/or ratified. However, when it comes to domesticating these treaties to make them enforceable in the country, the story becomes different. Most environmental protection-focused treaties like the United Nations Framework Convention on climate change [UNFCCC], the Kyoto Protocol and the

[779][PA] Cap. P10, LFN 2004.
[780]*Ibid*, s 9(1)(b)(i)-(iii).
[781][AGRA] Cap. A19 LFN 2004.
[782]*Ibid*, s 3(2)(b).
[783]AGRA 2004, s 3(2) (b).
[784]Regulation No. 43 of 1984.

Montreal Protocol on Substances that Deplete the Ozone Layer [Montreal Protocol], among a host of others particularly related to the reduction of atmospheric pollution have not been domesticated. The same applies to other treaties focused on the prevention of pollution to the marine environment. Each of these treaties requires appropriate legislative and other policy measures to become enforceable within a national jurisdiction.

The 1999 Constitution adopts a dualist approach to the application of international law to the territory of Nigeria. Section 12(1) requires a every treaty entered into between Nigeria and another country to be enacted into law before it will become binding on her. This absence of domestication of key environmental protection treaties is responsible for the continued violation of the rights of indigenous peoples to a clean and healthy environment.

5.4.4 Weak and Non-Deterrent Penal Sanctions for Environmental Recklessness

Nigeria's oil and gas regulatory regime is littered with a lot of non-deterrent penal statutes which give MNOCs the leeway to continue to pollute the environment. For instance, under the NESREA Act, NESREA is given the power to make regulations, guidelines and standards for the protection and enhancement of the quality of land resources, natural watershed, coastal zone, dams and reservoirs, prevention of flood and erosion.[785] The Agency is also empowered to make regulations setting out specifications and standards for the protection and enhancement of the quality of Nigeria's air resources.[786] Violation of any of the several regulations made attracts a paltry fine of N200, 000 for individuals and N2, 000, 000 for corporate bodies.[787]

Violation of the regulations for the protection and enhancement of the quality of land resources, natural watershed, coastal dams and reservoirs, including prevention of flood and

[785]NESREA Act 2007, s 26(1).
[786]*Ibid*, s 20(1).
[787]*Ibid*, ss 20(3).

erosion attracts a fine of not more than N200, 000 or imprisonment term of not more than one year or to both such fine and imprisonment;[788] and where the offence is committed by a corporate body, the applicable fine is not more than N1, 000, 000.[789] The penalty for the discharge of hazardous waste or harmful substance into the air, upon land, and into the waters of Nigeria where such act is prohibited is a fine of not more than N1, 000,000 for both individuals and corporate violators or imprisonment not exceeding 5 years for individuals alone.[790] Similarly, the Agency is empowered to make regulations for the purpose of regulating water quality. The penalty for the breach of these regulations is a fine not exceeding N50,000 or imprisonment for a term not exceeding one year or both such fine and imprisonment, for an individual offender and a fine of not more than N500,000 for a corporate offender.[791]

Under the National Oil Spill Detection and Response Agency Act,[792] the penalty for non-reporting of the occurrence of a spill incident by a polluter to the Agency is N500, 000 for each day of default,[793] while the failure on the part of the polluter to clean-up a spill occurring from its facility is a paltry sum of N1 million.[794] In addition, under the Oil in Navigable Waters Act[795]prescribes a fine of not more than N2, 000 as penalty for any person or body corporate to discharge crude oil, fuel and lubricating oil or heavy duty oil from a Nigerian ship into a prohibited sea area; or the discharge of oil from any apparatus to or from land by a master or owner of vessel or an occupier of land on which a vessel is kept.[796]

[788]NESREA Act 2007, s 26(3).
[789]*Ibid*, s 26(4).
[790]NESREA Act 2007, s 27(2).
[791]*Ibid*, s 23(3) and (4).
[792] [NOSDRA Act] No. 15 of 2006.
[793]*Ibid*, s 6(2).
[794]*Ibid*, s 6(3).
[795] [ONWA] Cap 06, LFN 2004.
[796]*Ibid*, s 6.

The list is in-exhaustive. A careful look at these penal provisions in Nigeria's environmental protection statutes betrays any genuine intention to protect the nation's environment, especially the fragile ecosystem of the indigenous peoples of the Niger Delta region. The penalties are generally ridiculously low and could easily be paid by polluters. In fact, most of the penalties are driven more by the concern to raise funds for the Federal Government than the need to protect the people's environment. Otherwise, how else can one explain the provision under the NOSDRA Act which prescribes a penalty of N1 million for a polluter who fails to clean up an impacted site. A more potent sanction ought to have included the revocation of operatorship licence and/or approvals granted to the polluter to operate in the activity giving rise to the pollution. This ought to be in addition to monetary claims/compensation payable in favour of indigenous peoples affected by the pollution and criminal proceedings against the directing minds of the polluter should it fail to clean up and restore the environment to its pristine and pre-pollution state. These non-deterrent sanctions actually bolster the MNOCs to degrade the indigenous peoples' environment with impunity.

5.4.5 Reluctance of the Courts to Develop Environmental Rights Jurisprudence through Purposive Interpretation of the Fundamental Right to Life

In countries where the right to a clean, safe and healthy environment has not been recognized and enforced as a fundamental right, the courts have risen to close the gap by interpreting the actionable and enforceable fundamental rights provisions relating to life and dignity of the human as requiring the wholesomeness of the environment for their optimum enjoyment and realization.

For instance, Articles 48 and 51(g) of the Indian Constitution which creates the environmental obligation of the Indian State as a mere statement of principle, is interpreted together with Article 21 of the same Constitution which is the provision on right to life.

According to Article 21, "no person shall be deprived of his life and personal liberty except according to procedure established by law". In the Indian case of *Gaur v State of Haryana*,[797] the court held that:

> Article 21 protects the right to life as a fundamental right. Enjoyment of life and its attainment including the right to live with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance, free from pollution of air and water sanitation without which life cannot be enjoyed. Any contrary acts or actions would cause environmental pollution. Environmental, ecological, air, water pollution, etc should be regarded as amounting to violation of Article 21.

Similarly, in *Zia v WAPDA*,[798] the Supreme Court of Pakistan established an inextricable link between the right to life and the enjoyment of a clean and healthy environment when it held thus:

> Any action taken which may create hazards of life will encroach upon the rights of a citizen to enjoy life according to law. In the present case this is the complaint the petitioners have made. In our view the word "life" constitutionally is so wide that the danger and encroachment complained of would impinge fundamental rights of a citizen.

Bangladeshi courts have also developed and embraced the jurisprudence of distilling environmental rights from the right to life. Thus, in *Farooque v Bangladesh*,[799] the court held that:

> Articles 31 and 32 of our constitution protect the right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.

In the above case, the petitioner challenged an experimental structural protect of the huge Flood Action Plan [FAP] in Bangladesh. The petitioner alleged that the FAP project was an

[797] (1995) 2 AIR 577 SC.
[798] PLD, 1994 SC 693.
[799](1997) 49 Dhaka Law Reports 1 [per chewdhury J].

anti-environment and people-unfriendly project since it will adversely affect and injure more than a million people by way of displacement, causing damage to soil and destruction of the natural habitat of fishes, flora and fauna. The court held that the project, if implemented, would violate the people's right to life and to a clean and healthy environment.

Thus, in the Bangladeshi case of *M. Farooquev Bangladesh*,[800] the High Court interpreted the right to life as inclusive of anything which affects life, public health and safety as well as the enjoyment of pollution-free water and air, and a sustainable condition consistent with human dignity.

Furthermore, the argument that enforcement of environmental rights in India would lead to massive unemployment in the country was rejected by the Supreme Court of India. In *M C Mehta v Union of India*,[801] a number of tanneries operating in India discharged effluents into the Ganges River, leading to massive pollution. The government authorities failed to take appropriate steps. The petitioner asked the court to restrain the industries from discharging the effluents into the river. It was contended for the respondents that restraining the industries from discharging the effluents would lead to closure of the tanneries which in turn would occasion unemployment and loss of revenue. The Supreme Court ordered the tanneries to close down unless the trade effluents were subjected to a pre-treatment process by setting up primary treatment plants approved by the State Pollution Board. The court noted that "closure of tanneries may bring unemployment [and] loss of revenue, but life, health and ecology have greater importance to the people".

Similarly, the Costa Rican court in *Presidente de la sociedad Marlene S.A. v Muicipalidadad de Tibas, SalaConstitucional de la corte Supreme de Justicia*[802] made the point that the full

[800](1997) 49 Dhaka Law Reports (AD) 1.
[801] 1988 AIR 1115; 1988 SCR (2) 530.
[802]Decision No.6918/94 of 25 November 1994.

and optimum enjoyment of the right to life is dependent on first being a right to health and to the environment.

In addition, Article 9 of the Pakistani Constitution provides that "no person shall be deprived of life or liberty save in accordance with the law". This provision is the equivalent of Section 33(1) of the 1999 Constitution which recognizes and guarantees to every person in Nigeria the right to life. The Supreme Court of Pakistan held that Article 9 of the Pakistani Constitution entailed all amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.[803] The court further held that the right to life and dignity of the human person will be illusory in the absence of access to food, clothing, shelter, education, healthcare, clean atmosphere and pollution-free environment.

Furthermore, in *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v The Director, Industries and Mineral Development, t*he petitioners filed this suit to enforce the right of the locals to have clean and pollution-free water. Their contention was that if the miners were allowed to continue their mining activities, the whole watercourse would be polluted. The court, relying on Article 9 of the Pakistani Constitution held that serious threat to life and human existence would be occasioned should the miners continue to carry out their operations and contaminate the water. By this decision, the court established an inextricable relationship between right to life and the right to a clean, safe and pollution-free environment which is conducive to human habitation as well as to the maintenance of ecological balance.

The same approach has been adopted in the Philippine. The Supreme Court has interpreted Sections 15 and 16 of Article II of the Philippine Constitution[804] which includes the right to health and ecology under the Declaration of Principles and States Policies, as implying the

[803]Shehla Zia's Case [PLD 1994] S C 693.
[804]Constitution of Philippine 1987.

right to life. In *Minors Oposa v Secretary of the Department of Environmental and Natural Resources*,[805] the plaintiffs who consist of a group of 43 children represented by their parents sought to have the logging licences approved for certain companies revoked because of the massive rate of deforestation resulting from extensive logging. The plaintiffs alleged that the logging was causing irreparable injury to present and future generations and violated their right to a healthy environment. They alleged that of the 16 million hectares of rain forest that existed 25 years ago, only 1.2 million were left. The plaintiffs asked the court to revoke all existing timber licences already granted to logging companies while at the same time praying that no new timber licences should be granted. The plaintiffs anchored their claims on Sections 15 and 16 of Article II of the Declaration of Principles and State Policies under the Philippine Constitution which provide the right to health and ecology. The lower court rejected this claim as raising a political question but on appeal the Supreme Court made the following useful statement of the law:

> While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State policies and not under the Bill of Rights, it does not follow that it is less important that any of the civil and political rights enumerated in the latter …As a matter of fact, these basic rights need not even be written in the constitution for they are assumed to exist from the inception of humankind.

Furthermore, the Supreme Court held that the civil, political, economic and social rights encapsulated in the Constitution are indivisible and interdependent upon the existence of one another. In other words, the court acknowledged that the right to health and ecology is found in the part of the Constitution declared as mere declaration of principles and state policies which are ordinarily not justiciable. This part is different from the chapter on Bill of Rights which contains the civil and political rights – such as the right to life and right to dignity of the human person, which are enforceable rights. The point the Supreme Court established in

[805]33 ILM 173 (1994).

this decision is that the enforceable fundamental rights provisions cannot exist or be realized without the realization of the economic and social rights. On this point, the Supreme Court held:

> The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment… The said right implies, among other things, the judicious management and conservation of the country's forests".

The court therefore ordered all the licences already granted by the executive arm of government to be rescinded and also restrained the further grant of logging licences. Accordingly, the court held that the State has an obligation to protect the right to a healthy environment of the complainants/plaintiffs.

Clearly, the foregoing discussion reveals that the nexus between a clean, safe and healthy environment and the right to life has been acknowledged across jurisdictions. Even at the International Court of Justice [ICJ], the link has been acknowledged. In Gabcikovo-Nagymaros, the ICJ stated:[806]

> The protection of the environment is likewise, a vital part of contemporary human rights doctrine, for it is sine qua non for numerous human rights such as the right to health and the right to life itself… as undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

In Nigeria, Section 20 of chapter two of the1999 Constitution declares that the Nigerian State "shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria". This provision is in chapter two of the Constitution. This chapter is titled "Fundamental Objectives and Directive Principle of State Policy" which Section 6(6)(c) expressly says is non-justiciable. Furthermore, Section 33 of the Constitution recognizes and protects the right of every citizen of Nigeria to his life. Section 34 provides that "[E]very individual is entitled to respect for the dignity of his person and accordingly – (a) no person

[806]Separate opinion of Judge Wecramantry 91-92 <https://www.icjcij.org/docket/files/92/7383.pdf> accessed 12 December 2017.

shall be subject to torture or to inhuman or degrading treatment". It can be seen that the foregoing provisions of the 1999 Constitution are similar to those in the Indian, Pakistani, Bangladeshi and Philippine constitutions examined wherein the courts have enforced the right to a clean and healthy environment as necessary pre-condition for the enjoyment of the rights to life and dignity of human person.

However, this global momentum has not been sustained and replicated in Nigeria by the Nigerian courts. *Gbemre v SPDC*[807] appears to be the only known Nigerian case where this global approach was adopted, albeit at the trial court level. It is uncertain what the decision of the appellate courts will be when the opportunity presents itself for interpretation of Sections 20 and 33 of the 1999 Constitution. In all other cases, the attempt to smuggle the right to a clean and healthy environment into the right to life provision has not succeeded.[808]

5.4.6 Absence of Recognition of the Right to Clean and Healthy Environment in Other Statutes

Apart from giving recognition to the right of citizens to a clean and healthy environment in national constitutions which has been done by over 100 countries of the world, some countries have recognized and protected the right, not in their constitutions but in other enabling environmental protection-focused statutes. While this approach may lack the constitutional flavour of pre-eminence enjoyed by constitutional entrenchments, it nevertheless provides a means of enforcing environmental rights and ensuring that citizens enjoy a clean, safe and healthy environment. Countries such as Mexico and Indonesia adopt this approach.

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[807] Suit No. FHC/CS/B/153/2005 [Unreported decision of the Federal High Court, Benin delivered on 14 November 2005..

[808] *Okpara*v*SPDC* Suit No. FHC/CS/518/2005 [Unreported]. Judgment of the Federal High Court, Port Harcourt delivered on 29 September 2006.

In the case of Mexico, the General Law of Ecological Balance and Environmental Protection[809] states that the objective of the law is to encourage sustainable development and establish the bases to: "guarantee the right of all persons to live in an environment suitable for their development, health and welfare"; "preserve, restore and improve the environment"; "preserve and protect biodiversity; to establish and manage natural protected areas" and "to prevent and control pollution on air, water and soil".[810] Also, Article 15 of the law reiterates the right and mandates the competent authorities of the State to adopt measures aimed at guaranteeing the exercise of this right.

Similarly, Tanzania recognizes and protects the right of her citizens to a clean and healthy environment in her environmental protection statute. The Environmental Management Act[811] provides that every person living in Tanzania shall have a right to clean, safe and healthy environment. It further defines the right to a clean, safe and healthy environment to include the right of access by any citizen to the various public elements or segments of the environment for recreational, educational, health, spiritual, cultural and economic purposes.[812] Section 5(2) provides a remedy in the event of a violation of the right. It states:

> Every person may, where a right referred to in section 4 is threatened as a result of an act or omission which is likely to cause harm to human health or the environment, bring an action against the person whose act or omission is likely to cause harm to the human health or the environment.

This provision is revolutionary and commendable for an African country. It gives right to any person who complains of an act or omission which may threaten or impair not only his health, but also the environment. Such action can be maintained against the polluter or likely polluter as well as the government agency responsible for monitoring of compliance and enforcement of the law. The action is not contingent upon the actual occurrence of the harm.

[809]Published in the Official Journal of the Federation on 28 January 1988 (as amended) in 2010.
[810]General Law of Ecological Balance and Environmental Protection 1988, art 1.
[811] Environmental Management Act No. 20 of 2004.
[812]*Ibid*, s 4 (2).

Anticipatory action can be taken to stop the action, discontinue the harmful activity, compel any public officer to take measures to prevent or discontinue any act or omission which is likely to harm human health or environment, require the polluter or likely polluter to take steps to protect the environment or man, and to compel the polluter to restore the degraded environment as far as practicable to its condition immediately prior to the damage, among other reliefs.[813]

The most important provision in this law is found in Section 5(3) which requires any tribunal, court or any person exercising jurisdiction in relation to the enforcement of environmental rights to be guided by the principles of environment and unsustainable development – such as, the precautionary principle, the polluter payers principle, the principle of ecosystem integrity, the principle of public participation in the development policies, plans and processes for the management of the environment, the principle of access to justice, the principle of inter-generational equity and intra-generational equity, the principle of international co-operation in management of environmental resources shared by two or more States and the principle of common but differentiated responsibilities.[814]

The Tanzanian Environmental Management Act gives the same level of protection to the citizens to enjoy the right to a clean, safe and healthy environment, to the point of applying the principles of international environmental law. Other countries, particularly Nigeria ought to emulate Tanzania.

Furthermore the principal environmental legislation[815] in Indonesia recognizes and protects the right of the Indonesian citizens to a clean and healthy environment. In chapter 3 titled 'Community Rights, Obligations and Role," Article 5 provides that "Every person has the

[813]Environmental Management Act No. 20 of 2004, .s 5(2).
[814]*Ibid*, s 5(3)(a)-(h).
[815]Law Concerning Environmental Management No. 23 of 1997.

same right to an environment which is good and healthy".[816] This is followed by provisions that guarantee "the right to environmental information" and "the right to participate in the environmental decision-making process".

The converse is the case in Nigeria. The principal environmental legislation in the country is the National Environmental Standards and Regulations Enforcement Agency Act[817] which replaced the Federal Environmental Protection Act.[818] The NESREA Act, like its predecessor, only creates an environmental administrative mechanism without any right to human health and environment conferred on Nigerians expressly in the Act. Quite curiously, the function of enforcing compliance with laws, guidelines, policies and standards relating to the environment imposed on the National Environmental Standards and Regulations Enforcement Agency [NESREA] does not extend to the oil and gas industry which is responsible for the highest volume of pollution and environmental degradation in the country. This absence of recognition of the right to a clean and healthy environment in the NESREA Act is responsible for the failure to protect indigenous peoples from the environmental pollution generated by the activities of MNOCs on their lands and the concomitant lack of effective remedy in the case of a violation or threatened violation. On the other hand in the NOSDRA Act, the Agency was designed to respond swiftly to oil spill occurrences which could threaten the nation, considering its impact on the fragile ecosystem of the country, particularly the Niger Delta where oil and gas are produced. Judging from the functions and powers of NOSDRA, effective performance of its mandates can go a long way in addressing environmental pollution in the oil industry. Its limitations are that the Act does not empower NOSDRA to enforce preventive measures. In other words, the act is more reactionary than preventative as it focuses on the capability to respond to a spill after it has occurred. All an

[816] *Ibid*, art 5(1).
[817] [NESREA Act] No. 25 of 2007.
[818] [FEPA Act] Cap F10 Laws of the Federation of Nigeria [LFN] 2004.

MNOC will do is to pay N1 million which is paid to the Agency to boost government revenue and not to the indigenous peoples directly who are exposed to the hazards associated with oil spill.

It is recommended that Nigeria adopts this approach or follow the constitutional entrenchment approach, in giving adequate protection to her citizens to enjoy the best attainable state of health and environmental protection in the midst of oil and gas pollution.

CHAPTER SIX: ATTITUDE OF COURT TO ENVIRONMENTAL RIGHTS IN NIGERIA

6.1 Issues that can be litigated

The discussions so far has demonstrated abundantly that there is no constitutional recognition of the right to a healthy environment in Nigeria as it is in other jurisdictions. Accordingly, Nigerian citizens and more particularly, host communities to MNOCs have no right to seek the protection of their health and environment under the 1999 Constitution since the Constitution says the duty of the Nigerian State to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria, is only a statement of objectives and directive principles of State policy, and therefore not justiciable. Although the jurisprudence that has developed in other countries like Nigeria where the right to a healthy environment is not expressly recognized is to imply this right from express constitutional provisions on the rights to life and dignity of human person, Nigerian courts have not fully embraced such line of jurisprudence.

At the moment, apart from the *Gbemre case* which has not been tested at the Appellate courts, there appears to be no reported Nigerian case where the court has recognized and upheld the right to a healthy environment as a necessary precondition for the exercise of the fundamental right to life. However, indigenous peoples are not entirely hopeless.

The chapter examined the various judicial remedies available to indigenous peoples in the enforcement of their right to a clean and healthy environment, such as the tort of negligence, nuisance, strict liability and suing MNOCs in foreign jurisdictions. Ex ray the Results of Suing MNOCs in Nigerian Courts and the effects of Foreign Courts' Judgment on CSR Issues of Oil and Gas Companies.

There are other causes of action open to indigenous peoples whose lands are polluted by the operations of MNOCs under Nigerian law. Such cause of action could be founded on the tort of negligence, nuisance and strict liability.[819] This segment explores these alternatives.

6.1.1 Negligence as a Cause of Action

Under Nigerian law, negligence as a cause of action arises where a party who owes another a duty of care breaches that duty which results in damage to the party in respect of whom the duty is owed. In the petroleum industry in Nigeria, the oil and gas companies are under obligation to exercise proper care in carrying out their operations in such a manner that harm is not caused to the host communities. Thus, where the operator's activities or operations causes harm, injury or loss to indigenous peoples, the operator will be held liable.[820] Thus, in *SPDC vEdamkue*,[821] the respondent filed an action claiming damages for injury suffered as a result of serious explosion and spillage of crude oil from the appellant's *Yorla* oil field in *Khana* Local Government of Rivers State which occurred in 1994. The trial court held the appellant negligent and upheld the claim. This decision was upheld on appeal. Similarly, in *SPDCv Isaiah*,[822]as a result of repairs carried out on the appellant's dented pipeline which traverses the respondent's swamp land and surrounding farmlands, crude oil freely spilled into the respondent's swampland. The oil spillage which also spread to the respondent's community swampland polluted the surrounding farmlands, streams and fish ponds. The respondent as plaintiff alleged negligence in the conduct of the appellant's operations and claimed damages. The trial court held that the appellant was negligent and granted all the reliefs sought by the respondent.

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[819] The tort of strict liability is otherwise referred to as the rule in*Rylandsv Fletcher*.

[820]Instances of where operators of oil and gas facilities have been held negligent are: oil spillage from leaked pipes, fouling of watercourses of communities, oil spillage on land leading to destruction of crops or community property and loss of sources of livelihood.

[821](2009) 14 NWLR (pt 1160) 1.

[822](2001) 11 NWLR (pt 723) 168.

6.1.2 Strict Liability as a Cause of Action – The Rule in *Rylands v Fletcher*

The tort of strict liability is another alternative to the enforcement of environmental rights under Nigerian law. The rule was developed in the case of *Rylands v Fletcher*[823] where Blackburn J stated eloquently:

> *The person who for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his own peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.*

On appeal to the House of Lords, Lord Cairns added the requirement that what is brought on land must be a non-natural user of the land. Thus, the gist of the rule in Rylandsv Fletcher[824] is the bringing or accumulation upon land of a thing which constitutes a non-natural user of land as well as its escape and damage to the defendant. The tort is committed where the defendant brings upon land in his possession or occupation objects or things which when accumulated in certain quantity will do mischief if it escapes or makes a non-natural use of land which escapes from an area under his control to another place outside his control and which results in damage to the plaintiff. Liability is strict and it is immaterial whether the defendant was not negligent. Courts in Nigeria, over the years, have recognized this cause of action and have applied it to oil spillage cases.

In *Ikpede v SPDC,*[825] the plaintiffs claimed damages against the respondent as a result of the escape of crude oil and other chemicals from the defendant's pipelines to the plaintiff's land. *Ovie-Whiskey J* held that "to lay crude oil carrying pipes through swamp forest land is …a non-natural user of the land" and that "it is common knowledge that crude oil causes great havoc to fishes and crops if allowed to escape from the pipeline in which it is being carried". However, the learned trial judge went ahead to hold that the acts of the defendant were

[823](1866) L.R. 1 Exch 265.
[824]*Ibid.*
[825](1973) MWSJ 61.

covered by the defence of statutory authority since they had a licence to lay the oil pipelines. It is however worthy of note that the court conceded that the rule in Rylands v Fletcher[826]can be applied to oil pollution cases in Nigeria.

6.1.3 The Tort of Nuisance

A nuisance is some sort of interference that affects either an individual plaintiff or the public at large and which gives rise to liability for defendant who has caused this inconvenience. Nuisance is generally in the form of things like smoke, noise, odor etc., that interferes with the use or enjoyment of property. A legal action in nuisance is one aimed at redressing harm arising from the use of a property (public or private) where such usage would substantially and reasonably amount to invasion of interest or injury to an individual or the general public whether or not the invasion is done innocently, negligently or intentionally.

The two actionable nuisances in tort law are private and public nuisance.

In private nuisance, the plaintiff must show that the act of the defendant produced sensible material injury to his property or a substantial interference with his comfort and enjoyment of his land.

In public nuisance the plaintiff must prove that he has suffered some particular damage over and above that suffered by the public at large.

In private nuisance, plaintiff must have a possessory interest in the land that is must have legal equitable and statutory interest in property. That is to say the plaintiff must either own the land or have the right to possess it. Secondly the defendant must have actually performed an act that interferes with the plaintiffs use and enjoyment of the property. Thirdly the defendant's act must cause an interference with the plaintiff's use and enjoyment of the

[826](1866) L.R. 1 Exch 265.

property that is substantial and unreasonable that is something a reasonable man would not tolerate. See Ige v Taylor Woodrow (Nig.) Ltd [827]In this case vibrations from the construction activities of the defendant company who were driving piles in preparation of a site for a high rise building caused damage to the nearby building of the plaintiff , the case in nuisance succeeded. Also in *Tebite v Nigeria Marine and Trading Co.*[828] it was held that the excessive noise and noxious fume from the defendant workshop substantially interfered with the plaintiffs comfort and convenience and he was entitled to damages and an injunction to restrain continuance of the nuisance.

On the other handPublic nuisance occurs when a person's action or inaction causes inconvenience to the general public. It is generally a crime that is actionable only by the Attorney General. However, in the case *of Amos v Shell BP Nigeria Ltd*[829]it was held by the court that a private individual would have a right of action when it comes to public nuisance if the person can establish before the court that by the defendant's action, he has suffered damage over and above other members of the society.

From the above discussion, actions for redress in oil pollution damages brought under the tort of nuisance are likely to fail on grounds of lack of locus standi on the part of the plaintiff and the grounds that the damages may not have been foreseeable.[830]

6.2 Results of Suing MNOCs in Nigerian Courts

Indigenous peoples in the Niger Delta who suffer pollution find it difficult to navigate the procedural hurdles to maintain successful claims against MNOCs. This has led to a several cases being dismissed for one procedural defect or the other. This segment examines these procedural hiccups. The first obstacle thatusually confronts indigenous peoples whose

[827] (1963)LLR 40
[828] (1971) 1ULR 432
[829] (1974) 4E.C.SL.R 486
[830] T.C. Eze and U.G Eze : ' *The law for the prevention of oil and gas pollution in Nigeria'*

property, environment and health have been damaged due to environmentalpollution from oil and gas operations is the issue of locus standi.

The trend of case law, especially in Nigeria, is that in order to have standing to sue, the plaintiff must exhibit 'sufficient interest', that is 'an interest which is peculiar to the plaintiff and not an interest which he shares in common with general members of the public.' The judicial attitude in Nigeria is that a plaintiff who sues for damages arising from an environmental pollution must show that he suffered damage. [831] In *Shell Petroleum Development Company Nigeria Limited v Chief Otoko*,[832]the respondents who were plaintiffs at the Bori High Court in Rivers State claimed the sum of N499, 855.00 as compensation payable to the defendants (appellants herein) for injurious affection to and deprivation of use of the Andoni Rivers and creeks as a result of the spillage of crude oil. The action was brought in a representative capacity. The Court of Appeal held that: (a) It is essential that the persons who are to be represented and the person(s) representing them should have the same interest in the cause of matter; (b) Given common interest and a common grievance a representative suit would be in order if in addition to the relief sought it is in its nature beneficial to all whom the plaintiff proposes to represent. The Court rejected the purported representative action.

In *Amos v. Shell BPLtd*,[833]the plaintiffs sued the defendants in a representative capacity claiming special and general damages. It was alleged that the 2nd defendants as contractors to the first, had in the course of oil mining operations built a large earth dam across the Plaintiffs' creek. As a result, farms were flooded and damaged; movement of canoes was hampered, and agriculture and commercial life was paralyzed. One of the issues was whether special damages could be claimed in a representative action, when the plaintiffs suffered

[831]Ladansupranote 2 at pp. 117-365.
[832] (1990)6 NWLR(pt. 159-693.
[833](1974) 4 ECSLR 48.

unequal losses, or whether the plaintiffs as general public could claim for losses suffered by them individually. It was held, dismissing the claim:

1. That since the creek was a public waterway, its blocking was a public nuisance and no individual cold recover damages therefore unless he could prove special damage peculiar to himself from the interference with a public right.
2. That since the interest and losses suffered by the plaintiffs were separate in character and not communal, they could not maintain an action for special representative capacity.

In *NNPC vSele*,[834]the plaintiffs sued for massive spillage of crude oil from the defendant's pipeline, which polluted and ravaged economic trees and crops, fishing ponds, fishing contrivances, local gin distilleries, and fresh water wells over a very wide area. They claimed 20,000,000.00 as fair and adequate compensation for their losses. At the conclusion of the trial the trial court entered judgment for the respondents and awarded N15,329,350.00 as special damages and N3,000,000.00 as general damages.

One of the points taken on appeal was that the trial court was wrong to grant leave to the respondents to sue in representative capacity. The Court of Appeal held that while in this case it has been shown that they have common interest, the grievance of individuals is separated and distinct consequently a representative action taken as in this case must fail.The appeal failed because, the respondents did disclose common grounds and interest in the suit and there were no individual claims. This would reduce the valuable Court time devoted to proving all the material issues over and over in each individual action.

The second hurdle a claimant in an action for environmental justice will have to cross is the issue of proof. In order to enable the courts to enforce environmental laws, the parties must prove their cases, as required by law. This is a common procedure in litigation and not unique

[834]*(2004) ALL FWLR (Pt 223) 1859 CA.*

to environmental law. What could be unique is if the particular environmental statute requires a particular burden or standard or proof in a particular matter. Meeting the requisite burden of proof in environmental cases has most times been difficult particularly in civil cases.

The nature of the obligation on the parties will depend on the requirements of the substantive law upon which the action arises and the rules of evidence. Environmental pollution cases are civil cases in which the parties are expected to make proofs on the preponderance of evidence or balance of probabilities.Generally in environmental litigation, the following proofs are necessary: - where the claim is damaged to property, the plaintiff must prove ownership of the property damaged.[835]In a claim for loss or destruction of farm crops, farm land and economic trees, the court held in *UhunmwangbovUhunmwangbo*[836]that the plaintiff must adduce sufficient evidence to show inter alia: the name, nature, and number of economic trees allegedly destroyed. For an action in negligence or nuisance, the ingredients of the offence must be established.[837]For a claim in special damages, the claims must be itemized and specially proved. In *RCC (Nig) Ltd vEdonwonyi*,the court held that a claim of loss of earning is a claim in special damages in the sense that full particulars must be given.[838]Such facts as rate of earning and other facts that will enable the court to determine the claim in arithmetical calculation should be pleaded. In a claim of highly technical and professional nature[839]which the court would not ordinarily appreciate, the plaintiff needs to go extra mile to establish his claim through expert evidence.[840]The difficulty encountered by victims of environmental pollution in the issue of remedy lies on the problem of claim and proof. This problem arose in at the Supreme Court in the case of *Shell Petroleum Development Company of Nigeria Ltd v. Chief Tiebo VII.* In this case, the plaintiffs commenced action at the Yenagoa High Court

[835]*Sommer&Ors v. Federal Housing Authority*(1992) 1 N.W.L.R (Pt.219) 548.
[836](1992) 2 N.W.L.R (Pt. 226) 709.
[837]*Anya v Concorde Hotel* [2003] 2 MJSC 160; *Royal Ade v. National Oil* [2004] 9 M.J.S.C 40
Adediran v. Interland Transport Ltd (1986) 2 N.W.L.R (Pt. 20) 78

[839]Claims involving determination of substances, extent of damage, etc.
[840]*Seismograph Services (Nigeria) Ltd v KwarbeOgbeni* (n 10).

claiming the sum of ₦64,146,000.00 as special and general damages arising from the defendant's negligence.[841]This was a result of crude oil spill on the lands, creeks, lakes and shrines of the plaintiff from the defendant's oil mining activities. The plaintiffs claimed specific sums as special damages for losses arising from pollution of fishponds, damages to communal fishing nets and raffia palms.

They also claimed specific sums as general damages. The trial court awarded damages of ₦400,000.00 and ₦600,000.00 as general damage for loss of raffia palms and loss of drinking water respectively; ₦5 million as general damages and ₦1 million as costs to the plaintiffs. The defendant's appeal to the Court of Appeal was dismissed. The appellant further appealed to the Supreme Court. The issues canvassed before the Supreme Court was: whether it was proper for the court below to award special damages when there was no sufficient proof? Whether the amount awarded as general damages and cost was too high and unnecessary?

In dealing with this challenge, the Supreme Court held that 'anyone making a claim in special damages must prove strictly that he did suffer such special damages claimed. Where plaintiff is unable to prove special damages, his case crumbles and a trial court cannot compensate him by way of general damages. For the award in general damages, the Supreme Court stated that the courts are at discretion in the award of general damages. Such award will depend on assessment based on certain considerations. It is only when they are manifestly too excessive or too low that the court will interfere. In this case there was evidence of excessive damage to crops, farms, farmlands, ponds, creeks and widespread environmental pollution so the court did not interfere with the award of N5 million.

However the grant of remedy may likely be affected by the attitude of the court and the limited number of courts that can exercise jurisdiction to grant remedy in environmental

[841] *Ibid.*

litigation. In *AllarIrou v. Shell B.P Development Company (Nigeria) Limited*[842] the court denying the injunction stated that 'to grant the injunction would amount to asking the defendant to stop operating in the area… and cause the stoppage of a trade… mineral which is the main source of the country's revenue'.

6.3 Effects of Foreign Courts' Judgment on CSR Issues of Oil and Gas Company

A new trend in the search for environmental justice against MNOCs operating in the Niger Delta region of Nigeria has been to sue the companies in foreign courts. One attraction for this emerging trend appears to be the strict regulations in those countries. Mayer and Jebe[843] observe that:

> When companies do business in host countries, they also may be required to obey laws of their home nations: in addition to the right to make and enforce laws within their territory, all nation-states reserve the right to make and enforce laws that apply to its citizens (or "nationals"), wherever they may be located or do business.[844]

Because Nigerians are aware that the home countries of the MNOCs operating in the Niger Delta subscribe to higher and stricter standards of environmental protection and enforcement of standards, it has become fashionable to sue MNOCs for environmental rights violations committed in Nigeria in their home States or other countries with more favourable laws with extra-territorial application and jurisdiction. It has also been pointed out that delays in getting justice against MNOCs in Nigeria, corruption in the judiciary, Federal Government's influence on the outcome of environmental suits filed against MNOCs given that the Federal Government is the majority shareholder in the JV arrangement adopted in the oil and gas industry, and the influence of MNOCs, usually combine to make justice elusive to indigenous

[842] Suit No. W/89/71 Warri High Court 26/11/73 (Unreported); see M.A. Ajomo, '*An Examination of Federal Environmental Laws in Nigeria*' in M.A. Ajomo& O. AdewaleEds: *Environmental Law and Sustainable Development in Nigeria*(Lagos: N.I.A.L.S & the British Council 1994), p.22.
[843] D Mayer and R Jebe, '*The Legal and Ethical Environment for Multinational Corporations'*<*https://www.mafiadoc.com/the-legal-and-ethical-environment-for-multinational-corporations_59da03bf1723dda63faa63faa634d.html*> accessed 15 November 2017.
[844] Ibid, 159-160.

peoples in the Niger Delta. Whatever that means, indigenous peoples have been recording successes in cases filed abroad.

In *Akpan (Ikot Ada Udo) v Shell,*[845]*Milieu defensie,*[846] a Netherlands-based environmental group, along with four Nigerian farmers sued SPDC claiming damages for oil spillage/pollution from its facilities which affected three communities in AkwaIbom State. The Netherlands court in January 2013 held SPDC liable in negligence for the breach of its duty of care by failing to take adequate measures to prevent sabotage by third parties to Shell Nigeria's submerged pipelines near Ikot Ada Udo in 2006 and 2007. In other words, Shell Nigeria's plea of sabotage was rejected. But in *Oguru v SPDC,*[847]*Dooh (Goi) v SPDC*[848] and *Efanga v SPDC*[849] - cases which were contested before Nigerian courts, the Nigerian courts dismissed the claims of the claimants on the ground that the oil spillages complained of were acts of sabotage and not due to the negligence of SPDC and relied on the statutory exemptions to release SPDC from liability.

Similarly, in *Bodo Community v SPDC,*[850]***Bodo*** community – a coastal city in Gokana Local Government Area of Rivers State sued SPDC claiming compensation over two separate oil spills which occurred from the company's facilities in 2008 and resulted to the devastation of the local environment. SPDC negotiated an out-of-court settlement with the Bodo community which saw SPDC pay £55 million to the community and the affected members. Currently, a non-governmental organization [NGO] known as Oil Spills Victims Vanguard [OSVV] has dragged the Shell Nigeria Exploration and Production Company [SNEPCO] to a TTC High Court of Justice in London over massive oil spillage allegedly caused by an operational error

[845]Court of Appeal of the Hague, Case No. 200, 127, 813<*https://www.milieudefensie.nl/publications/bezwaren/shell-courtcase-appeal-in-uitspraken/shell-courtcase-appeal-in-motion-to-produce-documents*> accessed 19 September 2017.
[846]Dutch name for Friends of the Earth – an environmental advocacy group.
[847]Ibid, Case No. 200. 126, 834, 200, 804.
[848]Ibid, Case No. 200. 126, 848.
[849]Ibid, Case No. 200, 126.
[850][2014] EWHC 1973 (TCC).

from SNEPCO's facilities resulting in the discharge of about 40,000 barrels of crude oil into the Atlantic Ocean. It also claims that the spill affected at least 300 communities and about 168,000 people in Delta and Bayelsa States. The spill occurred in 2011 and the Federal Government of Nigeria imposed a fine of $5 billion on SNEPCO as compensation to the affected people and communities. This suit was filed in 2017 to enforce the payment of the fine.[851] It remains to be seen what the outcome of this suit will be in view of the recent somersault made by the United Kingdom [UK] courts declining jurisdiction in pollution cases instituted in London against SPDC and insisting that the appropriate forum is Nigeria.[852] With this decision which Amnesty International claims signals the demise of holding multinationals accountable for acts of grave human rights abuses committed in economies in transition with lax environmental standards and enforcement procedures like Nigeria, it is not certain if further oil pollution suits can be filed in the UK by Nigerian victims of environmental pollution.

[851]C Ukpong, '*Group Drag Shell to London Court over 2011 Bonga Oil Spill',* Premium Times (Lagos 12 October, 2017) <*http://www.premiumtimesng.com/regional/south-south-regional/245838-group-drags-shell-london*> accessed 23 October 2018.

[852]Press Release, 'UK Court Ruling on Shell Nigerian Oil Spill Sets "Dangerous Precedent" – Amnesty International', Premium Times (Lagos, 26 January 2017) <https://www.premiumtimesng.com/news/headlines/221636-uk-court-ruling-shell-nigerian-oil-spill-sets-dangerous-precedent-amnesty-international-html> accessed 10 December 2017 [where the suits brought by the Niger Delta communities – Bille in Degema and Ogale in Eleme Local Government Areas in Rivers State against SPDC for pollution caused to their environments were dismissed by a UK High Court on the ground that the issues involved are fundamentally Nigerian issues which can only be entertained and decided by a Nigerian court].

CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

This is the climax of the process that began in chapter one which sought to examine the corporate social responsibility of oil and gas companies and the indigenous peoples' right to healthy environment in Nigeria. In other words, the study investigated what oil and gas companies in Nigeria are doing to respect, protect and remedy the rights of indigenous peoples (host communities) to have and enjoy a clean and healthy environment, beyond complying with the law.

The impetus for this research stemmed from the failure of previous studies on corporate social responsibility (CSR) of multinational industries to address the environmental rights of indigenous peoples (host communities). Previous researches/studies had focused extensively on the impact of CSR on stakeholders' relationship in the oil and gas industry, as well as the social and environmental aspects of CSR.[853] There appeared to be no research on the CSR of oil and gas companies which focused on the rights of indigenous peoples to a healthy environment which is the focus of the present study.

[853] U Idemudia, '*Community Perceptions and Expectations: Reinventing the Wheels of Corporate Social Responsibility Practices in the Nigerian Oil and Gas Industry'* [2007](112)(3) *Business and Society Review*; C U Mmuozoba, '*Oil Economy, Corporate Social Responsibility and the Politics of Oil Pipeline Explosions: Are there Socio-Legal Paradigms for Pipeline Integrity in Nigeria*? [2009](1)(1) *Natural Resources and Environmental Law Journal* 45-65; S U Evudeocha, '*Managing Indigenous Relations: Corporate Social Responsibility in a New Age of Activism'* [2005](10)(4*) Corporate Communications* 328, 330; U E Ite, '*Multinationals and Corporate Social Responsibility in Developing Countries: A Case Study of Nigeria*' [2004](11)(1*) Corporate Social Responsibility and Environment Management* I, 11; ARwabizambuga, '*Corporate Social Responsibility Practice in the Nigeria Oil Sector: The Case of Royal Dutch Shell'* (Ph.DDessertation, London School of Economics and Political Science, London 2008); F N Igbara and Others, '*Corporate Social Responsibility and the Role of Oil Companies in Community Development Projects in Rivers State, Nigeria: An Evaluation'* [2014](19)(3) *IOSR Journal of Humanities and Social Science* 92, 97; O A E Ndu and B A Agbonifoh, '*Corporate Social Responsibility in Nigeria: A Study of the Petroleum Industry and the Niger Delta Area'* [2014](6)(2) *International Review of Social Science and Humanities* 214, 238.

In the course of achieving the aim and objectives of the study, the researcher formulated one over-arching question, thus: Can the CSR of MNOCs be used to further or advance the right of indigenous peoples (host communities) to a clean and healthy environment in Nigeria? To narrow down the focus of the study, specific objectives were stated as follows:

(1) To examine the environmental and health impacts of oil and gas operations in Nigeria.

(2) To ascertain if the CSR of oil and gas companies in Nigeria extends to protecting the health and environment of the host communities.

(3) To ascertain whether indigenous peoples have right to a clean and healthy environment under international law.

(4) To ascertain the status of the right to a healthy environment under Nigerian law *vis-à-vis* the situation of indigenous peoples (host communities) in Nigeria.

(5) To examine the current focus of CSR undertaken by oil and gas companies (MNOCs) in Nigeria and what their roles should be in protecting the health and environment of indigenous peoples.

This study has successfully achieved its aim and objectives. The study has demonstrated that the activities/operations of oil and gas companies in Nigeria cause serious health impairment and damage to the host communities' ecosystem and sources of livelihood; that the CSR of MNOCs should incorporate environmental accountability; that indigenous peoples all over the world have rights to their lands/resources and the health of their environment which are protected under international law; that there is no right to a healthy environment in Nigeria and that the CSR of oil and gas companies in Nigeria is restricted in scope and coverage as it does not presently extend to environmental audit and sustainable exploitation of natural resources.

This study has investigated the CSR of oil and gas companies in Nigeria *vis-à-vis* the right of indigenous peoples to healthy environment. In descending order of importance, MNOCs operating in the oil and gas sector of Nigeria engage in the provision of educational facilities for their host communities, the provision of healthcare, basic amenities and infrastructures (such as roads, electricity, water, construction of markets and town halls), poverty alleviation (including soft loans), provision of employment opportunities, youth/women empowerment, among other activities.Thus, philanthropic objects have dominated MNOCs' CSR in the Niger Delta region of Nigeria. Scholars conclude that this approach to CSR is dictated by the expectations and perceptions of the people.

After x-raying the various components of the CSR of MNOCs and the environmental standards observed in host communities in Nigeria, this study concluded that the CSR of MNOCs as presently constituted does not place emphasis on the health of the indigenous peoples. Accordingly, the study makes the following specific findings:

1. The CSR of MNOCs in Nigeria is restricted in scope and coverage. At present, what is called CSR in Nigeria focuses on social and infrastructural facilities – like schools, health centers, markets, water projects, road construction/maintenance/rehabilitation, provision of drugs for health centres and assisting in combating epidemics, award of scholarships and provision of learning aids such as laboratory equipment/apparatus, electrification projects, skills acquisition and empowerment in addition to investments in cultural festivals and sports/talent hunts. In the developed countries, these facilities are provided by government and not corporations. The CSR of MNOCs does not extend to environmental protection.

2. Activities of MNOCs result in colossal environmental degradation, loss of biodiversity and loss of livelihoods of the indigenous peoples. Also, the operations of

MNOCs operating in the Niger Delta have negative impacts on the health of the people. Among the fall outs of oil and gas operations in the Niger Delta, oil spillage and gas flaring are the most endemic and life-threatening.

3. Nigeria is not a party to the United Nations Declaration of the Rights of Indigenous Peoples [UNDRIP] 2007[854] and the Indigenous and Tribal Peoples Convention 1989;[855] neither has she signed/ratified any of the treaties/declarations which recognize the rights of indigenous peoples anywhere in the world to participatory rights in the exploitation of their natural resources as well as the right to a healthy environment. This had made it difficult for indigenous peoples in the country to assert their rights to free, prior and informed consent in the exploitation of their lands and natural resources.

4. The right of citizens to a clean, safe and healthy environment is not recognized under Nigerian law. In the first place, neither the Constitution of the Federal Republic of Nigeria 1999 nor any of the environmental protection-focused legislations establish the right to a clean and healthy environment as is the trend across the globe. In the second place, Section 6(6)(c) of the 1999 Constitution ousts the jurisdiction of the courts in Nigeria from entertaining a matter which questions or purports to question whether the Nigerian State has complied with her environmental objectives or not.

5. Attempts in Nigeria by indigenous (host) communities to enforce their environmental rights under the cloak of fundamental rights to life and dignity of the human person under Sections 33 and 34 of the 1999 Constitution as is the practice in many other jurisdictions in South Asia,[856] have not yet succeeded. Nigerian courts have not risen

[854][UNDRIP] 2007. Adopted at the 107th Plenary Meeting of the United Nations General Assembly on 13 September 2007.
[855][ILO Convention 169] 1989.
[856]For instance, India, Pakistan, Philippine.

to the occasion like their counterparts in other jurisdictions to hold citizens' right to a clean and healthy environment as an inextricable component of the right to life and a necessary pre-condition to human existence. The lone success in *Gbemre v SPDC*[857] cannot be reckoned as sparking off an intriguing chapter in Nigeria's evolving environmental rights jurisprudence as the decision is yet to survive appellate review.

6. Nigeria's regulatory regime in the oil and gas industry is weak, porous and obsolete. The Petroleum Act enacted since 1969, the Petroleum (Drilling and Production) Regulations and other Regulations made thereunder, the Associated Gas Re-Injection Act enacted since 1979, the Associated Gas Re-Injection Act (Continued Flaring of Gas) Regulations and other laws governing the oil and gas sector have remained unaltered for the past 40-50 years since they were first enacted, despite the changing circumstances and the deleterious impact of the industry on human health and the environment. This has ensured that there are either inadequate or no regulation for certain aspects of oil and gas operation which have deleterious effect on the environment and human health. Nigeria has not domesticated a number of environmental protection treaties.

7. The terrible failure of MNOCs in Nigeria to employ good oil field practice in their operations is not down entirely to the absence of environmental protection laws in the oil and gas industry but a number of factors which include: weak enforcement and monitoring of standards, corruption, inadequate funding of standards enforcement agencies such as the Department of Petroleum Resources [DPR], National Oil Spill Detection and Response Agency {NOSDRA] and the like, lack of political will on the

857 Suit No. FHC/CS/B/153/2005 [Unreported decision of the Federal High Court, Benin delivered on 14 November 2005.

part of the Federal Government to enforce international best practices in Nigeria's oil and gas industry. These combine to undermine the monitoring and enforcement system.

8. Monitoring and enforcement of environmental standards by relevant Federal Government agencies is ineffective.

9. Non-justiciability of environmental rights in Nigeria has forced indigenous peoples to resort to suing MNOCs in foreign courts for acts of environmental pollution committed in Nigeria. A number of such cases have succeeded, resulting in the award of huge amounts as compensation.

10. Despite the absence of a global treaty on the CSR of MNOCs *vis-à-vis* the observance of environmental standards in undertaking their businesses, there are still voluntary codes of business practice in operation globally which hold MNOCs accountable to the highest level of respect for human rights. These standards are not being followed by MNOCs operating in the Niger Delta region of Nigeria.

11. Environmental protection is one of the aspects of a CSR activity. MNOCs have a role to play in protecting the rights of indigenous peoples to enjoy a healthy environment. However, self-regulation has not worked in Nigeria as seen in chapter 2 where what MNOCs claimed to have done in the area of environmental protection was found to be far below local standards. What is practiced in Nigeria is voluntary self-regulation.

12. There is a generally low level of awareness among indigenous peoples regarding their rights to a clean, safe and healthy environment. Majority of indigenous peoples (communities) do not know that they have rights to healthy environment. Thus, they

are unable to challenge unwholesome oil field practices employed by MNOCs in their operations.

13. The United States and India have done commendably well in the area of protection of the rights of their citizens' rights to clean and healthy environment. Though there is no clear cut constitutional recognition of the right to healthy environment in the two countries, this right has been enforced through effective laws and judicial decisions. In India, for instance, notwithstanding the absence of an express recognition of the right to healthy environment, the courts have held from an unbroken chain of decided authorities that the right to healthy environment is an inextricable component of the fundamental right to life. Thus, environmental right has been elevated from the status of a mere fundamental objective and directive principle of State policy to a fundamental right in India.

This study concludes that this philanthropic approach to CSR cannot guarantee protection for the health of the indigenous peoples and their environment. Therefore, the study argued for the inclusion of environmental protection into the CSR of MNOCs operating in the Niger Delta region. In other words, it concludes that MNOCs can do more than they are presently doing by way of CSR by extending their CSR to cover environmental protection as well as the protection of the health of the members of their host communities. It proposes that this can only be achieved if MNOCs operating in Nigeria comply with Nigerian regulatory and environmental standards in the petroleum industry, in addition to the adoption of good oilfield practice and international standards where Nigerian standards are found to be slack, inadequate, sometimes non-existent or below globally accepted benchmark.

In view of the enormous national and international environmental standards applicable in the oil and gas industry to which MNOCs in Nigeria are subject and which they deliberately

breach, the study concludes that self-regulation cannot be the best approach to CSR in Nigeria, particularly in the oil and gas industry. In other words, this study observes that in view of the deleterious nature of oil and gas operations, not only on the environment, but also on human health in host communities coupled with the willingness of MNOCs to compromise environmental standards in the country, the Federal Government needs to regulate the environmental aspect of the CSR of oil and gas companies while it could allow the social and infrastructural aspects for self-regulation. It is only in this way that the right of indigenous peoples to a healthy environment guaranteed under international law can be protected.

Findings has shown that previous work did not investigate the correlation between CSR of oil and gas companies and the indigenous peoples' right to a healthy environment in Nigeria and no research on the CSR of oil and gas companies focused on the rights of indigenous peoples to a healthy environment which is the focus of the present study.

We discovered that the activities/operations of oil and gas companies in Nigeria cause serious health impairment and damage to the host communities' health and sources of livelihood hence the CSR of oil and gas should incorporate environmental responsibility and accountability.

We also find out that the CSR of oil and gas companies in Nigeria is restricted in scope and coverage as it does not presently extend to environmental protection and Philanthropic approach to CSR cannot guarantee protection for the health of the indigenous peoples and their environment

Also that indigenous people all over the world have rights to their lands/resources and healthy environment which are recognize and protected under international law; yet right of citizens to a clean, safe and healthy environment is not recognized under Nigerian law.

The findings of this study have huge implications for research on the oil and gas companies, indigenous peoples and the government. By advocating that the protection of the environment, health and general well-being of indigenous people should have primacy over the profit motive of business. This approach underscores the primacy of the environment and its indispensability to human existence, including the enjoyment of the first and second generation rights. Thus, this study opened a new chapter in human rights jurisprudence by placing emphasis on rights pertaining to the protection of the environment. It is expected that future research will explore this approach deeper.

For the oil and gas industry, the findings of this research will produce a change in the attitude of industry operators to respect human rights in their host communities, particularly the right to a clean and healthy environment. While this is anticipated, the realization that indigenous peoples have no right to a clean and healthy environment may usher in a new era of environmental recklessness in the conduct of operations, especially where the cost of environmentally-friendly technology is high. On their own part, industry operators will be better equipped to manage the frictions and strained relationship between them and their host communities since this study will arm oil and gas companies with the reasons for the agitations of the indigenous peoples for environmental justice. This knowledge will force them to cut down on their gas emissions, will assist them to conduct pipeline integrity and will encourage them to adopt up-to-date technology and good oil field practice consistent with global industry standards in their operations for smooth stakeholders' relationships.

Armed with this knowledge, the communities (indigenous peoples) will be better equipped to continue to press for their rights under international law. Indigenous peoples could use the findings of this study as the springboard for mounting pressures on the Federal Government of Nigeria to accede to the UNDRIP and ILO Convention 169 which protect the rights of indigenous peoples to both their resources and the health of their environment. The findings

could impact negatively on the existing strained relationship between oil and gas companies and their host communities as knowledge of the harm caused to their environment and livelihoods could intensify agitations for environmental protection and hostilities towards the oil and gas companies.

On the side of the Federal Government, this study has implications for the formulation of its environmental policies. It could lead to a constitutional recognition of the right to a healthy environment as has been embraced in other jurisdictions.

7.2 Recommendations

Arising from the findings of this study, the need for measures to be taken by the oil and gas companies, Federal Government of Nigeria, stakeholders and indigenous communities to expand the CSR of oil and gas companies towards the protection of the right of indigenous peoples to a clean environment becomes apparent. In view of this, the study makes the following recommendations:

First, oil and gas companies operating in Nigeria should as a matter of urgency redesign their CSRs in such a way that they will reflect the environmental and health implications of their operations. The era of complete focus on the provision of infrastructure and other basic/social amenities to host communities at the expense of the damage done to their environment and the threat to their health and well-being should be jettisoned. Oil and gas companies should go beyond building ill-equipped health centres and participating in anti-malaria campaigns to take the health and environment of the people in the communities where they operate seriously.

Second, the Federal Government of Nigeria should demonstrate capacity to enforce environmental standards and regulations rather than leaving indigenous peoples at the mercy

of MNOCs. The Federal Government of Nigeria should ensure that environmental responsibility is inculcated into the CSR of oil and gas companies.

Third, Nigeria should recognize the right to a healthy environment of her citizens and residents in the 1999 Constitution or in the NESREA Act. If this is done, oil and gas companies will show greater environmental responsibility in the conduct of their operations as the fear of incessant liability will force them to observe environmental standards. This will enhance the capacity of indigenous communities/peoples to enforce their rights to an environment that is conducive and suitable to their health and development. Such right expressly recognized in the Constitution of Nigeria or in any other environmental statute will act as a catalyst for indigenous communities to hold oil and gas companies to account for acts of environmental recklessness committed in the course of their operations, to protect their environment and livelihoods as well as obtain environmental justice.

Fourth, Nigerian courts should demonstrate greater capacity for judicial activism, innovation and creativity by adopting a purposive and progressive approach to the interpretation of Section 20 of the 1999 Constitution as it is the case in other jurisdictions. In the absence of express recognition of the right to a healthy environment under Nigerian law, the courts should rise to the occasion and interpret Sections 20 and 6(6)(c) of the 1999 Constitution as indispensable component of the right to live with dignity as obtainable in India, Pakistan, Bangladesh and many South-Asian jurisdictions.

Fifth, the Nigerian regulatory framework in the oil and gas industry should be completely overhauled. The Petroleum Act[858] and its accompanying regulations, Associated Gas Re-Injection Act[859], Associated Gas Re-Injection (Continued Flaring of Gas), Regulations,[860] Oil

[858] Cap P10, Laws of the Federation of Nigeria [LFN] 2004.
[859] Cap A10, Laws of the Federation of Nigeria 2004.
[860] No.43 of 1984.

in Navigable Waters Act[861], NESREA Act[862]as well as the Environmental Impact Assessment Act[863] should be reviewed in line with global best practices in the oil and gas industry, particularly with respect to environmental protection and sustainable development of natural resources. The Associated Gas Re-Injection Act[864] and the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations[865] should be repealed as they are no longer in tandem with developments in the area of climate change, to the extent that they still permit the flaring of gases.

Sixth FG to relinquish its shares in the joint venture and production sharing contract with oil and gas companies to be able to carry out its international duties

Seventh S. 1(3) of the 1999 Constitution to be amended to give the international law and other Nigeria Statute equal weight with the Constitution.

Eight, apart from voluntary codes of conduct for business enterprises adopted by transnational corporations as guiding tenets in their host States, there are no binding treaties by which oil and gas companies operating in Nigeria can be held to account for their environmental recklessness. Efforts should be made at the global level to develop treaty instruments on the CSR of oil and gas companies in the area of environmental responsibility which will give indigenous peoples the right to seek environmental justice where their right to a clean, safe and healthy environment is violated.

Nine, civil society groups and governments at all levels in Nigeria should carry out and intensify advocacy and sensitization of indigenous peoples on their rights to healthy environment, as knowledge is power.

[861]Cap 06, LFN 2004.
[862]No. 25 of 2007.
[863] Cap. E12 LFN 2004.
[864]Associated Gas Re-Injection Act, Cap A10, LFN 2004.
[865]Associated Gas Re-Injection (Continued Flaring of Gas) Regulations No. 43 of 1984.

Ten, Indigenous peoples should participate in ensuring the healthy environment of their areas and prompt reporting of application of unwholesome practices by the oil and gas companies.

Eleven, Nigeria should emulate the US and India and enact appropriate up-to-date environmental protection laws and enforce same. Nigerian courts should rise to the occasion to adopt a more liberal and progressive approach to the construction of the fundamental right to life as is the case in India. Right to live should be construed by Nigerian courts as encapsulating the idea that a dignifying and fulfilling life is dependent on an environment that is pollution and poison-free.

Twelve, life insurance policy should be provided for members of indigenous communities currently playing host to oil and gas companies to compensate them for the environmental degradation, loss of livelihoods and health hazards to which they are being exposed in the event that the oil and gas companies stop operation.

Thirteen, the S.6 (6) c of the Constitution to be expunged to enable indigenous people gain access to environmental justice in Nigeria.

Fourteen S.44 (3) should be expunged to enable indigenous people enjoy the protection of their natural resource under international law.

Fifteen Public awareness is key, therefore issues of environmental pollution can be monitored through frequent publication and this will influence the mind of the public most especially the IP to develop thought and idea on the need to protect their environment right.

Sixteen the Federal Government should carry out regular inspection exercise to detect element that threatens the environment and health of the IP.

Seventeen Indigenous people should mount enlightenment campaign on the importance of s.13 and s.20 of the 1999 constitution that is under the fundamental objectives and directive principles of state policy and expunge S.6(6)(C) of the 1999 constitution to enable indigenous people gain access to environmental justice in Nigeria.

CONTRIBUTION TO THE BODY OF KNOWLEDGE

- This study has shown that there is a huge correlation between the oil and gas CSR and the right of indigenous people to healthy environment in the host community where their operations is carried hence the need to extend their CSR package to pay more attention to the environment .
- From the angle of research, the study has contributed to the body of knowledge on the channeling of the CSR of oil and gas companies towards the protection of the right of indigenous people to a healthy environment.
- One of the major role of the oil and gas company is to first eliminate the carbon footprint arising from their operations hence this study will assist the oil and gas companies to be more environmentally conscious, responsible and accountable and see the need to act fast to re inject the gas flared and channel it to gas turbine that will generate power supply in order to add more value to our country Nigeria.
- It will assist the FG to appreciate the need for collaboration and consultation with all stakeholders before hazardous project are carried out.

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